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Body Corporate and Community Management (Accommodation Module) Regulations 2008

Regulation	Paragraph
129(4)	¶90-203

Body Corporate and Community Management Act 1997

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126	¶90-204
287(3)	¶90-200

Competition and Consumer Act 2010

Section	Paragraph
52	¶90-201

Property Law Act 1974

Section	Paragraph
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A New Tax System (Goods and Services Tax) Act 1999 (Cth)

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Section	Paragraph
32C	¶90-178

Body Corporate and Community Management Act 1997

Section	Paragraph
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Body Corporate and Community Management (Accommodation Module) Regulation 1997

Regulation	Paragraph
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Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld)

Regulation	Paragraph

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151	¶90-191
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Body Corporate and Community Management (Commercial Module) Regulation 1997 (repealed)

Regulation	Paragraph
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94	¶90-150

Body Corporate and Community Management (Standard Module) Regulation 2008

Regulation	Paragraph
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Corporations Act 2001 (Cth)

Section	Paragraph
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22	¶90-155; ¶90-158; ¶90-164
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Law Reform (Miscellaneous Provisions) Act 1946 (NSW)

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Property Law Act 1974 (Qld)

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What's New — Queensland Community Schemes Law & Practice Cases

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See also the "What's New" for Commentary.

This What's New section lists decisions added to *Queensland Community Schemes Law & Practice Cases* over the previous twelve months (the most recent addition is at the top of the list). Each decision has a reference date that reflects the date on which the case was added.

• Pulse (2016) LQCS ¶90-208; Court citation: [2016] QBCCMCmr 43, a decision from the Office of the Commissioner for Body Corporate and Community Management concerned with whether a body corporate had unreasonably withheld their consent to the assignment of a management rights business in order to recover a debt. [August 2016]
• Williahra Tower (2016) LQCS ¶90-207; Court citation: [2016] QBCCMCmr 177 a decision from the Office of the Commissioner for Body Corporate and Community Management that confirms that the use of powers of attorney in voting at an annual general meeting in Queensland, is a valid method of lot owners exercising their vote, and there is no limit on the number of powers of attorney that may be used for a meeting. This stands in contrast to the restrictions placed on the use of proxies at general meetings. [July 2016]
• 18 Kingsford Street (2016) LQCS ¶90-206; [2016] QBCCMCmr 78, a decision from the Office of the Commissioner for Body Corporate and Community Management which provides a perfect example of how a body corporate can deal with complaints about noisy lot owners. [July 2016]
• *Albrecht* v *Ainsworth & Ors* (2015) LQCS ¶90-205; Court citation: [2015] QCA 220, a decision from the Queensland Supreme Court of Appeal which is important for its exploration of when a body corporate will be found to have fulfilled its obligation to act reasonably when carrying out its general functions under s 94 of the *Body Corporate and Community Management Act 1997*. [November 2015]
• *Vie Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation)* v *Body Corporate for Gallery Vie* (2015) LQCS ¶90-204 [2015] QCAT 164. A decision from the Queensland Civil and Administrative Tribunal which illustrates that the protection afforded under s 126 of the *Body Corporate and Community Management Act 1997* to a financier of management rights for a community scheme, are limited. This section provides some protection for financiers by permitting them to act in place of the contractor or to appoint receivers without the prospect of the contract being terminated by the body corporate by reason of those acts. [September 2015]
• *Peterson Management Services Pty Ltd* v *Body Corporate for The Rocks Resort* (2015) LQCS ¶90-203 [2015] QCAT 255. A decision from the Queensland Civil and Administrative Tribunal which should serve as a warning to body corporates to pay close attention when drafting Remedial Action Notices. [September 2015]
• *Lambert Property Group Pty Ltd* v *Body Corporate for Castlebar Cove Community Title Scheme 37148* (2015) LQCS ¶90-202 [2015] QSC 179. This decision concerned an application by a developer for an easement over an adjacent apartment complex's basement carpark. The application failed on a number of grounds including that there were no details of the practical aspects of how the use of the easement would be regulated. [September 2015]

18 KINGSFORD STREET

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(2016) LQCS ¶90-206; Court citation: [2016] QBCCMCmr 78

Queensland Body Corporate and Community Management Commissioner — Adjudicators Orders

Decision delivered on 23 February 2016

Conveyancing — Body corporate — Nuisance — Where lot owner replaced carpet and underlay with floor tiles — Where tiles were laid without acoustic underlay — Where downstairs neighbour complained to the body corporate about the noise from the tiles — Whether tiles caused a nuisance for the purposes of s 167 of the Body Corporate and Community Act 1997 — Body Corporate and Community Management Act 1997, s 167.

The owner of a unit replaced the existing carpet and underlay in living areas and the bedrooms of their unit with porcelain tiles. The downstairs neighbour complained to the body corporate that this resulted in frequent and disruptive noise transference and a serious loss of amenity for him.

The by-laws for the scheme included the following:

> *A proprietor or occupier of a lot shall not upon a parcel create any noise likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property.*

In addition to the by-law, s 167 of the *Body Corporate and Community Management Act 1997* provides as follows:

> *167 Nuisances*
>
> *The occupier of a lot included in a community titles scheme must not use, or permit the use of, the lot or the common property in a way that —*
>
> *(a) causes a nuisance or hazard; or*
> *(b) interferes unreasonably with the use or enjoyment of another lot included in the scheme; or*
> *(c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.*

The body corporate issued the owner with a breach notice — informing them that they were contravening the relevant by-law because of the tiles.

When the owner failed to remedy the breach, the body corporate sought an order that the lot owner replace the tiles with carpet and underlay, so that the flooring was restored to its original “as built” construction.

Evidence before the adjudicator included a report from acoustic engineers who were engaged to assess the acoustic impact resulting from the installation of the new floor on the downstairs neighbour. They found that the impact insulation rating of the new floor did not meet the lowest rating of the AAAC’s floor rating system of 2 stars. The acoustic engineers were of the opinion that the new tile floor had no acoustic underlay between the tiles and concrete slab.

The downstairs neighbour also provided audio recordings taken from his unit of the noise. He claimed that he suffered disturbed sleep as a result of the noise and was forced to leave his unit.

The owner countered that the entire building was badly insulated and as a result, all sounds in other units such as doors being opened and closed, toilets flushing and water taps turning on and off, could be heard in other units.

The owner also argued that halfway through the construction of the new flooring, they consulted with the body corporate. They then engaged a licensed tiler who laid a rubber-based adhesive and installed bond breaker joints at the junctions between the walls and tiles.

Further, in the absence of specific by-laws relating to installation of hard flooring in the unit, they believed it was only necessary to comply with the original building approval or development decision notice which dated back to 16 April 1995. Additionally they sought to minimise any noise transference in a number of ways, including putting floor protectors under furniture, walking barefoot and putting away baby toys that were likely to cause noise.

Held: for the body corporate.

1. Applying the test for nuisance under s 167 of the Act developed by President Wilson in *Norbury* v *Hogan* [2010] QCAT (Unreported, Application Number KA007-09, 13 May 2010), it needed to be demonstrated that the noise:

1. existed
2. emanated from the relevant unit, and
3. was of such volume and frequency that it would interfere unreasonably with a resident of ordinary sensitivity.

2. In determining whether a nuisance existed, apartment owners are entitled to use their property in an ordinary manner and the level of noise that is reasonable in a community living environment, may well be higher than would be expected in a detached house, for example. Further, what is relevant is not just what a complainant has experienced, but rather an objective standard of what might be considered unreasonable by an ordinary person in the same circumstances.

3. Having regard to submissions of the parties and the acoustic engineers' report, the owner has breached s 167 of the Act. They are required to install carpet and underlay over the tiles, or replace the tiles with carpet and underlay. Alternatively, the tiles could be replaced with new tiles laid over an appropriate acoustic membrane.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Before: R Miskinis, Adjudicator

Editorial comment: This decision demonstrates the effectiveness of providing detailed evidence in support of a body corporate's application before an adjudicator. It was difficult for the lot owner to dispute the acoustic engineers' report and the audio recordings of the noise provided by the downstairs owner. The body corporate also provided copies of the breach notice sent to the lot owner, letters sent to the lot owners by the body corporate, detailed diary entries of when the noise occurred.

The decision also illustrates the powers of the adjudicator — the lot owner was ordered to put back the carpet and underlay or replace the tiles.

R Miskinis, Adjudicator:

ORDERS MADE:

I hereby order that within three months of the date of this order, the owners of lot 3 are to take appropriate action to attenuate the transference of noise through the floor of lot 3, and in particular, those areas where porcelain tiles were laid in September 2014.

I further order that this may be achieved by installation of carpet and underlay over the tiles, or replacement of the tiles with carpet and underlay. Alternatively, the tiles could be replaced with new tiles laid over an appropriate acoustic membrane.

R Miskinis, Adjudicator:

Introduction

[1] This is an application by the body corporate for 18 Kingsford Street, seeking the following outcome:

> *To have the tiles in unit 3 replaced with carpet and underlay such that the flooring is restored to its original "as built" construction of carpet with underlay in bedrooms and living areas in line with discussion in Palmer Acoustic Field Impact Insulation Test report.*

Jurisdiction

[2] 18 Kingsford Street consists of 5 lots in a residential building. It was created under a building unit plan of subdivision and is governed by the Act and the Standard Module.

[3] This is a dispute between a lot owner and the body corporate and therefore falls within the legislative dispute resolution provisions.[1] *Section 276(1)* of the Act provides that an adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute in the context of a community titles scheme about a claimed or anticipated contravention of the Act.

Overview of Dispute

[4] The applicant body corporate says that in September 2014, the owner of lot 3 arranged to replace carpet and underlay in living areas and bedrooms with porcelain tiles. The applicant further states that this has resulted in frequent and disruptive noise transference to lot 2 and a serious loss of amenity for the occupiers of lot 2.

[5] Palmer Acoustics, Acoustic Engineers, were engaged to assess the acoustic impact resulting from the replacement of carpet with tiles in lot 3. Palmer Acoustics found that the impact insulation rating of the new floor does not meet the lowest rating of the AAAC's floor rating system of 2 stars. Three stars is considered by the acoustic industry to be the bare minimum level of floor impact insulation. The Acoustic engineers have stated that if carpet and underlay were installed, they would expect that the floor would have a 5 to 6 star floor impact insulation rating.

[6] The by-laws for the scheme include the following:

> *A proprietor or occupier of a lot shall not upon a parcel create any noise likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property.*

[7] The applicant says the significant decline in flooring acoustic properties brought about by this work creates noise that disturbs the peaceful enjoyment of lot 2, in contravention of the by-law. The applicant seeks an order that the owners of lot 3 replace the recently laid porcelain tiles with carpet and underlay, so that the flooring is restored to its original "as built" construction of carpet with underlay in bedrooms and living areas.

[8] In support of the application, the body corporate has provided a copy of a Form 10 — *"Notice of Continuing Contravention of a Body Corporate By-law"* dated 23 April 2015, which states:

Take notice that the complainant has reasonable grounds to believe that you are contravening the following by-law:

> *By-Law 1. Noise — a proprietor or occupier of a lot shall not upon the parcel create any noise likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or any person lawfully using the common property.*

[9] Also attached to the application were the following:

- letters to the owners of lot 3 dated 9 October 2014, 5 February 2015, 27 February 2015, 25 August 2015 and 26 October 2015;
- comprehensive diary entries containing details of noise emanating from lot 3 during the period 16 August 2014 to 3 April 2015; and
- Test Report by Palmer Acoustics dated 25 August 2015.

[10] The Test Report states that Palmer Acoustics performed field impact isolation tests at Unit 3 on the newly laid tile floor in the living room and two bedrooms. Palmer Acoustics is of the view that the new tile floor has no acoustic underlay between the tiles and concrete slab. The unit 2 living and bedroom areas are identical to, and directly beneath, the unit 3 living and bedroom areas. The tile floor in the living room and bedrooms 1 and 2 of unit 3 were tapped in two different orientations with the receiving spaces sound measurements averaged over a 1 minute period per test orientation.

[11] Results of testing were as follows:

Test System	LnTw	CI	LnTw + CI
Test 1 — Tile Floor (Living area)	75	−12	63
Test 2 — Original kitchen Tile Floor	78	−13	65
Test 3 — Tile Floor (Bedrooom 1)	79	−12	67
Test 4 — Tile Floor (Master bedroom)	80	−13	67

LnTw and CI are terms used in the Building Code of Australia (BCA). LnTw is a weighted room noise level and a lower number represents better performance.

[12] The report states:

> *The original floor covering in the living area and two bedroom areas was carpet with underlay. The owner of unit 3 has recently changed the carpeted areas to tiled floor. The newly laid tile floor has an impact rating of LnTw of 75–80 with a CI of −12 to −13. Under the Association of Australian Acoustical Consultants, "AAAC Guidelines for Apartment and Townhouse Acoustic Rating 2010", this represents less than a 2 star level of performance. As such, impact noises from Unit 3 will be very clearly audible and can be considered to be intrusive and disruptive to the acoustic amenity of unit 2.*
>
> *We note that the current BCA at this time allows an impact rating of up to LnTw + CI of 62. This is a very low level of amenity and never recommended by our office or any members of the Association of Australian Acoustical Consultants (AAAC). The usually recommended minimum rating (3 star) is an LnTw of not more than 55. Our tests show levels 20–25 dB over the AAAC 3 Star limit. The levels measured exceed the BCA limit by 1 to 5 dB.*

The tests show performance close to the level of performance that we would expect from a bare slab and indicates that no impact insulation layer has been installed under the tiles.

From our experience the performance of soft flooring carpet with underlay is expected to be LnTw <35. A worn carpet is still expected to achieve LnTw<45. When changing from a soft floor to hard floor without a high quality acoustic underlay, the floor impact insulation rating will be significantly degraded.

This is a body corporate matter in which, by virtue of poor acoustic isolation of the floor system the owner of the upper level apartment is allowing a construction that affects the peaceful enjoyment of the occupants in the lower unit 2. The by-law requires that an occupier must not create any noise likely to interfere with the peaceful enjoyment of a person lawfully on another lot or common property.

Submissions

[13] In accordance with section 243(2)(a) of the Act, submissions were invited from all lot owners including the owners of lot 3 and the owner of lot 2.

[14] A submission was made on behalf of the owners of lot 3, by their daughter who resides in the lot. She states that the entire building is badly insulated and as a result, all sounds in other units such as doors being opened and closed, toilets flushing and water taps turning on and off, can be heard in other units. As proof of this, the occupier of lot 3 has recorded all noises that occurred during a 2 week period in May 2015. She also states that the common area above lot 3 is tiled with terracotta tiles and it is possible to hear people using that area.

[15] The occupier of lot 3 also states that the owner of lot 2 had been complaining about noise since he moved into the scheme in 2013. Further, the original tiles in the kitchen, bathrooms and part of the dining room complied with the requirements of the Building Code of Australia (BCA) when the building was first constructed.

[16] The occupants of lot 3 also state that the noises complained about are the type of noises that are to be expected when living in a unit block. They also believe that they are being discriminated against because they have a baby and the owner of lot 2 has previously requested that lot 3 not be rented to a family. In August 2014 they moved back into lot 3 and the occupant of lot 2 began complaining about noise from lot 3, particularly the noise of the crying baby. They have met with the Brisbane City Council and Auchenflower Police and have been advised that there has never been a formal noise complaint raised for this address.

[17] They state that half of the living area had already been tiled during construction and before tiling the other half of the floor, they consulted with the body corporate and the body corporate manager. They then engaged a licensed tiler who laid a rubber-based adhesive and installed bond breaker joints at the junctions between the walls and tiles. In the absence of specific by-laws relating to installation of hard flooring in the unit, they believe it was only necessary to comply with the original building approval or development decision notice which dates back to 16 April 1995. Further, they state that they have sought to minimise any noise transference in a number of ways, including putting floor protectors under furniture, walking barefoot and putting away baby toys that are likely to cause noise.

[18] The owner of lot 2 made submissions in response. He says that the issue first arose in August 2014 when the owners' daughter and son in law contacted the body corporate manager, advising of their intention to tile the remainder of their unit (living area and both bedrooms). The body corporate manager advised that there were potential issues associated with noise transference and that "a qualified contractor should be able to supply you with certification that they have applied a sound barrier to comply with these standards".

[19] The tiling work went ahead soon afterwards but after completion, it became obvious that a noise insulating membrane had not been laid below the tiles. Since that time the amenity of unit 2 has been compromised with impact noise such a footsteps, items being dropped, vacuum cleaners and brooms being audible in lot 2. He further states that after the tiles were laid, his sleep would be disturbed on average 5 out of 7 nights, whereas previously, there were no occurrences of interrupted sleep. Testing by Acoustic Engineers shows that the newly laid tile floor has an impact rating of LnTw of 75–80, when a level of 55 is considered the absolute recommended maximum noise level. Where floors are covered with carpet and underlay, the sound impact rating would be in the vicinity of 35.

[20] The owner of lot 2 also disputes that the building is badly insulated and says the noise nuisance is wholly attributable to the tiles that have been laid without an acoustic membrane. He does not have an issue with airborne noise transference e.g. a baby crying as most of the noise transferred from unit 3 to unit 2 is impact noise through the floor. The occupants did consult with the body corporate manager prior to tiling and were told that "A qualified contractor should be able to supply you with certification that they have applied a sound barrier to comply these standards". However this advice was ignored and as a result, the floor does not meet AAAC or even the much lower BCA standards, resulting in the contravention of the body corporate's noise by-law. Further, this dispute concerns noise nuisance and not whether the tiler has complied with building regulations or QBCC requirements. Rubber based adhesives are not considered to provide an effective noise barrier and there is no evidence that porcelain tiles transfer less noise than terracotta or ceramic tiles. The new tiles in the bedrooms yield worse results than the original tiles in the kitchen. He eventually moved out of his unit after multiple nights of interrupted sleep.

Analysis

[21] The issues for consideration in this application are (i) the level of noise transference occurring between Lots 3 and 2; (ii) whether this noise amounts to a nuisance or unreasonable interference under *section 167* of the Act; and (iii) if there is a nuisance, what is required to rectify that nuisance.

[22] The by-laws for the scheme include the following by-law:

> *A proprietor or occupier of a lot shall not upon a parcel create any noise likely to interfere with the peaceful enjoyment of the proprietor or occupier of another lot or of any person lawfully using common property.*

[23] In addition to the by-law section 167 of the Act provides as follows:

> *167 Nuisances*
>
> *The occupier of a lot included in a community titles scheme must not use, or permit the use of, the lot or the common property in a way that—*
>
> > *(a) causes a nuisance or hazard; or*
> > *(b) interferes unreasonably with the use or enjoyment of another lot included in the scheme; or*
> > *(c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.*

Test for nuisance

[24] The Queensland Civil and Administrative Tribunal (**QCAT**) has considered the test for nuisance under *section 167* of the Act. In his decision,[2] President Wilson said [at paragraphs 13 to 15]:

> *"In the absence of a statutory definition it is useful to consider how the common law has construed the phrase* 'interferes unreasonably'. *Under the common law, a private nuisance is an unlawful and unreasonable interference with an occupier's use and enjoyment of land or of some right over, or in connection with it…*
>
> *What is considered unreasonable depends on the prevailing circumstances in each case but the nuisance, these decisions show, needs to be an inconvenience that materially interferes with the ordinary notions of a 'plain and sober' person, and not merely the 'elegant or dainty' habits of the complainant….*
>
> *The nuisance must result in a substantial degree of interference according to what are considered reasonable standards for the enjoyment of those premises…"*

[25] President Wilson went on to say [at paragraphs 17]:

> *"In residential areas, the cases show, the principle of 'give and take, live and let live' is customarily applied so that the 'ordinary and accustomed' use of premises will not be considered a nuisance, even if some inconvenience to a neighbour is caused."*

[26] In determining whether a nuisance existed, President Wilson referred [paragraph 28] to the need to establish whether the activity complained of was *"… of such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity."* Applying this test to the circumstances of this case, I need to determine the following: that the noise complained of exists; that the noise emanates from Lot 3; and is of such volume and frequency that it would interfere unreasonably with a resident of ordinary sensitivity.

[27] Occupants in a community titles scheme are entitled to use their property in an ordinary manner and the level of noise that is reasonable in a community living environment, particularly an apartment, may well be higher than would be expected in a detached house, for example. What is relevant is not just what a complainant has experienced, but rather an objective standard of what might be considered unreasonable by an ordinary person in the same circumstances.

[28] Having regard to submissions of the parties and the acoustic engineer's report, I am satisfied that the owner of lot 2 has experienced levels of noise transference from the lot above which has interfered with the enjoyment of his lot. In particular, I note that testing by the acoustic engineer revealed that the newly laid tile floor in lot 3 above, has an impact rating of LnTw of 75–80 with a CI of −12 to −13. As such, impact noises from Unit 3 would be very clearly audible and can be considered to be intrusive and disruptive to the acoustic amenity of unit 2.

[29] I also note that testing in the unit 3 bedrooms produced readings of LnTw 79 & LnTw 80, with a LnTw + CI of 67. The Building Code of Australia (BCA) requires that impact sound insulation requirements for floors separating dwellings should be not more than LnTw + CI 62. The lower the rating, the better the performance of the floor in terms of impact sound insulation. The BCA criteria are very much a minimum standard and that even when the standard is met, there will be poor levels of sound insulation. I have also had regard to the AAAC's *Acoustical Star Rating for Apartment and Townhouses*[3] which can be seen as complementing the minimum BCA requirements with the acoustic standards that may be expected by occupiers of different standards of accommodation. In regard to the impact isolation of floors between tenancies, the guide refers to minimum ratings of equal to or less than LnTw 65 in a 2 star building, and with a sliding scale up to 40 in a 6 star building.

[30] It is evident from the testing conducted by Palmer Acoustics that the noise transference between Lots 3 and 2 fails to meet the BCA minimum standard and also exceeds the maximum level for a 2-star building. The Acoustic engineer states at page 3 of his report, that "*The usually recommended minimum rating (3 star) is an LnTw of not more than 55. Our tests show levels 20–25dB over the AAAC 3 Star limit. The levels measured exceed the BCA limit by 1 to 5 dB*."

[31] In a previous adjudication an L'n,w result of 70 was found by the adjudicator to be *"an extremely poor result"*[4] . That finding was noted as comparison in a subsequent decision in which the adjudicator found that the L'n,w rating of 71 demonstrated in their case was an even poorer result[5] .

[32] It is not disputed that the owners of lot 3 replaced existing carpet with tiles. The evidence indicates that there was no proper acoustic insulation installed below the tiles, and as a result, this has created the noise nuisance experienced by the owner of lot 2. All occupiers have an obligation not to use, or allow the use of, their lot in a manner that would unreasonably interfere with their neighbours. On the basis of objective evidence, I am of the view that there is noise transference occurring between Lots 3 and 2. I further find that the level of noise transference is above industry acceptable levels. I further find that this noise transference amounts to an unreasonable interference with the use and enjoyment of lot 2. Finally, I accept that this interference has arisen because the respondents replaced existing carpet with uninsulated, or inadequately insulated hard flooring.

[33] It follows then, that I consider the respondents have, albeit not necessarily intentionally, breached *section 167* of the Act. The question is what action should be taken to rectify this. The outcome sought by the applicant is *to have the tiles in unit 3 replaced with carpet and underlay such that the flooring is restored to its original "as built" construction of carpet with underlay in bedrooms and living areas*

[34] I am of the view that the owners of lot 3 should, within three months of the date of this order, take appropriate action to attenuate the noise transference through the floor from lot 3 to lot 2. This could

be achieved by installation of carpet and underlay over the tiles, or replacement of the tiles with carpet and underlay. Alternatively, the tiles could be replaced with new tiles laid over an appropriate acoustic membrane.

Footnotes

1 *Sections 227,228, 276* and *Schedule 5* of the Act

2 *Norbury* v *Hogan* [2010] QCAT (Unreported, Application Number KA007-09, 13 May 2010)

3 Current edition published September 2010, www.aaac.org.au

4 *Contessa Condominiums* [2007] QBCCMCmr 130, page 5

5 *Contessa Condominiums* [2007] cited above, at page 6

WILLIAHRA TOWER

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(2016) LQCS ¶90-207; Court citation: [2016] QBCCMCmr 177

Queensland Body Corporate and Community Management Commissioner — Adjudicators Orders

Decision delivered on 21 April 2016

Conveyancing — Body corporate — Powers of attorney — Where body corporate manager brought an application for an interim order against the body corporate challenging the validity of a motion which was purportedly passed at the annual general meeting — Where motion approved the engagement of an alternative body corporate manager — Where the alternative body corporate manager was elected due to the votes exercised by an individual pursuant to powers of attorney — Whether votes exercised were invalid because individual was not entered on the body corporate's roll as being the representative of the 27 lots he purported to vote for — Whether the appointment of a power of attorney and a proxy are analogous — Whether individual had circumvented the proxy farming restrictions — Accommodation Module: s 81, 105 and 107(3)(f)(i).

The body corporate managers (SSKB) of a 108 lot strata scheme brought an application for an interim order against the body corporate challenging the validity of a motion which was purportedly passed at the annual general meeting.

The motion was concerned with the election of a body corporate manager for the scheme. Three alternative body corporate managers were presented, including the re-election of SSKB.

Prior to the AGM, Mr Nagy was appointed power of attorney by owners of 27 of the lots. Mr Nagy gave the secretary a copy of the powers of attorney prior to the meeting. The powers of attorney were in identical terms and appointed Mr Nagy to, on behalf of each principal, do anything the principal may lawfully authorise an attorney to do for the lot in relation to the AGM, including but not limited to obtaining all relevant information relating to the AGM, executing and delivering the documents for the AGM, and voting on behalf of the principal.

One of the alternative body corporate managers was elected due to the votes exercised by Mr Nagy pursuant to the powers of attorney.

SSKB argued that the votes exercised by Mr Nagy were invalid for the following reasons:

Non-compliance with s 81 of the Accommodation Module

Mr Nagy was not entered on the body corporate's roll of lot owners as being the representative of the 27 lots he purported to vote for. SSKB argued that he therefore did not comply with the requirements of s 81 of the Accommodation Module. SSKB submitted that it is clear as per s81(1)(a), that in order for an individual to be considered a voter, that individual must have had its name entered on the body corporate's roll.

SSKB also submitted that Mr Nagy failed to give the secretary a copy of the powers of attorney prior to the AGM with sufficient time for the secretary to alter the roll to enter Mr Nagy's name as representative for all the lots over which he held a power of attorney. It was further argued that while s 81(3)(a) does not provide a time for provision of any instrument of appointment, when it is read in conjunction with s 81(1)(a), the only possible conclusion that may be reached is that the relevant information must be given prior to a meeting.

Circumvention of proxy provisions

Alternatively SSKB argued, that on the basis of the decision in *Q1* [2011] QBCCMCmr 323, despite a representative ostensibly satisfying the requirements of s 81 of the Accommodation Module, that representative's votes could be invalidated on the basis that the representative had acted in circumvention of other legislative voting requirements.

SSKB submitted that the powers of attorney were obtained solely to exercise votes on the lot owners' behalf at the meeting and therefore the limitations imposed on the right to vote by proxy should be imposed as follows:

a) s 105 of the Accommodation Module limits the maximum amount of votes by proxy that one person may exercise to 10% of the number of lots in scheme, and
b) s 107(3)(f)(i) prohibits voting by proxy on a motion approving the engagement of a body corporate manager.

Held: for the body corporate. SSKB's application for interim orders dismissed.

Whether there has been non-compliance with s 81 of the Accommodation Module

1. There is no requirement under the Accommodation Module that the powers of attorney be provided by a certain time, and no such requirement can be inferred from the wording of the Module when read as a whole.

2. The purpose of requiring a representative to give the document purporting to give them authority to vote is so that the chairperson can ascertain whether the person has genuinely been appointed by the owner and so that the body corporate knows where to send notices to (on the authority of the Q1 decision).

Whether Mr Nagy had circumvented the proxy provisions

3. The powers of attorney the subject of this application were not limited to voting. The powers of attorney had the effect of Mr Nagy standing in the shoes of the owner for body corporate matters for a period of time. This falls squarely within the definition of a representative, rather than a proxy (on the authority of the Q1 decision).

4. . The interpretation sought by SSKB suggested that the appointment of a power of attorney and a proxy are analogous. They are not; the two relationships are entirely different and are intended to be treated differently, as is evident by the fact that they are dealt with by the Accommodation Module separately.

Before: M A Schmidt, Adjudicator

Editorial comment: This decision confirms that the use of powers of attorney in voting at an annual general meeting in Queensland, is a valid method of lot owners exercising their vote, and there is no limit on the number of powers of attorney that may be used for a meeting. This stands in contrast to the restrictions placed on the use of proxies at general meetings.

M A Schmidt, Adjudicator:

INTERIM ORDERS MADE:

1. **I hereby order** that the application for interim orders is **dismissed**.

M A Schmidt, Adjudicator:

Introduction

[1] This application is brought by Stewart Silver King and Burns (Brisbane) Pty Ltd (**SSKB**), the current body corporate managers, against the body corporate, challenging the validity of Motion 9 which was purportedly passed at the annual general meeting (**AGM**) on 16 March 2016. SSKB argue that the votes cast by Mr Mario Nagy at the AGM are invalid. As a result, SSKB argue that Alternative A of Motion 9 considered at the AGM should be deemed to have passed.

[2] SSKB seek an interim order restraining the body corporate from implementing or in any way acting upon the resolution purportedly passed pursuant to Motion 9 until the application for final orders is determined.

[3] In deciding whether or not to grant an interim order it is appropriate for me to consider:

a. Whether the applicant has raised any serious legal questions for me to determine.
b. Whether inconvenience likely to result from an interim order is outweighed by the potential detriment if the order is not granted.

Overview

The lead up to the dispute

[4] “Willahra Tower” CTS 30990 is a community titles scheme governed by the *Body Corporate and Community Management Act* 1997 **(the Act)** and the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 **(Accommodation Module).** There are 108 lots in the scheme, which is situated in Brisbane City.

[5] SSKB states that it was engaged by the body corporate as its body corporate manager at the AGM on 24 April 2015. The management agreement subsequently entered into was to run until 23 April 2016.

[6] A motion with alternatives to appoint a body corporate manager was included in the Notice of Meeting for the March 2016 AGM in the following terms:

> THAT the Body Corporate enters into a three year administration agreement with one of the following alternatives and that two members of the Committee execute the agreement under the common seal on behalf of the Body Corporate….
>
> Alternative A — SSKB
>
> SSKB administration agreement as circulated with the meeting material, which includes:
>
> i. Commencing on 24 April 2016

ii. With a secretarial fee of $110.00 per lot per annum (excluding GST) and a disbursement fee of $60.—per lot per annum (excluding GST).

Alternative B — Archers

Archers administration agreement as circulated with the meeting material which includes:

i. Commencing on 24 April 2016
ii. With a secretarial fee of $130.00 per lot per annum (excluding GST) and disbursements are to be paid for per item (excluding GST).

Alternative C — Body Corporate Services

i. With a secretarial fee of $105.00 per lot per annum (excluding GST) and a disbursement fee of $60.00 per lot per annum (excluding GST),

[7] In the evening prior to the March 2016 AGM, SSKB states Mr Nagy presented 27 documents to SSKB (on behalf of the secretary) entitled “Power of Attorney”. Each of these documents had been signed by a lot owner. As a result, Mr Nagy purported to be the Attorney for each lot owner that had signed such a document, being Lots 8, 11, 12, 13, 15, 20, 21, 26, 27, 29, 31, 34, 36, 37, 39, 40, 41, 47, 50, 51, 54, 63, 66, 83, 85, 88, and 104. In addition to these lots, Nagy held a power of attorney document signed by an unfinancial lot owner.

[8] The committee submits that around 7 March 2016, Mr Nagy was appointed power of attorney by owners of some 27 Lots. The powers of attorney were in identical terms and appointed Mr Nagy to, on behalf of each principal, do anything the principal may lawfully authorise an attorney to do for the lot in relation to the AGM, including but not limited to obtaining all relevant information relating to the AGM, executing and delivering the documents for the AGM, and voting on behalf of the principal.

[9] The committee further submits that around 8 March 2016, 22 of the 27 powers of attorney were provided to SSKB (on behalf of the secretary). The remaining 5 powers of attorney were provided to SSKB at 12 noon on 16 March 2016.

[10] At the AGM, the committee submits that some lot owners stated that the quotes were not comparable because the proposals made by SSKB and Archers were for three years and the proposal by Body Corporate Services (**BCS**) was one year. In response, SSKB sought to amend its proposal to instead be engaged for a one-year agreement (compared to the three-year agreement contained in Motion 9). The lot owners present agreed to amend Motion 9 accordingly.

[11] Subsequently, the caretaking service contractor, Wenmain Zhong (also known as Will Zong) advised those present that he had contacted Archers The Strata Professionals (**Archers**) and confirmed that their proposal was to be amended to a one year agreement as well. The lot owners present agreed to amend Motion 9 accordingly.

[12] Motion 9 was therefore considered with the following alternatives:

a) SSKB to be engaged for one year beginning on 24 April 2016 at a cost of $110.00 per lot per annum plus disbursements of $60.00 per lot per annum;
b) Archers to be engaged for one year beginning on 24 April 2016 at a cost of $130.00 per lot per annum plus disbursements paid per item; and
c) BCS to be engaged for one year beginning on 24 April 2016 at a cost of $105.00 per lot per annum plus disbursements of $60.00 per annum.

[13] Motion 9, in its amended form, was then considered by the body corporate. The motion passed by 43 votes in favour and four votes against.[1] Alternative B (the appointment of Archers) was carried with 33 votes, alternative A (the appointment of SSKB) had 10 votes in favour and Alternative C (the appointment of BCS) had no votes in favour.

[14] SSKB states that all of Mr Nagy’s votes (including the 26 votes purportedly made pursuant to the powers of attorney) were in favour of the motion and in favour of alternative B. SSKB argues that if the votes exercised by Mr Nagy pursuant to powers of attorney are invalid, the motion would have passed as follows:

a) Motion 9 as a whole would have been carried with 16 votes in favour and 4 against;

b) Alternative A would have been carried with 10 votes in favour (Alternative B received 6 votes in favour and Alternative C no votes).

Procedure and jurisdiction

[15] This is a dispute about alleged contraventions of the legislation that falls within the dispute resolution provisions of the legislation[2] .

[16] An adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute about a claimed or anticipated contravention of the Act or the CMS, or the exercise of rights or powers or performance of duties under the Act or the CMS.[3] An order may require a person to act, or prohibit a person from acting, in a way stated. An order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate.[4]

[17] In particular, an adjudicator may make an interim order if satisfied, on reasonable grounds, that one is necessary because of the nature or urgency of the circumstances.[5]

[18] At this time, I am concerned only with the application for an interim order and the threshold issue of whether interim orders are warranted. An interim order will not be granted unless it is necessary due to the nature or urgency of the circumstances to which the application relates.[6] Any order granted must be just and equitable in the circumstances.[7]

[19] It is not appropriate to consider the substantive issues in the application in detail at this time. To determine whether it is just and equitable to grant interim relief, however, it is relevant to briefly consider the issues raised in the application. An adjudicator must be satisfied that the application raises serious questions and that the balance of convenience between the parties justifies injunctive relief.

[20] I provided Mario Nagy, Archers (the alternate body corporate manager engaged pursuant to the resolution purportedly passed on Motion 9), and the committee with an opportunity to make a written submission in response to the application for an interim order. A submission was made by the committee.

[21] I have decided the interim application based on the written material provided.

Analysis

Urgency?

[22] In order to make an interim order, an adjudicator must be satisfied that one is necessary because of the nature or urgency of the circumstances to which the application relates.

[23] SSKB states that its engagement as body corporate manager expires on 23 April 2016. Given the impending date for the expiry of SSKB's management agreement, SSKB submits that urgent circumstances exist. The committee submits that it appreciates the purported urgency of the application but says that the urgency only arises from SSKB's conduct in misconceiving the potential outcome of the application. The committee argues SSKB simply cannot obtain an order that it be appointed body corporate manager. The committee argues that Mr Nagy was a voter and his votes are valid and there is no basis for invalidating them. However, even if the committee is unsuccessful on that point and Mr Nagy's votes are invalidated, then there is no quorum formed and the meeting held on 16 March 2015 is a nullity and none of the motions can be passed or deemed to have been passed.

[24] The committee concludes that the urgency of the application is solely due to SSKB's misconception of the application and accordingly, should not be a consideration for granting an interim order.

[25] Given that the current engagement of SSKB expires on 23 April 2016 and there is a dispute as to whether Archers was validly appointed at the AGM, I am satisfied that urgent circumstances exist for the purpose of considering whether an interim order is warranted.

Serious Issue?

[26] SSKB argues that Nagy did not comply with the requirements of section 81 of the Accommodation Module to be validly appointed as the representative of lot owners for which he purported to exercise votes pursuant to powers of attorney. Alternatively, and in accordance with the decision of *Q1*[8] , Mr Nagy circumvented the requirements of the legislation by exercising votes via powers of attorney in circumstances where he would otherwise have been prohibited from exercising those same votes by a properly obtained proxy. As a result, it is argued any votes exercised pursuant to various powers of attorney by Mr Nagy at the March 2016 AGM should be invalidated.

[27] The committee submits that there is no genuine legal question to be decided because the votes made by Mr Nagy were valid votes because the use of powers of attorney in voting is a valid method of lot owners exercising their vote and there is no limit on the number of powers of attorney that may be used for a meeting. In the alternative, the committee submits that even if the votes of Mr Nagy are invalid, the orders sought cannot be made, because if the votes of Mr Nagy are invalid, then only 20 voters were present at the March 2016 AGM which, for the 105 lot Scheme, is not at least 25% of the voters, which is required to make a quorum and as a result, the meeting is a nullity.

[28] The committee further submits that the application is frivolous, vexatious, misconceived and otherwise constitutes an abuse of process. Further, that the application is otiose in circumstances where the relief sought cannot be granted.

Non-compliance with section 81

[29] By virtue of section 81(1)(a) of the Accommodation Module, SSKB argue it is clear, that in order for an individual to be considered a voter, that individual must have had its name entered on the body corporate's roll of lot owners.

[30] In the present case, Mr Nagy was not entered on the body corporate's roll as being the representative of the 27 lots he purported to vote for. As a result, SSKB claims he cannot be considered a 'voter' for 26 of the votes that he cast and those votes cast by Nagy as a representative pursuant to the powers of attorney must be declared invalid.

[31] SSKB also submit that Mr Nagy failed to give the secretary a copy of the powers of attorney prior to the March 2016 AGM with sufficient time for the secretary to alter the roll to enter Mr Nagy's name as representative for all the lots over which he held a power of attorney. Whilst section 81(3)(a) does not provide a time for provision of any instrument of appointment, when it is read in conjunction with section 81(1)(a), the only possible conclusion that may be reached is that the relevant information must be given prior to a meeting. Otherwise, a person may be able to be entered on the roll of lot owners as a representative without authority and vote on motions without any proper authority being given to the body corporate. In the present case, Mr Nagy did not present the powers of attorney to the secretary with sufficient time to enter the information into the body corporate's roll prior to the March 2016 AGM. As a result, it follows that Mr Nagy did not provide the powers of attorney to the secretary in accordance with section 81(3)(a) of the Accommodation Module.

[32] The committee submits that Mr Nagy held a power of attorney for each of the lots. Section 81(2)(b)(i) of the Accommodation Module specifically contemplates powers of attorneys and provides that a person acting under a power of attorney is a representative. There are limited exclusions, none of which apply in the present case. Accordingly, Mr Nagy is a representative of the owners of the Lots. Mr Nagy has given the secretary a copy of the instrument under which he derives the representative capacity, in compliance with section 81(3)(a) of the Accommodation Module.

[33] The committee acknowledges Mr Nagy's name was not entered on the body corporate roll as representative for each of the owners of the Lots. The committee submits that this does not negate Mr Nagy's status as a voter because the failure for Mr Nagy's name to be entered on the roll as representative for each of the owners of the Lots is entirely due to the delay or inaction of SSKB. 22 of the 27 powers of attorney were provided to SSKB around 8 March 2016 (not the evening before the meeting, as suggested by SSKB). The provision of the powers of attorney eight days prior to the meeting provided more than sufficient time for the applicant to enter Mr Nagy's name on the roll as representative. Despite this, SSKB failed to do so and cannot now rely on its own delay or inaction to invalidate votes that were cast under the powers of

attorney. The remaining 5 powers of attorney were provided to SSKB at 12 noon on 16 March 2016, 4 hours prior to the meeting. In circumstances where the roll is maintained electronically, the committee submits that even this period of time is sufficient to enable SSKB to update the roll to include Mr Nagy's name. Further, or in the alternative, strict compliance with the Accommodation Module is not necessary and technical irregularities are permitted, as demonstrated in the decision of *Crown Towers*[9] , *Admiralty Towers II*[10] and *Q1*[11] . Mr Nagy's name not being listed on the roll as representative for each of the Lot owners should not invalidate the votes in circumstances where:

> i. Substantial compliance with the process was followed whereby Mr Nagy provided the powers of attorney to SSKB (on behalf of the secretary);
> ii. Non-compliance was due to the actions of SSKB and outside the control of Mr Nagy;
> iii. There is no suggestion that Mr Nagy was not the authorised representative of the owners of the Lots;
> iv. Public inconvenience would be the result of the invalidation of the votes because it would require an EGM to be called; and
> v. The outcome of appointing SSKB as body corporate manager would be unjust in circumstances where the relationship between SSKB and the body corporate has broken down irrevocably and SSKB is effectively attempting to force a contractual relationship with the body corporate.

[34] There is no requirement under the Accommodation Module to provide the powers of attorney by a certain time, and no such requirement can be inferred from the wording of the Module when read as a whole. The purpose of requiring a representative to give the document purporting to give them authority to vote is so that the chairperson can ascertain whether the person has genuinely been appointed by the owner and so that the body corporate knows where to send notices to.[12]

[35] I find the submission from the committee quite persuasive on the issue of alleged non-compliance with section 81 of the Accommodation Module. I do not consider that a serious issue has been raised in this regard.

Circumvention of proxy provisions

[36] On the basis of the decision in Q1, SSKB argues, despite a representative ostensibly satisfying the requirements of section 81 of the Accommodation Module, that representative's votes could be invalidated on the basis that the representative had acted in circumvention of other legislative voting requirements.

[37] It does not make sense, states SSKB, that Mr Nagy could gain the right to vote for 26 different lot owners via a power of attorney, without the limitations imposed on the right to vote by proxy, in circumstances where:

> a) Section 105 of the Accommodation Module limits the maximum amount of votes by proxy that one person may exercise to 10% of the number of lots in scheme; and
> b) In any event, section 107(3)(f)(i) prohibits voting by proxy on a motion approving the engagement of a body corporate manager.

Therefore, Nagy would have been prevented from exercising any votes by proxy on Motion 9 at the March 2016 AGM.

[38] SSKB submits it is clear that the powers of attorney were obtained for the sole purpose of Mr Nagy exercising votes on lot owner's behalf at the March 2016 AGM as the powers of attorney relevantly provide:

> The Principal appoints Mario Nagy of 61/540 Queens Street, Brisbane QLD 4000 to be the Attorney of the Principal from the date of this deed up to and including 30 April 2016 to do in the name of the Principal and on its behalf anything the Principal may lawfully authorise an Attorney to do for Lot _ of Wilahra Tower in relation to the Annual General Meeting ("AGM") of Wilahra Tower CTS 30990, which is to be held on 16 March 2016 or a later date as required, including but not limited to, obtaining all relevant information of the AGM, executing and delivering the documents for the AGM and voting on behalf of the Principal."

[39] Accordingly, SSKB submits that the practical effect of the powers of attorney is that they circumvent the requirements for the appointment and use of proxies in voting at general meetings in accordance with the Accommodation Module.

[40] The committee submits that the *Q1* decision and the present case are distinguishable, specifically, the documents appointing Mr Jones were not powers of attorney and were limited to authorising Mr Jones to vote at the AGM.

[41] The powers of attorney the subject of this application are not limited to voting. The powers of attorney have the effect of Mr Nagy standing in the shoes of the owner for body corporate matters for a period of time, which is evident in Mr Nagy having the ability to obtain relevant information on behalf of the principal and to do anything in relation to the AGM, which reasonably includes liaising with the body corporate and asking questions in relation to the proposed motions. By being able to liaise with the body corporate regarding the AGM, the body corporate was entitled to treat Mr Nagy as if he was in the shoes of the real owner until 30 April 2016. By the reasoning of the very decision referred to by SSKB, that falls squarely within the definition of a representative, rather than a proxy.[13] Further, at [66] of *Q1*, Adjudicator Toohey specifically contemplates people being appointed as power of attorney and indicates that this is an acceptable appointment of representative.

[42] The committee submits that SSKB seeks to read the Accommodation Module in a manner that limits the number of powers of attorney that may be used to vote, as if a power of attorney is the same appointment as a proxy. The interpretation sought by SSKB suggests that the appointment of a power of attorney and a proxy are analogous. They are not; the two relationships are entirely different and are intended to be treated differently, as is evident by the fact that they are dealt with by the Accommodation Module separately.

[43] Nothing in the Accommodation Module or the Act suggest that the Accommodation Module should be interpreted in the manner suggested by SSKB, argues the committee. In fact, in circumstances where the Accommodation Module specifically contemplates powers of attorney and does not place a limit on them; compared to also specifically contemplating proxies and placing a limit on their use, it can be inferred that the purpose of the legislature is to not place any limit on the number of powers of attorney that may be exercised.

[44] Further, to suggest that there be a limit placed on powers of attorney voting at a meeting, submits the committee, is entirely inconsistent with the main objective of the relevant provisions, which is to allow for each owner to vote as part of the democratic body corporate decision making process.

[45] Again, in this regard, I find the committee submission quite persuasive. SSKB does not allege a breach of legislation, but rather suggests that a limitation which it does not contain, be read into it. I consider it a long shot in terms of seeking to establish a serious issue.

Balance of Convenience

[46] An adjudicator must balance the inconvenience of granting relief now if final orders are ultimately refused, against the inconvenience of refusing relief now if final orders are ultimately granted. Of particular relevance is evidence that an interim order is necessary to prevent serious or irreparable harm.

[47] SSKB argues that the inconvenience of refusing interim relief and granting final relief is that:

> a) The body corporate will be required to incur the cost and inconvenience of the engagement of an alternative body corporate manager before re-engaging SSKB should final orders be issued;
> b) SSKB will suffer the cost of having to transfer all of the body corporate's records to Archers before suffering the cost of receiving them back and including the same back into its systems; and
> c) Lot owners may be confused as to whom to contact if it requires information or assistance from the body corporate and may contact the wrong party.

[48] In contrast, submits SSKB, the only inconvenience of granting interim relief and refusing final relief is that it will move the date by which SSKB will be required to transfer the body corporate's records to Archers to the date that final orders are made.

[49] SSKB argues the balance of convenience therefore favours the granting of the interim order sought.

[50] The committee submits that no serious or irreparable harm arises from the suggested inconveniences; the harm is purely financial or a minor inconvenience if a lot owner contacts the incorrect body corporate manager which, the committee submits, would occur in many cases where a body corporate manager has changed and is not so inconvenient to give rise to irreparable harm.

[51] Further, the committee submits that the circumstances suggested by SSKB as giving rise to the balance of inconvenience favouring SSKB are advanced on a misconceived premise. That is, that an order that SSKB be appointed body corporate manager simply cannot be made, as in the event Mr Nagy's votes are invalidated, a quorum was not formed and the meeting held on 16 March 2016 would be a nullity.

[52] Without exploring the issue of whether or not a quorum was present at the AGM, or would have been in the event that Mr Nagy's votes as attorney were invalid, I agree with the committee that no serious or irreparable harm arises from the inconveniences suggested by SSKB. I am not persuaded that the balance of convenience necessitates the making of an interim order, especially in circumstances where the committee has made it clear that it does not wish to retain SSKB as body corporate manager and suggests that the relationship between SSKB and the body corporate has broken down irretrievably.

Conclusion

[53] It is my preliminary view that Mr Nagy has complied with all of the elements of being a "voter" under the Accommodation Module, except for the fact that his name was not entered on the body corporate roll as representative for each of the Lot owners. In my preliminary view, this does not invalidate the votes cast by Mr Nagy. Further, Mr Nagy was not voting as a proxy and there is no limit on the number of powers of attorney that may be used to cast votes.

[54] I prefer the committee's submission over SSKB's in relation to urgency, whether a serious question has been raised and the balance of convenience. I am not persuaded that it is just and equitable to make an interim order in circumstances where arguably there is not any serious question raised, the balance of convenience does not necessitate it, the committee no longer desire the services of SSKB and that appears to be reflected in the vote at the AGM.

[55] I note the committee's submission that the application is frivolous, vexatious, misconceived and without substance and its request for costs against SSKB. I will deal with these issues in the context of a final order, should one be necessary. SSKB will be afforded some time to consider the committee's submission (which I note it has requested a copy of from this Office) and whether it wishes to proceed with the application for final orders, before the application for final order is progressed further.

Footnotes

1 These four votes were determined to be 'no' votes as the voting papers submitted indicated votes for an alternative which was altered by the meeting at the March 2016 AGM.

2 See *sections 226, 227 and 228*, Act.

3 *Section 276* of the Act

4 *Section 284(1)* of the Act

5 *Section 279(1)* of the Act

6 *Section 279* of the Act.

7 *Section 276* of the Act.

8 [2011] QBCCMCmr 323

9 [2011] QBCCMCmr 472 at paragraphs [35] to [38].

10 [2015] QBCCMCmr 288

11 [2011] QBCCMCmr 323

12 Q1 [2001] QBCCMCmr

13 *Q1* [2011] QBCCMCmr 323 at [64]

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(2016) LQCS ¶90-208; Court citation: [2016] QBCCMCmr 43

Queensland Body Corporate and Community Management Commissioner — Adjudicators Orders

Decision delivered on 5 February 2016

Conveyancing — Body corporate — Transfer of management rights — Where body corporate withheld consent to transfer of management rights unless owner of management rights agreed to repay an alleged debt — Whether body corporate breached s 94 of the Body Corporate and Community Management Act 1997 by failing to act reasonably in withholding consent to the transfer — Whether body corporate breached s 120(6)(b) of the Accommodation Module by requiring payment of the debt before it would consent to the transfer — Body Corporate and Community Management Act 1997, s 94; Accommodation Module, s 120(6)(a)(b).

The applicant (BP Management) was the owner of the caretaking and letting rights for the respondent body corporate.

BP Management also undertook the reading of water and electricity meters for each lot in the scheme so that individual usage could be determined and the relevant lot owner charged pursuant to their usage.

The meter reading service was outside the scope of the caretaking and letting agreement and BP Management was paid on submitted invoices for the service. The body corporate later asserted that BP Management had never been authorised by the committee to undertake the meter reading duties and as such, BP Management had been paid for services that he was not entitled to receive.

BP Management subsequently entered into a contract of sale with Trending Management to sell the management rights business. He sought the body corporate's permission to do so. However, the buyer terminated the contract as a direct result of the body corporate unreasonably withholding consent to the assignment.

BP Management then entered into a contract of sale with Quan Realty to sell the management rights. However prior to settlement, the body corporate issued a formal demand to BP Management that alleged that BP Management was never duly authorised by the body corporate to provide the meter reading service and that payments to BP Management for the service in the sum of $17,246.90 were owed to the body corporate (plus approximately $2,000 that the committee had incurred in costs).

Despite BP Management denying liability for repayment of any debt, he identified that there was a legitimate risk that unless he agreed to pay the debt, the body corporate would withhold its consent to the assignment of the management rights, albeit unreasonably.

In light of the identified risk and the approaching settlement date, BP Management acting under duress to protect the sale contract, engaged in without prejudice settlement discussions with the body corporate to try and resolve the debt issue. The body corporate rejected all offers put forward by BP Management and BP Management ultimately accepted the body corporate's offer that it would grant its consent to the assignment on the condition that BP Management paid $12,000 plus GST to the body corporate, being in full and final satisfaction of the meter reading service debt.

However once the sale was completed, BP Management argued (inter alia) before the adjudicator that the body corporate:

1. breached s 94 of the *Body Corporate and Community Management Act 1997* and s 120(6)(a) of the Accommodation Module by failing to act reasonably in withholding consent to the assignment of the management rights
2. breached s 120(6)(b) of the Accommodation Module by requiring consideration for approving the assignment
3. breached the Code of Conduct by failing to act honestly and fairly
4. should reimburse the $12,000.

Held: for BP Management.

Whether the body corporate failed to act reasonably

1. The fact that the body corporate did not profess any reasonable explanation for the withholding of its consent to the assignment (other than the alleged debt) was indicative that it acted unreasonably for the purposes of s 94 of the Act.

Whether the body corporate breached s 120(6)(b) of the Accommodation Module

2. The body corporate clearly breached s 120(6)(b) of the Accommodation Module which expressly prohibits any payment or other consideration for approving the transfer of management rights.

Whether the body corporate breached the Code of Conduct

3. In light of the finding that the body corporate imposed a condition on the approval of the transfer of the management rights that was unreasonable, the body corporate breached the Code of Conduct and failed to act honestly and fairly.

Whether the body corporate should reimburse the $12,000

4. Although the body corporate may have a genuine and valid claim against BP Management for reimbursement of the funds paid to him, the matter was not appropriately addressed by the body corporate in the way that it was. In these circumstances, BP Management must be reimbursed the $12,000.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Before: C Trueman, Adjudicator

Editorial comment:

The adjudicator was unable to make a determination as to whether BP Management had been authorised to provide the meter reading service. The body corporate may have indeed had a legitimate claim against the caretaker. The adjudicator was only concerned with whether the body corporate had frustrated the transfer of the management rights business in an attempt to resolve their debt dispute with the caretaker.

While one can see the temptation for the body corporate to use their consent to the assignment as leverage to recover the debt, it was clearly impermissible for them to do so with the adjudicator finding that they had breached both the Act and the Accommodation Module. Indeed, the adjudicator noted:

> "A body corporate cannot use the power to withhold consent for the approval for the transfer as a tool to hold outgoing management rights owners over a barrel to agree to any demand or condition they seek fit to impose" (para 34).

C Trueman, Adjudicator:

ORDERS MADE:

1. **I hereby order** that the Body Corporate acted unreasonably in withholding its consent to the assignment and transfer of the management rights.
2. **I further order** that the Body Corporate is in breach of section 120(6)(b) of the Accommodation Module by receiving consideration for the approval of the transfer of the management rights.
3. **I further order** that the Body Corporate is in breach of the Code of Conduct by failing to act reasonably and fairly.
4. **I further order** that the Body Corporate must repay the sum of $12,000.00 plus GST to the Applicant within 30 days from the date of this order.
5. The application **is otherwise dismissed**.

C. Trueman, Adjudicator:

Introduction

[1] Pulse consists of 52 lots and common property. TDCCT Pty Ltd as Trustee for Banks Pulse Management, who hold Management Rights at the scheme ("the applicant") filed the application on 28 July 2015 against the Body Corporate for Pulse ("the respondent") regarding a dispute concerning the body corporate and whether the body corporate have breached the Code of Conduct. It is alleged that the body corporate demanded unreasonable terms and conditions prior to consenting to the assignment of management rights.

[2] The applicant submits that the body corporate passed a resolution at a committee meeting in June 2009 appointing them to provide a service to the body corporate and that they are entitled to be paid for such services. The body corporate's demand for the applicant to repay those funds is unjust and unreasonable, and the applicant is entitled to the payments.

[3] The applicant seeks the following Final Orders:

> *(a) An order that the Body Corporate is in breach of section 94(2) of the BCCMA by failing to act reasonably by engaging in oppressive and unconscionable conduct.*
> *(b) An order that the Body Corporate is in breach of section 120(6)(a) of the Accommodation Module by failing to act reasonably by engaging in oppressive and unconscionable conduct and unreasonably withholding its consent to the assignment of management rights.*
> *(c) An order that the Body Corporate is in breach of section 120(6)(b) of the Accommodation Module by requiring BP Management to pay the amount of $12,000 plus GST to secure the Body Corporate consent to the assignment of management rights.*

(d) An order that the Body Corporate is in breach of the Code of Conduct by failing to act honestly and fairly.
(e) An order that the resolution passed at the June 2009 Committee Meeting were at all times valid.
(f) An order that the Body Corporate repay the sum of $12,000 plus GST to the Applicants
(g) Such other orders the Adjudicator considers are just and reasonable in the circumstances.

[4] In determining this application, I will consider section 120 of the Accommodation Module ("the Module") which deals with the general provisions relating to transfer engagements of body corporate managers and service contractors.

JURISDICTION

[5] I am satisfied this matter falls within the legislative dispute resolution provisions.[1] It is a dispute between a lot owner and the body corporate about a claimed contravention of the Act. An adjudicator's order may require a person to act, or prohibit a person from acting, in a way stated in the order.[2] Further, an adjudicator's order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate.[3]

PROCEDURAL MATTERS

[6] Under *section 243* of the Act, a copy of the application was provided to the body corporate, with an invitation to the Body Corporate Committee (the committee) and all owners to respond to the matters raised by the application. A submission was received from the committee and one lot owner. The applicants inspected the submissions received and made a written reply.[4]

[7] In this matter dispute resolution has been unsuccessful, and the matter[5] was referred to department adjudication and I then investigated the dispute[6] , which included reviewing the application and submissions, and obtaining further information including the community management statement and evidence and details of lot ownership.

[8] I have decided the application based on the written material provided. The most relevant material is referred to below.

Analysis

Submissions

[9] The applicant submits the following is relevant:

- At the time of lodging this application the applicant was the duly authorised owner of the caretaking and letting rights and the owner of lot 5 in the scheme.
- That if the management and caretaking rights are assigned prior to determination of this matter, while they no longer will be an owner they will nevertheless have a continuing interest in the matters in dispute.
- This is a dispute between a letting agent and caretaking service contractor and an owner and the Body Corporate.
- The background to the dispute is that on 12 June 2009 the Scheme was established in the Department of Natural Resources and the First Community Management Statement ("CMS") was recorded.
- On 12 June 2009 the First Extraordinary General Meeting ("EGM") of the Body Corporate, BP Management was appointed as the caretaking and letting agent for the Scheme and entered in a Letting and Caretaking Agreement with the Body Corporate.
- In relation to water and electricity utilities the Scheme was constructed in such a way that utility providers were provided with total power and water usage for the scheme as opposed to being provided with usage details for individual lots. Accordingly water and electricity meters were installed for each of the 52 units within the scheme to enable individual usage to be determined, and the relevant lot owner charged pursuant to their usage.

• In order for the Body Corporate to recover usage costs from each unit it was necessary for the Body Corporate to engage a contractor to read the meters. These meter readings were then provided by the Body Corporate to a company called Meter2Cash Solutions ("Meter2Cash") who issued invoices to lot owners and collected the utility monies from each lot.
• At the time the Scheme was established a number of units were already occupied, yet no arrangements had been made in relation to engaging a contractor to conduct the required meter readings.
• On 12 June 2009, as a matter of urgency, given residents were already using the utility services, the Body Corporate decided at a committee meeting to engage BP Management to undertake the meter reading duties. The minutes of the committee meeting on 9 June 2009 record the following:

> *"An urgent issue is the utility services, electricity and water. To allow recovery of utilities used by tenants, it was agreed that the Caretaker on behalf of the body corporate, undertakes the following work:*
>
> > *• To further liaise with the Body Corporate Services, Utility Manager Graeme Jackson for the implementation of a utility billing system for all Pulse residents.*
> > *• Liaise with BCS Services for options to reduce the current electricity tariff to a lower more acceptable rate*
> > *• To take periodic readings of unit electricity and water meters on an on-going basis. This work will include forwarding readings maintaining a readings database and assistance in identifying possible meter problems. The committee in return agrees to pay to a maximum of $5+GST per periodic read and $15+GST for non-periodic eg. exit/entry reads. Invoices to be sent to the body corporate manager for payment." ("The Meter Reading Agreement")*

• The meter reading service was outside the scope of BT Management duties pursuant to the Management Rights Agreements. The meter reading engagement was on a month to month basis, terminable at any time by either party. The terms of the engagement were clearly explained at the 12 June 2009 Committee Meeting and recorded in the minutes.
• From in or around June 2009 to in or around November 2009, pursuant to the terms of the Meter Reading Agreement, BP Management undertook quarterly meter readings and submitted the readings to the BC Manager, Body Corporate Services ("BCS"), who was the body corporate manager at the time. They sent quarterly invoices to BCS for the meter readings taken in the relevant period and were paid the amounts invoiced by BCS on behalf of the body corporate.
• On February 2010, at a Committee Meeting of the Body Corporate, the committee amended the terms of the Meter Reading Agreement by requesting that BP Management increase the frequency of the periodic meter reading from every three months, to a monthly basis. ("Amended Meter Reading Agreement")
• The terms and changes of the Amended Meter Reading Agreement was recorded in the Minutes of Meeting held on 19 February 2010 and note:

> *"Utility Services Changeover to meter2Cash*
>
> *All records and services have now been transferred over to Meter2Cash. The first electricity readings have been carried out and invoices have been issued to the residents. The committee agreed that the preferred option of billing was monthly as apposed (sic) to three monthly billing."*

• That from on or around February 2010 to on or around June 2012, pursuant to the terms of the Amended Meter Reading Agreement, BP Management undertook monthly meter readings and submitted the readings to the body corporate, sent monthly invoices to the BCS for the monthly readings and were paid the amounts by BCS on behalf of the body corporate.
• BP Management obtained a statement from Keith Croswell, who was the Chairman of the Body Corporate Committee from 26 November 2009 to 2 August 2011 to prove that the body corporate had knowledge of and approved the Meter readings and Amended Meter reading agreements. Mr Croswell states:

"I was elected Chairperson of Pulse Body Corporate from 26 Nov 2009 to 2nd August 2011. In that time in my capacity as Chairperson, I had numerous discussions with Tony Banks (TDDCT Pty Ltd) Caretaker of Pulse Villas CTA 40129 on various body corporate matters. One such matter was utility management at Pulse. I can confirm that in accordance with previous approvals, TDDCT conducted quarterly and monthly readings of electricity and water meters on behalf of the committee. In return TDDCT was paid on submitted invoices for this service. These readings were presented to the contracted utility company for invoicing and money collection on behalf of the Body Corporate. This necessary work was done with the full knowledge and approval of the committee during my time as chairperson."

• On or around July 2012 CJ Strata was appointed as the Body Corporate Manager ("BCM") for the scheme.
• That in or around July 2012 to around October 2012 and pursuant to the terms for the Amended Meter Reading Agreement, BP Management undertook monthly meter readings and submitted the reading to CJ Strata, with monthly invoices that were paid for the relevant periods.
• On or around 6 February 2013, at a committee meeting of the Body Corporate, it was confirmed that Strata Utility Management were to take over the utility billing services for the body corporate from Meter2Cash Solutions.
• On or around 6 February 2013, at a meeting with Mr Banks (BP Management), Ms Cauchi (CJ Strata), Steven Maller (Strata Utility Management) and Leone Allen (Chairperson of the Committee), BP Management were advised by Strata Utility Management that they were to take over the meter reading duties, moving forward, which in turn terminated the Amended Meter Reading Agreement. Mr Banks was advised at this meeting that BP Management had never been authorised by the committee to undertake the meter reading duties, which is denied.
• While BP Management denies it lacked the appropriate authorisation to undertake the works pursuant to the Meter Reading Agreement and Amended Meter Reading Agreement respectively, BP Management does not contest the termination of the Amended Meter Reading Agreement as BP Management's engagement was on a month-to-month basis, which could be terminated at any time.
• On 28 October 2014, BP Management entered into a Contract of Sale with Trending Management to sell its management rights business within the Scheme.
• On 4 March 2014, Trending Management terminated the Contract of Sale as a direct result of the Body Corporate, in breach of section 120(6) of the Module, unreasonably withholding consent to the assignment.
• Pursuant to clause 13.1 of the Caretaking Agreement and Clause 9.1 of the Letting Agreement BP Management has a right to assign its interest in each agreement pursuant to the terms of Clause 13 and Clause 9 respectively.
• Terms of Cluse 13 of the Caretaking Agreement and Clause 9 of the Letting Agreement, dealing with assignment, are identical and replicate the requirements under section 120 of Module.
• On 20 March 2015, BP Management entered into a Contract of Sale with Quan Realty to sell its management rights and settlement was due to take place at 2pm on 28 July 2015.
• On 25 March 2015, the Body Corporate, through HerdLaw issued a formal demand to BP Management that alleged the following (which is denied):

BP Management was never duly authorised by the Body Corporate to provide the meter reading service
Payments made to BP Management from BCS in relation to the meter reading agreement and the amended meter reading agreement were made without authority of the Body Corporate
The Committee completed an audit for the period between December 2009 and June 2012 and determined BP Management had been paid the sum of $17,246.90 for meter readings for which there was no authority.
The Committee had incurred the sum of $2,015.00 in auditing the records to ascertain the unauthorised payments made to BP Management; and
BP Management owed the amount of $19,261.90 to the Body Corporate

• On 22 April 2015 Hynes Legal on behalf of BP Management wrote to HerdLaw advising that BP Management had authorisation from the Body Corporate to provide, invoice and undertake the meter reading service and that they had not breached the Caretaking Agreement or the Module in providing or invoicing for such services.
• On 1 May 2015 HerdLaw wrote to Hynes Legal asserting that BP Management must pay the debt to the Body Corporate and failing payment, indicated that the Body Corporate would issue a Remedial Action Notice pursuant to section 129 of the Module.
• Despite BP Management denying liability for repayment of any debt, they identified that there was a legitimate risk that unless it agreed to pay the debt the Body Corporate would withhold its consent to the assignment of the management rights, albeit unreasonably. As predicted, the Body Corporate did in fact unreasonably withhold its consent on this basis.
• In light of the identified risk and the approaching settlement scheduled for 1 June 2015, BP Management, acting under duress to protect the Contract of Sale, engaged in without prejudice settlement discussions with the Body Corporate to try and resolve the debt issue.
• The Body Corporate rejected all offers put forward by BP Management and BP Management ultimately accepted the Body Corporates offer that the Body Corporate would grant its consent to the assignment on the condition that BP Management paid $12,000.00 plus GST to the Body Corporate, being in full and final satisfaction of the debt.
• On 7 May 2015 Hynes Legal wrote to HerdLaw attaching all documentation relevant to the sale of the management rights business including a proposed Motion for Committee Meeting seeking the Body Corporate's consent. The proposed motion stated:

> *"That subject to payment of the body corporate's reasonable legal and administrative costs by TDDCT Pty Ltd CAN 109 419 392 as trustee for Banks Pulse Management, the body corporate consent to the assignment of the Caretaking Agreement and Letting Agreement both dated on or about 12 June 2009 from TDDCT Pty Ltd CAN 109 419 392 as trustee for Banks Pulse Management to Quan Realty Pty Ltd CAN 600 065 530 as trustee for Quan Realty Family Trust and that the body corporate enter into and sign under deal the deed of assignment attached to this agenda."*

• The Body Corporate did not agree to the terms of the motion proposed by BP Management and in a letter from HerdLaw set out the terms of its proposed draft Motion which relevantly stated:

> *".. the Committee are prepared to consent to the Assignment subject to the stated conditions, the most important of which is that… the outstanding utility and service charges regarding the electricity meter readings being paid by the Assignor… That the Body Corporate consents to the assignment of the Caretaking and Letting Agreement from TDDCT Pty Ltd 109 419 392 as trustee for Banks Pulse Management (hereinafter referred to as "the Assignor") to Quan Realty Pty Ltd CAN 254 168 434 as trustee for Quan Realty Family Trust "hereinafter referred to as the Assignee")subject to…*
>
> *…4 the outstanding utility service charges regarding the electricity and meter readings in the amount of $12,000 plus GST being paid by the Assignor"*

• BP Management had earlier identified as a legitimate risk that the Body Corporate would withhold its consent if BP Management did not make the payment. Even though the Body Corporate was entirely satisfied with Quan Realty as the incoming Management Rights owner, the Body Corporate ransomed its consent to the assignment with the unreasonable condition that BP Management make the payment.
• BP Management was at all times under duress because it feared that if it did not make the payment the Contract of Sale would be jeopardised with significant cost consequences. As such, BP Management made the necessary arrangements to make the payment and ensure the sale of the management rights went through.

[10] The Respondent submits that the following is relevant:

• The dispute is about a claimed contractual matter about the Applicants Caretaking and Letting agreements.
• The Caretaking and Letting Agreements could only transfer with Body Corporate approval.
• The application should be dismissed.

• In the event that the application is not dismissed for want of jurisdiction the following submissions regarding such matters are provided and relied upon as relevant.
• The appointment by agreement on 12 June 2009 to read the meters as alleged by the applicant, and the Minutes to confirm the committee meeting are not valid, and most likely are a recent invention.
• The minutes of the EGM held on 12 June 2009 at the offices of the BCS note that BCS were appointed as the BCM for the scheme and that Jacques Mamet was declared the Chairperson, Secretary and Treasurer for the Body Corporate as nominee of the sole owner.
• The books and records of the Body Corporate were maintained by BCS from when they were appointed on 12 June 2009 until BCS were replaced by CJ Strata in or about 2012.
• The records handed over by BCS were complete and did not contain the purported minute of a 12 June 2009 committee meeting. The minute mysteriously materialised in April 2015 after the Body Corporate demanded payment for approximately $17,246.90 that was paid to the applicant for services without body corporate authority or approval.
• On 23 July 2009 the applicant sent an email to the BCM, Amber Keys, regarding the meter reading. The email is at total odds to the purported 12 June 2009 Minutes and in fact makes no reference to the purported agreement. The confirmation of the 23 July 2009 email was that Graham Jackson was to take over the account and that the Applicants agreement will be for general readings of meters at $2.
• If the 12 June 2009 email was to be believed as the "meter reading agreement" as asserted by the applicant, the 23 July 2009 email makes no reference to the purported 12 June 2009 agreement. The context of this email is evidence that there was no agreement involving the applicant and meter reading and no minutes or resolution to support this proposed arrangement.
• The first Annual General Meeting ("AGM") was held on 26 November 2009 at 4.30pm at the offices of BCS.
• On or around late 2009, Meter2Cash submitted a proposal to the body corporate to undertake certain services which included meter reading and billing lot owners for electricity consumption in the scheme, for this service the Body Corporate would pay $85 per lot per annum.
• The body corporate entered into the agreement with Meter2Cash on 15 January 2010 and continued to supply meter reading and billing services until their agreement was terminated on 9 November 2012 by the committee.
• On 15 January 2010 the applicant sent an email to Marty at Meter2Cash advising that the applicant had terminated the contract with the body corporate.
• On 28 January 2010 there was an exchange of emails between the applicant and Meter2Cash that clearly showed that the applicant was a subcontractor of Meter2Cash and was required to bill Meter2Cash for the meter reading and not the body corporate, as asserted by the applicant.
• The first committee meeting of the Body Corporate actually occurred on 19 February 2010 at the offices of BCS. The first committee meeting minutes record that "*this is the first meeting of the body corporate committee and as such there are no previous committee meeting minutes to ratify*" and that "*all records and services have now been transferred to Meter2Cash"* and that "*the first electricity meter readings have been carried out."*
• On or about September 2012, the applicant was challenged about his invoices for meter readings that he had rendered to the Body Corporate after the services of Meter2Cash were terminated. The Body Corporate demanded a refund of approximately $1,146.00.
• On 18 October 2012 Diane Job of CJ Strata wrote to the applicant and asked if the applicant had anything that would confirm the arrangement that the applicant was asserting with his charging the Body Corporate for meter reading, notwithstanding the body corporate were paying Meter2Cash for the meter reading under their agreement.
• On 18 October 2012, the applicant replied to Diane Job stating that he was told to invoice the BCS by Amber Keys, who was the BCS Manager. The applicant told Ms Job that he did not have any evidence to support this suggestion that he was to charge the body corporate for the meter reading service.
• On 3 December 2015 the new BCM advised the applicant that unless there was an authority for the payment to be made, the Body Corporate would not be making any future payments. The BCM

advised the applicant that a resolution had never been passed by the committee to authorise any payments to the applicant.
• On 31 December 2012 the applicant sent an email to the BCM advising that he would withdraw the invoices and would refund the money paid to him and deposit funds into the Body Corporate's bank account.
• The applicant repaid the sum of $1,146.00 to the Body Corporate being the invoiced amounts for August and September 2012.
• At no time has the applicant asserted to the Body Corporate that he was entitled to such payments pursuant to any meeting allegedly held in June 2009. It would have been reasonable to assume that the applicant, on account of the fact that he was recorded as an attendee at the purported meeting, would have brought this to the attention of the BCM in December 2012 when he refunded the money for the meter readings.
• Subsequently the Body Corporate had undertaken an audit of its books and had ascertained that the applicant had invoiced the body corporate by way of petty cash claims for meter readings between December 2009 and June 2012 the sum of $17,246.90, which had been paid by the previous BCM on the direction of the Applicant.
• On or about 25 March 2015, the Body Corporate instructed HerdLaw to allege that the Body Corporate considered the Applicant was guilty of misconduct in taking money for which no authority existed and demand for repayment of the sum of $17,246.90. At no time had the Body Corporate passed a resolution authorising the payments.
• On 2 April 2015 the Applicant's lawyer advised that his client believed that there was an agreement for the Applicant to perform the services and to charge the Body Corporate.
• HerdLaw responded on 2 April 2015 that they had searched the records and minutes of the Body Corporate and there was no agreement recorded on the body corporate records.
• On 2 April 2015 the Applicants solicitors responded stating that their client would have a quantum meruit claim. HerdLaw responded to the applicant's lawyer advising that Meter2Cash were responsible for the administration of the electricity supply and were paid for that service. The Body Corporate understood that the Applicant read the meters for that company and not the Body Corporate. Accordingly, they considered that the applicant supplied a service to Meter2Cash and not to the body corporate and that the BCM made payments that were not sanctioned by any decision of the body corporate and there is no evidence of "an arrangement" with the body corporate.
• On 22 April 2015 the Applicant's solicitors sent a letter enclosing what purported to be Minutes of a Body Corporate meeting held on 12 June 2009. An examination of the purported Minutes of the 12 June 2009 meeting reveals:

    # The alleged meeting occurred approximately 4 hours after the first EGM at another place in Brisbane.
    # Mr Jacques Mamet who was the appointed sole committee member only 4 hours before at the first EGM, was not in attendance.
    # As an urgent issue the caretaker "take" periodic readings of unit electricity and water meters despite the fact that the General Meeting Minutes for 12 June 2009 record that all lots are in the ownership of the original owner.
    # The 12 June 2009 minutes are not on the BCS stationary, which was usual for all minutes subsequent to this
    # There were no committee members of the Body Corporate present at this purported 12 June 2009 committee meeting.

• Upon receipt of the purported Minutes, HerdLaw contacted Mr Jacques Mamet who confirmed that he did not recall attending any committee meeting on 12 June 2009 and that if he had, he certainly would not have agreed to appoint the Applicant to read the electricity meters.
• The compelling conclusion is that the 12 June 2009 meeting did not take place and the minutes are either a fabrication or are not valid minutes of the Body Corporate.
• The Minutes of the 19 February 2010 committee meeting do not support the applicants' assertion that an amended agreement with the applicant was made regarding the meter reading arrangement.

• An examination of the Minutes of the 19 February 2010 committee meeting supports the position of the Body Corporate that Meter2Cash were not responsible to the Body Corporate for the meter reading and billing. The minutes record that the records and services have been transferred to Meter2Cash, the applicant was not mentioned at all in the minutes and it is difficult how the applicant can assert that the Minutes support his position.
• The applicant has not provided any explanation as to why he would advise he had terminated the arrangement on 15 January 2010. There is no evidence that supports the applicants' assertion that the body corporate agreed to pay the applicant for meter reading after the Meter2Cash agreement was entered into on 15 January 2010.
• The applicants evidence is contradictory; particularly allegations made and the content of an email sent to the BCM on 31 December 2012.
• The evidence is that the applicant never had any authority to charge and receive the amount he claimed from the Body Corporate for reading meters and that the amount paid by the applicant was properly refunded.
• The Body Corporate did not at any time attempt to frustrate the sale of the applicants business and did not raise the issue of the misconduct of the applicant until after the 28 October 2014 Sale Contract had been terminated by the buyer under that contract.
• The matters in application 0673-2015 do not have any relevance to this application as there is no suggestion that the Body Corporate sought to withhold consent to the transfer of the management rights based upon the misconduct of the Applicant.
• On 1 May 2015 HerdLaw sent two letters to the applicant regarding the electricity issue and the failure to pay the costs, stating that it may result in a remedial action notice being issued.
• The Body Corporate made its position clear that if the meter reading charges and issues could not be resolved it would issue the remedial action notice based on the fact the applicant had engaged in misconduct and was in breach of the Code of Conduct which entitled it to terminate the caretaking agreement if the Applicant did not remedy the default.
• The Body Corporate considers the allegation that it used the resolution of this issue as a condition of withholding its consent as preposterous.

[11] The owners of Lot 1 and 2, Mr Leone and Desli Allen provided a submission, they state:

• That Leone Allen was the secretary of the body corporate committee from 26/11/2009 to 24/9/2015. Desli Allen was an ordinary committee member from 26/11/2009 to 24/9/2015.
• That at no time did the Committee approve TDCCT to incur any body corporate charges to read the electricity and water meters.
• The committee never approved for TDCCT to be paid at all and had no knowledge of payments made from petty cash vouchers by the body corporate manager.
• Their understanding was that the utilities company was responsible for conducting the work for all readings and collection of utility funds from the residents
• Any private arrangement between TDCCT and the utilities company was never discussed by the committee
• Mr Croswell gave personal approval for payment of body corporate funds without discussion with the rest of the committee and without approval. Such permission is invalid.
• The issue of the payments to the Caretaker only became known when the new body corporate manager took over and advised that the petty cash payments were not approved in the records.
• That the costs in the financial statements had been hidden as "utilities costs" so the committee were not aware what the costs were. As soon as the committee realised what the costs were they stopped payment and demanded the Caretaker reimburse those costs. The Caretaker reimbursed the costs to the body corporate
• Once the extent of the overpayment was realised the body corpate engaged the services of lawyers, HerdLaw. The amount of the claim for overpayment was $17,000.00. The committee accepted a settlement of $12,000.00
• The committee could never have approved the Caretaker to undertake the meter reading services and expenses as it was a sum that exceeded the amount of spending the committee is allowed to approve.

• They dispute the assertions of Mr Croswell as unbelievable and not credible given it is not supported by contemporaneous records of the body corporate and committee.

[12] The applicant provided a reply to the respondents submission and states:

• The management rights were sold and transferred to a new owner and the applicant is no longer an owner or the Caretaker at the scheme, however, he is an interested party and has a continuing interest in the matters in dispute.
• The Minutes of meeting for 12 June 2009 are not a recent invention and that on 12 February 2009 the Form 11 Certificate of Classification for the building was issued to Immo (the original owner of the scheme) meaning Immo could legally put tenants into completed units.
• At this time Immo was being charged for all water and electricity usage for the tenanted lots because there was no mechanism in place to calculate and pass on utility costs to tenants of the tenanted lots until the CMS for the scheme was registered
• On 12 June 2009 the Scheme was established by the registration of the first CMS
• At 10am on 12 June 2009 the first EGM of the Body Corporate was held, relevantly at the first EGM, the applicant was appointed as Caretaker and Letting Agent of the Scheme.
• At 2pm on 12 June 2009 the first committee meeting was urgently held by Immo at their offices in Springwood to address a number of operational issues, one of which, was the issue of Immo being charged for all water and electricity usage for the tenanted lots.
• Immo organised and chaired the June 2009 committee meeting and as sole owner approved all motions. The Meter Reading agreement came into existence at the June 2009 committee meeting. Amber Keys of BCS and the applicant were present at the June 2009 committee meeting.
• It is not a case of the June 2009 Committee meeting Minutes being a "*recent invention*" but rather it is a case that the Body Corporate record is incomplete.
• That the Body Corporate have never at any time contacted Amber Keys to question the issue of the validity of the June 2009 meeting and minutes, and as issues of fraud and fabrication have arisen, the applicant contacted Amber Keys. Amber Keys sent an email relevantly stating that "*BCS was appointed the BCM to Pulse on 21 June 2009 until July 2012.. and confirms that the committee meeting of the owners of the body corporate took place on 12 June 2009 at 2pm*" where she was present. She further states "*that meeting was held by the original owners being Immo. The caretaker was present and Immo had full voting power..minutes of the meeting were held by Immo as they organised the meeting."* At the meeting many operational issues were discussed but the key issue was utility services to Pulse. She claims *"this I remember was crucial to Immo cash flow as they had no way of utility recovery from existing tenants up to that point. At this time Immo had not paid the first quarters levies causing significant cash flow issue for body corporate."* Amber Keys further claims that "*All invoices received in the office of BCS were approved by the boy corporate and that both BCS and the caretaker fully disclosed to the body corporate committee the invoices paid to the caretaker for the meter reading services."*
• The respondents' evidence of the Meter2Cash agreement and the cost of $85 only refers to the provision of the services of: "*billing services, receipting services, customer management, tariff management, performance reporting, and absorption of bank fees".* The applicant submits that Meter2Cash did not provide for meter reading services in their agreement with the body corporate. The applicant refutes the respondent's contention that he was a subcontractor employed by Meter2Cash. He claims that the evidence suggests he was an Agent for the Body Corporate when dealing with Meter2Cash. Further, that Amber Keys confirms that he was engaged by the Body Corporate and was not a subcontractor for Meter2Cash.
• That the withdrawal of the two invoices for July and October 2012, for payment was not an admission that it was not entitled to the payment for the meter reading services but rather that the applicant identified that CJ Strata were refusing to acknowledge the existence of the agreement and withdrew the invoices as a matter of convenience to avoid the cost and time expense of disputing the matter with CJ Strata.
• That the evidence provided by the respondent relating to contact with Mr Jacques Mamet was wrongly stated and that the applicant contacted Mr Mamet on 11 August 2015 who provided a different version of events to what HerdLaw alleged. Mr Mamet stated, "*he could not recall if he attended a meeting as it was too long ago and he could not remember that far back*" and that "*he*

was advised that the Caretaker was charging excessively for meter reading and would he have approved the resolution". He stated that "*he did not remember"* but replied *"that if the charges were excessive and unfair no I would not have approved, However if the charges were fair and reasonable, then I would have approved of the resolution."*

• That HerdLaw have attempted to misrepresent the content of the conversation with Mr Mamet and such evidence should not be taken into consideration.

• That various letters from Hynes Legal to HerdLaw are marked "*without prejudice save as to costs"* and was a genuine attempt by the Applicant to settle the dispute and accordingly is privileged and cannot be used as evidence against the Applicant as per the *Evidence Act 1995* (Cth), and as entrenched in common law, is inadmissible and cannot be taken to be an admission of liability.

Relevant Legislation

[13] The jurisdiction conferred on an Adjudicator and orders they can make is provided for in the Act.[7] An Adjudicator cannot determine a dispute about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or caretaking service contractor or the authorisation of a person as a letting agent for a community titles scheme.[8]

[14] If parties to a dispute about the transfer of management rights cannot resolve the matter they may apply under Chapter 6 for an order of a specialist adjudicator to resolve the dispute or under the QCAT Act for an order that QCAT exercise the tribunal's original jurisdiction to resolve to dispute.[9]

[15] The definition of contract for Chapter 3, part 2, division 4 means the contract or other arrangement under which a person is engaged as a service contractor, or authorised as a letting agent, for a community titles scheme.[10]

[16] A Body Corporate has a statutory obligation to act reasonably in undertaking its functions and that includes either making or refusing to make a decision.[11] The functions of the Body Corporate include administering the common property and assets, enforcing the community management statement (CMS) and carrying out other functions under the CMS and the Act.[12] The committee must also act reasonably in making decisions.[13]

[17] The Body Corporate has a general obligation to act reasonably and must not unreasonably withhold its consent to approve the transfer of management rights.[14] A body corporate must not require or receive a fee or other consideration for approving the transfer (other than reimbursement for expenses reasonably incurred by the body corporate in relation to the application for its approval.[15] Subsection 6 of section 120 of the Accommodation Module applies subject to division 2. Division 2 of the Accommodation Module relates to any payment of amounts on transfer.

[18] A body corporate committee and its voting members must have a commitment to acquiring an understanding of the Act and to abide by a Code of Conduct.[16] A body corporate committee must act honestly, fairly and exercise confidentiality[17] in performing the members' duties as a committee voting member and must act in the best interest of the body corporate.[18] The committee voting members must take reasonable steps to ensure they comply with the Act including the code, in performing the members' duties as a committee voting member.[19] A committee voting member must disclose to the committee any conflict of interest the member may have in a matter before the committee.[20]

[19] A body corporate manager and caretaking service contractor must have a good working knowledge and understating of the Act and comply with the code of conduct relevant to the person's functions.[21]

[20] The body corporate committee may engage a body corporate manager to carry out functions of the committee and executive members.[22]

Analysis

[21] The applicants claim that I must answer several questions, they are:

1. Is the dispute a contractual dispute and do I have jurisdiction to determine the matter?
2. Did the body corporate breach section 94 of the Act by failing to act reasonably in withholding consent to the assignment of management rights.
3. Did the body corporate breach section 120 of the Module by failing to act reasonably in withholding consent to the assignment of the management rights.
4. Has the body corporate engaged in oppressive and unconscionable conduct by requiring the applicant to pay an amount to secure the consent to the assignment of the management rights
5. Are the body corporate in breach of the Code of Conduct by failing to act honestly and fairly?
6. Was the resolution passed at the June 2009 committee meeting valid at all times?
7. Should the applicant be reimbursed the sum of money paid to the body corporate to secure the consent to the assignment of the management rights?

[22] The first question to answer, is whether this is a contractual dispute and whether I have jurisdiction.

[23] While I do not have jurisdiction to decide whether or not a service contractor is performing their duties under a caretaking or letting agreement or contract, this is not a dispute arising from caretaking or letting agreements. This was a dispute between a lot owner and service provider (at the time of lodging the application) and the body corporate and allegations that the body corporate have not acted reasonably in line with section 120 of the Module.

[24] It is not disputed that since the application was lodged the applicant has sold their lot and transferred the caretaking and letting agreements to another party. However, jurisdiction is conferred to an interested party who is no longer an owner, pursuant to section 238 of the Act. A person may make an application if the person is directly concerned with a dispute and that the continuation of the application remains and the party has standing despite the fact the standing of a party changes.[23] The legislation provides that unless someone else is substituted as the relevant person, the application continues subject to the party continuing as the relevant person for the application.[24]

[25] On this basis I am satisfied that the applicant has standing and that the application continues, despite the applicant no longer being an owner of a lot or the caretaker or letting agent at the scheme.

[26] I have the power to consider a dispute on matters which concern the Code of Conduct for Body Corporate Committee at Schedule 1A of the Act, and make decisions about whether the body corporate, through its committee, has breached the legislation.

[27] The second question to answer is whether the body corporate is in breach section 94 of the Act by failing to act reasonably in withholding consent to the assignment of management rights. Sections 94 of the Act requires the body corporate to act reasonably, what is deemed reasonable in the circumstances?

[28] The question of whether the body corporate has acted reasonably is not a simple one and there is no mechanical test or formula to be applied. The issue is not whether an action or decision (or absence of action or a decision) was ‘correct’ or ‘preferable’ but whether it is objectively reasonable.[25] What is reasonable is a question of fact, based upon all relevant matters in the circumstances of each case.

[29] A recent QCAT decision[26] explored the question of ‘reasonableness’ in detail. Tribunal Member Mr Roney QC reviewed the various approaches to, and applications of, the test of reasonableness in a number of different decisions before setting out what he considered is the proper approach.[27] He concluded that if *any* known reasons for a decision can be accepted as reasonable, even if there are a number which are unreasonable, the conduct of the body corporate will nevertheless be reasonable.

[30] The fact that the body corporate is required to act reasonably and did not profess any reasonable explanation, other that the demand to repay a debt, which they knew was disputed, as a reason for it withholding its consent to the transfer of the management rights, such an entrenched position of the body corporate, without adequate explanation, is unreasonable.

[31] The third question to answer is a consideration of whether the body corporate has breached section 120 of the Module by failing to act reasonably in withholding consent to the assignment of the management

rights. The test of reasonableness has been examined and found to be that which is objectively reasonable. What was the reason the Body Corporate demanded the repayment of the debt when section 120(6)(b) of the Module expressly prohibits any payment or other consideration for approving the transfer? The body corporate certainly has engaged in conduct that is contrary to the legislation, either intentionally or inadvertently. The issue of intention is immaterial and what is clear is that the Body Corporate has breached the legislation.

[32] The fourth question to answer is whether the body corporate engaged in oppressive and unconscionable conduct by requiring the applicant to pay an amount to secure the consent to the assignment of the management rights.

[33] In various decisions by Adjudicators, regard is made to the provision in Schedule 1A and 2 of the Act relating to various Codes of Conduct that govern body corporate committee members, body corporate managers and caretaking service contractors. A requirement of the Code of Conduct is a mandatory requirement to not engage in fraudulent or misleading or unconscionable conduct. Examples of Unconscionable conduct is listed as:

> *1. Taking unfair advantage of the person's superior knowledge relative to the body corporate.*
> *2. Requiring the body corporate to comply with conditions that are unlawful or not reasonably necessary.*
> *3. Exerting undue influence on, or using unfair tactics against, the body corporate or the owner of a lot in the scheme.*

[34] To determine what is unconscionable conduct, decisions have examined various types of conduct and deemed particular acts and omissions to be unconscionable. In the decision of *Grosvenor Apartments - Brisbane*[28] unconscionable conducthttp://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QBCCMCmr/2006/58.html?stem=0&synonyms=0&query=unconscionable%20conduct - disp4 was found to "*ordinarily import an element of acting in bad faith*". To make a finding of unconscionable conduct I would be required to make a finding that a party was acting unreasonably, unfairly, maliciously and not in good faith, and unconscionably. There is evidence that the demand by the body corporate that they would not consent to the transfer of management rights unless the debt was paid was a decision to impede the process of the transfer of management rights. When it appears from all of the evidence that the proposed assignee met the criteria set out for consideration by the body corporate in section 120 of the Accommodation Module, the refusal to consent to the transfer and withhold consent was not a reasonable decision. A body corporate cannot use the power to withhold consent for the approval for the transfer as a tool to hold outgoing management rights owners over a barrel to agree to any demand or condition they seek fit to impose.

[35] In this case it was clear that the applicant was in dispute with the body corporate regarding the issue of the meter reading service costs since the termination of the meter reading agreement in approximately December 2012.

[36] The chronology of events indicates that since the meter reading costs dispute arose, the applicant and body corporate had been attempting to resolve the dispute, without success. The evidence suggests that for some time the Body Corporate did not take any action regarding the disputed payments to the applicant until the applicant was attempting to sell the management rights business. It was at this time, the body corporate issued the applicant with a formal demand, alleging it was owed a debt.

[37] The facts are that the applicant had attempted previously to transfer the management rights to another buyer, Trending Management, in or around October 2014, with that sale being frustrated by the body corporate allegedly imposing unreasonable pre-conditions on the potential assignee so that the contract with that purchaser was terminated. That dispute is the subject matter to a current application with this office being 0673-2015. The applicant alleges that the body corporate was again attempting to frustrate another sale opportunity, with the sale to Quan Realty, by the imposition of a condition on approving the transfer that a debt be paid by the applicant, prior to the body corporate consenting to the transfer.

[38] From the evidence is appears that the body corporate may have frustrated the transfer of the management right business in an attempted earlier sale and the applicant submits they were cornered that the body corporate was causing the potential loss of this purchaser. The applicant was concerned that the Body Corporate could jeopardise the Contract of Sale with Quan Realty and therefore, they agreed to pay

the funds to ensure the sale could procced. When considering all the circumstances, and evidence, it is clear that the body corporate had frustrated a previous sale in 2014, and that the sale to Quan Realty and transfer of the management rights business was crucial to the applicant. The imposition of an unreasonable condition for the repayment of money, prior to providing consent to the transfer was unreasonable. The power the body corporate held, was in my view, abused by it by knowing that unless the applicant agreed to repay the debt, consent would not be provided to the transfer and that such action of the body corporate was unfair, and taking advantage of their superior position of power.

[39] I am satisfied from the evidence, that the demand that the assignment of the management rights would only occur if the applicant agreed to pay, amongst other costs, "*the outstanding utility service charges regarding the electricity meter readings in the amount of $12,000 plus GST being paid by the Assignor*"[29] , was, in all the circumstances, contrary to the legislation, unfair and unreasonable. In this case I do not believe it is necessary or relevant for a determination to be made that the body corporate engaged in unconscionable conduct.

[40] The fifth question to answer is whether the body corporate are in breach of the Code of Conduct and whether they failed to act honestly and fairly. In light of the finding that the body corporate imposed a condition on the approval of the transfer of the management rights that was unreasonable, I find that the body corporate breached the Code of Conduct and failed to act honestly and fairly. In light of the fact the body corporate were satisfied that the potential assignee met the criteria set out in the Accommodation Module, the imposition of a condition to repay a debt identified in 2012, knowingly held the applicant to ransom, as without the payment the consent would not be given to the transfer. The conduct and decision of the Body Corporate was unfair, and not acting honestly, and unreasonable in all the circumstances.

[41] The sixth question to consider is whether there was a valid resolution passed at the June 2009 committee meeting that authorised the applicant to undertake the meter reading services for a fee. In considering this point I have carefully considered all of the evidence and the evidence is conflicting. The difficulty is that there is disagreement as to whether there was a committee meeting held on 12 June 2009 and whether that meeting actually occurred. This point is crucial as to whether there was any committee decision to appoint the applicant to provide a service to the Body Corporate to provide meter reading services.

[42] Minutes of the June 2009 meeting note that both BCS had been appointed as body corporate manager and TDCCT Pty Ltd appointed Caretaker. Some operational issues were included in the items of agenda for the June 2009 meeting that required attention.

[43] The evidence is that the Minutes of the meeting of 12 June 2009 note "*that the urgent issue is the utility services, electricity and water".* The Minutes indicate that the body corporate committee passed a motion, amongst other things, that "*the Caretaker on behalf of the body corporate will undertake works including. .further liase with the BCS Utility Manager for the implementation of a utility billing system..to take periodic readings of unit electricity and water meters on an oi-going basis. This work will include forwarding readings, maintaining a readings database and assistance in identifying possible meter problems. The committee in return agrees to pay to a maximum of $5+GST per periodic read and $15+GST for non-periodic. Invoices to be sent to the body corporate manager for payment."*

[44] The evidence of the statement from the body corporate committees' previous Chairperson, Mr Keith Croswell, was, that he was the Chairperson from approximately November 2009 to August 2011 and during that time TDCCT was requested to conduct quarterly and then monthly readings of utility services at the scheme and that in return TDCCT was paid on submitted invoice for the service they provided.

[45] The evidence of the Secretary and other Committee members, Ms's Leone and Desli Allen was that at no time has the Committee ever approved such services be supplied by the Applicant to the Body Corporate. This evidence is in stark contrast to the evidence of Mr Croswell, although it appears that the submissions from all three lot owners note that they were only committee members after June 2009, when the alleged committee meeting occurred when the applicant states he was engaged to undertake the utility reading services.

[46] I find on the evidence that it is impossible to determine with any certainty that there was a committee meeting and valid Motions passed at a committee meeting held on 12 June 2009 authorising TDCCT to undertake periodic readings of the utility services supplied to the scheme, and approving payment for such services.

[47] The evidence on this point is conflicting. I am not able to determine whether the applicant was ever engaged to provide the utility reading services for an agreed fee. I find that the evidence of this matter cannot be dealt with in this forum, with a decision on the papers. This matter should be determined only where the veracity of evidence could be tested; in a forum where parties give oral evidence; where evidence in chief and the opportunity for cross examination of witnesses to determine issues of credibility and whether the meeting ever occurred and whether the minutes of the committee meeting in June 2009 are authentic. I cannot make a determination with any certainty, that the Minutes of the June 2009 meeting are genuine or fraudulent and what in fact was ever agreed. That matter can only be determined as a minor civil dispute and minor debt matter and in the appropriate jurisdiction. The issue of debt recovery from the applicant should not have formed part of a motion that related to the consent to the assignment of Caretaking and Letting agreements. It was unreasonable to require the applicant to repay those fees for services, as a condition to providing consent, to the transfer of the management rights. The debt issue was a separate matter and should have been dealt with separately by the body corporate against the applicant in the appropriate court of competent jurisdiction.

[48] The seventh question to be answered is whether the applicant be reimbursed the sum of money paid to the body corporate to secure the consent to the assignment of the management rights and whether it is entitled to retain the funds paid for the meter reading services.

[49] On the finding that I cannot determine with any certainty as to whether or how the applicant was engaged to undertake utility reading services and if or how he was to be paid for those works, the issue of entitlement to payment is not a decision I can make in this forum. I cannot make any finding of fact that there was a valid motion passed at the 2009 EGM to appoint the applicant to undertake meter reading services.

[50] What is a relevant consideration, however, is the application of section 120 of the Accommodation Module. As the body corporate demanded that the applicant reimbursed the sum of money paid to them for the utility meter reading services, it stands to reason they should now be reimbursed those same funds. I note that the amount paid by the applicant was a reduced sum and not the full amount of monies paid to the applicant during the alleged meter reading period. However the sum repaid to the body corporate was, from the evidence, a sum of $12,000.00 and I am satisfied that this sum should be reimbursed in full to the applicant.

Summary

[51] Section 120 of the Accommodation Module provides that a Body Corporate cannot receive a fee or other consideration for approving the transfer. The Body Corporate is in breach of section 210(6)(b) of the Accommodation Module and is not acting reasonably by requiring BT Management to pay the sum of $12,000 to it, as a condition on approving the transfer of the management rights.

[52] The conduct by the Body Corporate to leverage pressure on BP Management, to pay an alleged outstanding debt owed to the Body Corporate, which BP Management disputed, as a condition for approval of the transfer of management rights is unreasonable and less than desirable conduct by the Body Corporate. I understand the Body Corporates frustration, if it believed that the applicant had been paid for services that he was not entitled to receive and were not approved by the committee, however, its conduct and methodology to recoup those funds, was not appropriate.

[53] Whether BP Management did or did not owe a debt to the Body Corporate, any subsequent minor debt matter is a civil matter and one that should have been dealt with separately in a court of competent jurisdiction, and apart from the consideration of consent relating to a transfer of management rights.

[54] The conduct by the Body Corporate towards BP Management was unreasonable in the extreme and I have sympathy for the dire situation the applicant was placed in whereby the Body Corporate advised him that the approval for the transfer would not be granted unless the debt was paid. I accept he agreed to pay whatever funds were necessary to ensure the sale of the management rights business went to completion.

[55] It was the intention of the legislation that section 120(6) of the Accommodation Module is to enable Body Corporate to be able to undertake their own necessary investigations and due diligence on determining whether a potential incoming managements rights owner is suitable to conduct the roles and duties necessary for the position. Section 120(3) provides the matters for consideration by the Body Corporate including the character, competency, qualifications and financial standing of the proposed transferee, and all matters, once considered to compel the body corporate to not unnecessarily or unreasonably withhold consent to the transfer of the management rights. I find that the provision in section 120(6)(b) specifically prohibits any Body Corporate from demanding the requirement of being paid a fee, or any other payment of any kind, or any consideration whatsoever, of any kind, for approving the transfer of management rights (other than the specific fees and costs provided for in the legislation).

[56] I am satisfied that the various letters between Hynes Legal and HerdLaw marked "*without prejudice save as to costs"* have not been relied upon and I find that they are merely genuine attempts by the Applicant to settle the dispute and that they are not admissions of guilt or liability. I find that the "*without prejudice*" correspondences are privileged and cannot be used as evidence as contained in the *Evidence Act 1995* (Cth), and common law, and I note that nothing contained in those correspondences, in any way, would be taken to be an admission of liability. I have not taken the content of those correspondences into account, and they do not assist me in any event in determining this matter.

CONCLUSION

[57] The Body Corporate refuted the allegation that it used the resolution of the issue of the utility reading debt and repayment of that money, as a condition of withholding its consent to the assignment of the management rights, yet the evidence supports a finding that this is exactly what it did.

[58] The content of the proposed motion drafted by the Body Corporates solicitors, to approve the transfer of the Management Rights, specifically provides that the applicant must pay the sum of $12,000 for outstanding utility service charges regarding the electricity meter readings. I find that the Body Corporate would only agree to consent to the assignment of the Caretaking and Letting Agreements from TDCCT Pty Ltd as trustee of Banks Pulse Management to Quan Realty Pty Ltd conditional on the payment being made.

[59] I make a finding that the Body corporate have failed to act reasonably by withholding consent to the assignment of management rights unless a payment of $12,000 was made to it.

[60] I cannot make a finding that the body corporate engaged in unconscionable conduct and that order is refused.

[61] I find and am satisfied that the body corporate did breach the Code of Conduct by failing to act honestly and fairly.

[62] The fact is the body corporate required the payment of $12,000 prior to consenting to the assignment of the management rights. I find that they were not permitted to receive any payment of any kind or any other consideration for approving the transfer and that the Body Corporate have breached section 120(6)(b) of the Accommodation Module. I find the Body Corporate's conduct to be unreasonable and in breach of their statutory obligation to act in compliance with their Code of Conduct.

[63] Although the Body Corporate may have a genuine and valid claim against the applicant for reimbursement of the funds paid to him for services that were allegedly not approved or fraudulently obtained, such matter was not appropriately addressed by the Body Corporate in the way that it was.

[64] In the circumstances the applicant must be reimbursed the sum of money paid to the body corporate to secure the consent to the assignment of the management rights in the sum of $12,000.00.

[65] This decision has not made any findings about whether the funds should or should not be reimbursed to the Body Corporate, this decision has determined that the way the Body Corporate handled the disputed debt issue and the method of receiving payment for the alleged debt owe, is in breach of the legislation, therefore unlawful and unreasonable in the circumstances.

[66] I will now make appropriate orders to give effect to the decision reached.

Footnotes

1 See sections 227, 228, *276* and *Schedule 5* of the Act
2 *Section 276(2)* of the Act
3 *Section 284(1)* of the Act
4 See *sections 246* and *244* of the Act respectively.
5 *Section 248* of the Act
6 The investigative powers of an adjudicator are set out in *section 271* of the Act
7 Section 276 of the Act
8 Section 149B of the Act
9 Section 149A of the Act
10 As defined in Schedule 6 Dictionary of the Act
11 Section 94(2) of the Act
12 Section 94(1) of the Act
13 Section 100(5) of the Act
14 Section 120(6)(a) of the Accommodation Module
15 Section 120(6)(b) of the Accommodation Module
16 Schedule 1A subsection 1 of the Act
17 Schedule 1A subsection 2 of the Act
18 Schedule 1A subsection 3 of the Act
19 Schedule 1A subsection 4 of the Act
20 Schedule 1A subsection 6 of the Act
21 Schedule 2 of the Act
22 Section 56 of the Accommodation Module
23 Pursuant to section 239C(1) of the Act
24 Pursuant to section 239C(2) of the Act
25 *Cwealth Bank of Australia* v *Human Rights & Equal Opportunity Commission* (1997) 150 ALR 1. pp34, 38.
26 *Ainsworth & Ors* v *Albrecht & Anor* [2014] QCATA 294
27 Ibid at paras 84–85
28 [2006] QBCCMCmr 58 (10 February 2006)
29 As contained in correspondence from Herd Law dated 9 July 2015 marked “Exhibit 12” attached to the applicants submission

BODY CORPORATE FOR DONNELLY HOUSE CTS 37465 v SHAW

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(2015) LQCS ¶90-200; Court citation: [2015] QDC 139

Queensland District Court

Decision delivered on 05 June 2015

Dispute resolution — Body corporate adjudication — Where lot owner's unit sustained significant and sustained water damage — Where order was made by an adjudicator requiring the body corporate to rectify defects — Where parties were in extensive dispute regarding the carrying out of the adjudicator's orders — Where lot owner was then successful in obtaining an order in the Magistrates Court for the appointment of an administrator pursuant to s 287(3) of the Body Corporate and Community Management Act 1997 — Where body corporate appealed against order for the appointment of an administrator — Body Corporate and Community Management Act 1997, s 287(3).

This decision concerned a six-lot scheme in which the family controlling the appellant body corporate owned four lots, the respondent owned one lot and an independent third party owned the other lot. The body corporate's chairperson was also the body corporate's solicitor.

The lot owner's unit suffered significant and sustained water damage over a number of years. An adjudicator required the body corporate to rectify the scheme defects.

After extensive dispute between the parties regarding the carrying out of the adjudicator's orders, the lot owner obtained an order in the Magistrates Court pursuant to s 287(3) of the *Body Corporate and Community Management Act 1997*, for the appointment of an administrator of the body corporate to perform the body corporate's obligations.

The body corporate on appeal submitted that the Magistrates Court erred in exercising its discretion, arguing inter alia, that placing a body corporate into administration should be used sparingly in particular circumstances.

Held: body corporate's appeal dismissed.

1. An administrator should have been appointed. It was not necessary for the Magistrates Court to have made a finding as to the party ultimately at fault.

2. While s 287 of the Body Corporate and Community Management Act ("Enforcement of other orders") provides no guidance as to how to exercise the court's discretion in the appointment of an administrator, the evidence clearly established that the parties were not going to agree as to whether the adjudicator's orders had been or would be complied with, without the intervention of an independent administrator.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Mr Hughes QC and Mr Sinclair (instructed by Stratum Legal Pty Ltd) for the respondent.

Ms Skennar (instructed by Noel Woodall and Associates) for the appellant.

Before: Robertson DCJ

Robertson DCJ:

ORDER:

1. Appeal dismissed
2. Appellant to pay Respondents' Costs of and incidental to the Appeal and the proceedings below on the standard basis or as agreed. Certify for 2 Counsel on hearing of the Appeal
3. Liberty to apply upon the giving of 3 days notice

Robertson DCJ:

[1] This is an appeal pursuant to s 45 of the *Magistrates Courts Act* 1921 against a decision

[140740]

made by Magistrate Madsen in the Maroochydore Magistrates Court on 27 March 2015 appointing an administrator of the Body Corporate for Donnelly House to perform the obligations of the Body Corporate under adjudicator's orders in dispute resolution 0846 of 2011 made 23 October 2012 and subsequently amended on 1, 12 and 16 November 2012.

[2] His Honour's order came after a hearing of two and a-half hours before him on 24 March 2015. It appears from the record of those proceedings that the application by Mrs Shaw was heard on the basis of sworn affidavits filed by both parties and no person was required for cross-examination. Written submissions were

made by Mr Sinclair, who represented Mrs Shaw and still does as junior to Mr Hughes QC, and Ms Donnelly of Noel Woodall & Associates represented the Body Corporate. Ms Donnelly is also the chairperson of the committee of the Body Corporate for Donnelly House and her husband has been the chairperson of the committee in the past. On the appeal her firm has instructed Ms Skennar of counsel on the appeal. The written submissions filed in the court below were supplemented by oral submissions.

The relevant law

[3] Section 287 of the *Body Corporate and Community Management Act* 1997 ("the Act") provides relevantly as follows:

"**287 Enforcement of other orders**

(1) This section applies if the following are filed with the registrar of a Magistrates Court—

(a) a copy of an adjudicator's order, other than an order for the payment of an amount, certified by the commissioner as a copy of the adjudicator's order;
(b) a sworn statement by a person in whose favour the order is made stating that an obligation imposed under the order has not been performed.

(2) The registrar may register the order in the court.
(3) The Magistrates Court may, by order, appoint an administrator, and authorise the administrator to perform obligations, under the adjudicator's order, of the body corporate, the committee for the body corporate, a member of the committee or the owner or occupier of a lot the subject of the order.
(4) If the Magistrates Court appoints an administrator to perform obligations of an entity mentioned in subsection (3), anything done by the administrator under the authority given under the order is taken to have been done by the entity."

[4] Pursuant to s 47 of the *Magistrates Court Act* 1921, on the hearing of an appeal, this court may do any of the acts set out in (a) to (f) of the section. Pursuant to s 113 of the *District Court of Queensland Act* 1967, this court has, for an appeal of this nature, the same powers as the Court of Appeal to hear an appeal. Those powers are derived from r 766 of the *Uniform Civil Procedure Rules* 1999. On 24 April 2015 the Body Corporate made an application that his Honour's order be stayed pending the appeal and an argument was advanced by Mr Sinclair on behalf of Mrs Shaw that the court did not have jurisdiction. I will deal with that later in the reasons.

[5] As Mr Sinclair said from the outset before his Honour, the issue in dispute between the parties relates to significant and serious water leaks in the building, and in particular leaks which affect Mr and Mrs Shaw's unit, lot 6. Ms Donnelly and her family have an interest in four lots, and the remaining lot is owned by an independent person. As I have noted, at all material times either she or her husband was the chair of the Body Corporate committee.

[6] The material filed before his Honour to consider was voluminous. Ms Donnelly's affidavit filed on 20 March 2015 extended over 425 pages. As he noted himself, he had "skim read" the material and it is clear, with respect to him, that at the hearing he was not fully cognisant with the history of the multilayered dispute between Mr and Mrs Shaw and the Body Corporate over performance by the Body Corporate of adjudicator's orders, the subject of the order his Honour made. That is not meant to be a criticism of his Honour.

[7]

[140741]

He expressed concern at a very early stage about potential conflict of interest arising from the fact that Ms Donnelly was acting for the Body Corporate in all the circumstances. He returned to this theme on a number of occasions and also referred to it in his reasons despite being told by Mr Sinclair (at 1–14 line 4 of the transcript) that his client took no position in relation to Ms Donnelly's appearance.

[8] At the conclusion of the hearing, he adjourned to 20 April 2015, but indicated that he would try and do the decision quickly and if he did he would notify the parties. In fact this is what he did, and he delivered his decision on 27 March 2015. The sufficiency of his reasons are a ground of appeal. The orders he made are as follows:

"1. Forthwith that Archers is appointed as the Administrator under section 278 (sic) of the *Body Corporate and Community Management Act* 1997 and is authorised to perform the obligations of the Body Corporate for Donnelly House CTS37465 and/or for Body Corporates Committee, under the Adjudicator's Orders in dispute resolution application 0846 of 2011 made on the 23rd of October 2012 and as subsequently amended on 1, 12 and 16 November 2012, which authorisation extends without limitation to include:

a. to prepare, with or without the assistance of a suitably qualified person, a specification for the rectification and other works required to be undertaken under the Adjudicator's Orders;
b. to obtain quotations from contractors for the performance of works detailed within the specification referred to;
c. to engage one or more of those contractors to perform the necessary works including by entering into the necessary contracts;
d. to administer and monitor, with or without the assistance of a suitably qualified person, the performance of the works under the contracts including so as to seek to ensure that the works are performed in compliance with the relevant contract, the specification and the Adjudicator's Orders;
e. to procure completion of the works within the contract/s with the contractor/s to the relevant standard required under the Adjudicator's Orders;
f. to procure confirmation of completion of the works from the contractor/s and provide that confirmation to the parties and to the Court;
g. to pay itself, the administrator, the contractor/s and any other person engaged by the administrator on behalf of the Respondent Body Corporate pursuant to these orders, including without limitation a licensed contractor, architect or consulting engineer pursuant to any special levy issued by the administrator for the purpose, or from the Body Corporate administrative fund or sinking fund as applicable;
h. if there are insufficient funds in the Body Corporate sinking fund or Body Corporate administrative fund (as the case may be) to raise the necessary contributions, whether by way of special levy or otherwise;
i. to amend the current budget of the Body Corporate, adopt a new budget or otherwise take such steps as are required on behalf of the Body Corporate to make the payments contemplated within these including the remuneration of the administrator but not restricted to that;
j. that the administrator has power to direct officers of the Body Corporate to cease conduct or action, or to take necessary action that the administrator believes necessary to secure compliance with the obligations referred to in the adjudicator's decision;
k. that the administrator has power to direct officers of the Body Corporate to take stated action to help perform the work of the administrator, which includes but is not restricted to the provision of any relevant documentation to the administrator promptly; and
l. that there be liberty given to the administrator to apply to the court in relation to its remunerations;

2. The administrator receive within seven days of this order, this decision, the affidavit of the applicant and exhibits filed 5 January

[140742]

2015 and the adjudicator's decision registered 5 January 2015;

3. That there be liberty given to the administrator to apply to the court in relation to the terms of these orders, or in relation to the powers exercisable by it in respect of the adjudicator's order;

4. That the applicant file and serve such submissions in relation to costs of and in respect of these proceedings within 28 days; such submissions to address who is liable to pay those costs and how they should be paid and on what basis including but not restricted to the question of standard costs, indemnity costs, or costs payable out of a fund or by a particular person;

5. That the respondent file and serve submissions in relation to costs in respect of these proceedings within 56 days; and

6. Proceedings be listed before me again on 26 May 2015 at 2 pm in relation to costs."

[9] Prior to making those orders, his Honour wrote:

"My original intention was to deliver this decision on 11 May 2015.

Quite frankly I was horrified by what I have read since and I have sought to publish these reasons … as soon as I possibly could … without reference to a transcript of the proceedings."

[10] One of the complaints on appeal is that his Honour did not act on the evidence and instead acted on his own personal views and failed to give adequate reasons.

The appeal

[11] A notice of appeal was filed 16 April 2015. The grounds as articulated are as follows:

"1. The learned Magistrate erred in not accepting the submission of the respondent that the application was an abuse of process in circumstances where there were extant applications before an adjudicator in relation to the issues the subject of the application.

2. The decision of the learned Magistrate failed to have any regard to the proper legal principles for to (sic) the appointment of an administrator pursuant to s 287 of the *Body Corporate and Community Management Act* 1997.

3. Having regard to the proper legal principles as to the appointment of an administrator pursuant to s 287 of the *Body Corporate and Community Management Act* 1997, the learned Magistrate ought to have refused the application.

4. The learned Magistrate erred in not accepting the uncontested evidence of the respondent that a binding contract for the rectification works had been entered into.

5. The learned Magistrate erred in making the orders in that the orders were incapable of implementation in circumstances where a contract for the rectification works had already been entered into.

6. The decision of the learned Magistrate was against the evidence and the weight of the evidence.

7. The learned Magistrate erred in finding that the Appellant was not ready, willing and able to complete the works when the uncontested evidence before him was that a contract had been entered into for such works and the works had been scheduled for completion.

8. The learned Magistrate failed to have any or any proper regard to the material filed by the appellant.

9. The learned Magistrate failed to hear and determine the application according to law, instead according to his own personal views about the matters the subject of the application.

10. The Learned Magistrate failed to give adequate or proper reasons for his decision."

On 24 April 2015 the Body Corporate sought a stay of his Honour's order pending the outcome of the appeal. At the outset Mr Sinclair argued that leave to appeal was necessary because the "amount" in dispute was less than the "minor civil dispute limit" i.e. $25,000 referred to in s 45(2) (a) of the *Magistrates Courts Act* 1921. He submitted correctly that if this submission was correct, the court could not exercise the power to stay until leave was given. Ms Skennar was taken somewhat by surprise by this point but was able to refer me to an authority: *Winch* v *Ketchell* [2002] 2 Qd. R. 560 (although she did not have a copy for me).

[140743]

Essentially, Mr Sinclair's argument was predicated on acceptance of his submission that in the case of an appeal against a non-money order, reference should be had to whether the dispute involves, directly or indirectly, any claim in relation to any property right with an equal value to or more than the minor civil dispute limit. This is a reference to the analysis of his Honour Judge McGill SC's decision in *Ramzy* v *Body Corporate for G32 & Anor* [2012] QDC 397, to which I referred with approval in *Baker* v *Arkman Pty Ltd* [2014] QDC 16. His argument was that the claim here related to the adjudicator's fees, which were less than $25,000. Ms Skennar's argument was that the relevant value should be derived from the quantum of the contract entered into by the Body Corporate to, it says, comply with the adjudicator's orders and the

amounts estimated by contractors who provided quotes to Mrs Shaw, all of which greatly exceed the minor civil dispute limit.

[12] It was conceded that there was no authority that could be located that deals with the exercise of the discretionary power under s 287(3) of the Act, and I indicated for that reason alone I was prepared to proceed on the basis that leave was not required as there was at least an argument that "some important principle of law or justice is involved". I granted the stay, and the parties agreed to a truncated process for the filing of outlines and other material if required leading to a full hearing on 15 May 2015, which took place. Mr Sinclair did not require me to give reasons for granting leave, on the basis that I indicated that I would expose my reasons in my final judgment. Given my conclusions as to the merits of the appeal, I do not intend to say anything more about the leave issue.

[13] The adjudicator's orders were made following a disputed adjudication before Adjudicator D Toohey in application number 0846-2011 and are cited as *Donnelly House* [2012] QBCCMCmr 474.

[14] The orders made by Mr Toohey were in the following terms:

> "1. **I hereby order** that, as soon as practicable, the body corporate must ensure the following work as referred to in the Saint report or Schwabe report respectively, is performed by Queensland Building Services Authority licensed contractors to relevant Building Code of Australia requirements:
>
> (a) Re-install the southern curved window.
> (b) Waterproof the southern wall by removing the relevant screens and waterproofing the wall (including sealing cracks in the wall and the holes used to attach the screens) before reattaching the screens. The detached skirting board within unit 6 should then be reattached.
> (c) Ensure the unit 6 balcony railings are in good condition by checking joints for depth and effectiveness, re-cutting joints as necessary, cleaning and resealing cracks and joints (using approved sealant with backing rod to manufacturer's specifications), and repainting as necessary.
> (d) Rectify the upper floor metal roof by having new flashing installed under the roof sheeting to protect the soffit lining, improving the flashing fixity, resealing the flashing, reinstalling the sump, and repairing the soffits.
> (e) Re-install the unit 6 upper deck waterproofing membrane, grout layer and tiles ensuring:
>
> a. the membrane extends to waterproof the sliding door (costs of removal and reinstallation of this door to be paid by the unit 6 owners);
> b. the membrane has an appropriate bond breaking system and an adequate upturn and, where necessary, the waterproofing membrane extends to the outer edge and down over the wall.
> c. spitters are installed and points of discharge increased in capacity where practicable with drainage collection points increased in capacity (cost of new drainage grates to be paid by the unit 6 owners);
> d. similar tiles are re-laid.
>
> (f) install spitters to allow drainage of the lower deck of unit 6 through or under the planter boxes.
> (g) repair damage to the ceiling of the lower floor of unit 6 and remove mould.
>
> [140744]
>
> (h) fix water damage to the unit 6 dining room window sill and surrounding areas (costs of removal and reinstallation of this window to be paid by the unit 6 owners).
>
> 2. **I further declare** that it would be unreasonable for the unit 6 owners to be liable to pay any insurance excess regarding any claims for insurance recovery for damage caused by failures of the body corporate to perform the above work within a reasonable time.
>
> 3. **I further order** that the body corporate must regularly clean common property drains, including the drain on the front awning.
>
> 4. **I further order** that the application is otherwise dismissed."

[15] Attached to that order was a 13-page set of reasons for decision. The adjudicator's order and his reasons are Exhibit JES1 to Mrs Shaw's affidavit filed on 5 January 2015.

The evidence below

[16] The Body Corporate filed two affidavits of Ms Donnelly which were in support of the stay application in this court. It is not suggested that the material the subject of these affidavits was not before his Honour. Neither party filed any new material with their outline. It follows that on appeal this court should review the impugned decision in the light of all the evidence before the lower court.

[17] The material before his Honour was as follows.

1. Affidavit of Mrs Shaw filed 5 January 2015 to which was annexed the relevant adjudicator's decision of Mr Toohey dated 23 October 2012.

[18] That order was appropriately certified to comply with the requirements of s 287(1)(a) and (b) of the Act. The decision was amended on three occasions, namely 1, 12 and 16 November 2012. The original decision dated 23 October 2012 is on the court file, but the three exhibits reflecting changes which Mrs Shaw notes were under the "slip rule" were not. However, all exhibits are provided in volume 2 of the material annexed to Mr Hughes QC and Mr Sinclair's submission in this court and clearly the adjudicator amended his reasons for his decision (as opposed to the orders) under the slip rule and his original decision is read accordingly.

[19] As I have noted the order was made after a contested hearing of a dispute referred under the Act to the Commissioner for Body Corporate and Community Management, which officer is appointed under Part 2 of Chapter 6. Chapter 6 of the Act deals with dispute resolution and provides for a multilayered system for resolutions of disputes between lot owners and body corporates in a timely and inexpensive manner. Section 277(4) provides authority for an adjudicator to order the appointment of an administrator but otherwise does not provide guidance as to the way in which that discretion is to be exercised. Part 10 of Chapter 6 deals with enforcements of adjudicators' orders, and s 287 is contained in that part.

[20] At the time the dispute was referred to the Commissioner for appointment of an adjudicator, the Donnelly interests owned all the lots in the scheme except for lot 6. As I have noted, an independent person has since purchased one of the lots but the Donnellys still control the voting in the Body Corporate committee.

[21] Mrs Shaw's affidavit and the other evidence before his Honour established that all parties had an opportunity to lodge submissions before Mr Toohey, which they did. Attempts at conciliation failed. As can be seen from Mr Toohey's detailed decision which is annexed to Mrs Shaw's affidavit, the parties to the dispute were given many opportunities to provide expert reports and responses and did so.

[22] The issue in dispute was (and remains) whether the actions taken by the Body Corporate since the orders were made comply with the orders. It is common ground that the orders were designed to rectify defects in the structure of Donnelly House which have led to significant water penetration predominantly affecting lot 6 owned by Mr and Mrs Shaw. To give some flavour to the extent to which the adjudicator went to inform himself of the nature of the problem, it is instructive to quote from paragraphs [10]–[17] of his decision:

> "[10] I reviewed the application, the registered plan and the community management statement. On 5 March 2012 I
>
> [140745]
>
> informed the body corporate of a provisional view that the body corporate was responsible for maintaining balustrades, external windows, and the waterproofing membrane and requested reports and quotations for works to address cracking within the building and to address waterproofing issues. On 24 May I received a report from Roy Saint. On 29 May the applicant's solicitors made submissions claiming this draft report was inadequate and raising a number of questions about the report. On 1 June 2012 I granted an extension until 6 June 2012 for the finalisation of the report and 15 June 2012 for the provision of quotes.
>
> [11] On 12 June Roy Saint provided a report that included a response to the issues raised by the applicant's solicitor (**Saint report**).

[12] On 15 June 2012 I granted an extension of time until 29 June 2012 for provision of quotations to perform the necessary work. Both parties had difficulty obtaining quotations based on the Saint report with quotations variously stating some items were *'inconclusive for the purposes of a quotation', 'it is advisable that further investigation be undertaken', 'to be read in conjunction with the … report … based primarily on visual non evasive evaluation',* or '*quotation amounts may need to be adjusted … once necessary invasive inspections have been carried out'*. Subsequently, on 5 July 2012, I granted the applicant's request to allow time for a further engineering report referring to specific deficiencies or inadequacies in the Saint report.

[13] On 24 July 2012 the applicant provided a report from John Schwabe (**Schwabe report**). This report was based partly on moisture readings and investigations carried out by John Groom (**Groom report**). The Schwabe report disputed a number of recommendations made in the Saint report. Given these significant areas of dispute it was no longer feasible to expect the parties to provide full quotations for agreed works.

[14] On 30 July 2012 I provided the parties with some provisional views and proposed orders based on the expert reports and invited a response by the end of August. The parties provided further submissions and reports by letters of 27 August 2012 and 31 August 2012.

[15] On 3 September 2012 I held a teleconference between Ms Shaw and Ms Donnelly regarding the issues in dispute. At the request of Ms Donnelly I gave the body corporate until 17 September 2012 to provide a further expert report in response to the alleged defects with the waterproofing of the upper deck.

[16] On 5 September 2012 Ms Shaw and Ms Donnelly provided further correspondence evidencing some dispute over the body corporate's proposed course of action and whether access to unit 6 would be granted for this purpose. It also became apparent the body corporate for Donnelly House did not have a functioning committee. On 7 September 2012 I made a further order authorising BCP Strata Pty Ltd to act for the body corporate for Donnelly House to arrange an extraordinary general meeting and, in the meantime, obtain a further expert report. I extended the period for provision of this further expert report by further order of 17 September 2012.

[17] On 25 September 2012 the body corporate provided me with the further report from A.D.A Waterproofing (**ADA report**). In the meantime, Ms Donnelly had provided me with an affidavit containing some history of water ingress to Donnelly House. On 3 October 2012 the applicant and respondent made further submissions in response to this additional information."

[23] Paragraph 18 of his decision is also instructive of the attitude of Ms Donnelly and presumably the Body Corporate at that time:

"[18] I note that, on 7 September 2012, Ms Donnelly requested I disqualify myself from further involvement with this dispute if I was *'not going to allow the body corporate procedural fairness'.* While it is difficult to respond to this request without any alleged bias or misconduct being particularised, I note that I do not have any financial or other

[140746]

relevant interest in the outcome of this dispute and I am not aware of any significant failings to afford procedural fairness to any party."

[24] In relation to each of the disputed areas, in his reasons, Mr Toohey refers at length to the expert reports before him, namely the Saint, Schwabe and Groom reports.

[25] Again, the attitude of the Body Corporate to one of the disputed issues is instructive. The position of Ms Donnelly on behalf of the Body Corporate was that the problems with the upper floor waterproofing membrane were insignificant and would involve minimal work to correct. Mr Toohey found otherwise by his analysis of the expert material before him. After he had expressed a provisional view that it would be unreasonable for the Body Corporate to patch the membrane, Ms Donnelly "strongly protested" and sought, and was given, leave for a further report to be obtained. This is a report referred to in [17] above at a time when BCP Strata was acting for the Body Corporate. At [53] of his reasons, Mr Toohey refers to the

conclusions of that report which strongly supported his provisional view based on his analysis of the other expert evidence.

[26] Despite Ms Donnelly's apparently unjustified, unsupported and unsuccessful attempt to have Mr Toohey recuse himself, it is clear from his reasons that he did not find completely for Mrs Shaw. Relevantly to the present issues, it is instructive to set out his conclusions from paragraphs [79]–[84]:

> "[79] The legislation requires the body corporate to maintain certain parts of the building in good condition and requires owners to maintain other parts of the building in good condition. If a building has defects then this duty to maintain requires those defects to be rectified. In this instance there is evidence of a number of failures to comply with Building Code of Australia requirements. These failures have resulted in significant water and moisture ingress into unit 6 and these failures must be promptly rectified.
>
> [80] It is not possible for the body corporate or individual owners to simply avoid responsibility by arguing they are not responsible for pre-existing defects. Rather, if the relevant builder or tradesperson does not fix the defect within a reasonable time then the body corporate or the owner who is responsible for maintaining the relevant area in good condition must fix those defects.
>
> [81] The applicant has sought a number of orders against the body corporate. The application has been partially successful but I note that a number of the alleged defects are the responsibility of the applicant. I have not made orders binding the applicant in relation to these remaining defects because no orders were sought against the applicant. However, if the applicant does not rectify these defects in a timely manner then the body corporate or another owner should be able to relatively quickly obtain such orders based on the findings made in this application.
>
> [82] The most contentious issue in dispute was whether the waterproofing membranes should be replaced. There is evidence of a number of defects in the installation of the membrane on the upper deck. It is likely these defects are the primary cause of moisture and mould issues related to the ceiling of the lower floor of unit 6. I have ordered this entire upper deck membrane be replaced given the impossibility of inspecting the entire membrane for defects, the likelihood of parts of the membrane being too thin to bridge cracks in the concrete, and the likely difficulties in effectively just replacing parts of this membrane.
>
> [83] There is not the same evidence of defects in the installation of the lower deck membrane. However, there are still concerns with the tiling and drainage from the lower deck that have resulted in the recommendation of alternative solutions to water issues involving the installation of spitters and some additional works to waterproof the adjacent doorways. I am satisfied the body corporate is responsible for the installation of spitters as these will form part of the common property utility infrastructure allowing overflow of excess water from this area. Conversely, the owners of unit 6 are responsible for the
>
> [140747]
>
> waterproofing of their own doorway as this work would be solely within their own lot boundaries.
>
> [84] The body corporate should act as soon as practicable to install a new waterproofing membrane on the upper deck. Acting quickly to address this problem is of special importance due to the likelihood failures in this membrane are contributing to significant mould growth within the ceiling void below. This has resulted in a recommendation the air conditioning system remain switched off until mould issues are addressed and the unit be vacated subject to occupiers gaining a medical clearance regarding possible respiratory issues that might result from these mould issues."

[27] In an affidavit filed 5 January 2015 in the lower court by reference to Mr Toohey's orders, Mrs Shaw swore that:

> "6. Order 1(a) has not been complied with in that the southern curved window has not yet been reinstalled.
>
> 7. Order 1(b) has not been complied with in that the southern wall, southern screen and lounge skirting board has not yet been rectified.

8. Order 1(b) has not been complied with in that the western wall, western screen and skirting board in the office have not yet been rectified.

9. As required by Order 1(c) the balcony railings have not yet been rectified.

10. As to Order 1(d) rectification work was done to the roof in October 2014. I do not know if that work resulted in the obligation of the Respondent Body Corporate under this part of the Order being discharged.

11. Order 1(e)a. & b. have not been complied with in that the upper deck waterproofing has not yet been rectified.

12. Order 1(e)c. has not been complied with in that the spitters in the upper deck have not yet been installed.

13. Order 1(e)d. has not been complied with in that similar tiles have not been installed.

14. Order 1(f) has not been complied with in that the spitters on the lower deck have not yet been installed.

15. Order 1(g) has not been complied with in that the ceiling of the lower floor of lot 6 has not yet been rectified.

16. Order 1(h) has not been complied with in that the dining room window sill and surrounding areas has not yet been rectified."

[28] She noted in her affidavits that order 1 was required to be performed in accordance with the terms of the order itself"as soon as practicable".

[29] As I have noted she was not required for cross-examination in the hearing before his Honour. Mr Toohey's decision was never challenged on appeal.

2. Affidavit of Mrs Shaw filed 11 March 2015

[30] In her second affidavit she refers to and exhibits a decision of Adjudicator M A Schmidt dated 30 July 2013.

[31] This decision was a result of an application to the Commissioner for Adjudication made by the Body Corporate alleging that the Shaws had failed to maintain lot 6 in good condition. The Body Corporate asserted by reference to paragraph [81] of Mr Toohey's reasons that the failure of the Shaws to keep their lot in good repair was preventing it from complying with the orders made by Mr Toohey. Again, after careful analysis, Mr Schmidt dismissed the Body Corporate's application as "misconceived and without substance". That decision was not appealed.

[32] In this affidavit, Mrs Shaw swore that the failure to carry out the orders of Mr Toohey remained and that as a result of severe rain in late February 2015, she removed 75 litres "of water that entered my unit through the areas to be repaired under the orders". Again, this statement of fact was not challenged.

[33] Annexed to her affidavit is an email to her and her husband dated 9 January 2015 from Ms Donnelly attaching a letter of the same date signed by her as chairperson of the Body Corporate. It refers to a number of as yet unresolved dispute applications filed by the Shaws with the Commissioner which, before his Honour and before me, are referred to in support of the Body Corporate's argument that the proceedings in the Magistrates Court by Mrs Shaw amounted to an abuse of process.

[34]

[140748]

The letter can only be described as an extraordinary piece of correspondence. It acknowledges the Shaws' longstanding views that the Body Corporate should comply with the adjudicator's orders. It asserts however that it is impossible for the Body Corporate to comply with the orders because to do so would compromise its statutory obligations under the Act. It threatens to make an application to the Supreme Court "to seek Declarations regarding the impossibility of compliance with the adjudicator's orders". No Supreme Court application has been made. This letter was sent at a time when the Body Corporate had not been served (I infer) with the material filed on 5 January 2014. The application to appoint an administrator pursuant to

s 287(3) of the Act was filed on 11 March 2015, along with the affidavit of Mrs Shaw filed that day. Also at that time, Mrs Shaw's lawyer, Mr Michael Kleinschmidt, filed an affidavit sworn by him on 11 March 2015. To that affidavit are exhibited letters from him to three professional Body Corporate Managers including Archers Body Corporate Management. The response from Archers includes their quote for undertaking the services described by Mr Kleinschmidt in his letter from points 1–9 as $5,000 with $220 per hour for additional services. There is no suggestion that there was a misdescription in the services required to give effect to the adjudicator's orders and no suggestion that the fees quoted are excessive. Mr Kleinschmidt was not required for cross-examination.

[35] Finally, Mrs Shaw relied on an affidavit of Frank George Groom filed 17 March 2015. One of the issues raised in Ms Donnelly's letter of 9 January 2015, and in the material filed on behalf of the Body Corporate, is the contention that the Body Corporate cannot comply with the adjudicator's orders unless hobs are installed to the upper level of lot 6. Mr Groom was one of the experts who provided a report to Mr Toohey. At paragraphs 4–5 of his affidavit he states:

> "4. In my opinion the order *Donnelly House* [2012] QBCCMCmr 474 (23rd October 2012) 'the order' can be reasonably complied with in its current form. This is on the basis that after the tiles were uplifted to the upper level deck of lot 6 the depth of the bed under the tiles was determined to be of sufficient depth to comply with AS 3958.1 and provided a sufficient threshold at the sliding door. This is detailed in my report annexed as Exhibit FJG-4.
>
> 5. Subject only to confirmation of the tile bed depth in paragraph 4 above, I confirm that the order can be complied with, without the need to install a hob nor the need to replace the existing sliding doors."

[36] Again, he was not cross-examined by Ms Donnelly on behalf of the Body Corporate in the hearing before his Honour.

[37] The following material was filed on behalf of the Body Corporate.

1. Affidavit of Jennifer Donnelly filed 20 March 2015.

[38] Ms Donnelly annexes to her affidavit, as Exhibit A, part of the adjudication application made by Mrs Shaw on 30 April 2013. It is said that the material filed ran to 938 pages. In summary, it seeks to restrain the Body Corporate from proceeding with motion 18 passed at the EGM conducted on 24 April 2013, which was to appoint a contractor "Megasealed" to perform the works in compliance with Mr Toohey's order. As Ms Donnelly notes, the Body Corporate through its then solicitors provided a response on 23 May 2013. Again, as a demonstration of the degree of animus between the parties, the respondent argues that the Shaws' application was "vexatious, misleading and an abuse of process", and should be dismissed with costs and "the maximum penalty under section 297(1) of the Act should be imposed against the applicant". This is a reference to an offence of stating "anything to the Commissioner or an Adjudicator the person knows to be false or misleading in a material way". Perhaps as a reflection of a lack of understanding of the law of the Body Corporate's then lawyers, obviously a penalty like that would only follow after due process. In fact, Mrs Shaw was partially successful as the adjudicator's order dated 28 May 2013 exhibited to Ms Donnelly's affidavit and marked C confirms, in that interim orders were made.

[39]

[140749]

A further EGM was then called on 25 July 2013. Motions proposed included revocations of the motions effectively temporarily invalidated by the 28 May 2013 interim orders, but also proposed a motion to which was attached three quotes for "all the work necessary to fully comply with the orders (of Mr Toohey)". The quotes ranged from $104,250 (the Boss quote) to $258,981 (J Hutchinson Pty Ltd). Mrs Shaw then made another adjudicator application under the Act.

[40] An adjudicator was not prepared to make interim orders, and it is clear from the reasons (Exhibit D to Ms Donnelly's affidavit) that the adjudicator did not deal with the substance of Mrs Shaw's complaints at that point. Mrs Shaw proceeded with her application for final orders which included the appointment of an administrator of the Act. As can be seen from the adjudicator's reasons for refusing to appoint an administrator (Exhibit F), Mrs Shaw had sought appointment well beyond compliance with Mr Toohey's

orders and included orders that sought to extend the administrators' powers to "records and financial affairs of the Body Corporate be brought into compliance with the Act".

[41] One of the issues raised before his Honour and on appeal is whether or not the Body Corporate has entered into a binding contract with Boss on 10 September 2013, and whether or not that contract does address the works required to comply with the adjudicator's orders.

[42] The issue of the hobs to the sliding glass doors to the upper level is raised by Ms Donnelly in her affidavit at [34]–[42]. She annexes a number of expert reports to her affidavit including a report of Mr Saint dated 6 June 2012 and a report of Mr Schwabe dated 20 July 2012.

[43] In her affidavit she describes this as the "main issue in dispute". Certainly, Mr Saint said hobs were necessary, but Ms Donnelly's sworn statement at [38] that "all engineers have either agreed with Roy Saint or dropped out of the equation", does not stand up under scrutiny even on the basis of her own material. At [40] she annexes a report of engineer Karl Aldridge dated 17 July 2014. It is clear from that report that as well as undertaking two inspections, Mr Aldridge had access to other reports At 7.3 he states:

> "7.3. INSTALLATION OF A HOB
>
> Previous reports have advised that the installation of a hob is the only way to prevent water entry occurring in this location in the future. We onsider this information as incorrect and based on extremely limited investigation by the parties involved.
>
> We are of the opinion that there is no requirement to install a hob to prevent water entry and in fact, the installation of a hob would create unnecessary expenses to be incurred due to the necessity to completely replace the existing doors to facilitate this. A hob would also create a potential, unnecessary tripping hazard to the door opening. Furthermore we consider it most likely that the waterproofing to the hobs would likely fail over time as the movement between the hob and slab (cold joint) would put stress on the water proofing.
>
> A sufficient step down is available to be incorporated into the retiling of the external deck area. We are strongly of the opinion that the installation of a hob would have no additional or beneficial effects on the waterproofing performance of this area if the step down mentioned above is incorporated."

[44] When considered with the sworn, unchallenged evidence on oath by Mr Groom and Mr Aldridge's report the statement made by Ms Donnelly in her affidavit at paragraph [41] affirmed before Mr Woodall is clearly incorrect.

[45] The rest of her affidavit establishes conclusively in my view, that the dispute over compliance with Mr Tooheys' orders will never be settled by discussion between the parties. Further adjudication applications have been made and are pending. The last adjudication application concerns the Body Corporate's decision (opposed by Mrs Shaw) to appoint yet another engineer Mr Steve Waite to review the "hob" solution. A motion was passed which had the effect of imposing on Mr and Mrs Shaw the responsibility for the cost of Mr Waite's report if it confirmed that the

Body Corporate's preferred solution of hobs was confirmed by him. The Shaws were successful in having that part of the motion, transferring liability to them, restrained by an interim order made 18 December 2014. In the submission to the Body Corporate to the adjudicator in relation to final orders sought by the Shaws in relation to that application, inferentially drafted by Ms Donnelly, it still alleges a miscellany of alleged false and misleading statements by the Shaws. It demonstrates once again, from the Body Corporate's own material the extent of animus between the committee, which is controlled by the Donnellys, and the Shaws. Consistently with some of the statements made by Ms Donnelly in her affidavits filed in support of the stay application, it contains highly critical and inflammatory statements e.g. at page 368 of her affidavits.

[46] In her affidavit paragraphs [83]–[91] she raises once again the prospect of an application to the Supreme Court for declaratory relief, even exhibiting a draft application (p 424) seeking to set aside a number of Mr Tooheys' orders against which the Body Corporate did not choose to appeal under the Act.

[47] Ms Donnelly filed another affidavit sworn on 23 March 2015. Relevantly, and annexed to the affidavit was a draft affidavit of Mr Waite and his report in which he recommends hobs. She also refers to an EGM on

30 July 2014 in which motions to raise funds and strike a levy to pay for rectification works totalling $131,250 gross were proposed. The first was not passed, because all six lot owners were required to vote yes, but the second motion was passed but the Body Corporate has not yet acted on the motion "because of the risk to the lot owners that they would have committed funds … and would have been unable to be used because of the constant disputing by the Lot 6 owners".

[48] She also referred to a payment of an invoice from Boss dated 15 October 2014 for $13,274.80 for repairs to the roof and soffits. Mrs Shaw refers to this in her 5.1.15 affidavit and says she cannot say if these works complied with 1(d) of the adjudicator's orders. Given the uncontested evidence of Mrs Shaw about the amount of water that entered her unit in February it could hardly be contended that whatever work has been done has gone anywhere near satisfying Mr Toohey's orders.

The position of the parties below

[49] As I have noted, written submissions were handed to his Honour and these were supplemented by oral submissions. The first issue raised by the Body Corporate is the same issue raised in Ground 1 on appeal; that is, because there were two extant adjudications in train under the Act initiated by Mrs Shaw, the proceedings before his Honour were an abuse of process, as the applicant Mrs Shaw, was "maintaining several proceedings at the same time for an improper purpose". In her written submission, and consistently with many statements in her affidavit, Ms Donnelly submitted on behalf of the Body Corporate that "strict compliance with the adjudicator's orders is impossible in light of evidence now available: expert report of Steven Waite".

[50] Then there was an argument to the effect that his Honour lacked jurisdiction to make the orders, despite reference being made to s 287(3) of the Act. This argument is not advanced on appeal, but has morphed into a submission that the Magistrate did not have regard to "proper legal principles" for the appointment of an administrator pursuant to s 287(3). This argument extended to a challenge to some of the orders made as being beyond power. In this part of the submission, Ms Donnelly referred to the Boss contract; asserting that the contract complied with Mr Tooheys' orders. This issue is taken up in paragraphs 4 and 5 and 7 of the Grounds and was really the main focus of the Body Corporate's argument on appeal.

[51] In relation to the "legal principles" point, reference is made to a decision of the now disbanded Consumer Credit Tribunal at [60] of the written outline. Ms Donnelly made a submission to the effect that placing a Body Corporate into administration is used sparingly in particular circumstances: *Surace* v *Commisso* [2009] CCT KA002-09 at paragraph 44:

> "An applicant must therefore demonstrate to the required standard that such a step is appropriate. Typically, without attempting to be exhaustive, there will be evidence that the body corporate is so dysfunctional that it
>
> [140751]
>
> cannot operate properly within the statutory framework that governs it, or that there is a well founded suspicion, on the part of an applicant for appointment of an administrator of financial malpractice within the body corporate, or that there is conduct that amounts to undue oppression in the conduct of its affairs. Without more, mere disagreements between the members, especially when the disputes are due to reasonably held differences of view and there are means available to resolve them by reference to external processes (will not usually support the exercise of the discretion)"(I have inserted these words as the quote in the submissions seemed to be missing the conclusion and I was not given the case by the appellant).

[52] Mrs Shaw's case below was that despite the passage of 883 days since Mr Toohey's order and 602 days since the failure of the Body Corporate to obtain orders that she and her husband keep their lot in good repair, the orders have not complied with, and Lot 6 was still leaking badly. Her submission made by Mr Sinclair pointed out that the main item in dispute and the most expensive is order 1(e). She referred to Ms Donnelly's affidavit filed on 23 March 2015 and Exhibit D to the affidavit, the minutes of the EGM on 30 July 2014. Motions 4 and 5 proposed by Mrs Shaw were to investigate the differences alleged by her between Mr Tooheys' orders and the Boss contract, and to request written confirmation from Boss "that all works quoted within the contract are completely in accordance with the adjudication order", were lost four against

two in favour. Not surprisingly, her submission was that the Body Corporate was not willing and not ready to implement Mr Tooheys' orders. The submission referred to the adjudication order sought by the Body Corporate which was dealt with on 30 July 2013 — this was the adjudication to which the Body Corporate sought to have hobs installed described by the adjudicator as misconceived and without substance.

[53] Mr Sinclair and Ms Donnelly made further oral submissions. Her submission expanded on the written submission, asserting the application was an abuse of process, that the Body Corporate was acting reasonably and endeavouring to comply with the orders; and was being unreasonably prevented from doing so by the actions of Mr and Mrs Shaw. She referred in some detail to the Boss contract, but agreed with his Honour that the repair of the upper level deck of unit 6 had not been completed. I take that to be a reference to order 1(e).

The Magistrate's decision

[54] I have referred above to the circumstances in which his Honour gave his decision at a time earlier than he had anticipated. His reasons are brief, and it is alleged are inadequate. His Honour referred to the extensive material filed by the Body Corporate and he said he had considered it carefully.

> "As I indicated on the day this matter was argued my instinct was to appoint at (sic) administrator because relations between the lot owner and the respondent were so bad that it could not be expected that they could attend to the issues raised in the adjudicator's decision."

[55] He referred to the authority raised by Ms Donnelly without actually citing it and wrote:

> "An administrator is a person who directs or manages the affairs of another. An administration allows the management of a business or other organisation. The application before the Court is not to replace all of the obligations and duties of the Body Corporate. The application seeks orders directly related to the enforcement of the order of the adjudicator. The test that law in relation to Body Corporate administration needs to be considered in the light of the fact that this is an enforcement proceeding. Although extensive powers are sought to be given to the administrator it is intended that those powers are given to them to allow them to effectively discharge the terms of the order of the adjudicator, without interference and with an open mind to the topic.
>
> Much was written in affidavits about why things had not been done and why it was one party's fault and not another's.
>
> [140752]
>
> In terms of decision to appoint an administrator I don't think I need to reach a concluded view in relation to whose fault it is.
>
> It was submitted that I should consider whether or not the respondent was ready, willing and able to comply with the adjudicator's decision and that on a balanced consideration of that submission I should conclude that the respondent was not ready, not willing, and not able to comply with the decision.
>
> In reaching my decision I would like to clearly state that I have considered all of the matters raised in that respect. Although I have not referred to all the matters raised in this written decision, it is not because I have ignored those other matters. The matters to which I intend to refer are things which I think are relevant to the decision that I have reached in relation to the appointment of an administrator.
>
> 1. The applicant holds minority interest within the community title scheme;
> 2. The scheme is not managed by a professional Body Corporate manager;
> 3. The chairman of the Body Corporate committee holds and interest in four of the six total lots;
> 4. It would appear that the chairman also sold to the applicant the unit which it seems is perhaps been most effected by the water membrane problem;
> 5. There has been extensive correspondence sent and received by the parties in relation to the determination which readily allows the conclusion to be reached that the parties' positions are relatively entrenched;

6. There have been a number of meetings to try and resolve the apparent impasse without success;
7. It has been approximately two and a half years since the adjudicator's decision was made;
8. Other legal proceedings have been contemplated or threatened or taken without the position being advanced; the respondent it seems delivered an ultimatum which included an application to the Supreme Court to appoint an administrator yet has not advanced that in any way.
9. Although some work has been done it seems conceded that the most expensive and the most significant component of the work remains to be done;
10. The adjudicator's decision has not been challenged by an appeal—and it would appear to me at least that the decision was given careful consideration to the competing positions and the obligations under the Act. (sic)
11. An adjudicator in another decision considered the operations of the Body Corporate under the Act and found there was no need for an administrator. There was a cave (sic) used expressed (sic)

'However the Body Corporate needs to be aware that factionalism or hostility between owners may be grounds for appointing an administrator, particularly if circumstances create an atmosphere which leads to endemic disputation or it is established circumstances are not conducive to a balance (sic) consideration of issues and the result (sic) decisions are not in the best interest of owners.'"

[56] Later in his reasons he wrote:

"All of the material filed by both parties demonstrate (sic) palpably that there is little or no real prospect that the adjudicator's decision will be complied (sic) 'as soon as practicable' with without (sic) the appointment of administrator…

The attraction of an administrator being appointed is that the administrator is a professional administrator — has statutory obligations — and as I understand fiduciary obligations that it needs to discharge. It appears to be that an independent administrator charged with the responsibility of achieving compliance with the adjudicator's decision is the best alternative to a negotiated outcome which seems impossible. The professional administrator would certainly not have any problems with any suggestion of partiality in terms of the dispute and would hopefully look at what needs to be done with open eyes and

[140753]

with a clear objective, namely to ensure that the adjudicator's decision is complied with.

It has been 883 days since the adjudicator made his decision.

Clearly the problems need prompt attention…"

[57] He appeared to reject Mrs Shaw's contention of an issue of estoppel in relation to the hobs without referring to the extensive evidence about that issue, and he rejected without specific reasons that the application was an abuse of process. Apart from an oblique reference in 9. above, he did not refer to the Body Corporate's contention, advanced more forcibly on appeal that there is in existence a binding contract to perform the works the subject of the orders, and that is a factor that strongly militates against exercising the discretion to appoint an administrator.

The appeal

[58] I will deal with the grounds of appeal seriatim.

Ground 1—abuse of process

[59] This was a ground not forcibly advanced on appeal. Clearly Mrs Shaw was entitled to file the orders and seek the appointment of an administrator. The previous attempt to have an administrator appointed under the Act did not succeed, but in any event the orders sought by the Shaws were intended to invest much more power in the administrator on that occasion than is provided for in his Honour's orders. It could not be seriously argued that the dispute over the implementation of the orders, which has extended over years,

had, by the end of 2014, reached a complete impasse. The attitude of the body corporate to the orders is demonstrated vividly by its threat to seek the vacation of many of the adjudicator's orders including 1(e) by way of equitable relief in the Supreme Court. In passing the delay in making such an application would in all the circumstances militate strongly against its success. It does however demonstrate the attitude of the Body Corporate to the adjudicator's orders.

[60] The two unresolved adjudicator's references referred to by Ms Donnelly in her written submission below made by Mrs Shaw clearly relate to the central issue in dispute i.e. the extent to which the Body Corporate has complied with the orders, and the extent to which the Boss contract addresses the orders. It is telling that when Mrs Shaw sought this information (effectively) at the EGM on 30 July 2014, her two motions were defeated four to two — I infer the Donnellys voted as a bloc and the other independent owner voted with Mrs Shaw. There is no merit in this ground.

Ground 2 — disregard for proper legal principles and failure to properly exercise the discretion

[61] As I have noted his Honour specifically referred to the case relied upon below by the Body Corporate without referring to its name. The same case is referred to in Ms Donnelly's submission below is referred to by the Body Corporate on appeal at paragraphs 26 to 28 of its written outline.

[62] Clearly the decision to appoint an administrator under s 287(3) of the Act involves the exercise of judicial discretion. Otherwise s 287 provides no guidance as to how that discretion is to be exercised, nor does the section in the Act dealing with an adjudicator's power to appoint an administrator. I agree with Mrs Shaw that because the order sought here was for the appointment of an administrator for a limited purpose, it is not necessary to find that the Body Corporate has become dysfunctional, or was engaging in financial malpractice. As I have noted on a number of occasions, it cannot be seriously argued that the impasse between the owners of Lot 6, the lot most significantly affected by significant and serious water leaks to the building, and the body corporate itself, is in a state of irretrievable stalemate. I agree that the financial implications for the Body Corporate, particularly in relation to the Boss contract, are a relevant factor; as is the uncontested evidence that despite the Body Corporate expending monies to (as it says) comply with the orders, as recently as February 2015, Lot 6 was severely inundated.

[63] I agree with the submission made by Mr Hughes QC and Mr Sinclair in their written outline on behalf of Mrs Shaw:

> "(1) First, the power is a discretionary power which ought to be exercised:
>
> (i) judicially; and
>
> [140754]
>
> (ii) having regard to available evidence and inferences able to be drawn from that evidence when the issues will no doubt vary with respect to the nature of the administration sought, and the particular facts of the case;
> (iii) with reference to the specific purpose of the appointment."

[64] The Body Corporate's written outline, as with its approach before his Honour, was to contend that it has acted reasonably at all times to comply with the orders and that Mrs Shaw has deliberately hindered it in carrying out its duties. The evidence of Ms Donnelly on its own, referred to above, does not support that contention but, in my opinion, it was not necessary for his Honour to determine ultimately who was at fault. I accept the submission made at paragraph 26 of Mrs Shaw's submission on appeal:

> "in this regard, particularly where the disagreement stretches over many months, even years; involves numerous applications by the parties with attendant legal costs and delays; burdens the courts and tribunals; involves constant inability to agree with respect to the manner of complying with an outstanding order; where the parties are clearly at odds, the appointment of an administrator is likely to be proper exercise of discretion."

[65] The evidence clearly establishes that the parties will not agree as to whether the adjudicator's orders have been or will be complied with without the intervention of an independent administrator. There is no merit in this ground.

Grounds 4, 5 and 7 — the BOSS contract issue

[66] It is the Body Corporate's contention that there exists a binding contract between it and BOSS to perform the works required by the adjudicator's orders. The contract was before his Honour as an annexure to one of Ms Donnelly's affidavits and he certainly referred to it in the hearing, but not in his reasons. The Body Corporate submits that this is a factor that is strongly against the exercise of a discretion pursuant to s 287(3) of the Act, and his Honour's failure to deal with it in his reasons constitutes appellable error.

[67] For convenience I will refer to the copy of the contract which is Exhibit JAD1 to Ms Donnelly's affidavit filed in these proceedings on 23 April 2015.

[68] The contract is in a standard form Master Builders Commercial Building Contract. Clause 1(a) refers to the "Works"; and the works are described ("a brief description") on p 3 of the contract thus:

> "As per BOSS Building Maintenance (Australia) Pty Ltd attached QUOTATION 1651/41594-1 $98,406 including GST dated 30 May 2013 including our General Terms and Conditions and as per Scope of Works requested in correspondence dated 11 February 2013 from Ray Donnelly and additional Scope of Works requested in correspondence dated 29 May 2013 from Jennifer Donnelly updated quotation with additional items raised after Adjudication Application. Excludes any works not stated in our quotation and excludes any works associated with removal, manufacture and installation of windows and doors. This is by others as per the scope of works requested in correspondence dated 11 February 2013 from Ray Donnelly. Excludes any building certification, council application or engineers fees."

[69] There is also a special condition at p 5 which may be relevant to the scope of the works covered by the contract:

> "As per BOSS Building Maintenance (Australia) Pty Ltd QUOTATION 1651/41594-1 $98,406 including GST dated 30 May 2013 including BOSS Building Maintenance General Terms and Conditions, Master Buildings General Conditions LS32-07/2013 and as per Scope of Works requested in correspondence dated 11 February 2013 from Ray Donnelly and additional Scope of Works requested in correspondence dated 29 May 2013 from Jennifer Donnelly updated quotation with additional items raised after Adjudication Application. All the above documents are attached and form part of this contract. Excludes any works not stated in our quotation and excludes any works associated with removal, manufacture and installation of windows and doors (sic) this is by others
>
> [140755]
>
> as per the scope of works requested by correspondence dated 11 February 2014 from Ray Donnelly. Excludes any building certification, council application, Qleave or engineers fees or any other costs not included in our quotation. Access to unit 6 and Common Areas and any other part of the building where we need access to complete the works is the responsibility of the Body Corporate. Should we commence works and any areas of access is denied or delayed access (sic) and we have to leave site additional costs will be incurred by the Body Corporate for reestablishment of site work. BOSS will only take instructions from the Body Corporate representative, please advise us in writing of this representative."

[70] There is no date inserted for commencement of the contract or a date for practical completion. As indicated there purports to be attachments, the most significant of which is the quotation dated 30 May 2013 which is said to be valid for 45 days. The contract is dated 10 September 2013 and signed on behalf of the Body Corporate by Mr Donnelly.

[71] The adjudicator's orders are set out above. Apart from the reference above, there is no reference anywhere to the actual particulars of the adjudicator's orders in the Boss contract. The most comprehensive description of the works covered by the contract is that set out in the quotation dated 30 May 2013. The correspondence allegedly from Ray and Jennifer Donnelly referred to in the contract is not annexed to the contract.

[72] The Boss quotation and contract can be contrasted with the quote from Pandanus Constructions. This quotation dated February 2013 forms part of Exhibit JAD3 to the affidavit of Ms Donnelly filed on 23 April 2015 in these proceedings. In her affidavit Ms Donnelly states that Mrs Shaw organised two quotes from

Pandanus and J Hutchinson Pty Ltd. These quotes were certainly considered by the Body Corporate but not accepted. The Pandanus Constructions quote dated 6 February 2013, (unlike the Boss quote attached to the contract) specifically refers to the adjudicator's orders and the items listed by reference to the orders and quotes amounts by reference to order numbers. For example, the Pandanus Constructions quote quotes an amount of $84,275.60 to comply with orders 1(e)a., b. and d. and $6,285 to comply with order 1(e)c., and refers to other matters set out in the adjudicator's orders.

[73] As I have noted, the quotation from Boss, which was for less than half of the other two quotations, does not in terms address the orders. The Body Corporate has not relied upon any affidavit from the principal of Boss or any correspondence from him to the effect that the quotation does address the orders. This has to be considered in light of the undoubted animus between the Shaws and the Donnellys, who control the committee, and the reality that it is the Shaw's unit that is most substantially affected by the water leaks. As indicated before, one of the significant issues now in dispute between the parties is whether or not hobs need to be installed. Certainly the Boss quote refers to it but quotes only for a modest sum. The orders do no mention hobs, and a fair reading of Mr Toohey's decision (particularly paragraphs [45]–[47]) suggests he did not agree with Mr Saint's opinion about construction of a hob inside the doors of unit 6. Without any evidence from the principal of Boss, it is difficult for me to undertake a meaningful comparison of the Boss quote with the orders to ascertain if in fact the works address adequately the adjudicator's orders. As I have noted, the Pandanus quote specifically refers to the orders.

[74] I do not accept Ms Skennar's submission that Mrs Shaw has either directly or inferentially accepted that the Boss contract addresses the adjudicator's orders. She referred me in argument to correspondence at pp 281 and 287 of Volume 2, but not to Mrs Shaw's letter to Ms Donnelly at p 279 dated 20 June 2014. The letter refers to the Boss contract. It seems to seek that information be obtained from Mr Kemp (apparently the principal of Boss) and proposes that he visit the site to "quote according to the adjudicator's orders 0846-2011. This order has all rectifications clearly stated that the Body Corporate is responsible for. This will invariably avoid his company's position (and the position of the Body Corporate) being compromised if there are indeed unforeseen variations in the works or further costs".

[140756]

The letter in response from Ms Donnelly dated 21 June 2014 did not address that issue and in effect stated that the contract was in force.

[75] This is not the forum to decide if the Boss contract is binding. It has features (lack of a commencement and practical completion date, and the fact that a fundamental term, the costs of the works referred to in a quotation was valid for only 45 days) that tend to undermine the submission that it is a valid and binding contract.

[76] As I have noted, the hobs issue has become significant, so significant that Boss would not guarantee the works unless hobs were installed. As I have noted, Mr Groom was the only engineer who provided an affidavit in the proceedings below, and his opinion unchallenged by cross-examination was that hobs were not necessary to comply with the adjudicator's orders. Mr Waite's report which contains a contrary opinion was annexed only in draft form to one of Ms Donelly's affidavits, so necessarily he could not have been cross-examined. As I have noted, a fair reading of Mr Toohey's reasons suggests he did not agree with Mr Saint's opinion that problems with the upper level waterproofing membrane, to the effect that the membrane would be repaired in three places and a hob installed on the floor inside the doors of unit 6, was sufficient. Ms Donnelly's response is to engage another engineer, Mr Waite, whose, unsworn report was attached to one of her affidavits below.

[77] In relation to this issue of whether the Boss contract covers the work specified in the orders, it is clear, consistent with its attitude throughout, particularly from its response to one of the extant adjudication applications made by Mrs Shaw (p 405 of volume 2) that the Body Corporate was not prepared to provide correspondence between itself and Mr Kemp prior to the receipt of the quotation attached to the Boss contract. That correspondence, or as I noted a statement from Mr Kemp, might assist in deciding whether or not the works covered by the contract do cover the works contemplated by the orders. As I have noted earlier, when Mrs Shaw moved motions to compel this disclosure at the 30 July 2014 EGM the motions were defeated by the Donnellys voting as a bloc.

[78] At 43 of their submission Mr Hughes QC and Mr Sinclair write:

> "43. Two further things need to be said:
>
> (a) First, if it be the fact that the Body Corporate has entered into a contract in respect of works to ameliorate water penetration to Mrs Shaw's unit, but that contract does not provide for scope of works ordered by the adjudicator, Mr Toohey, then that is a problem for the Body Corporate (in terms of the contractual arrangements it has entered to the exclusion of Mrs Shaw). It involves conduct and consequences for which the Body Corporate is responsible irrelevant to satisfying its obligations under the adjudicator's orders;
> (b) Second, the appellant's submissions overlook the proposition that the administrator appointed may, in the independent discharge of his duties, choose to pursue Boss as the preferred contractor. The administrator will be in a position if so advised:
>
> (i) to review the terms of the contract;
> (ii) to ensure the contract addresses the order of the adjudicator and, if not, to seek the variations to ensure that it does;
> (iii) to otherwise negotiate a contemporary contract price; the commencement dates, and a date for practical completion and, if the administrator thinks appropriate;
> (iv) to engage Boss to complete the works."

[79] Both propositions appear to me to be self-evident. Ms Skennar on behalf of the Body Corporate was dismissive of both propositions, arguing that the administrators' obligations under the impugned orders are to, in effect, start the process again. I think the answer to this dispute is that the orders made appropriately do not constrain the administrator in how it undertakes its appointment. To suggest otherwise would be to speculate.

[80] In my view, the existence of the contract was a relevant issue for his Honour to consider in the exercise of his discretion. His failure to do so was an error. However, in undertaking the analysis above in relation to this discrete issue, I have concluded that, in

[140757]

conjunction with other factors, and in particular the animus between the parties; the uncertainty over the extent to which the Boss contract addresses the adjudicator's orders, the attitude of the Body Corporate in refusing to provide information that may assist Mrs Shaw to determine if the contract does address the orders; the fact that it is her unit that is most seriously threatened by admitted serious defects in the building (the rectification of which by the orders is the responsibility of the Body Corporate); and the fact that despite saying it is ready, willing and able to comply with the orders, the actions of the Body Corporate e.g. the threatened application to the Supreme Court, strongly suggest otherwise, in exercising the discretion afresh, taking into account this discrete issue, the same orders should be made.

Remaining appeal grounds

[81] It is submitted that his Honour's decision was coloured by his view of a possible conflict of interest in Ms Donnelly representing the Body Corporate. As I have noted, he was concerned about this issue and does refer to it in his reasons and referred to it frequently during the hearing, but I cannot detect any basis for inferring that he allowed his view on this discrete issue to affect the exercise of his judicial discretion. His expression that he was "horrified by what [he] read" is saying no more than it is alarming that despite the orders being made over two and a-half years ago, they have still not been complied with. I have dealt with the attribution of blame argument earlier. It is without merit to suggest that his Honour was referring only to the Body Corporate when he said this and for that reason he denied it procedural fairness.

[82] The substance of his Honour's reasons are set out above. In Ms Skennar's submission 41, she refers to *Soulemezis* v *Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259 where Kirby J (as his Honour then was) said (in effect) that in order for reasons to be adequate they must "state generally and briefly the grounds which have led him or her to the conclusion reached concerning disputed factual questions and to list the findings on principal contested issues". In the same case McHugh JA (as his Honour then was) said:

> "If an obligation to give reasons for a decision exists its discharge does not require lengthy or elaborate reasons: *Ex parte Powter*; *Re Powter* (1945) 46 SR (NSW) 1 at 5; 63 WN 34 at 36. But it is necessary that the essential ground or grounds upon which the decision rests should be articulated."

[83] At 55 of their submission Mr Hughes QC and Mr Sinclair referred to a more comprehensive analysis of the law in respect of this topic for this jurisdiction in the decision of the Court of Appeal in *Sunland Group Ltd* v *Townsville City Council & Ors* [2012] QCA 30 wherein the Court adopted with approval what had been said earlier in *Drew* v *Makita (Australia) Pty Ltd* [2009] 2 Qd. R. 219 (see [36]). Of particular relevance in this case, emerging from the principles adopted by the Court of Appeal in this State are the following:

> (a) The extent to which a trial judge must expose his or her reasoning will depend on the nature of the issues for determination and for that reason, what is required has been expressed in a variety of ways;
> (b) What is required is a basic explanation of the fundamental reasons which led the judge to his (or her) conclusion — there is no requirement for an extended intellectual dissertation upon the chain of reasoning.

[84] I say in passing that this approach is not common, as demonstrated by the length of these reasons. Mark Twain famously said, "I didn't have time to write a short letter, so I wrote a long one instead."

[85] As I have noted, his Honour did not deal adequately in his reasons with the contract issue. He was clearly keen to give a decision, perhaps because of the urgency engendered by the unchallenged evidence of Mrs Shaw of very significant water inundation at the end of February 2015. It would have been preferable for his Honour to undertake a somewhat more extensive analysis of the evidence, but there can be no reason to doubt that he had read it and the submissions prior to making his decision. In my view, the reasons are sufficient. In any event, as I have indicated, for the reasons I have stated if I had exercised the discretion afresh, I would have reached the same conclusion as his Honour.

[86]

[140758]

Unfortunately the Body Corporate's submission was not written in a form that addressed the grounds of appeal. It also argues that Mrs Shaw had consistently voted in favour of payments being made in furtherance of a contract. The evidence — indeed, the evidence of Ms Donnelly — did not support that proposition. In her affidavit filed 23 April 2015 in support of the stay application, she states (by reference to the Boss contract):

> "8. This contract has been commenced with some of the work undertaken. For example the roof has been repaired.
>
> 9. There was a written variation to the contract to repair the roof as the Body Corporate sought to completely rectify all defects in the roof not just those items that were initially identified in the initial contract in 2013. Delay in getting the work completed meant that the problem had become significantly worse."

[87] She then proceeds to exhibit a tax invoice from Boss dated 15 October 2014 for "repairs to roof and soffits" for $18,780. It is said to relate to quotation 10000232 — August 14, 2014. Mrs Shaw did vote for this sum to be paid. The quotation number dated 13 May 2013 annexed to and forming part of the contract is 1651/41594-1. The later works were described in a scope of works prepared on 10 September 2014 (i.e. a year after the contract was signed) by Plumbing Design and Drafting. The contract quote provides for only a sum of $2,650 for "repairs to roof soffit linings …". These are clearly works not covered by the contract quote, and a strong inference can be drawn that it was a separate scope of works and not a variation of the contract. Mr Hughes QC and Mr Sinclair describe Ms Donnelly's sworn statement that "the roof has been repaired" as "incredible". It is very loose language indeed, given what occurred to lot 6 in the heavy rain in February i.e. after these works were completed.

[88] In my reasons above, I have referred to some of the other points made on appeal which are not attributed to a specific ground. In my opinion the appeal should be dismissed, and I so order. Both parties were given an opportunity to make submissions about costs at the conclusion of the appeal hearing. I order the appellant to pay the respondent's costs of and incidental to the appeal on the standard basis, and I certify for two counsel. I am satisfied that the matter is of sufficient complexity to require two counsel, particularly

given the importance of the matter to the respondent. The parties agree that I have power to deal with costs below, and the Body Corporate should pay those costs as well on the standard basis. It goes without saying that Mrs Shaw should not have to contribute to any levy struck in order to satisfy the costs orders.

[89] I will give the parties liberty to apply by the giving of three days' notice in writing.

ORCHID AVENUE PTY LTD v HINGSTON & ANOR

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(2015) LQCS ¶90-201; Court citation: [2015] QSC 42

Queensland Supreme Court

Delivered on 06 March 2015

Misleading and deceptive conduct — Where parties entered into a sale contract to purchase an apartment "off-the-plan" — Where buyer refused to complete the contract due to obstructed views — Where buyer claimed that they were induced to enter into the contract by the seller's misleading representations regarding the views — Trade Practices Act 1974, s 52 (since replaced by the Competition and Consumer Act 2010).

The plaintiff seller entered into a sale contract with the defendant buyer in respect of an "off-the-plan" apartment to be built in Surfers Paradise. The apartment was to be built on the 52nd floor. The agreed price was $3,150,000.

The buyer refused to complete the contract as a result of the waters views being partially obscured by a new 77-floor apartment tower (called "Soul") having being built between the coastline and the apartment. The market value of the apartment on termination of the contract was $1,650,000.

[140759]

The seller sought damages for the buyer's non-performance of the contract. The buyer countered that the conduct of the seller's agents by making various statements about the view which could be expected from the apartment, contravened the misleading and deceptive conduct provisions of s 52 of the then *Trade Practices Act 1974* (Cth). In particular, it was alleged that the seller's agent made the following statements:

- that once the apartment was constructed, it would be unobstructed by any other building
- the apartment would be protected from being obstructed because the local council would not approve another building of such a height that it would obstruct the views.

The buyer also asserted he was given sales brochures which depicted unobstructed views.

Held: for the seller.

1. The overall outlook from the apartment would have been better without the Soul apartment building in front of it. Further, the apartment would probably have been more valuable with an entirely unobstructed view of the ocean.

2. However it would have been surprising if the buyer was not made aware of the Soul development at the time he made investigations about purchasing the apartment, especially given the obviousness of the Soul development which was under construction at this time. Further, given the obviousness of the development, it would have been unlikely for the seller's agents to have made the representations at all. Additionally, it was unlikely that the purchaser decided to purchase an apartment off-the-plan at a price of more than $3m without giving any consideration to what was otherwise available in the same market, especially given this was not his first investment in real estate.

3. Further even though the images in the brochure clearly represented unobstructed views, there was no text within the brochures which suggested that the locality would remain the same as depicted in those images or that there was some impediment to the development of that locality from the relevant planning laws.

4. Additionally, the fact that the buyer was an experienced property investor (or the seller's agent believed him to be so) made it even less likely that the seller's agent made the representations given there was such a small prospect that those assurances would be accepted as credible. "After all, the locality was central Surfers Paradise with very many high rise buildings. There is nothing suggested by the evidence which might have caused a buyer to think that there had been some recent change in the planning laws, such that a nearby building could not be constructed to the height of that which was to be constructed to include their apartment."

[Headnote by the CCH CONVEYANCING LAW EDITORS]

G Handran (instructed by Hickey Lawyers) for the plaintiff.

No appearance for the first or second defendants (first defendant appeared on his own behalf).

Before: McMurdo J

McMurdo J:

[1] The plaintiff's claim is for damages for the defendants' non-performance of a contract for their purchase of an apartment in Surfers Paradise. It was a contract for the sale of an apartment "off the plan" in a development described as Hilton Surfers Paradise Hotel and Residences. The contract was to be completed after registration of the relevant plan and the creation of a separate title for the apartment. The agreed price was $3,150,000.

[2] In August 2011, the plan was registered and a separate lot was created. Settlement became due on 8 September 2011. The defendants refused to complete the contract, having purported to terminate it on 12 July 2011.

[3]

[140760]

There was also a contract between the parties for the sale of certain furniture for the apartment. It became due for completion also on 8 September 2011. The plaintiff claims nominal damages for the non-performance of that contract, suggesting that an award of $100 would be appropriate.

[4] The claim for damages for breach of the contract of sale of the apartment is quantified as follows:

Contract price	$3,150,000
Market value of the apartment on termination of the contract	$1,650,000
	$1,500,000
Less deposit	$315,000
	$1,185,000
Less commission saved	$67,650
Amount claimed	$1,117,350

[5] The defendants' pleaded case raised essentially two defences. The first was in reliance upon the then terms of s 25(1) of the *Land Sales Act* 1984 (Qld). That defence was not pursued at the trial. The second defence alleged that there was conduct which contravened the then provisions of s 52 of the *Trade Practices Act* 1974 (Cth) and by which the defendants were induced to enter into the contract. By their counterclaim, the defendants pleaded that they should have such relief under s 87 of that Act as would avoid their loss from having entered into the contract.

[6] When their case was pleaded, the defendants were legally represented. But at the trial they were without representation. Mr Hingston appeared at the trial, giving evidence and arguing his case. Mrs Hingston did not appear at the trial. The defendants have the same address for service. The only explanation for her absence came from Mr Hingston who said that Mrs Hingston "couldn't make it today".[1] At a time when the defendants were legally represented, the case was set down to be tried on 3 June 2014. Mr Hingston unsuccessfully applied for an adjournment on 30 May 2014. But on his application on 3 June 2014, I adjourned the trial to 16 September 2014. There was then no appearance by Mrs Hingston. On 16 September, the trial was adjourned to 23 September 2014. Again there was then no appearance by Mrs Hingston.

The plaintiff's case

[7] At a time when the defendants were legally represented, the plaintiff served a Notice to Admit Facts on 11 March 2013, asking them to admit that the market value of the apartment as at September 2011 was $1,650,000 and that its value as at August 2012 was $1,450,000. On 25 March 2013, the defendants' solicitor replied, enclosing a notice which disputed those facts. But later that day, the defendants' solicitor wrote again, withdrawing that notice disputing facts which he explained by saying that he was mistaken as to his instructions. The fact that the apartment was worth $1,650,000 as at September 2011 was thereby admitted.[2]

[8] The amount of the contract price and the deposit paid are not disputed. The deposit was paid by an initial payment of $31,500 with the balance being provided by a bank guarantee. The amount guaranteed was paid to the plaintiff's solicitors on 28 September 2011.[3]

[9] The defendants did not admit the component of the plaintiff's claim which was the reduction in their favour for agents' commission. There is in evidence an invoice from Elfbest Pty Ltd, the agent which introduced the defendants for this contract, dated 1 August 2011. When the contract was terminated in September 2011, the plaintiff had other agents, charging a lower rate of commission. The plaintiff's claim allows the defendants a reduction for the difference between the commission which was to be paid to Elfbest Pty Ltd and that which would have been payable to the other agents and on a sale price at the property's then value of $1,650,000.

There was no case pleaded by the defendants which was to the effect that some reduction should be made in this respect but in a greater amount. And at the trial Mr Hingston made no submission in that respect. The plaintiff has conceded this reduction from its claim although, according to its written submissions, Elfbest Pty Ltd was paid.[4]

[10]

[140761]

One other matter should be considered about the quantum of the plaintiff's claim. The contract for the sale of the apartment provided, by special condition 5, that the plaintiff agreed to contribute $23,350 towards the total cost ($46,700) of the furniture to be supplied under the furniture contract between the parties. It was agreed that that sum would be paid by the plaintiff at settlement of the two contracts. Therefore had the two contracts been completed, the defendants would have paid effectively $23,350 for the furniture. That furniture was placed in the apartment before the contract was terminated. But because there was no valuation evidence, I do not know whether the furniture has affected the value of the apartment according to the valuation upon which the plaintiff's claim was formulated. I must assume that the amount of $1,650,000 was the value of the apartment without that furniture. Therefore, the comparison between the plaintiff's position under the subject contract (for the sale of the apartment) had that contract been performed and its position upon termination of the contract requires the plaintiff's claim to be reduced by $23,350, in order to represent the net value of the contract for the sale of the apartment.

[11] As I have noted, there is no claim for substantial damages for breach of the furniture contract. There is no evidence as to the value of the furniture.

[12] Therefore, the claimed amount of the plaintiff's damages is proved by a combination of admissions and evidence, except that there should be a reduction for that sum of $23,350.

Land Sales Act

[13] Before discussing the s 52 case for the defendants, something should be said of the defence which was pleaded in reliance upon the *Land Sales Act*. Section 21 of the Act required the plaintiff to give to the defendants, before entering upon their purchase of a proposed lot, a written statement which, amongst other things, clearly identified the lot to be purchased. Section 21(4) provided that where a prospective vendor was also required under s 49 of the *Building Units and Group Titles Act* 1980 (Qld) to give a statement in accordance with that section, it would be sufficient compliance with s 21(1) if the particulars were included in the s 49 statement. Prior to the defendants entering into the subject contract, the plaintiff gave them a statement for the purposes of those two provisions. It described the proposed lot by reference to a plan within the statement, which depicted the boundaries of the lots on the subject floor of the building. The plan represented that the subject apartment would have an internal area of 166 square metres and two balconies of 19 square metres and 7 square metres respectively.

[14] Section 22 of the *Land Sales Act* then provided that if a statement of particulars referred to in s 21(1) contained information that subsequently became inaccurate, it was the duty of the vendor to give a further statement as soon as was reasonably practicable after the proposed lot became a registered lot. Section 25 then provided that where such a statement was given under s 22, the purchaser could avoid the contract if "materially prejudiced" by the inaccuracy of the original statement.

[15] On 8 July 2011, the lot was registered. Four days later, the plaintiff through its solicitors gave a statement pursuant to s 22. It disclosed that the internal area had become 163 square metres, a reduction of three square metres, and that the area of the smaller balcony had been increased from seven square metres to eight square metres. The locations of the balconies and of the apartment itself within this floor of the building remain unchanged.

[16] The defendants pleaded that they were materially prejudiced by that suggested inaccuracy in the original disclosure statement. They alleged that the "amenity of the Property" was "less desirable" and that its value was less for these changes. They alleged that had the lot been described in the s 21 statement as it was in the s 22 statement, they would not have contracted to buy it. They therefore claimed to be entitled to avoid the contract under s 25(1) of the *Land Sales Act*. It is unsurprising that this defence was not pursued at the

trial and that there was no evidence which was tendered in an attempt to prove that the defendants were materially prejudiced as they had alleged.

[140762]

The misrepresentation case as pleaded

[17] The case pleaded by the defendants is that there were several representations made to them by the plaintiff's agents on the same day which they cannot identify but which was "on a weekend in early March 2008".[5] Their case is that there were representations made to them by Candice McGregor at the offices of Elfbest Pty Ltd on Orchid Avenue, Surfers Paradise. They were then escorted by Ms McGregor to a nearby sales office or display centre which was being operated by the developer where there were representations made by unidentified "sales staff of the plaintiff".[6] In each case, the alleged representation was about the view which they could expect from the subject apartment.

[18] The proposed building was to be known as "Orchid Tower". It was one of two buildings which were to be developed for the occupation, in part, of a Hilton Hotel. The other building was immediately to the west of the Orchid Tower. The proposed apartment was to be on the 52nd floor, where there would be three apartments. This apartment was on the eastern side of the building.

[19] The defendants pleaded that at the offices of Elfbest, they asked Ms McGregor about this proposed development, in the course of which she represented to them:

> "18.2 … that the views of the ocean from the Property facing East:
>
> (a) would, when the Property was constructed, be unobstructed by any other building (First Representation);
> (b) would be protected from being obstructed because the local council would not approve another building in front of the Project of such a height that it would obstruct the said views (Second Representation)."

[20] They pleaded that they were then shown a model of the project, "in which the views referred to in paragraph 18.2 above were not obstructed by any other building".[7] By that conduct, they pleaded, Ms McGregor represented to them "that the views of the ocean from the Property facing East would, when the Property was constructed, be unobstructed by any other building".[8]

[21] They pleaded that on the same day, they were taken by Ms Gregor to a nearby sales office operated by the plaintiff where sales staff of the plaintiff showed them another model of the project "in which the views referred to in paragraph 18.2 above were not obstructed by any other building".[9] They allege that those staff represented to them "that the views of the ocean from the Property facing East could not be 'built out' (Fourth Representation)" and that these staff gave to them "brochures and concept drawings which showed that the views referred to in paragraph 18.2 above would, when the Property was constructed, not be obstructed by any other building".[10]

[22] They alleged that by that conduct of the plaintiff's sales staff, the plaintiff represented to them "that the views of the ocean from the Property facing East would, when the Property was constructed, be unobstructed by any other building (Fifth Representation)".[11]

[23] They pleaded that they entered into the contract induced by those representations, which were misleading because they were representations as to future matters for which the plaintiff did not have reasonable grounds.[12] They allege that the conduct involved in each of the five representations was in contravention of s 52 and that each representation was a false and misleading representation concerning the characteristics of the property, contrary to s 53A(1) of the *Trade Practices Act*.

[24] They did not specifically allege that they suffered or were likely to suffer loss from those contraventions. But they sought relief under s 87(1) of the Act, by which the contract would be declared to be void and the deposit refunded to them. Having regard to the fall in the value of the apartment, which is proved by the

plaintiff, it is clear that if the effect of the contract is not displaced, the defendants will suffer a loss to the extent of their liability to the plaintiff for damages for breach of that contract.

[25] Each of those representations is denied by the plaintiff. But as I will discuss, the plaintiff agrees that at least Mr Hingston had dealings with Ms McGregor about this contract and that Mr and Mrs Hingston also went to the plaintiff's sales office at some stage where they spoke to the plaintiff's representative, Ms Panagakos.

[140763]

The evidence

[26] The construction of the Orchid Tower was delayed by the appointment of administrators of the plaintiff in January 2009. Work resumed in May 2009 and was completed in mid 2011. The view from the subject apartment towards the east is obstructed by another apartment building, which is called "Soul". It is more than 70 floors in height and is about 100 metres to the east of the Orchid Tower with a frontage to The Esplanade. The defendants' case is that they would not have agreed to purchase this apartment had they thought that there would be such an obstruction to the view.

[27] In evidence, there are photographs of the current views to the north, east and south from this apartment. The views to the north and south are unobstructed. Undoubtedly, the Soul building obstructs the view to the east. I accept that the overall outlook from this apartment would be better without the Soul building and that probably the apartment would be more valuable with that entirely unobstructed view of the ocean.

[28] The only evidence in the defendants' case was from Mr Hingston. His evidence in chief was given by a three page statement. He was extensively cross-examined. The plaintiff's oral evidence was from Ms McGregor and Ms Panagakos. Subsequently, I permitted the plaintiff to reopen its case to lead further evidence from Ms Panagakos, this time by affidavit, as I will discuss.

[29] Mr Hingston's evidence in chief as to the alleged representations was substantially in accord with his pleading. He said that one weekend in March 2008, he said that the defendants entered the office where Ms McGregor worked and talked to her about the proposed Hilton development. He referred to a model at that office which was "not just of the building, but also of the surrounds to the east showing the ocean". He says that the model showed "no buildings shown as obstructing the view of the ocean from the building". There was some discussion with Ms McGregor about the prices for the units, in the course of which Mr Hingston decided that the penthouses and sub-penthouses were outside his price range. He then asked Ms McGregor:

> "What are the best units still available, facing east with unobstructed views."

adding:

> "There's not much use buying in this development if you lose your views."

According to this statement, Ms McGregor replied:

> "If you want unobstructed views, the best one remaining in unit 25202. It is on the level below the penthouses and sub-penthouses. If you get one that high in the building, your views will be safe. The Council won't approve another building in front of it at that height."

[30] The defendants were then taken by Ms McGregor to a nearby office of the developer. At that place, there were photographs as well as displays of rooms and, in particular, "photographs of the views which would be available from the rooms", none of which showed "any obstruction of the views". At this office, Mr Hingston talked to the staff about the apartment which Ms McGregor had suggested and he was shown by them its location on a model of the Orchid Tower. He said that this apartment "faced east and provided 180 degree views of the ocean". At that point, Mr Hingston says that he asked "[s]o is it correct that the views for this unit can't be built out?" to which one of the sales staff present responded "[y]es, the views from this level can't be built out".

[31] In his statement, he added that he was "given glossy brochures, concept drawings and links to internet sites to show what the views would be", none of which showed any obstruction of the views from the building.

[32] At that point, according to Mr Hingston's statement, the defendants signed a document which was "effectively an offer to purchase" and provided a cheque for $5,000 as a "holding deposit".

[33] Subsequently, contract documents were sent to the defendants' solicitor. The defendants signed the documents, paid the initial deposit and later provided the balance of the deposit by a bank guarantee. Mr Hingston said that had it not been for the representations in relation to the views from the unit, he would not have agreed to buy it.

[34]

[140764]

He said that at the time the contract was signed, there was no large building in front of the proposed Hilton building.

[35] Again according to his statement, about a year or a year and a half later, the defendants were again at the Gold Coast and noticed that there was a building being constructed on what became the Soul site. Mr Hingston said in his statement that this building was "then about 10 stor[eys] high". This prompted them to go again to the plaintiff's display office where they asked one of the staff how high this other building was going to be and whether it would "impact on our views?" They were told that it would not do so and that "[y]ou will be able to see the beach and the ocean over the top of it".

[36] Subsequently, according to Mr Hingston, the defendants visited the Orchid Tower building when they were invited as purchasers to inspect their apartment. On that inspection, they found that the view of the ocean was "badly obstructed" by the Soul building and that they were looking into apartments within that building.

[37] Although Mr Hingston's statement referred to brochures and other material which he had received at the sales office, he did not tender such documents. As the plaintiff's case was conducted to the completion of addresses on the second day of the trial, no such brochure was tendered by the plaintiff. I was then informed that the plaintiff had been unable to locate an example of the brochures which were used in February and March 2008. However, subsequently the plaintiff applied to reopen its case to tender, by an affidavit of Ms Panagakos, examples of the brochures which had been used then. The plaintiff does not seek to draw any assistance from the content of those brochures. It emerged that the plaintiff was seeking to tender these brochures only to correct the record where it had been said that they were no longer available. The further evidence was admitted, there being no apparent prejudice to the defendants.

[38] There were two brochures which were then used. There was one of about 10 pages and a more extensive brochure containing about 50 pages. Both were available at the plaintiff's sales centre in 2008. Ms Panagakos said that it was her practice to give the shorter document to anyone who came to the display centre and to give the longer document only to people who were interested in apartments above the 49th floor or who had already purchased apartments. It is likely that the defendants were given both documents.

[39] Mr Hingston did not make any submission which was directed to the content of these two brochures. But they are consistent with his evidence that the brochures which were given to the defendants did not show any obstruction of views from the building, at least from the height at which the defendants' apartment would be situated. The brochures contained images of the proposed two towers in the development superimposed upon photographs of this part of Surfers Paradise. They showed no building between the Orchid Tower and the sea which would obstruct the views from the subject apartment. These images clearly represented that if the built environment between the Orchid tower and the ocean remained as it was in these photographs, there would be no obstruction of the view from the subject apartment. However, there was no text within these brochures which suggested that the locality would remain the same as depicted in those photographs and that, for example, there was some impediment to the development of that locality from the relevant planning laws. On the defendants' case, the representations to that effect were made *orally*, by Ms McGregor and by someone at the plaintiff's sales office.

[40] A number of documents which were tendered by the plaintiff showed that the relevant dealings with the defendants occurred over several days rather than upon the one day as Mr Hingston said in his evidence. The first of those documents is a form described as a "Client Registration Sheet" which was completed by Ms McGregor. It shows Mr Hingston (only) as the "client", consistently with Ms McGregor's recollection that

it was Mr Hingston alone who came to her office and discussed with her the proposed development. On this document, Ms McGregor recorded Mr Hingston's contact details and that she had provided these details to "Michelle" (who was Ms Panagakos). She recorded that Ms Panagakos was "calling re: $5,000 deposit", meaning that it was Ms Panagakos

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who was to contact Mr Hingston about the deposit. Ms McGregor subsequently recorded that this $5,000 deposit had been paid on 11 March 2008. This was prior to the contract being signed. The so called deposit was to secure some priority over other prospective purchasers in the negotiations.

[41] On the same document, on 13 March 2008 Ms McGregor noted that she had spoken to Mr Hingston saying that she had sent to him the "E pack", which was some material about the development. On 19 March 2008, she made a further note on this form, recording her conversation with Ms Panagakos about Mr Hingston's proposed purchase.

[42] On 19 March 2008, Ms McGregor faxed to Mr Hingston a copy of the floor plan for the proposed apartment. That appears from the fax imprint on the copy of that plan.[13]

[43] A further document records that both defendants went to the plaintiff's display centre on 22 March 2008. Ms McGregor and Ms Panagakos recalled that Ms McGregor then introduced them to Ms Panagakos at the display centre.

[44] There is a further document, headed "Client Follow Up Procedure", on which Ms McGregor made a series of notes from 25 March 2008 to 4 June 2008. They are consistent with her evidence that she had a number of conversations with Mr Hingston prior to the contracts being signed of a kind to be expected between a vendor's agent and a purchaser. There is no reference in them to any discussion about views. The discussions after the contracts were signed, as there noted by Ms McGregor, were for the most part in relation to the payment of the deposit required by the contract.

[45] It therefore appears that Mr Hingston is mistaken in his recollection about his first meeting with Ms McGregor. He was alone when he first spoke to her at her office and that occasion was in February and some weeks prior to both defendants being in the display office. These inaccuracies are of some significance in the assessment of his evidence.

[46] Ms McGregor described the model which was at her office. She said that it was "pretty much the same" as that which was at the plaintiff's display centre (except that it was bigger than that in her office). There are photographs of the model at the centre.[14] Contrary to Mr Hingston's evidence, that model at the display centre did not depict the built environment between the Orchid Tower and the ocean. It was a model of the two towers of the development on effectively only its own site. There is no real likelihood that, contrary to Ms McGregor's evidence, the model at her office showed more of the surrounding locality than that at the display centre. Therefore, I find that the models at both offices did not suggest that the views would be unobstructed.

[47] When cross-examined, at one point Ms McGregor appeared to concede that she had been asked by Mr Hingston in her office to identify units which had unobstructed views. That was the answer she gave in the highlighted part of this passage:[15]

> "So if someone comes in and they want a unit with unobstructed views, which ones would you have suggested to them?---I wouldn't have. I would've taken them to the Raptis display centre.
>
> Did you know which ones had unobstructed views?---No.
>
> You didn't. So you hadn't been around the Soul building and looked at their display to see that that building was going to be 77 stories high and therefore anything built behind it wouldn't have obstructed views?---Sorry, what was the question?
>
> You said you didn't know whether the views would be obstructed or not. So — but you did know that there was a building going up in front of it?---I — *I believe you asked me which units had unobstructed views so — and I didn't know that information*. As for Soul, yes, I had been into their display centre.
>
> So you knew that any building — any apartment facing east to the water would have an obstructed view?---Well, Soul was going up in front of the Hilton.

That's right?---Yes.

So you knew it would have an obstructed view?---Well, Soul was going up in front of the Hilton, so, yeah.

[140766]

Okay. Well, I put it to you that you - - -?---You'd be able to see Soul in front of the Hilton.

I put it to you that you did know that any units facing the ocean would have obstructed view because the Soul building was going up in front of it. Did you convey that message to any of your buyers or me?---I was never asked that question."

In context, particularly when read with the final answer in that passage, Ms McGregor was not conceding that she had been asked that question in her office. Rather, the highlighted answer was a reference to the question she had been asked a few lines earlier in that passage.

[48] Ms Panagakos recalled speaking to Mr Hingston by telephone and meeting Mr and Mrs Hingston at the display centre. She was asked whether on any of those occasions, she spoke about "uninterrupted views", to which she answered:

"No. He wanted to know that he could see the coastline, basically, the coastline of the — from east — sorry — from north to south. And that's exactly the case; this apartment faces direct east and you can look north to south."

She said that he did not ask at any stage whether the views of the coastline "could not be built out".[16]

[49] In cross-examination, Ms Panagakos described the views from the apartment today as "[a]bsolutely stunning" and that apart from the Soul building, "[i]t's all unobstructed".[17] Her evidence tended to confirm what would be expected, which is that she would not have been reluctant to promote the merits of this apartment by her descriptions of the likely views from it. Still the question is whether either she or Ms McGregor said something to the effect that nothing would be built which would obstruct those views to any extent.

[50] One circumstance which affected the likelihood of the alleged representations was that construction of the Soul building had begun by February/March 2008. In evidence are photographs of the Soul site as at 5 February 2008, some of which show signage on the boarding facing The Esplanade which informed passers-by that this was the site of a building, to be completed in 2010, and which would be "rising 77 levels above Cavill Avenue and The Esplanade".[18] The signage directed those interested to a display centre for this development in Cavill Avenue. Mr Hingston admitted that he saw that boarding.[19] He said that "[t]hey were demolishing the shops that had been there for years as far as I could see but it was all boarded off and I didn't take much notice of it because there's always things going on around the country. I just didn't take much notice of what was happening … You couldn't see into the site and you couldn't — it didn't tell you what it was. It was just construction work".[20]

[51] Mr Hingston denied that he read an article in *The Australian*, published 1 March 2008, which described the Soul development as having 77 storeys.

[52] It is not inherently probable that he read that newspaper article. But it is surprising that when he was attracted as a passer-by to the office of Ms McGregor and its promotion of the Hilton development, he apparently overlooked the Soul development. It would be remarkable if, as he appears to suggest, he decided to purchase an apartment off the plan at the price of more than $3 million without giving any consideration to what was otherwise available in the same market. According to his evidence, this was not his first investment in real estate, which again suggests the likelihood that he would have conducted some research of the market. But most importantly, he recalls walking past the boarding on the Soul construction site but offered no credible explanation for how he could have overlooked the potential impact of that development upon the apartment which he proposed to purchase.

[53] The obviousness of the Soul development with its proposed height is significant here in two ways. The first is that it affects the likelihood that the defendants were in truth misled by the representations which are

alleged by them, if those representations were made. The second is that it affects the likelihood that the representations were made. Of course it is not unknown for representations to be made, in the promotion of real estate, which would be obviously false to an alert prospective purchaser. But the obviousness of the circumstances of the Soul development tend

[140767]

to make it less probable that either Ms McGregor or Ms Panagakos made the alleged representations.

[54] The absence of Mrs Hingston as a witness was not satisfactorily explained. Her absence is the more remarkable for the fact that she is a defendant and a counterclaimant. On the defendants' pleaded case, Mrs Hingston was a participant in each of the critical conversations. The evidence of Mr Hingston was always going to be strongly challenged. In these circumstances, it should be inferred that Mrs Hingston's evidence would not have assisted the defendants' case.[21]

[55] The brochures which must have been given to the defendants did not depict the Soul development. But it is another thing to say that they represented that there could not be a development in the locality which could affect the defendants' views.

[56] It is inherently likely that none of the three witnesses has a precise recollection of what was said in any of the relevant conversations. The imprecision of Mr Hingston's evidence is demonstrated by its inconsistency with the contemporaneous documents. And it would be unrealistic to expect either Ms McGregor or Ms Panagakos to precisely recall the words of their conversations in circumstances where this was one of many sales or potential sales within this development. Most probably each of the agents made statements which promoted the apartment by reference to its views. Ms McGregor suggested that her role was not that of a seller's agent acting in the normal way and that instead, her task was to simply direct interested persons to the display centre. That is difficult to accept. In her office there was material, including a model, which depicted and promoted this development. And importantly her employer was entitled to a commission of three per cent of the sale price under its agreement with the plaintiff.[22]

[57] But the defendants must go further than proving that the views were represented as something such as exceptional or "stunning". The essence of their case is that they were told that there could be no development in the locality which would obstruct the views of the ocean from their apartment. Ultimately, I am not satisfied that such a representation was made. In particular, I am not satisfied that it was represented that there was some legal impediment to the construction of a building which would have that effect.

[58] The agents knew or believed that Mr Hingston was an experienced property investor. This makes it even less likely that either of them would have provided the alleged assurances about views when there was such a small prospect that those assurances would be accepted as credible. After all, the locality was central Surfers Paradise with very many high rise buildings. There is nothing suggested by the evidence which might have caused a buyer to think that there had been some recent change in the planning laws, such that a nearby building could not be constructed to the height of that which was to be constructed to include their apartment. And as I have already noted, the obviousness of the Soul development makes it more unlikely that the alleged representations were made.

[59] A further circumstance which is adverse to the defendants' case is that no complaint was made by them until close to the due date for settlement of the contract, when the height or likely height of the Soul building, as it emerged from the ground, must have become obvious at least by 2010.

Conclusion

[60] The outcome is that the plaintiff's claim succeeds and the counterclaim fails. According to my reasoning above at paragraph 10, damages should be assessed in the amount of $1,094,000.

[61] Clause 15.6 of the contract provided that the defendants should pay interest at the rate of 15.6 per cent on "any money payable by [them] under the contract". The plaintiff claims interest at that rate on the amount which should have been paid at settlement (which the defendants do not dispute was $3,146,095.90[23]) from the date of settlement until the contract was terminated by the plaintiff on 22 September 2008 (a total of 14 days). That interest amounts to $18,100.83. The plaintiff claims interest from 23 September 2011 until the

date of judgment at the prescribed rates for default judgments, on the amount of the assessed damages. I am persuaded to award interest on that basis from

[140768]

the termination of the contract (as well as the interest under the contract in the sum of $18,100.83). The interest at the prescribed rates on that sum of $1,094,000 from 23 September 2011 to the date of this judgment amounts to $308,058.40.

[62] Therefore, the defendants will be ordered to pay to the plaintiff the sum of $1,420,159.23. The counterclaim will be dismissed.

Footnotes

1 Transcript 1 – 2.
2 *Uniform Civil Procedure Rules* 1999 (Qld), r 189.
3 Exhibit 3, tab 35.
4 Written Submissions, para 91, footnote 72.
5 Counterclaim, para 18.
6 Counterclaim, para 22.
7 Counterclaim, para 19.
8 Counterclaim, para 20.
9 Counterclaim, para 22.1.
10 Counterclaim, paras 22.2, 22.3.
11 Counterclaim, para 22.
12 In reliance upon s 51A of the *Trade Practices Act* 1974 (Cth).
13 Exhibit 3, tab 5.
14 Exhibit 3, tabs 36 and 37.
15 Transcript 1 – 75.
16 Transcript 2 – 7.
17 Transcript 2 – 30.
18 Exhibit 2.
19 Transcript 1 – 26.
20 Transcript 1 – 26–27.
21 *Jones* v *Dunkel* (1959) 101 CLR 298.
22 Exhibit 3, tab 26.
23 Exhibit 3, tab 25.

LAMBERT PROPERTY GROUP PTY LTD v BODY CORPORATE FOR CASTLEBAR COVE COMMUNITY TITLE SCHEME 37148

(2015) LQCS ¶90-202; Court citation: [2015] QSC 179

Queensland Supreme Court

Decision delivered on 29 July 2015

Conveyancing — Easements — Where developer owned a vacant lot and an adjacent apartment complex — Where developer irregularly procured (through the developer's improper use of powers of attorney), a resolution which approved entry into a form of easement over the apartment complex for the benefit of the vacant lot — Where the easement was never granted — Where the development did not proceed — Where the developer later sold the vacant lot — Where the new owner applied for a statutory right of user under s 180 of the Property Law Act 1974 in terms of the easement document (even though it had no legal rights as a result of the document) — Where the body corporate of the apartment complex opposed the application — Property Law Act 1974, s 180.

[140769]

In 2008 a developer owned a vacant parcel of land (Lot 1) situated in Queensland and an adjacent apartment complex called Castlebar Cove. At the time, the developer intended to develop Lot 1 to become part of Castlebar Cove. At this time the developer controlled Castlebar Cove's body corporate.

At an extraordinary general meeting of Castlebar Cove's body corporate in 2008, the developer irregularly procured (through the developer's improper use of powers of attorney), a resolution which approved entry into a form of easement. The easement would have enabled the construction and development of Lot 1 to form part of Castlebar Cove for a consideration of $1 (however presumably the residents of Lot 1 would have made contributions to Castlebar Cove's body corporate). Despite the passing of the resolution, the easement was never granted.

Specifically the easement would have allowed Lot 1's residents to access their car parking via Castlebar Cove's secured carparking basement. This would have required a hole to be constructed in an existing wall of the Castlebar Cove carpark.

Later purchasers of apartments in the Castlebar Cove complex were not made aware of the resolution to allow the easement.

The developer did not proceed with developing Lot 1. Instead in 2011, after obtaining development approval for the development (which was granted on the condition that vehicle access to Lot 1 would be via the easement through Castlebar Cove's land), it sold the land to the applicant in these proceedings. The applicant wanted to develop the land into an apartment complex which would have been separate to the Castlebar Cove complex and also on a larger scale than was approved under the development approval. To facilitate access to the development, it applied for a statutory right of user under s 180 of the *Property Law Act 1974* over the common property of Castlebar Cove in terms of the easement document which the body corporate resolved to grant in 2008 (even though it had no legal rights as a result of the document).

Castlebar Cove's body corporate (being the respondent in these proceedings) resisted the application arguing that if the easement was granted, the security and privacy of Castlebar Cove's residents would have been reduced for a "woefully inadequate and unreasonable" $1 consideration. It also identified an alternative means of access for Lot 1's residents.

The substantial issues to be determined (as per s 180) were:

- was it reasonably necessary in the interests of the effective use in a reasonable manner of Lot 1 to have access via the Castlebar Cove car park in the manner proposed?
- had the applicant satisfied the court that use of Lot 1 in the manner proposed was consistent with the public interest?
- could the owners of the Castlebar Cove land be adequately recompensed in money for any loss or disadvantage which they may suffer from the imposition of the easement over their common property?
- was the body corporate's refusal to accept the imposition of the easement on the terms contained in the 2008 document unreasonable in all the circumstances?

Held: for the body corporate. The developer's application failed.

Reasonable necessity

1. The applicant failed to establish that it could not undertake the development it intended without access via Castlebar's carpark. The body corporate's alternative that it put forward (ie access through an existing driveway over which Lot 1 enjoyed legal rights) was a preferable method for the proposed development that avoided interference with the proprietary rights of the Castlebar Cove's owners and also personal inconvenience to them.

[140770]

Section 180(3) matters

2. The applicant failed to satisfy the court that it was in the public interest that Lot 1 be used in the manner proposed. The 2008 document contained no details of the practical aspects to regulate the use of the easement and matters which would be a potential source of conflict between the parties who sought to make use of the easement and residents of Castlebar Cove. For example, the 2008 document does not address matters such as the speed at which vehicles may travel, security arrangements, how any door or firewall between the two properties would be operated, how rules about security and speed would be enforced, the movement of refuse from Lot 1 along the easement and its storage on Castlebar Cove prior to collection, the roles of on-site managers and the cost of their services in managing access and maintaining security.

3. Further, the applicant failed to provide an appropriate amount of detail about the practical operation of the proposed access which made it hard to assess the financial cost to the body corporate in meeting the obligations which the easement would impose upon it. For example, what would be the cost of issuing security fobs to Lot 1's residents to allow them access to Castlebar Cove's car park but not its lifts? Further it was hard to assess in financial terms adequate compensation for the actual and perceived loss of privacy and reduction in security among the Castlebar Cove residents who presently felt secure when entering and leaving their cars in the secure basement car park.

4. Given that:

(a) the 2008 resolution was passed through the improper use of powers of attorney
(b) the 2008 resolution was not disclosed to individuals who later acquired apartments in Castlebar Cove
(c) neither the previous developer nor anyone else took steps to progress through the granting and registration of the easement
(d) the easement would impose significant obligations upon the body corporate for the benefit of Lot 1's owners where there was no intention of developing Lot 1 to form part of an amalgamated scheme,

the body corporate's refusal to consent to the imposition of the easement was not unreasonable.

5. Additionally the 2008 resolution was passed in circumstances in which the previous developer then intended to develop Lot 1 as part of a larger Castlebar Cove development. The easement expressly provided that it would be extinguished if the development of Lot 1 in this manner did not proceed. The fact that Lot 1 will never be part of the Castle Cove complex was a good reason alone for the body corporate's change of position.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M D Hinson QC (instructed by McBride Legal) for the applicant.

D A Savage QC and G Handran (instructed by Mahoneys) for the respondent.

Before: Applegarth J

Applegarth J:

ORDERS:

1. The application is refused.
2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

Applegarth J:

[1] The applicant, Lambert Property Group ("LPG"), owns vacant land at 108 Lambert Street, Kangaroo Point. Its land (Lot 1) is suitable for development.

[2] Castlebar Cove is a residential apartment development which borders Lot 1. It is situated

[140771]

at 39 Castlebar Street, Kangaroo Point, and comprises two, 12 storey towers, each with 19 units. Its residential towers sit above a podium level. Castlebar Cove's residents share a foyer, a waiting area and other facilities including a swimming pool and a gymnasium. They also share a common basement car park which abuts the southern boundary of Lot 1. The car park is accessible only by internal lifts and through a secure gate access at the front entrance. Access to the car park requires a security fob.

[3] Vehicular and pedestrian access to the land comprising the Castlebar Cove Community Title Scheme land is via Castlebar Street. It is a narrow, steep street which runs downhill off Lambert Street. There is also pedestrian access from Lambert Street to Castlebar Cove.

[4] LPG has no access rights over the Castlebar Cove land, let alone through Castlebar Cove's secure car park. It applies for a statutory right of user under s 180 of the *Property Law Act* 1974 ("*PLA*") over the common property of the Castlebar Cove's Community Title Scheme, in terms of an easement document which the body corporate resolved to grant for the benefit of Lot 1 at an extraordinary general meeting held on 4 August 2008.

[5] In August 2008 the body corporate of Castlebar Cove was under the effective control of its developer, Sincere Properties (Kangaroo Point) Pty Ltd, which also owned Lot 1. At the time, Sincere had plans to develop another stage of Castlebar Cove on what was described as the Stage 3 land, which comprised Lot 1. It had lodged a development application for a high rise on Lot 1. At an extraordinary general meeting of the body corporate on 4 August 2008, Sincere irregularly procured, through the use of Powers of Attorney which it held, a resolution which approved entry into a form of easement. The easement, if granted for a consideration of $1, would have enabled the construction and development of Stage 3 of Castlebar Cove. But despite the passing of the resolution, the easement was never granted. No easement was signed and registered, and the proposal to develop Stage 3 of Castlebar Cove fell away.

[6] Having obtained in November 2010 a development approval for the construction of a high rise apartment block on Lot 1, Sincere sold Lot 1 to LPG. LPG does not intend to facilitate the further development of the Castlebar Cove scheme. Instead it has plans to develop Lot 1 as a stand-alone development.

[7] Although LPG has no legal rights by virtue of the 4 August 2008 resolution, it asks the Court to grant it an easement over the common property of Castlebar Cove on the terms of the August 2008 resolution. It would thereby acquire valuable access rights and inconvenience the residents whose common property the respondent controls by paying a consideration of $1.

[8] Unsurprisingly in those circumstances, the respondent resists LPG's application to grant an easement on the terms of the 2008 easement document.

The issues

[9] The application is opposed on the grounds that LPG has failed to establish that access to Lot 1 via the Castlebar Cove car park is reasonably necessary for the effective use of Lot 1. It contests LPG's position that the construction of an opening in the concrete wall of Castlebar Cove's car park and the granting of an easement of indefinite duration is "reasonably necessary" for the effective use of Lot 1 as an apartment complex.

[10] The authorities on the meaning of "reasonably necessary" in the context of s 180(1) of the *PLA* establish the following principles:

> "(a) One should not interfere readily with the proprietary rights of an owner of land.
>
> (b) The requirement of 'reasonably necessary' does not mean absolute necessity.
>
> (c) What is 'reasonably necessary' is determined objectively.
>
> (d) Necessary means something more than mere desirability or preferability over the alternative means; it is a question of degree.
>
> (e) The greater the burden of the imposition that is sought the stronger the case needed to justify a finding of reasonable necessity.
>
> (f) For a right of user to be reasonably necessary for a development, the
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> [140772]
>
> development with the right of user must be (at least) substantially preferable to development without the right of user.
>
> (g) Regard must be had to the implications or consequences on the other land of imposing a right of user."[1]

[11] The respondent identifies an alternative means of access by which vehicles might access Lot 1 via an existing driveway off Lambert Street. The current development approval requires this driveway to be improved and to be used as a means of access for cars and trucks to park on the ground level of Lot 1.

[12] Subject to a legal question to which I will return, the town planning experts called by both LPG and the respondent do not identify any planning impediment to changing the access into the development so that all traffic goes via the Lambert Street driveway, rather than having some traffic go through Castlebar Cove's secure car park to Lot 1's proposed basement car park.

[13] The respondent also contests that LPG has satisfied s 180(3). It requires the Court to be satisfied that:

> "(a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
>
> (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
>
> (c) … the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable …"

[14] The respondent submits that the easement proposed by LPG is completely lacking in detail about the regulation of access and that LPG's case is so lacking in detail in terms of evidence that it is impossible to reach any conclusion about the monetary compensation which would adequately recompense for loss or disadvantage.

[15] The respondent also submits that its refusal to agree to accept the imposition of an easement in terms of the August 2008 document, which would require it to accept $1 in return for granting the easement, could hardly be described as being unreasonable in all the circumstances. The $1 sum is said to be "woefully inadequate and unreasonable in all of the circumstances".

[16] LPG, on the other hand, points to the fact that the respondent in 2008 resolved to grant an easement for a consideration of $1 and had thereby valued its own recompense. It submits that the respondent's refusal to accept the imposition of an easement on the terms of the August 2008 document is unreasonable:

> (a) given the absence of any satisfactory explanation for the respondent's change of position;
> (b) the fact that the basement was designed and constructed to accommodate the access referred to in the condition of the development approval; and
> (c) the development approval applies to the land which was subject to the 2007 development application, which includes the common property on Castlebar Cove.

[17] The respondent replies that there has been a significant change in circumstances since the respondent, which was then controlled by Sincere, resolved to grant an easement for $1 to facilitate the future development of the scheme. That nominal sum was predicated on owners of the new building being part of Castlebar Cove and thereby making contributions to the respondent. There is no prospect of that now occurring, but if the easement is granted it will burden the respondent (and thereby the owners of apartments in Castlebar Cove) with obligations in relation to the easement.

[18] The substantial issues may be summarised as follows:

> • Is it reasonably necessary in the interests of the effective use in a reasonable manner of Lot 1 to have access via the Castlebar Cove car park in the manner proposed?
> • Has the applicant satisfied the Court that:
>
> > (a) use of Lot 1 in the manner proposed is consistent with the public interest;
> > (b) the owners of the Castlebar Cove land can be adequately recompensed in money for any loss or disadvantage which they may suffer from the
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> [140773]
>
> > imposition of the easement over their common property; and
> > (c) the respondent's refusal to accept the imposition of an easement on the terms contained in the 2008 document is "in all the circumstances unreasonable"?

[19] If LPG satisfies the Court that an order for a statutory right of user in terms of the 2008 document should be made because the s 180(3) factors are satisfied, then it will be necessary to consider a provision for payment by way of compensation or consideration as in the circumstances appears to be just,[2] and such other terms and conditions as may be just.[3]

The centrality of the 2008 document to the applicant's case

[20] LPG hangs its hat on the 4 August 2008 resolution, whilst conceding that it enjoys no legal rights as a result of that resolution. It seeks an easement to be granted to it on the same terms as the sparse terms of

the 2008 document, which contains no details about practical aspects to regulate the use of the easement and matters which would be a potential source of conflict between parties who sought to make use of the easement and residents of Castlebar Cove. The 2008 document does not address practical matters such as the speed at which vehicles may travel, security arrangements, how any door or firewall between the two properties would be operated, how rules about security and speed would be enforced, the movement of refuse from Lot 1 along the easement and its storage on Castlebar Cove prior to collection, the roles of on-site managers and the cost of their services in managing access and maintaining security. Many of these and other matters would have been regulated by by-laws if Lot 1 had become part of the scheme land and the common property of Lot 1 had become part of the common property of an expanded Castlebar Cove development.

[21] LPG's application to the Court does not seek the imposition of an easement on commercial terms that would require the owner of Lot 1 to pay a consideration of more than $1, and which contains detailed terms regulating the use of the easement and conditions which serve to preserve, as far as possible, the security of the Castlebar Cove car park. LPG's approach is that it should acquire the easement according to the terms of the 2008 document, which requires it to pay $1, and that compensation is something to be worked out pursuant to s 180(4)(a) by the Court doing its best to assess a just amount by way of compensation or consideration for an easement of an indefinite duration.

[22] Because LPG rests its case, particularly in terms of s 180(3) considerations, upon the resolution passed on 4 August 2008, it is necessary to give an account of certain historical matters, including the circumstances under which the resolution came to be passed.

Background

[23] Sincere owned a number of adjoining lots close to the river at Kangaroo Point. It proposed the development of its land in stages. Stage 1 involved the construction of two towers and other improvements which became what is now Castlebar Cove. Stage 2 was to be a volumetric subdivision of part of the common property of the scheme so as to provide, among other things, additional lots for visitor parking on the ground level of Castlebar Cove. It has occurred.

[24] Stage 3 was to be on Lot 1, and was intended to create up to 10 additional lots being residential apartments, together with common property including a swimming pool, health club and gymnasium and other recreational areas. Stage 3 was not developed, and now never will be.

[25] Lot 1 is situated at 108 Lambert Street, and is bounded to the south-east by the scheme land for Castlebar Cove Community Title Scheme 37148. Before the establishment of that scheme in late 2007, Sincere applied to the Brisbane City Council to develop Lot 1 for use as seven multi-unit dwellings. Its development application was lodged on 22 February 2007. Sincere owned the Castlebar Cove land at the time, as well as Lot 1. The application was made in respect of several parcels of land that it owned, situated at 108 and 110 Lambert Street and 39, 41 and 44 Castlebar Street. Some of those lots later became the Castlebar Cove scheme land.

[26] The development application was amended from time to time but, in its final form, provided for seven units (with five bedrooms each) over eight storeys, together

with a basement car park. Residents of the new building would access the basement car park through the car park entrance to Castlebar Cove and drive through an opening which was to be made in the adjoining basement wall in Castlebar Cove. Other vehicles, including visitors' cars and removalist trucks, were to access the new building by the existing driveway to Lambert Street.

[27] Stage 1 of Castlebar Cove was completed in 2007. The common property and lots forming the scheme were created by registration of a survey plan on 13 July 2007. The Castlebar Cove scheme was established on 2 October 2007. The community management statement establishing the scheme explained that the development of Stage 1 on the Stage 1 land had been carried out. The "Scheme land" as described in the community management statement consisted of the community property and the lots on Stage 1. It did not include Lot 1. Instead, the statement explained that the land for Stage 3 (Lot 1) would not form part of the scheme "until registration of the building format plans creating the Lots and common property" in that

stage. The community management statement for the Castlebar Cove CTS Scheme 37148 also stated: “The Original Owner may elect to not proceed with any one or more stages of the proposed development”.

[28] The statement made clear that Lot 1 did not then form part of the scheme. Lot 1 (the Stage 3 land) was described as being intended to be subdivided in order to give effect to Stage 3 of the development. Registration of the building format plan for Stage 3 and a new community management statement for that stage of the development was intended to occur. The community management statement for the existing Castlebar Cove scheme recorded: “the Stage 3 Land, as then subdivided, will **then** form part of the Scheme”. (emphasis added)

[29] Another part of the scheme document set out by-laws for the future development of Stages 2 and 3. Another schedule to the document contained the details for future development of the scheme, including establishing common property, utility infrastructure and utility services and connections.

The 4 August 2008 resolution

[30] At the time the common property and lots forming the Castlebar Cove scheme were created by registration in July 2007, and at the time the scheme was established on 2 October 2007, Sincere exercised control over the newly-created body corporate. It owned many lots and had been granted powers of attorney over lots which it no longer owned. On 4 August 2008 an extraordinary general meeting of the body corporate was held. It seems that the meeting was attended by three officeholders of the body corporate, the building manager, a representative of the manager of the scheme and a solicitor. The meeting resolved without dissent that a Form 9 Easement which had been tabled be approved and entered into by the body corporate and signed by one committee member and the chairman. Another resolution, which was also passed without dissent, approved amendments to remove certain clauses from the document and to insert a new clause 7. The meeting also resolved that after a survey plan of the easement was obtained the body corporate would execute the plan of easement.

[31] Mr O’Reilly, who was secretary of the body corporate at the time, has given evidence that the copy of the minutes in evidence is accurate. The minutes record that the new clause 7 was inserted into the document after Mr O’Reilly expressed his concerns about the encumbering easement over the common property of the scheme land. The minutes record that the meeting was advised that “the requirement for the easement was requested by the Brisbane City Council as a condition of the Development Permit for stages 2 and 3”. That matter provides an important context in which to consider the handwritten, new clause 7.3. It provides:

> “The parties agree that if this Easement is no longer required in order to facilitate the further development of the Scheme (stages 2, 3 and any other land to form part of the Scheme as contemplated in the CMS), and this Easement is not required in order to provide access to those further parts of the development, then this Easement, subject to obtaining the consent of the Brisbane City Council, will be extinguished to the extent it is no longer required. The parties agree to
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> [140775]
>
> sign any instruments or documents required to give effect to such surrender and registration of the instrument of surrender at the Queensland Land Registry.”

[32] For present purposes, it is sufficient to observe that the minutes of the 4 August 2008 meeting and the terms of clause 7.3 suggest that the easement was approved on the basis that the body corporate’s approval was necessary to meet a condition imposed by the Brisbane City Council for the development of Stages 2 and 3, and that if the easement was granted but was no longer required to facilitate the further development of the scheme, then it would be extinguished.

[33] The easement which the body corporate approved entry into on 4 August 2008 was never granted. It seems that in September 2008 surveyors were instructed to prepare a plan of easement, but no plan of easement is in evidence. No form of easement was executed by or on behalf of the body corporate and, as a result, no easement was in fact granted or registered. LPG does not contend that the 4 August 2008 resolution confers any legal rights upon it as the present owner of what was the proposed dominant tenement.

[34] There is no evidence that after September 2008 Sincere took any steps to progress the granting of an easement so as to carry into effect the 4 August 2008 resolution. This may be because of doubts about its validity.

[35] The respondent submits that the 4 August 2008 resolution was defective because of Sincere's improper use of powers of attorney. Briefly stated, the use or misuse by developers of a power of attorney of the kind Sincere purported to exercise on 4 August 2008 had been addressed by legislation. Section 219 of the *Body Corporate Community Management Act* 1997 (Qld), as it stood in 2008, limited the powers of a developer to use such a power of attorney. The respondent submits that the powers which Sincere purported to exercise on 4 August 2008 were not properly exercised, and LPG does not submit to the contrary.

[36] Many current residents of Castlebar Cove purchased their apartments after 4 August 2008. No mention was made of any easement or right of user over Castlebar Cove of the kind contemplated by the 4 August 2008 resolution. No proposal for an easement or right of user was disclosed in any disclosure documents to those purchasers.

The Development Approval

[37] The development application that was made by Sincere to the Brisbane City Council on 22 February 2007 to enable Sincere to develop Lot 1 as Stage 3 of Castlebar Cove had a protracted history. The application was approved, subject to conditions by the Council. Proceedings were commenced in the Planning and Environment Court and eventually on 19 November 2010 a changed development application was approved, subject to numerous conditions, by the Planning and Environment Court. An understanding of those conditions requires further reference to the configuration of Lot 1 and the easements which allow access to it and to neighbouring lots which are also a battle-axe shape.

[38] Lot 1 is a battle-axe shaped allotment, with the handle of the axe linking the major part of the lot to Lambert Street. The boundary forming the handle of the axe adjoins the northern boundary of Castlebar Cove. Members of the Daly family own three lots adjoining Lot 1. The Daly lots are also a battle-axe shape. Each has a townhouse situated on it.

[39] Lot 1 has the benefit of an easement over what might be described as the handle of the axe of the Daly lots. As a result, by a combination of its own land and the easement, Lot 1 has an existing access way 6.8 metres wide to Lambert Street. Similarly, by a combination of the handle of the axe that forms part of the Daly lots, combined with an easement granted over the Lot 1 handle, the Daly lots also enjoy right of access to Lambert Street.

[40] In other words, Lot 1 and the Daly lots each have rights of access to Lambert Street by a shared driveway. Road access, pursuant to ownership rights and existing easement rights, is a significant aspect for the development of Lot 1 and, for that matter, the future development of the Daly lots. Each reciprocal easement does not limit the intensity of use of it.

[41]

[140776]

So far as Lot 1 is concerned, the development approval with its conditions that was granted on 19 November 2010 attached to the land the subject of the development application to which the approval relates, and binds the owner, the owner's successor in title and any occupier of the land even if the land is later reconfigured.[4]

[42] The approval granted on 19 November 2010 relates to a seven unit development on Lot 1. Condition 5 requires the material change of use to be carried out generally in accordance with the approved drawings and documents. Those approved drawings and documents include drawings depicting the Lambert Street driveway. In particular, a ground floor car park access plan contains a notation: "ENTRY DRIVEWAY (EXISTING EASEMENT ACCESS) FROM LAMBERT STREET TO 108 LAMBERT STREET VISITOR PARKING". Drawings of a lower basement floor plan include the notation: "*CASTLE COVE BASEMENT WALL REMOVED TO PROVIDE ACCESS TO 108 LAMBERT STREET BASEMENT CARPARKING*."In short, the approved drawings and documents contemplate vehicular access to the developed Lot 1 through two means of access:

(a) the existing driveway for above-ground access, including visitor parking and the loading and unloading of trucks; and
(b) access via Castlebar Street and the common property of Castlebar Cove, including the entry ramp to its basement and then through the Castlebar Cove basement car park and through what is currently a concrete wall to the proposed Lot 1 basement car park.

[43] Condition 14 requires the surface of the existing Lambert Street driveway to be treated and finished to match the existing driveway and for the construction of external car parking surfaces. Incidentally, the work required for conditions relating to the existing driveway were thought by LPG's expert architect to involve work on the top part of the driveway and otherwise improving the driveway to make it more attractive as well as wider.

[44] Condition 28 deals with access, grades, manoeuvring and other matters and requires the construction and delineation or signing of areas that would permit the manoeuvring on Lot 1 of a SRV (which would include a removalist van or a refuse truck) and for the loading and unloading of the vehicles. Another condition requires an appropriate area for the storage and collection of refuse, including recyclables, in a position which is accessible to service vehicles on the site. Another condition requires parking on the site for 16 (including two visitor) cars and for the loading and unloading of vehicles within the site.

[45] Condition 27 concerns easements and refers to, among other things, "Easements (through the basement of existing development" as shown on certain approved plans which were received on 24 August 2010 "for access purposes" over certain lots that constitute Castlebar Cove in favour of Lot 1.

[46] Having regard to the history of the proposed development of Stages 1, 2 and 3 of the land owned by Sincere, the terms of the 4 August 2008 minutes and the evidence in general concerning the timing and process by which development approval was sought and eventually granted, it is reasonably apparent that the Council's approval of the original development application proceeded on the basis that the owner of the relevant lots, Sincere, proposed to develop Stage 3 of Castlebar Cove, and the Council granted a development approval on the basis that an easement through the basement car park of Stage 1 was required for the development of Stage 3 on Lot 1. Given the history of the matter, it would not also be surprising if the eventual approval that was granted by the Planning and Environment Court was based upon a similar assumption. However, counsel for LPG is correct to submit that the terms of the approval did not require, as a condition, that the new development on Lot 1 form part of an expanded Castlebar Cove development, whether described as Stage 3 or otherwise.

[47] To the extent that the Planning and Environment Court, and before it the Brisbane City Council, granted approval in the expectation that Lot 1 would form part of a larger scheme, it might have assumed that the proposed easement would be negotiated between the owners of the relevant lots so as to facilitate construction of, and access to, the new

basement car park on Lot 1 and that, at a later date, after Stage 3 was developed and a scheme established in respect of it, access rights would be governed by by-laws and the body corporate of the combined scheme. To the extent the approving authorities may have contemplated a different course, with the development of Lot 1 as a discrete development which was not intended to form part of an expanded Castlebar Cove scheme, the authorities might be taken to have assumed that it fell to a party seeking to satisfy the development conditions to obtain the required easement, either through negotiation with the owners of the proposed servient tenement or by the grant by a court of an easement under s 180 of the *PLA*.

[48] In any case, it is not suggested by LPG that Brisbane City Council or the Planning and Environment Court obliged the current owners of the common property at Castlebar Cove to grant an easement, let alone to grant an easement in accordance with the August 2008 document.

[49] In the circumstances which currently prevail, the development approval is subject to numerous conditions including a condition that an easement be obtained. The development approval should not be interpreted as amounting to a statement that the forms of access originally proposed by Sincere are the only, let alone the best, means of access to Lot 1. Expressed differently, the approval is a statement to the effect that you can develop Lot 1 according to the plans and drawings and conditions contained in the approval if you are able to obtain an easement through Castlebar Cove, including its secured underground car park.

If the parties whose property rights and interests were to be adversely affected by an easement were not prepared to grant the required easement by agreement, after negotiating suitable terms and a suitable price, then the approved development would depend upon an easement being granted by the Court.

More recent history

[50] Having obtained the development approval for Lot 1 in November 2010, Sincere did not proceed with its development, either as Stage 3 of Castlebar Cove or as a stand-alone development. Instead, soon after obtaining the development approval it sold Lot 1 to LPG.

[51] Sincere published an information memorandum to prospective purchasers in late 2010 and early 2011 which stated, among other things, that the development approval required the development to be "amalgamated into the Castlebar Cove Community Title Scheme". The information memorandum suggested that the benefits of amalgamation were that it would allow residents of the proposed development to access their basement parking via the secured basement of the Castlebar Cove residents' building. It incorrectly asserted that an access easement in favour of the 108 Lambert Street property had been granted by the respondent to facilitate the approved development of Lot 1. It also stated that amalgamation would allow residents of the proposed development to use the common facilities located within the Castlebar Cove residences, including a swimming pool, spa and an undercover visitor car park.

[52] LPG does not assert that it was misled by Sincere by these representations, and if it was, then its remedy would lie elsewhere.

[53] The sale to LPG seemingly was not made conditional upon a registered easement being granted over the common property of Castlebar Cove in favour of Lot 1. Any search by LPG in the course of its purchase of Lot 1 would have revealed that as owner of Lot 1 it would enjoy rights of access over its own land and the easement off Lambert Street. Any search would not have revealed a registered easement over the common property of Castlebar Cove in favour of Lot 1. The transfer of title to Lot 1 was registered on 4 February 2011.

[54] In October 2012, LPG sought a "pre-request" response from the Council in relation to proposed changes to the development on Lot 1. That request concerned increasing the number of units from seven to seventeen.

[55] By letter dated 14 May 2013, LPG, by Cardno HRP, requested the local authority to change the development approval by:

> (a) increasing the number of units to 16;
> (b) adding a level (i.e. to 9 nine levels);
> (c) increasing the footprint of the basement level;
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> [140778]
>
> (d) more than doubling the number of car parking spaces in the basement from 14 to 32; and
> (e) increasing the number of bedrooms to 50: i.e. accommodation for 100 people,
>
> whilst still having vehicular access through Castlebar Cove's basement.

[56] On 31 July 2013, the local authority gave notice that it was unable to consider the request due to a resident objecting to the proposed changes.

[57] On 11 October 2013 LPG applied to the Planning and Environment Court for declarations and other relief. During the proceedings, LPG:

> (a) represented that it intended to construct a building in accordance with the "pre-request" application or an alternative multi-unit dwelling by obtaining a "new development approval";
> (b) subsequently represented that it intended to construct a building in accordance with revised plans;
> (c) submitted plans indicating further changes to the development, including:
>
> i. adding a further level (i.e. to 10 levels);
> ii. increasing the number of units to 10; and

iii. increasing the number of bedrooms to 98 (i.e. accommodation for 200 people with an unknown number of car parks).

[58] LPG's proceedings in the Planning and Environment Court were dismissed for want of prosecution on 20 February 2015.

LPG's application to this Court

[59] The recent history of LPG's attempts to gain approval for a larger-scale development than currently approved is relevant to the application to this Court to grant an easement in terms of the 2008 document. The proposed easement contained in that document grants "an easement for a right of access, egress and regress (by pedestrian or Vehicles) for any and all purposes" over the common property of Castlebar Cove CTS 37148 in favour of Lot 1.

[60] The document does not limit the intensity of use, in terms of traffic and pedestrian numbers or the hours of day or night during which persons may exercise the right of access to the common property of Castlebar Cove, particularly by gaining entry to its secure underground car park. Clause 3 of the proposed easement obliges the body corporate for Castlebar Cove to not prevent or restrict "the Grantee or the Grantee's Associates in the exercise of the rights granted by this Easement". Those Associates include licensees and invitees who might be on Lot 1. Clause 3 goes on to oblige the body corporate to not obstruct access to the common property on Castlebar Cove to the Grantee and the Grantee's Associates and to ensure that any roadway or path is maintained and kept in good and trafficable condition. Whilst the Grantee must make good any damage caused to the body corporate's land and any improvement or structure on it, and cause as little inconvenience as practicable to the body corporate for Castlebar Cove and/or users of its land, the proposed easement gives extensive rights to the Grantee.

[61] The 2008 document, which contains the terms of the easement which the applicant applies to have imposed for the benefit of Lot 1, is remarkably lacking in detail about the regulation of vehicular and pedestrian access. It does not even make provision for the costs of construction (the original clause 6 having been struck out of the document) or indemnify the body corporate in respect of loss and damage which is suffered as a result of the construction work. Instead, clause 8.1 provides that each party indemnifies the other against any loss which occurs as a result of the other party's failure to strictly observe or perform the provisions of the easement.

[62] If granted in the terms sought, the easement would not limit use of the easement to the number of units currently approved for the development of Lot 1. However, counsel for LPG at the start of the case indicated that it would be prepared to accept a limitation to use of Lot 1 for no more than seven units and no more than 14 car parking spaces.

[63] The respondent and the residents whose properties and interests are affected by the proposed easement remain concerned about the consequence of granting vehicular and pedestrian access through its presently-secured basement car park by the creation of a hole in

an existing wall. Once granted, there would be scope under s 180(4)(d) of the *PLA* for the owner of Lot 1 (not necessarily LPG) in the future to apply to modify the easement if "some material change in the circumstances has taken place since the order imposing the statutory right of user was made".

[64] LPG says that it intends to commence construction of *the basement* of the building on Lot 1 within the next six months, having obtained an extension of the currency period of the development approval to 19 November 2015. Its building contract (if any) for the basement or any other part of the proposed building is not in evidence, and the respondent raises a question about the financial capacity of LPG to undertake the development, despite it having unencumbered title to Lot 1. In any case, there is nothing to stop LPG from selling the property once it has obtained the grant of an easement pursuant to s 180. LPG might sell Lot 1 to a developer which, as LPG has done, seeks to increase the scale of development on Lot 1 and gain approval to do so. For example, if LPG, or more probably, a buyer from it, wished to increase the scale of development in order to make the project financially viable or more profitable, and obtained development approval to do so, it might make an application under s 180(4)(d) to modify the easement to reflect the modified development approval. It might argue, as LPG has done in this proceeding, that such an easement

is reasonably necessary in the interests of effective use in a reasonable manner of Lot 1 by carrying out the approved development of the land.

[65] This may be characterised as a kind of floodgates argument in the light of LPG's offer to limit the easement to the currently-approved development of seven units and 14 underground car spaces. I am concerned with the presently-proposed easement in the light of the current development approval, not a possible future application to modify the easement in the light of a different scale of development. That said, when one is being asked to make an order which interferes with the proprietary rights of an owner of land and considering the implications or consequences of doing so, it is appropriate to have regard to the potential for a future modification of the easement which would then be a permanent feature of the land through the creation of an underground gap between basement car parks. If, for example, a future owner of Lot 1 was to reasonably conclude that the present scale of approved development did not make the project financially viable and that the effective use of Lot 1 required a taller tower or more units on each floor, and if the Council approved such a modified development, then that owner of Lot 1 would have grounds to apply for a modification of the easement which had been granted.

[66] Given the recent history of LPG's attempts to modify the approved development, the respondent's concern about the future and the consequences of granting an easement are not without justification. My focus, however, remains upon the current proposal and LPG's offer to limit any easement to the size and scale of the currently-approved development.

The evidence

[67] A very substantial body of affidavit evidence is before the Court and many of the respondents were not required for cross-examination. LPG's accountant, Mr Latif, exhibited numerous documents to his affidavit as a matter of convenience, notwithstanding that he did not have personal knowledge of the truth of their contents. I treat his affidavit as a convenient repository of information.

[68] The chairperson of the body corporate committee of the respondent, Mr Walton, also swore an affidavit which exhibited numerous documents and which described the scheme land, the applicant's land, the Daly lots and relevant easements. Mr Walton, and a number of other residents, swore affidavits about the circumstances under which they came to acquire their lots in Castlebar Cove, and that there was no disclosure to them from the seller (Sincere) or its agent in relation to the proposed easement.

[69] Various residents gave evidence about their concern in relation to the granting of an easement. This included the inconvenience to them from noise and dust during the construction period, an ongoing loss of privacy and noise from additional traffic if the easement is granted. The residents value highly their privacy and the security offered by present access arrangements through their secured

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basement car park. They expressed concern about the presence of strangers on the Castlebar Cove site.

[70] Although not specifically addressed in the proposed easement, LPG's case is that the easement will allow persons on Lot 1 to move rubbish bins from the Lot 1 basement car park through the Castlebar Cove underground car park, up the ramp and to leave them for collection on Castlebar Cove's common property. This is said to be consistent with the development approval conditions which require an appropriate area for the storage and collection of refuse in a position which is accessible to service vehicle "on the site". The site referred to in the condition is said by LPG to extend to the Castlebar Cove land. Leaving aside the meaning of "the site" in that condition, the proposed easement does not clearly confer a right to store refuse bins on Castlebar Cove after they have been transported through the basement and left on the ground of the Castlebar Cove common property. If LPG wished the easement to extend to a right to store refuse on Castlebar Cove's land then this matter would need to be clearly stated in any easement and not left to become a matter of dispute between neighbouring body corporates, their managers and residents. This is only one matter which is not adequately addressed in the proposed easement document.

[71] If granted in the terms sought, the easement would require Castlebar Cove to facilitate access by residents, licensees and invitees of the Grantee and its successors. Castlebar Cove would be required to not prevent or restrict access and this would require it, through its manager, to maintain access for residents of a neighbouring property and others who they invited into their basement car park area. It would require the

issue of security fobs to allow access to Castlebar Cove's secure basement car park, but not its lifts, and to address issues when those fobs did not work or were lost. Because the cost of establishing and managing those arrangements for an indefinite term were not estimated, it is impossible to guess at their cost on an annual basis. This might have implications in connection with s 180(3)(b). The present issue, however, is that the proposed easement requires Castlebar Cove to bear the cost of maintaining a right of access for members of an unrelated scheme.

[72] The proposed easement does not descend to any detail about the management of traffic movement or its speed or matters which might be addressed through by-laws and other mechanisms were Lot 1 to be absorbed into a common scheme.

[73] Specifics have not been addressed about how any doorway or firewall between the two properties would be operated, either through sensor pads or magic eyes, and whether such a barrier would be closed at all times of the day or night.

[74] In summary, the terms of the easement document which LPG's application asks the Court to impose on Lot 1 are remarkably deficient in detail, and LPG's evidence has not considered important details about matters that are not addressed by its terms. Its general approach was that these matters "can be sorted out in determining appropriate compensation". But the devil is in the detail. The present application proposes that the respondent be paid $1 as consideration for the granting of an easement of indefinite duration, which imposes substantial obligations upon the respondent and which is lacking in detail about practical arrangements to manage access rights and their cost.

Alternative access to allow the proposed development without access through Castlebar Cove

[75] LPG sought changes to the development approval under revised drawings prepared by its architect, Mr Thompson, on the basis that the development of Lot 1 would be integrated with Castlebar Cove, with shared facilities. Mr Thompson was under the misapprehension that this was LPG's intention, when clearly it is not. This is not a criticism of Mr Thompson. It is simply to say that he proceeded on the basis that Lot 1 would form part of an integrated Castlebar Cove, and that the opinions that he expressed in his evidence were given on that false assumption. LPG has no such intention and the Castlebar Cove scheme no longer contemplates a Stage 3 expansion or any development on Lot 1.

[76]

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LPG does not suggest that it has sought and been refused Council permission to modify Condition 27 so as to remove the easement via the Castlebar Cove car park, and to have vehicular access by the Lambert Street driveway. As noted, Conditions 14 and 28 require that driveway to be modified and to be used for vehicles, including those of visitors and removalist trucks. No proposal has been put by LPG to Council to develop Lot 1 without access through Castlebar Cove. Instead, LPG relies on the development approval that was granted to Sincere at a time when it appears that Sincere intended, or at least told others that it intended, that Lot 1 be an expansion of Castlebar Cove.

[77] The respondent's architect, Mr Peabody, who was called as an expert witness, advanced an alternative proposal which would allow for the approved building to be constructed on Lot 1 without access via Castlebar Cove, including provisions for refuse collection to occur within that site. Mr Peabody's proposal offers the same amenity in a slightly different configuration, whilst allowing the development to be self-contained. It provides for access by the Lambert Street driveway and includes some landscaping and the removal of vegetation in the form of weeds. According to Mr Peabody, whose evidence I accept, the alternative development provides similar amenity. In some respects the amenity is improved, in others, it is slightly reduced, but overall they are comparable.

[78] Mr Thompson expressed a preference for the approved development, but, as noted, any implied criticism of Mr Peabody's alternative was based upon the false assumption that the approved development was to form part of Castlebar Cove.

[79] The land in the general vicinity, including Castlebar Street outside Castlebar Cove, is characterised by steep roads and driveways. Two traffic engineers gave evidence. The substance of their evidence is that

neither the approved development nor the alternative was ideal and that each required a relaxation of the desirable standards in the Transport, Access, Parking and Servicing Code. The development approval for Lot 1 required significant relaxations on both the width and gradient of the Lambert Street driveway. The implementation of the existing development approval would require some modification of the Lambert Street driveway close to Lambert Street. The respondent's traffic engineering expert, Mr Beard, has proposed a remodelled driveway which is said to be safer (in grade and width) than the design that was approved by Council on the basis of performance-based outcomes. The regrading does not impede the Daly lots.

[80] The rerouting of all access through Lambert Street would require minor modifications which appear achievable within existing gradients and which can be achieved without major cost or engineering difficulty. Mr Beard's evidence is that a re-design of the driveway is feasible and would contain desirable changes and that improvements to the approved design are possible.

[81] There is no significant conflict between the evidence of Mr Beard and Mr Gallagher with respect to access through Lambert Street. I accept Mr Beard's evidence, which was not the subject of any real challenge, that Lambert Street will, after development, have "marginally better" access and that the driveway to Lambert Street is "capable of being improved to the point where it would, in fact, be superior to the Castlebar Street access".

[82] Town planning experts gave evidence. Needless to say, there are no provisions in the Brisbane City Plan 2000 or the Brisbane City Plan 2014 that mandate access through an adjoining property. The planning scheme requires safe and functional vehicular access and parking to service a development of this scale. According to Mr Priddle, the town planning expert called by the respondent, the changes proposed by Mr Peabody and Mr Beard:

> "(a) ensure safe and functional access and parking to and from Lambert Street that accommodates all necessary vehicle types;
>
> (b) do not fundamentally change the outcomes provided for in the development approval — it is not a substantially different development;
>
> (c) are minor;
>
> [140782]
>
> (d) are generally complaint [sic] with the planning scheme provisions and, as such, if a development application was lodged for this type of development, Brisbane City Council would likely approve it;
>
> (e) demonstrate that there is no overriding necessity for any access easement through the basement of Castlebar Cove."

[83] It is acknowledged that the proposed changes in access arrangements would not be considered "generally in accordance with" the existing approval. They would require an application. The evidence did not reveal any significant issue concerning compliance with any relevant planning scheme which would operate as an impediment to approval being granted for the alternative design layout proposed by Mr Peabody and Mr Beard.

[84] LPG's town planning expert, Mr Reynolds, gave evidence that a right of user through the basement wall of Castlebar Cove "will be necessary if functional access cannot be provided [along the existing driveway on traffic engineering grounds] or procedurally a new development application [changing all access to the driveway] cannot be properly made" and, impliedly, thereafter approved. Mr Reynolds accepted, from a planning perspective, that redirecting all traffic via the driveway from Lambert Street does not "fundamentally change the development outcomes" for anyone other than the co-users of the existing driveway (being the Dalys) and the users of Lot 1.

[85] Both the existing development approval and any application to change access in accordance with the alternative proposed by Mr Peabody and Mr Beard will require the existing driveway to be improved for the benefit of all users, including the Dalys. There would be an issue concerning the intensification of use of the driveway brought about by all traffic in and out of the development using the Lambert Street driveway and, according to Mr Reynolds, this will result in a loss of amenity for adjoining premises and the users of the proposed development at 108 Lambert Street. That said, the grant of an easement through Castlebar Cove will also result in a loss of amenity for residents of adjoining premises.

[86] Subject to a legal issue about whether the Dalys' consent to an application to change access would be required, the evidence of the expert town planning witnesses is that both the proposed development with its approved access arrangement and a development with the modified access arrangements proposed by Mr Peabody and Mr Beard comply with relevant planning scheme provisions.

The legal issue

[87] The legal issue identified in the evidence of the planning experts is whether the consent of the Dalys would be required in order to make an application for a change in the approval or a new development application. Section 369 of the *Sustainable Planning Act* 2009 (Qld) governs the procedure if a person wants to make a permissible change to a development approval. Section 371 provides that if the person making the request is not the owner of the land to which the development approval attaches, the request must be accompanied by the owner's consent unless certain conditions are satisfied. Under s 371(c) the owner's consent is not required if it would not be required under s 263(1) if a development application were made for the requested change. Other exceptions exist including where the responsible entity is satisfied that, having regard to the nature of the proposed change, the owner has unreasonably withheld consent, and the requested change does not materially affect the owner's land. Insofar as s 371(c) directs attention to s 263(1), the consent required under s 263(1) for the making of an application for a material change of use of premises does not apply to the extent the land subject to the application has the benefit of an easement and the development is "not inconsistent with the terms of the easement".[5]

[88] LPG identifies the risk that an application of the kind identified by the town planning experts may require the consent of the Dalys to change access arrangements and that their consent will be refused. The town planning experts, quite rightly, did not seek to venture an opinion on what is essentially a legal issue. Moreover, LPG does not seek a ruling by me on the legal question of whether the Dalys' consent would be required or not. It rests its case on the fact that there is said to be a

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risk that their consent will be required to an application to modify access arrangements. The identified issue is whether the development "is not inconsistent with" the terms of the easement. The Dalys might argue that the modification involves an intensification of use which was not contemplated by the terms of the easement. An intensification of use may be relevant to their amenity, but the relevant issue is whether the proposal is inconsistent with the terms of the easement. In that regard, the easement does not limit access to a certain number of vehicles.

[89] The evidence, in particular Mr Walton's evidence, and the submissions refer to the reciprocal nature of the easements which constitute the Lambert Street driveway. The reciprocal easements are not limited in terms of the number of vehicles which may use them. Both the Dalys and the owner of Lot 1 have the benefit of their own land and a reciprocal easement for the purpose of future development of their land. If, for example, the Dalys wished to demolish the existing townhouses and build a high-rise, there seemingly would be nothing to prevent the occupiers of the new building from using the easement, provided planning permission was granted to the new development. Depending upon the intensity of the development, there may be town planning and traffic engineering issues. However, if they were resolved, there would be nothing preventing use of the easement. On this scenario, the Dalys could lodge a development application in respect of the easement land without LPG's consent because the proposed development would be "not inconsistent with" the terms of the easement, which is unlimited in terms of intensity of use. The same may be said of the mutual or reciprocal easement which benefits Lot 1.

[90] The proposed development, with all traffic access by the Lambert Street driveway, does not appear to be inconsistent with the terms of the easement.

[91] I recognise that there may be arguments to the contrary. However, neither easement is limited in terms of use, for example, to access low-rise dwelling houses. The terms of each would seem to permit the easement to be used for access to a high-rise development. The proposed development on the scale currently approved for seven units and 14 car spaces for residents would not appear to be inconsistent with the terms of the easement. On this basis, there would not seem to be a significant risk that the Dalys' consent would be required to make the necessary application for approval of the alternative access

arrangement proposed by Mr Peabody and Mr Beard. It would then be a matter for the Council to consider the application. The evidence before me does not identify any significant town planning issue to approval being granted for the alternative access arrangement.

[92] Finally, I turn to the expert evidence in relation to engineering matters, which was given by structural engineers, Mr Neil and Mr Ainsworth. The structural engineering drawings for Castlebar Cove identified an opening of about eight metres, requiring the removal of two existing piers in the Castlebar Cove basement wall. However, the approved drawings for Lot 1 identified an opening of about 10.5 metres, requiring three piers to be removed. A more recent drawing made further modifications to revert to an opening of about eight metres.

[93] It is unnecessary to address the detail of the evidence of the structural engineers. Certain risks were identified associated with undertaking the work in question, but it appears that the work is feasible through the adoption of proper practices to use props when removing the structural support for the wall. The likely period of construction is eight weeks. Mr Ainsworth's evidence identifies a risk of leakage through a seal and problems with successfully waterproofing the proposed interface between the adjoining basements. He says that the risk should not be underestimated and that seals of this type have a poor track record and require frequent repair.

[94] LPG responds to the respondent's submission that the work carries not immaterial risks in circumstances in which LPG has not undertaken to adopt a "best practice" model. I accept LPG's responsive submissions that the risks identified by the structural engineers are manageable and capable of being reduced to an acceptable level. This might be done by the imposition of appropriate

conditions in the terms of the easement itself to supplement whatever requirements are imposed by relevant standards and building approvals.

[95] The risk of seals failing should not be disregarded and the costs of any loss caused by that and their repair might also be addressed by a suitably-worded indemnity to be given by the owner of Lot 1 and by making the owner of Lot 1 legally responsible for the costs of inspection, maintenance and repair of the seals and the rectification of any damage. I should mention that none of these matters have been addressed in the easement that is proposed or in submissions. This is a further illustration of the fact that LPG's application is in terms of the 2008 document rather than a document which contains appropriate commercial and other terms.

[96] Whilst s 180(4)(b) contemplates that an order under s 180 will include "such other terms and conditions as may be just", the Court only turns to those matters if satisfied that an order of the kind referred to in s 180(1) should be made. In order to be satisfied that such an order should be made, the Court must be satisfied of the matters contained in s 180(3). The lack of detail in the terms of the easement proposed by LPG is a matter to which I will return in considering s 180(3) issues, including the issue of adequate compensation and whether the respondent's refusal to agree to the imposition of an easement in terms of the 2008 document was unreasonable in all the circumstances.

Is it reasonably necessary in the interests of the effective use of Lot 1 in a reasonable manner for it to have access via the Castlebar Cove car park in the manner proposed?

[97] This is the principal issue in the case. The respondent submits that LPG has not satisfied the test of reasonable necessity which, according to authority, means more than mere desirability or preferability over the alternative means.[6] The respondent contends that LPG has not proven its case because the means of access proposed by it, namely an easement through a secure basement car park, in the manner proposed, is not "reasonably necessary" in circumstances where the alternative proposed by the respondent will allow the effective use of Lot 1 for the kind of development proposed by LPG. In addition, the respondent submits that even if LPG's proposal was thought to be more desirable than the alternative proposed by it, s 180(1) is not concerned with the most preferable or desirable means of access. An order under s 180 interferes with proprietary rights and the greater the burden of the imposition that is sought, the stronger the case needs to be to justify a finding of reasonable necessity.[7] In that regard, for the right of user to be reasonably

necessary for a development, the development with the right of user must be at least substantially preferable to development without the right of user.[8]

[98] LPG's case is that it has a development approval which is current and that the use of Lot 1 in accordance with the approval is an effective use in a reasonable manner of its land. The approved development contemplates access through the basement of Castlebar Cove, being land to which the development approval applies, and no other access is approved. LPG's written submissions criticised the respondent's approach as being to "hypothesise an alternative development with alternative access" which was said to be "uncertain and speculative". That written submission was not pressed in the light of the expert evidence. Instead, the alternative proposed by the respondent was said to have its own problems, including the legal risk that consent would be required for the necessary application to vary access arrangements. I found that risk not to be a significant one.

[99] The principles discussed by Douglas J in *Lang Parade* make alternative means relevant. An applicant for an order under s 180 need not demonstrate that there is no alternative way to access the land. It does, however, need to meet the statutory requirement of "reasonably necessary" in the context of alternative means of access.

[100] Importantly, both the approved development and the alternative require work to be undertaken on the Lambert Street driveway. The owner of Lot 1 has a legal right of access by virtue of ownership and an existing easement to Lambert Street.

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The first principle identified by Douglas J in *Lang Parade* is that one should not interfere readily with the proprietary rights of an owner of land.[9] That principle and the other principles identified by his Honour have been followed in later cases. LPG's proposal involves an interference with proprietary rights. The respondent's alternative does not.

[102] Subject to the legal issue which I have addressed concerning consent of an owner to the making of an application to amend the access route to Lot 1's basement car park, there is no significant town planning impediment to approval of such an application so that vehicles travel along the existing Lambert Street driveway in accordance with existing rights of access. Although the existing approval does not require, in terms, widening and re-grading of the Lambert Street driveway, certain of those conditions which deal with access via the Lambert Street driveway will require improvements to that driveway. Implementation of the current development approval would, in practical terms, necessitate landscaping and other work to enhance the appearance and practical performance of the Lambert Street driveway.

[103] LPG has not established that Lot 1 cannot be developed with the kind of seven unit, 14 car space arrangement which it says it intends to construct, without access via the basement car park of Castlebar Cove.

[104] The alternative proposed by the respondent appears to be an effective use of Lot 1 to develop it, and to make effective use of the lot in a reasonable manner.

[105] Based upon the expert and other evidence, I regard the respondent's alternative as a preferable method for the proposed development than the approved means of access. The approved means of access may have been preferable if Lot 1 was to form part of a common scheme, but it is not.

[106] The fact that the previous owner of Lot 1 obtained the approval of the Planning and Environment Court to a modified application, which originated in an application which was made at a time when Lot 1 was intended to be developed and incorporated into Castlebar Cove, should be taken into account. It is evidence that the Planning and Environment Court concluded that, if the required easement was provided and other conditions were satisfied, the development might proceed. However, that approval should not be equated with an opinion that the approved development is preferable to other forms of development, including the alternative but essentially similar form of development proposed by the respondent. LPG has not sought the Council's response to such an amended form of development. The town planning evidence, particularly the evidence of Mr Priddle, and the other evidence, suggests that the proposed development,

with the modifications to access proposed in the respondent's alternative, is an effective use of Lot 1, and that the Council would be unlikely to reject such a proposed development on town planning or other grounds.

[107] The fact that the approved development may constitute an effective use of Lot 1 (considered in isolation) is not sufficient to meet the statutory test of reasonable necessity. A viable alternative means of access has been identified in the respondent's proposal, being an alternative which avoids interference with the proprietary rights of the owners of land at Castlebar Cove and personal inconvenience to them. That alternative will allow the use of Lot 1 to construct essentially the same building which LPG has approval to build. In the circumstances, I am not satisfied it is reasonably necessary in the interests of the effective use in a reasonable manner of Lot 1 to have access via the Castlebar Cove car park in the manner proposed.

[108] I am not even satisfied that development of Lot 1 with the proposed right of user is more desirable or preferable to its development in accordance with the alternative proposed by the respondent, or some similar alternative which would allow access by the Lambert Street driveway to Lot 1's basement car park to allow up to 14 cars to be parked there. If, as LPG would have it, the comings and goings of residents from the basement car park would cause minimal inconvenience to the residents of Castlebar Cove, given the relatively low intensity of such vehicular traffic each day, then the passage of the same amount of traffic along the existing driveway would

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not be thought to impose unacceptable inconvenience to residents in the vicinity of the existing driveway. I am not satisfied that LPG's proposal is more desirable than the respondent's alternative, having regard to relative loss of amenity, the extent of interference with proprietary rights and other relevant factors.

[109] Even if I had been satisfied that LPG's proposal was more desirable or preferable to the alternative proposed by the respondent, I would not have concluded that it was substantially preferable to it. I conclude that development of Lot 1 with the proposed right of user is not substantially preferable to development without the right of user.

Section 180(3) matters

[110] The Court must be satisfied that it is consistent with the public interest that Lot 1 should be used in the manner proposed before an order of the kind referred to in s 180(1) shall be made. LPG submits that it is consistent with the public interest that land be developed in accordance with a development approval for the land. That proposition may be accepted at a level of generality.[10] However, that general principle requires consideration of the terms of the development approval, which specifically include a requirement to obtain an easement. Framed differently, it might be said to be in the public interest for the land to be developed *if* the relevant easement could be obtained and the other conditions of the approval satisfied.

[111] The words "in the manner proposed" in s 180(3)(a) direct attention to the applicant's particular proposal.[11] The particular proposal is for access to Lot 1's basement car park by a to-be-constructed hole in an existing wall pursuant to an easement which is lacking in detail concerning the regulation of access. The means of access proposed reduces the security and privacy of residents of Castlebar Cove. Leaving to one side the lack of adequate consideration or compensation (being matters best addressed in the context of s 180(3)(b) and (c)), and focusing upon other aspects of LPG's particular proposal, I am not satisfied that it is in the public interest that Lot 1 be used in the manner proposed in circumstances in which the proposal is for an easement which is lacking in detail so as to regulate relations and avoid conflicts between different owners and body corporates of different schemes. The position may have been otherwise if the easement had been a temporary one, pending the establishment of a new scheme on Lot 1 and the absorption of Lot 1 into a scheme which would regulate access and provide for the enforcement of rules.

[112] I turn to the question of adequate compensation for loss or disadvantage which the owners of the common property may suffer from the imposition of the proposed easement. Mr Latif's affidavit states that LPG is prepared to carry out at its expense any survey work and the preparation of a plan or plans in registrable form. It says nothing about other costs associated with the construction of the easement, or any payment to compensate the respondent for the cost of maintaining, at all hours of the day and night, access through its basement, whilst attempting to maintain the security of its own car park.

[113] Rather than address practical aspects of the day-to-day operation of the easement, and their cost and inconvenience, LPG tended to treat these matters as something to be worked out in the future in the course of determining appropriate compensation. It also tended to suggest in its submissions that there was no real risk to the privacy and security of owners of Castlebar Cove and that their security would be preserved by issuing fobs to residents of the Lot 1 development, so that security would remain essentially the same. If a plan along these lines was adopted it would come at a cost and there also would be a cost in managing the allocation and replacement of fobs.

[114] LPG's proposal seemingly is to allow for refuse bins to be transported through, and stored on, the common property of Castlebar Cove. But there was no detail about how and when the transit of rubbish would be arranged, by whom and at whose cost.

[115] The lack of appropriate detail about the practical operation of the proposed access, including the operation of any firewall and at whose cost it would be operated and maintained, makes it hard to assess the financial cost to the respondent in meeting the obligations which the 2008 easement document would impose upon it.

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The concerns of residents about a reduction in their security and the presence of strangers on the Castlebar Cove site are not unfounded. It is hard to assess in financial terms adequate compensation for the actual and perceived loss of privacy and reduction in security among people who presently feel secure when entering and leaving their cars in the secure basement car park. I suspect that it would be possible to adequately compensate them for any justifiable concerns.

[117] It also might be possible to compensate the respondent for direct financial consequences of operating this novel means of access, which is distinctly different from a common easement in the suburbs or countryside associated with a battle-axe shape block of land or an easement where persons can have a common key to a padlock on a common gate. It might be possible, in theory, to fashion a term by which the costs to the respondent on an annual basis could be worked out. However, the lack of detail concerning the role which the respondent's manager would play, and how the time and resources required to maintain access for the benefit of Lot 1 would be worked out, would be something of a practical challenge. I am not satisfied that those costs can be worked out in a way that would allow them to be adequately assessed and compensated.

[118] Whatever the loss or disadvantage which will be suffered from the imposition of the easement may be in respect of an easement which is for an indefinite duration, and unlimited in terms of the hour of the day or night at which the respondent would be required to provide access, adequate compensation for that loss and disadvantage would vastly exceed $1.

[119] This brings me to the principal reason to refuse the application on s 180(3) grounds. As previously mentioned, LPG has no basis to demand the grant of an easement in terms of the 2008 document in return for the payment of a consideration of $1, being the consideration stated in that document.

[120] In these proceedings LPG did not propose the imposition of an obligation of user in the form of an easement according to commercial terms. It sought the imposition of an easement on the terms of the 2008 document. It did not advance a proposal to the respondent for the grant of an easement (whether on the sparse terms of the 2008 document or one which described respective obligations and arrangements in more detail) with the compensation or consideration to be agreed or, failing agreement, to be fixed by the Court in accordance with s 180(4)(a). Its proposal was to pay $1 in order to interfere with existing property rights and to impose an obligation on the respondent which conferred substantial benefits upon Lot 1, and therefore enhanced its value.

[121] This is not simply a case in which LPG did not offer to pay a reasonable consideration or reasonable compensation at the time the proceedings were commenced. It maintained the position at the hearing of the matter that the power under s 180 should be exercised in its favour in terms of an easement which provided only for a consideration of $1.

[122] The fact that the respondent's basement was designed to accommodate the removal of the wall in question and the development approval applies to the respondent's basement did not make it unreasonable for the respondent to refuse to agree to the imposition of an easement in terms of the 2008 document.

[123] LPG submits that the respondent's refusal to agree to accept the imposition of a statutory right of user in terms of the easement which the AGM resolved to grant on 4 August 2008 is unreasonable given, among other things, that no satisfactory explanation was given for the respondent's change of position. However, there is a satisfactory explanation for the respondent's refusal to agree to the imposition of an easement in terms of a resolution which:

(a) was passed through the improper use of powers of attorney;
(b) was not disclosed to individuals who later acquired apartments in Castlebar Cove; and
(c) neither Sincere nor anyone else took steps to progress through the granting and registration of an easement.

[124]

[140788]

In any case, the August 2008 resolution was passed in circumstances in which Sincere then intended to progress Stage 3 as part of a larger Castlebar Cove development. The easement expressly provided that it would be extinguished if the development of Stages 2 and 3 did not proceed. Stage 3 will not proceed and that is a good reason alone for the respondent's change of position.

[125] The easement which LPG seeks to have imposed on the owners of Castlebar Cove is one which imposes significant obligations upon one body corporate for the benefit of the owner of an adjoining property which has no intention of developing its property to form part of an amalgamated scheme.

[126] If LPG or a successor in title develops Lot 1 in accordance with the development approval and establishes a new scheme to govern it, the respondent would be maintaining a right of access for members of an unrelated scheme, who were not required to make any financial contribution to the benefits they enjoyed. It was not unreasonable of the respondent to refuse to accept the imposition of the obligations contained in the 2008 document in circumstances in which the only consideration provided for was $1.

[127] The respondent's refusal to agree to accept the imposition of an easement in return for the payment of $1 was not unreasonable in all the circumstances. In the circumstances, LPG has failed to satisfy the matter stated in s 180(3)(c).

Conclusion

[128] LPG has not established that it is reasonably necessary in the interests of the effective use in a reasonable manner of Lot 1 to have access by the Castlebar Cove car park in the manner proposed by it. The respondent's alternative proposal allows the effective use of Lot 1 for the development which LPG currently proposes, namely a seven unit development with 14 basement car parks, through the use of an existing driveway over which Lot 1 enjoys legal rights.

[129] I am not satisfied that it is consistent with the public interest that the proprietary rights of owners of the common property of Castlebar Cove should be interfered with in those circumstances. This is notwithstanding the fact that Castlebar Cove's basement was designed and constructed to accommodate the creation of a gap in the wall to facilitate the expansion of the Castlebar Cove scheme and that the current development approval extends to the respondent's land and envisages the grant of an easement through its basement car park. The effective use in a reasonable manner of Lot 1 in the manner proposed, namely the development of the currently-proposed high-rise, is allowed by the alternative proposed by the respondent. LPG has not shown otherwise or that there is a significant risk that the alternative proposal will not be approved if submitted to the Council.

[130] The existence of that reasonable alternative means of access and the degree of interference with property rights and privacy associated with the easement proposed by LPG means that the easement proposed by LPG is not reasonably necessary. In addition, I am not satisfied that it is consistent with the public interest that Lot 1 should be used in the manner proposed by LPG. In any event, there is insufficient evidence concerning details of the practical arrangements proposed by LPG for the indefinite duration of the

easement for me to be satisfied that any loss or disadvantage which may be suffered from the imposition of the easement can be adequately compensated in money.

[131] Most importantly, the application should be refused on s 180(3) grounds because LPG has not satisfied me that the respondent's refusal to agree to the imposition of an easement in terms of the 2008 document is in all the circumstances unreasonable. The proposed easement contains no provisions for adequate consideration on account of the obligations imposed upon Castlebar Cove by the proposed easement or any mechanism for the respondent to be compensated for the costs associated with meeting the obligation to provide access in the manner proposed for an indefinite period. The respondent is correct to submit that the $1 sum provided by way of compensation is woefully inadequate and unreasonable in all the circumstances.

[132]

[140789]

LPG has failed to establish the conditions for the making of an order under s 180 of the *PLA* over the common property of Castlebar Cove CTS 37148 in terms of the easement document which was adopted on 4 August 2008. Because it has failed to establish the conditions for the making of an order under s 180, the occasion to include in any such order terms and conditions that are just, does not arise. If it had, there was insufficient evidence about the detail of the practical arrangements to allow such terms and conditions to be drafted and LPG did not advance the kind of terms and conditions which one would expect in an easement which regulated the conduct of such an unusual easement. Whilst the terms of the 2008 document may have been appropriate for a temporary easement pending the establishment of a scheme on Lot 1 as part of Stage 3 of Castlebar Cove, they are not the kind of commercial and comprehensive terms which would be expected to govern relations between the owners and residents of entirely different developments. In the circumstances, it is unnecessary to attempt to work out the comprehensive terms and conditions which would be required to be imposed under s 180(4) if an order had been made.

[133] The application will be refused.

[134] There is no reason why costs should not follow the event. The orders will be:

1. The application is refused.
2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

Footnotes

1 *Lang Parade Pty Ltd* v *Peluso* [2006] 1 Qd R 42 at 47–48 [23] ("*Lang Parade*") (internal citations omitted).

2 *Property Law Act* 1974 (Qld), s 180(4)(a).

3 *Property Law Act* 1974 (Qld), s 180(4)(b).

4 *Integrated Planning Act* 1997 (Qld), ss 3.5.11(6) and 3.5.28 (being the Act which was in force when the development application was made) and the *Sustainable Planning Act* 2009 (Qld) ss 244 and 245 (which is currently in force).

5 *Sustainable Planning Act* 2009 (Qld), s 263(2)(a).

6 *Lang Parade* at 47 [23](d).

7 Ibid at 48 [23](e).

8 Ibid at 48 [23](f).

9 Ibid at 47 [23](a).

10 Cf. *Lang Parade* at 48 [27].

11 *Re Seaforth Land Sales Pty Ltd* v *Land (No 2)* [1977] Qd R 317 at 320–321, followed in *Pacific Coast Investments Pty Ltd* v *Cowlishaw* [2005] QSC 259 at [15].

PETERSON MANAGEMENT SERVICES PTY LTD v BODY CORPORATE FOR THE ROCKS RESORT

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(2015) LQCS ¶90-203; [2015] QCAT 255

Queensland Civil and Administrative Tribunal

Decision delivered on 21 May 2015

Conveyancing — Community Schemes — Remedial Action Notices — Where body corporate alleged its caretaker was not fulfilling its obligations — Where body corporate issued Remedial Action Notices requiring caretaker to remedy the breaches — Whether Remedial Action Notices were valid for the purpose of s 129(4) of the Body Corporate and Community Management (Accommodation Module) Regulations 2008 — Body Corporate and Community Management (Accommodation Module) Regulations 2008, s 129(4).

[140790]

The applicant was the caretaker appointed by the respondent body corporate in respect of a complex situated in Queensland.

The body corporate alleged that the caretaker was not fulfilling its duties and the caretaker was served with a number of Remedial Action Notices requiring the company to remedy the alleged breaches.

The caretaker made an application to the Queensland Civil and Administrative Tribunal for relief including (inter alia) declarations as to the validity of the Notices. Leave was granted for the caretaker to file a further amended application which incorporated the claims in respect of the validity of the Notices. The declarations it sought included that the Notices were invalid as they did not satisfy s 129(4) of the Body Corporate and Community Management (Accommodation Module) Regulations 2008.

Section 129 provides that a body corporate may terminate a caretaker's engagement for reasons including that the caretaker has failed to carry out its duties under the engagement. However the caretaker must first be given a Remedial Action Notice that complies with s 129(4). Section 129(4) provides that the Notice must state that the caretaker has "**not less than 14 days** after the Notice is given" (emphasis added) to carry out the duty or remedy the contraventions.

However the body corporate's Notices stated that the caretaker had to remedy the breaches "**within 14 days** of being served with a copy of this Notice".

Held: for the caretaker. Each of the Remedial Action Notices were invalid for the purposes of s 129 of the Accommodation Module and of no effect.

1. The phrase "within 14 days" as per the body corporate's Notices, is not the same as "not less than 14 days" as per s 129.

2. Under s 129(4) the trigger for the calculation of the minimum period for rectification is the giving of the notice and once the notice is given the person cannot be required to rectify until 14 days have expired. The words "not less than 14 days" refer to the "period stated in the notice". That period accordingly must be greater than 14 days.

3. To require rectification "within" 14 days is a requirement that requires rectification in a period "less than 14 days", that is, it requires rectification before 14 days have passed.

4. The body corporate submitted that the expression "within 14 days" means the same as "not less than 14 days". To express the issue in that manner ignores the words "after the notice is given". The correct meaning and effect of the words in the module is that there must not be a requirement to rectify until 14 days after the notice is given has expired.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Benjamin Kidston instructed by Mahoneys Solicitors for the Applicant caretaker.

Deborah Kerr, Greg Melloy authorised by the Body Corporate committee for the Respondent body corporate.

Before: Member Favell

Editorial comment: This decision illustrates that a body corporate must comply strictly with the requirements of s 129 of the Body Corporate and Community Management (Accommodation Module) Regulations 2008 when drafting Remedial Action Notices.

The body corporate in this decision may have had legitimate reasons for wishing to terminate the caretaker's engagement. However the body corporate, despite presumably spending a considerable sum on legal fees, was no closer to getting the matter resolved as the Tribunal declared that the Remedial Action Notices were invalid.

[140791]

Favell_M:

ORDERS MADE:

[1] The Tribunal Declares:

1. The Remedial Action Notice (Number 1) issued to Peterson Management Services Pty Ltd on 18 June 2010 is invalid and of no effect.
2. The Remedial Action Notice (Number 2) issued to Peterson Management Services Pty Ltd on 29 July 2010 is invalid and of no effect.
3. The Remedial Action Notice (Number 3) issued to Peterson Management Services Pty Ltd on 29 July 2010 is invalid and of no effect.
4. The Remedial Action Notice (Number 4) issued to Peterson Management Services Pty Ltd on 24 August 2010 is invalid and of no effect.
5. The Remedial Action Notice (Number 5) issued to Peterson Management Services Pty Ltd on 17 September 2010 is invalid and of no effect.
6. The Remedial Action Notice (Number 6) issued to Peterson Management Services Pty Ltd on 17 September 2010 is invalid and of no effect.
7. The Remedial Action Notice (Number 7) issued to Peterson Management Services Pty Ltd on 6 October 2010 is invalid and of no effect.
8. The Remedial Action Notice (Number 8) issued to Peterson Management Services Pty Ltd on 7 October 2010 is invalid and of no effect.

[2] The parties may make written submissions as to any costs order sought after notice that a costs order is sought is filed in the Tribunal and served on the other party. In the event a costs order is sought the party seeking costs shall file in the Tribunal and serve on the other party written submissions within 7 days of filing and serving any notice a costs order is sought. The other party may file and serve any written submissions in response within 14 days of being served with the written costs submissions. The costs application will then be determined on the papers.

Favell_M:

[1] Peterson Management Services Pty Ltd was appointed the caretaking services contractor for the Rocks Resort Community Title Scheme 9435 pursuant to two contracts, the first titled “Caretaking Agreement” and the second “Maintenance Agreement”. Both contracts were entered into on 12 September 2003. The building complex that is the subject of the agreements is 33 years old.

[2] The relationship between the parties has been subject to dispute and in 2010 the Rocks Resort served Peterson Management with a number of Remedial Action Notices[1] (RAN) requiring the company to remedy the alleged breaches or carry out the duties, which were alleged to have not been carried out.[2]

[3] Peterson Management must fail to comply with a RAN before the Rocks resort may take action to terminate their services under the agreements[3] .[4]

[4] Peterson Management made an application to the Tribunal on 22 December 2010 for relief including declarations as to the validity of the notices and a declaration that the company had complied with them. It also sought damages for breaches of obligations which were alleged to be owed by the Rocks Resort to Peterson Management under the *Body Corporate and Community Management Act* 1997 (Qld), the Accommodation Module and the agreement.

[5] It is noted that at the time of the Peterson Management application the Rocks Resort had taken no action to terminate either of the agreements in reliance on the notices. It is, however, clear from correspondence that Rocks Resort had reserved its rights to initiate the termination of the agreements.[5]

[6] The application filed by Peterson Management consisted of many hundreds of pages. The response and further material has now grown considerably. No complaint has been left unturned. Every point was agitated by the parties. Since 2010 the matter has had some considerable history. It has been the subject of numerous applications and directions.[6]

[7]

[140792]

On 5 March 2013, the Tribunal dismissed the claims in respect of damages for breach of contract and breach of statutory duty. Leave was granted to Peterson Management Services Pty Ltd to file a further amended application which incorporated the claims in respect of:

> i) The validity of eight remedial action notices,
> ii) Compliance with eight remedial action notices, and
> iii) Reimbursement of the sum of $15,006.20 on or before 4.00pm on 30 October 2013.

[8] It seeks declarations in respect of each of the remedial action notices. The declarations sought are:

> a. the notice, to the extent it purports to be a remedial action notice for the purpose of section 129 of the Accommodation Module 2008, is invalid and of no effect: and, or alternatively
> b. the applicant has complied with the notice; and, or alternatively
> c. the respondent is not entitled to terminate the agreement (caretaking or maintenance) in reliance on the notice.

[9] The respondent body corporate denies there were any defects in the notices, the notices were complied with and says it is entitled to rely on each notice to terminate the agreements.

[10] The respondent also seeks declarations;

> a. that the remedial action notices were and are valid for the purposes of the agreements and for the purpose of section 129(4) of the Body Corporate and Community Management (Accommodation Module) Regulations 2008;
> b. that the breaches contained in the remedial action notices were not remedied within the time limited by the notices in which they were contained;
> c. that the applicant has been grossly negligent in its performance or non performance of the duties under the agreements or any of them;
> d. that the applicant has committed gross misconduct in its performance or non performance of the duties under the agreements or any of them.

[11] The term “gross misconduct” is not defined in the relevant legislation or the agreements.

[12] The term “gross negligence” is not defined in the relevant legislation or the agreements.

[13] The Body Corporate contended that the whenever there was a breach of the agreements there was misconduct and gross negligence.

[14] The Body Corporate also sought findings that in respect of “suspected” alleged breaches of the *Property Agents and Motor Dealers Act* 2000 (Qld) (PAMDA) the applicant breached the PAMDA; breached the Letting Agents Code of Conduct; breached the letting agreement; was grossly negligent in its performance of the duties under the letting agreement and had committed gross misconduct in its performance or non performance of the duties under the letting agreement. The relief sought amounts to declarations of gross negligence and gross misconduct.

[15] The applicant contends that the Tribunal should determine whether the various parties who purported to represent the Body Corporate had authority to represent the Body Corporate. It contends that if it is found they did not have the authority the tribunal need not descend into further consideration of the substantial matters in dispute. In my view that result does not follow. In any event it is a matter for the Body Corporate to raise that issue if it did not authorise the response and counter application.

[16] On or about June 18 2010 a Remedial Action Notice (the first RAN) issued complaining that Peterson Management breached clause 5.3(n) of the Caretaking Agreement and clause 5.3(d) of the Maintenance Agreement by failing to comply with two written instructions (the directions) to have its key personnel attend a meeting with persons from Trade Facilities Management Pty Ltd for the purpose of induction and consultation on a new operations manual the Body Corporate wished to implement at the Scheme.

[17]

[140793]

The Body Corporate admitted[7] the allegation by Peterson Management Services that:

The directions do not constitute, on their proper construction:

i. A request to supervise the carrying out of the task;
ii. A request to carry out a reasonable task;
iii. A request to carry out an appropriate task; and, or alternatively;
iv. A request to carry out a reasonable and appropriate task.

[18] That being so, Peterson Management Services pleaded that as at the date of the first notice committee resolution, it was not in breach of clause 5.3(n) of the Caretaking Agreement and was not in breach of clause 5.3(d) of the Maintenance Agreement.

[19] The Body Corporate denies that allegation. It says that, notwithstanding the validity of the first Remedial Action Notice, the applicant was in breach of the Caretaking Agreement and the Maintenance Agreement generally and in particular, clause 5.3(n) of the Caretaking Agreement and clause 5.3(d) of the Maintenance Agreement.

[20] The Body Corporate admitted[8] that the first notice, to the extent it purports to be a Remedial Action Notice, is invalid and of no effect and that it had not given Peterson Management Services a Remedial Action Notice within the meaning of section 131 or otherwise of the Accommodation Module 2008.

[21] It also admitted that it is not lawfully entitled to act pursuant to section 131 of the Accommodation Module 2008 (or otherwise) in reliance on the first notice to terminate:

i. The Caretaking Agreement; and or alternatively,
ii. The Maintenance Agreement.

[22] In respect of the first notice, Peterson Management Services seeks a declaration that the first notice,

(a) to the extent it purports to be a Remedial Action Notice for the purpose of section 129 of the Accommodation Module 2008 is invalid and of no effect; and or alternatively
(b) it has complied with the first notice; and or alternatively
(c) the Body Corporate is not entitled to terminate the Caretaking Agreement in reliance on the first notice.

[23] The Body Corporate during the hearing sought to withdraw the admissions made. Those admissions had been made at a time when the Body Corporate had legal representation. In support of that application the Body Corporate filed an affidavit of their former solicitor. It did not however, provide any persuasive reason for the proposed change in pleading. The application was made very late and it does not appropriately address why the admission should be withdrawn or why it was inappropriately made. In my view the Body Corporate has not provided any valid reason for withdrawing the admission.

[24] In my view, because of the admissions made, Peterson Management Services is entitled to a declaration that the first notice is invalid and of no effect and the Body Corporate is not entitled to terminate the Caretaking agreement in reliance of it.

JURISDICTION

[25] This Tribunal has jurisdiction to deal with matters it is empowered to deal with under the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) or an enabling Act.[9]

[26] The Tribunal may make a declaration about a matter in a proceeding instead of making an order it could make about the matter or in addition to an order it could make about the matter.[10]

[27] It may make an order it considers necessary or desirable to give effect to a declaration under section 60(1) and the power under that subsection is, in addition to and does not limit, any power of the Tribunal under an enabling Act to make a declaration.

[28] The *Body Corporate and Community Management Act* 1997 (Qld) in section 149B allows a party to a dispute about a claimed or anticipated contractual matter about the engagement of a person as a body corporate manager or caretaking service contractor for a community title scheme or the authorisation of a

person as a letting agent for a community title scheme to apply as provided under the QCAT Act for an order of QCAT exercising the Tribunal's original jurisdiction to resolve the dispute.[11]

[29]

[140794]

Both the Body Corporate and Peterson Management Services contend that the matters pleaded in the amended application concern disputes about a claimed or anticipated contractual matter about the engagement of a person as a caretaking service contractor for a community title scheme within the meaning and operation of section 149B of the BCCM Act and hence QCAT has jurisdiction to determine this dispute.

Notice to remedy breach 1

[30] The respondent issued written instructions on 17 and 18 June 2010 to the applicant requiring the applicant's key personnel to attend a meeting at 10 am on 23 June 2010 with Trade Facilities Management Pty Ltd for a period of 2 hours at the complex for the purposes of assisting with a preliminary induction and consultation on a new operations manual.

[31] The applicant refused to attend.

[32] The body corporate alleged that the applicant had then breached clause 5.3(n) of the Caretaking Agreement and clause 5.3(d) of the Maintenance Agreement.

[33] Clause 5.3(n) of the Caretaking Agreement provides:

> The caretaker must supervise the carrying out of such other reasonable and appropriate tasks requested by the Body Corporate relevant to the caretaking of the common property.

[34] Clause 5.3(d) of the Maintenance Agreement provides:

> The contractor must —
>
> > (d) carry out such other reasonable and appropriate tasks requested by the Body Corporate or the manager relevant to the maintenance of the common property.

[35] For there to be a breach of Clause 5.3(n) of the Caretaking Agreement there must be a failure to supervise the carrying out of reasonable and appropriate tasks requested by the body corporate relevant to the caretaking of the common property which were tasks other than those required by clause 5.3 (a) —(m).

[36] For there to be a breach of Clause 5.3(d) of the Maintenance Agreement there must be a failure to carry out reasonable and appropriate tasks requested by the body corporate or the manager relevant to the maintenance of the common property which were tasks other than those required by Clause 5.3 (a)–(c).

[37] The requirement to attend at the meeting had to be relevant to the caretaking of the property and the maintenance of the common property.

[38] The applicant contends that the directions are not on, a proper construction, a request to supervise the carrying out of a task, a request to carry out a reasonable task, a request to carry out an appropriate task or a request to carry out a reasonable and appropriate task.

[39] The applicant also contends that there were defects in the first notice in that it was at the time the notice was issued a redundant complaint in that the alleged contraventions existed but had been re-mediated prior to the notice issuing or can only be remedied by an undertaking not to repeat the contravention or never existed.

[40] The applicant also contends that the notice suffered from a re-mediation defect in that the notice is so vague or lacking in particulars that it is unclear what action, duty was to be carried out.

Remedial Action Notice 2

[41] On or about 29 July 2010 the Body Corporate purported to issue to Peterson Management Services a Remedial Action Notice pursuant to section 129 of the Accommodation Module 2008 (the second notice). The second notice complained of 21 matters which can be described as follows:

1. The lock maintenance complaint;
2. The garden maintenance complaint;
3. The timber maintenance complaint;
4. The driveway cleaning complaint;
5. The lift cleaning complaint;
6. The information compilation complaint;
7. The pool and spa complaint;
8. The electrical testing quotation complaint;
9. The rubbish removal complaint;
10. The storm water drain complaint;
11. The building condition reporting complaint;
12. The pipe work complaint;
13. The electrical standards complaint;

[140795]

14. The stormwater pit complaint;
15. The pumps service history complaint;
16. The pool and spa service history complaint;
17. The hydrant room complaint;
18. The garbage room complaint;
19. The service cupboard complaint;
20. The entry steps and driveway complaint; and
21. The subcontractor complaint.

[42] Relying on those complaints, the Body Corporate contended that Peterson Management Services had breached clauses 5.1(b), (h), 5.3(b)(i) and (d) of the Maintenance Agreement and clause 5.3(b), (iii), 5.1(e), 5.1(c), 3(b)(i) and clause 6 of the Code of Conduct.

[43] Relevantly, clause 5.1 provides:

> In addition to the specific duties set out in the schedule to this agreement the Contractor must as reasonably required —
>
> (b) keep clean, tidy and maintain all parts of the common area;
> (c) maintain and clean any swimming pool, spa and/or sauna
> (e) clean any drains and gutters on common property;
> (h) effect minor repairs and maintenance to the common property where the services of a skilled tradesperson are not required.

[44] Relevantly, clause 5.3 provides

> The contractor must —
>
> (b) promptly report and account to the Body Corporate or the manager for —
>
> (i) matters requiring repair regarding a hazard or danger;
> (ii) use by the contractor of any Body Corporate funds; and
> (iii) use by the contractor of any other property of the Body Corporate in carrying out the maintenance duties.
>
> (d) carry out such other reasonable and appropriate tasks requested by the Body Corporate or the manager relevant to the maintenance of the common property.

[45] Clause 6 of the Code of Conduct for Body Corporate managers and caretaking service contractors in schedule 2 to the Body Corporate and Community Management Act 1997 provides:

> A Body Corporate manager or caretaking service contractor must take reasonable steps to ensure an employee of the person complies with this Act, including this Code, in performing the person's functions under the person's engagement.

Remedial action notice 3

[46] The third remedial action notice contained 33 complaints. If the RAN was valid it would be necessary to determine whether the applicant had acted in a way mentioned in section 129(1)(a), (b) or (c) of the Accommodation Module 2008, which amounted to misconduct or gross negligence, was a breach of clause 5, 5.1, 5.3, 7.2 or otherwise of the Care-taking Agreement or breached clause 2, 3, 4, 5 or 6 of the Code of Conduct.

[47] The complaints were:

1. The lock maintenance complaint
2. The garden maintenance complaint
3. The timber maintenance complaint
4. The Driveway cleaning complaint
5. The lift cleaning complaint
6. The balcony appearance complaint
7. The occupier statement complaint
8. The information compilation complaint
9. The pool and spa complaint
10. The electrical testing quotation complaint
11. The rubbish removal complaint
12. The storm water drain complaint
13. The key security complaint
14. The body corporate record maintenance complaint.
15. The supervision complaint
16. The building condition report complaint
17. The fire safety requirements notification complaint
18. The common property OH&S system complaint
19. The security reporting complaint
20. The common property complaint
21. The electrical standards compliance complaint
22. The fire regulations compliance complaint

[140796]

23. The basement storm water pit and pollutant trap complaint
24. The pumps service history complaint
25. The pool and spa service history complaint
26. The hydrant room and maintenance service history complaint
27. The fire protection records and compliance testing complaint
28. The garbage room cleaning complaint
29. The service cupboard maintenance complaint
31. The entry steps and driveway complaint
32. The vending machine and infrastructure complaint
33. The sub-contractor material and labour costs complaint

Remedial Action Notice 4

[48] The Fourth RAN was, in part, concerned with an alleged failure to report to the body corporate in respect of matters in checklists contained in a building operations manual given to the caretaker by the committee.

[49] It was also concerned with an alleged failure to report a potential hazard. The potential hazard was identified as “risks that the doors may contain asbestos despite being aware of this risk from at least early 2009 upon receipt of the GK consulting report”.

[50] The notice then alleged, without further particulars, that the applicant failed to comply with the Workplace Health and Safety Act and regulations by failing to comply with the Asbestos Management Code 2005. It also alleged that applicant failed to advise the body corporate of a requirement to comply with such requirements.

Remedial Action Notice 5

[51] The fifth notice was concerned with five alleged breaches namely a failure to maintain the gardens, a failure to clean Garbage rooms and garage door, a failure to clean lifts, a failure to attend to minor repairs and a failure to maintain pool records.

Remedial Action Notice 6

[52] The sixth RAN notice asserted conduct said to be a breach of section 129(1)(a),(b) and (c) of the accommodation module. There were 11 alleged breaches:

1. Failure to attend Committee Meeting
2. Failure to advise the body corporate regarding compliance with laws
3. Failure to advise the body corporate of breach of laws and potential hazard
4. Failure to comply with Committee Directions regarding expenditure
5. Failure to maintain the gardens
6. Failure to clean Garbage Rooms and Garage door
7. Failure to clean lifts
8. Failure to attend to minor repairs
9. Failure to comply with reasonable request
10. Failure to report fire safety hazard
11. Failure to Maintain Pool Records

Remedial Action Notice 7

[53] The seventh RAN alleges that the making of statements about committee and committee representatives said to be defamatory amounts to conduct breaching section 129(1)(a), (b) and (c) of the Accommodation Module.

[54] It also alleged that a failure to properly supervise a contractor to the extent that the contractor has failed to attend to cleaning and maintenance duties under the maintenance agreement and the caretaker has without justification or authority of the body corporate engaged third party contractors to perform the duties required to be completed by the contractor and then caused the contractors to bill the body corporate and/or the caretaker has sought reimbursement from the body corporate for amounts incurred by the caretaker for duties that the contractor should have performed at no extra cost to the body corporate.

[55] The notice alleges that various documents published by the caretaker were defamatory of the committee and “the committee representative”. It refers to various documents namely:

a. the March 2010 Newsletter;
b. letter dated 4 June 2010 from the caretaker to the body corporate with the subject line “Misconduct of Ms Deborah Kelly”;
c. letter dated 8 June 2010 from the caretaker to the body corporate with the subject line “misconduct of Ms Deborah Kelly- broken window 3j”;

[140797]

d. Rocks Resort Newsletter Issue 2, August 2010;
e. Owners Circular September 2010.

[56] The notice sets out what could be construed as imputations said to arise from the words used. Other than Ms Kelly, no other person is identified. The notice does not purport to plead defamation as would usually be expected in a properly constructed pleading alleging defamation.

[57] No attempt has been made to prove the defamations alleged. The allegations of defamations have not sought to be defended as would be expected in a defamation action.

[58] If the statements were proved there would be a need to prove that the imputations were published to a third person, were of and concerning a particular person or exempted corporation under the *Defamation Act* 2005 and were defamatory of that person or corporation. Whether the defamation was justified or excused is a separate matter which has not been litigated here.

[59] In my view, in this Tribunal it is not within the jurisdiction to determine those matters. In any event the alleged defamations have in my view not been proved.

[60] Further, the alleged defamations do not amount to misconduct or gross negligence in the carrying out a function required under the engagement of the caretaker. No function required under the engagement has been identified as relevant to this notice.

[61] The alleged defamations do not amount to a failure to carry out a duty under the engagement.

[62] The alleged defamations do not amount to a contravention of the relevant code of conduct.

Remedial Action Notice 8

[63] The eighth notice alleged that Mr Frank Petersen acted in an abusive and aggressive manner to the committee and committee representatives.

[64] This matter has been long and protracted. The amended application was reduced to 127 pages. The response and counter-application was 89 paragraphs. The written submission of the applicant is 187 pages and the written submissions of the respondent are over 77 pages with annexures. All of the requirements of section 129 of the Accommodation Module have been raised and contested. The validity of the RANs is in issue.

[65] A commencing point to determine the validity of the RANs is to determine whether the RANs complied with the requirements of Section 129 for the necessary statements required to be given.

Validity of the RANs

[66] Section 129 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 provides:

> **Termination for failure to comply with Remedial Action Notice**
> (1) The Body Corporate may terminate a person's engagement as a Body Corporate caretaker or service contractor if the person (including, if the person is a corporation, a director of the corporation) —
>
> (a) engages in misconduct, or is grossly negligent in carrying out functions required under the engagement; or
> (b) fails to carry out duties under the engagement; or
> (c) contravenes —
>
> (i) for the Body Corporate caretaker — the Code of Conduct for Body Corporate caretakers and caretaking service contractors; or
> (ii) for a service contractor who is a caretaking service contractor — the Code of Conduct for Body Corporate caretakers and caretaking service contractors, or the Code of Conduct for letting agents; or…
>
> (2) …
> (3) The Body Corporate may act under subsection (1) or (2) only if —
>
> (a) the Body Corporate has given the persona Remedial Action Notice in accordance with subsection (4); and
> (b) the person fails to comply with the Remedial Action Notice within the period stated in the Notice; and
> (c) the termination is approved by ordinary resolution of the Body Corporate; and
>
> [140798]
>
> (d) for the termination of a person's engagement as a service contractor if the person is a caretaking service contractor, or the termination of a person's authorisation as a letting agent — the motion to approve the termination is decided by secret ballot.
> (4) For subsection (3), a Remedial Action Notice is a written notice stating each of the following:
>
> (a) that the Body Corporate believes the person has acted —
>
> (i) for a Body Corporate caretaker or a service contractor — in a way mentioned in subsection (1)(a), (2)(e); or

(ii) for a letting agent — in a way mentioned in subsection (2)(a), (2)(d).

(b) details of the action sufficient to identify —

(i) the misconduct or gross negligence the Body Corporate believes has happened; or
(ii) the duties the Body Corporate believes have not been carried out; or
(iii) the provision of the Code of Conduct or the Regulation the Body Corporate believes has been contravened

(c) that the person must, within the period stated in the Notice but not less than 14 days after the Notice is given to the person —

(i) remedy the misconduct or gross negligence; or
(ii) carry out the duties; or
(iii) remedy the contravention

(d) that if the person does not comply with the Notice in the stated period the Body Corporate may terminate the engagement or the authorisation.

[67] Each of the eight RANs follows the same format. Each of them has a definitions section and a Notice that the Body Corporate gives the caretaker Notice pursuant to section 129 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 and clause 9 of the Caretaking Agreement of the matters that are then set out in the Notices.

[68] There is a statement in each case that the Body Corporate believes that the caretaker has acted in a way mentioned in section 129(1)(a), (b) and (c) of the Accommodation Module. They then seek to set out various breaches that they rely on to found the notice such as to identify the misconduct or gross negligence the Body Corporate believes has happened or the duties the Body Corporate believes have not been carried out. They also seek to identify the provision of the Code of Conduct or the Regulation the Body Corporate believes has been contravened.

[69] In each RAN number 2 to 8, the statement is made that:

"The caretaker must within 14 days of being served with a copy of this Notice:

(a) remedy the misconduct or gross negligence;
(b) carry out the duties;
(c) remedy the contravention of the Code of Conduct; and/or
(d) remedy the breach of the Caretaking Agreement.

with respect to the matters complained of by the Body Corporate in this Notice."

[70] The Notice then goes on to state, "*If the caretaker does not comply with the direction [**insert paragraph number**] within the period stated, then the Body Corporate may without further notice, put a motion to its members in general meeting to terminate the Caretaking Agreement."*

[71] As identified earlier, it is a requirement that a RAN in accordance with section 129(4) be given if it is to enliven the power of the Body Corporate to terminate an engagement as a Body Corporate caretaker.

[72] I note that section 38 of the *Acts Interpretation Act* 1954 (Qld) provides that if a period beginning on a given day, act or event is provided or allowed for a purpose by an Act the period is to calculated by excluding the day or the day of the act or event and if the period is expressed to be a specified number of clear days or at least a specified number of days- by excluding the day on which the purpose is to be fulfilled.

[73]

[140799]

In my view, a Remedial Action Notice as required by section 129(4) has not been given because each notice contains a statement which is not a statement "*that the person must, within the period stated in the notice but not less than 14 days after the notice is given to the person"* remedy the misconduct or gross negligence or carry out the duties or remedy the contravention.

[74] Under section 129(4) the trigger for the calculation of the minimum period for rectification is the giving of the notice and once the notice is given the person can not be required to rectify until 14 days have expired. The words “not less than 14 days” refer to the “period stated in the notice”. That period accordingly must be greater than 14 days. As an example, if the RAN was given on the first of a month then it is not until the 15th of the month that 14 days have expired. To require rectification “within” 14 days is a requirement that requires rectification in a period “less than 14 days”, that is, it requires rectification before 14 days have passed.

[75] A notice cannot require rectification within the 14 day period. It may allow rectification within that period but it cannot require rectification in the 14 day period.

[76] I accept that the “word “within” in relation to a period of time does not usually mean “during” or “throughout the whole of”: it is more frequently used to delimit a period “inside which” certain events may happen”….Ordinarily in the context in which it was used the word “within” would merely provide the limits of the period of time within which” something should occur.[12]

[77] A notice which requires a person to rectify by stating “must within 14 days of being served with a copy of this notice” requires that person to rectify before 14 days have expired.

[78] The Body Corporate submitted that the expression “within 14 days” means the same as “not less than 14 days”. To express the issue in that manner ignores the words “after the notice is given”. That phrase is qualified by the expression “but not less than 14 days”. The issue is whether the notice requires rectification before 14 days have expired.

[79] The correct meaning and effect of the words in the module is that there must not be a requirement to rectify until 14 days after the notice is given has expired.

[80] A requirement to rectify within 14 days offends that meaning.

[81] The notice that was given requires the caretaker to remedy the misconduct or gross negligence or carry out the duties or remedy the contravention in a period less than 14 days after the notice is given to the person. That is contrary to the requirement of section 129(4)(c) and accordingly the notices in each of the eight instances were not a Remedial Action Notice as required by section 129.

[82] Further, the statement “*if the caretaker does not comply with the direction… within the period stated, then the Body Corporate may without further notice, put a motion to its members in general meeting to terminate the Caretaking Agreement”* is not a statement “*that if the person does not comply with the notice in the period stated, the Body Corporate may terminate the engagement or authorisation”* as required by section 129(4)(d).

[83] For the reasons set out herein it is appropriate to declare each of the Remedial Action Notices invalid for the purposes of section 129 of the Accommodation Module and of no effect.

[84] Because the Remedial Action Notices are declared invalid it is not necessary or appropriate to determine the other issues raised which concern the Notices.

[85] The declarations sought by the Body Corporate are meant to address whether the Remedial Action Notices were appropriately given, in that, in so far as section 129 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 allows the notice to be based on misconduct, gross negligence in carrying out functions, a failure to carry out duties under the engagement or contravention of the Code of Conduct for the Body Corporate Manager.

[86] Given that the validity of the Remedial Action Notices had failed because they did not comply with the mandatory requirement of section 129(4)(c) of the Accommodation Module that the notice must amongst other things state “that the person must within the period stated in the notice but not less than 14

[140800]

days after the notice is given to the person”, it is not necessary or appropriate to make the declarations sought by the Body Corporate.

[87] The declarations made are:

1. The Remedial Action Notice (Number 1) issued to Peterson Management Services Pty Ltd on 18 June 2010 is invalid and of no effect.
2. The Remedial Action Notice (Number 2) issued to Peterson Management Services Pty Ltd on 29 July 2010 is invalid and of no effect.
3. The Remedial Action Notice (Number 3) issued to Peterson Management Services Pty Ltd on 29 July 2010 is invalid and of no effect.
4. The Remedial Action Notice (Number 4) issued to Peterson Management Services Pty Ltd on 24 August 2010 is invalid and of no effect.
5. The Remedial Action Notice (Number 5) issued to Peterson Management Services Pty Ltd on 17 September 2010 is invalid and of no effect.
6. The Remedial Action Notice (Number 6) issued to Peterson Management Services Pty Ltd on 17 September 2010 is invalid and of no effect.
7. The Remedial Action Notice (Number 7) issued to Peterson Management Services Pty Ltd on 6 October 2010 is invalid and of no effect.
8. The Remedial Action Notice (Number 8) issued to Peterson Management Services Pty Ltd on 7 October 2010 is invalid and of no effect.

[88] The parties have sought costs.

[89] The parties may make written submissions as to costs order sought after notice that a costs order is sought is filed in the Tribunal and served on the other party. In the event a costs order is sought the party seeking costs shall file in the Tribunal and serve on the other party written submissions within 7 days of filing and serving any notice a costs order is sought. The other party may file and serve any written submissions in response within 14 days of being served with the written costs submissions. The costs application will then be determined on the papers.

Footnotes

1 *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) s 129.

2 *Body Corporate and Community Management Act* 1997 (Qld) Schedule 2.

3 *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) ss 129(1).

4 *Peterson Management Services Pty Ltd* v *Body Corporate for the Rocks Resort CTS 9435* [2013] QCAT, [1].

5 *Peterson Management Services Pty Ltd* v *Body Corporate for the Rocks Resort CTS 9435* [2013] QCAT, [2].

6 *Peterson Management Services Pty Ltd (ACN 094 234 474) as trustee for the Peterson Family Trust* v *Body Corporate for the Rocks Resort Community Title Scheme 9435 (No. 1)* [2014] QCAT 541; *Peterson Management Services Pty Ltd (ACN 094 234 474) as trustee for the Peterson Family Trust* v *Body Corporate for the Rocks Resort Community Title Scheme 9435 (No. 2)* [2014] QCAT 542; *Peterson Management Services Pty Ltd* v *Body Corporate for the Rocks Resort CTS 9435* [2013] QCAT, [3]; *Peterson Management Services Pty Ltd* v *Body Corporate for the Rocks Resort CTS 9435* [2013] QCAT, [4]; *Peterson Management Services Pty Ltd* v *Body Corporate for the Rocks Resort CTS 9435* [2013] QCAT, [5].

7 The Body Corporate later sought to with draw the admission made.

8 The Body Corporate later sought to with draw the admission.

9 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 9.

10 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 60.

11 *Seed, F & J* v *Body Corporate for Renaissance Golden Beach CTS 31880* [2011] QCAT 246: *Batwing Resorts Pty Ltd* v *Body Corporate for liberty on Tedder* [2011] QCAT 277: *SCV Group Limited* v *Body Corporate for Parkview Gardens* [2011] QCAT 299: *Harvard Investments* v *Body Corporate* [2013] QCAT 254: *Wadiwel* v *Algester Gardens Body Corporate* [2011] QCAT 49.

12 *P&M Productions Pty Ltd* v *Elders Leasing Limited* [1992] 1 Qd R 264.

VIE MANAGEMENT PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) v BODY CORPORATE FOR GALLERY VIE

(2015) LQCS ¶90-204; [2015] QCAT 164

Queensland Civil and Administrative Tribunal

Decision delivered on 13 May 2015

Conveyancing — Community Schemes — Termination of financed managed service contracts — Level of protection to be afforded to financiers under s 126(2) of the Body Corporate and Community Management Act 1997 — Where body corporate entered into a caretaker agreement which was financed by a financier — Where the agreement provided that the body corporate could terminate the agreement if an insolvency event occurred — Where financier appointed receivers and managers for the agreement — Where court subsequently ordered that the caretaker be wound up on the grounds of insolvency — Where body corporate asserted a right to terminate the agreement, relying in s 126(7) of the Act — Where s 126 provides protection for financiers by permitting them to act in place of the contractor or to appoint receivers without the prospect of the contract being terminated by the body corporate by reason of those acts — Where s 126(7) provides an exception to this protection for something done or not done after the financier started to act under the subsection — Whether the making of the order to wind up the caretaker and the appointment of the liquidator by the court constituted "something done or not done" — Body Corporate and Community Management Act 1997, s 126.

This decision concerned a caretaking agreement between a body corporate and caretaker. Suncorp were the financier for the agreement.

Clause 11 of the caretaking agreement provided that the body corporate could terminate the agreement if inter alia:

- an order was made by a court that the caretaker be wound up or
- a liquidator or a provisional liquidator of the caretaker was appointed, whether or not under an order of a court.

Suncorp advised the body corporate that they had appointed receivers and managers for the caretaking agreement.

The Supreme Court of Queensland subsequently ordered that the caretaker be wound up on the grounds of insolvency and that a liquidator be appointed.

The body corporate asserted that the court's orders triggered cl 11 of the caretaking agreement and that in reliance on s 126(7) of the *Body Corporate and Community Management Act 1997*, it had acquired a contractual right to terminate the caretaking agreement (the body corporate also expressly reserved its rights under cl 11 of the agreement).

Section 126(1) provides that a body corporate under a financed contract may terminate the contract if circumstances exist that give it the right to terminate and appropriate notice is given to the financier.

However, s 126(2) provides that a body corporate cannot terminate the contract if, under arrangements between the financier and the contractor, the financier:

"(a) is acting under the contract in place of the contractor; or
(b) has appointed a person as a receiver or receiver and manager for the contract".

Section 126(7) goes on to provide that s 126(2) does not operate to stop the body corporate from terminating the contract for ***something done or not done*** after the financier started to act under the subsection.

[140802]

Suncorp countered that:

1. the s 126(7) exception did not apply because that provision only applies where a financier is acting under the contract in place of the contractor as per s 126(2)(a). The exception does not apply to s 126(2)(b).
2. Alternatively, s 126(7) does not apply because the subsection requires something to have been done or not done by the caretaker or the financier which is in the nature of a breach of the caretaking agreement and the substance of which occurs after the financier started to act. It was argued that the making of the order to wind up the caretaker and the appointment of the liquidator by the Supreme Court did not satisfy those requirements. In other words, the making of the winding up order and appointment of the liquidator arose by the acts of a third party. They did not arise from the direct actions of the caretaker or Suncorp and could not have been readily avoided by either.
3. Further in the alternative, the body corporate was not entitled to terminate the agreement because it had not properly served the s 126 notice on Suncorp.

[140803]

Held: body corporate not presently entitled to terminate the caretaker agreement because the s 126(1) notice was not properly served on Suncorp.

Whether the s 126(7) exception applies to both s 126(2)(a) and (b).

1. The exception provided by s 126(7) applies to both the circumstances in s 126(2)(a) and 2(b). This is because (inter alia):

> • There is no apparent reason why the legislative drafter would not have made express reference to s 126(2)(a) in s 126(7) if it was intended that the exception was only to apply to s 126(2)(a).
> • The effect of Suncorp's construction was that a body corporate would be precluded from terminating a financed contract after a receiver is appointed for the purposes of s 126(2)(b). This would be so even if the conduct of the contractor (by the receiver) constituted a repudiation of, or a breach of an essential term of, the contract occurring after the receiver was appointed.
>
> There is nothing in the language of s 126, the purpose of Division 4 (or of the Act generally), or in the Explanatory Notes which suggests that Parliament intended to permit a right of termination if a financier acts under the contract but not if a receiver (appointed by the financier) is acting pursuant to that appointment.

Whether the s 126(7) exception only applies to actions of the financier or the caretaker

2. The exception provided by s 126(7) can apply to the actions of other entities. To find otherwise would require the reading of s 126(7) as if it contained additional words and substantial recasting of the provision when there was no necessity to do so.

3. Further, Suncorp submitted that the liquidation was a "*condition*" brought about by an order of the court. The phrase "*something done*" in s 126(7) is expressed in very broad terms. The appointment of a liquidator pursuant to an order of the court is something done within the meaning of that phrase.

Additionally, the making of the winding up order was also "something done" within the meaning of s 126(7). It is difficult to see how a formal court order could not fall within the broad phrase "*something done*".

Whether the notice had been properly served on Suncorp

4. Despite the above findings, the notice was not properly served on Suncorp for the purpose of s 126(1). The Body Corporate was thus not entitled to terminate the caretaking agreement.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Ms S Moody of counsel (instructed by Herbert Smith Freehills) for the applicant.

Mr Charles Wilson of counsel (instructed by Reichmann Lawyers) for the respondent.

Before: Member Lumb

Editorial comment:

The management rights for a community titles scheme are a valuable asset. A financier who lends money to purchase such rights obviously has an interest in preserving them where the contractor has defaulted.

Section 126 of the *Body Corporate and Community Management Act 1997* provides some protection for financiers by permitting them to act in place of the contractor or to appoint receivers without the prospect of the contract being terminated by the body corporate by reason of those acts.

However as this decision demonstrates, financiers may have less protection than they realise under the Act. A body corporate may be able to terminate an agreement:

- for subsequent breaches that are outside the financier's control
- as a result of subsequent third party actions
- even where the body corporate suffers no detriment as a result of the subsequent breaches.

Lumb_M:

ORDERS MADE:

> **1. It is declared that the making of the order, by order of the Supreme Court of Queensland dated 19 December 2014 ('the order'), that the Applicant be wound up was something done, within the meaning of s 126(7) of the *Body Corporate and Community Management Act* 1997, after Suncorp-Metway Ltd started to act under s 126(2) of the *Body Corporate and Community Management Act* 1997.**
> **2. It is declared that the appointment of a liquidator by the order was something done, within the meaning of s 126(7) of the *Body Corporate and Community Management Act* 1997, after Suncorp-Metway Ltd started to act under s 126(2) of the *Body Corporate and Community Management Act* 1997.**

3. It is declared that the Respondent is not presently entitled to terminate the Caretaking Agreement between the Applicant and the Respondent dated 12 December 2007 ('the Caretaking Agreement') because of its failure to comply with the requirements of s 126(1) of the *Body Corporate and Community Management Act* 1997prior to 23 April 2015.
4. The Respondent, by its servant, agents or otherwise is, for a period of 21 days from the date of these orders, restrained from:

a. voting on any proposed motion to terminate the Caretaking Agreement at any general meeting; and
b. taking any other steps to terminate or purporting to terminate the Caretaking Agreement;

on the basis that the Applicant is subject to a winding up order or has had a liquidator appointed to it.
5. The parties shall file and serve, within 14 days of the date of these orders, written submissions in relation to the question of costs.

Lumb_M:

[1] The central issue raised by the Applicant's Application filed on 23 February 2015 ('the Application') is whether the Respondent ('the Body Corporate') is precluded from terminating a contract entitled '*Caretaking Agreement*' between the Body Corporate and the Applicant dated 12 December 2007 ('the Caretaking Agreement').

[2] By the Application, the Applicant sought against the Body Corporate the following relief:

1. An Interim Order, being an order restraining the [Body Corporate] from doing any of the following, pending determination of this proceeding:

[140804]

(a) Voting at its Annual General Meeting on 26 February 2015 to terminate the Caretaking Agreement; and/or
(b) Taking any other steps to terminate or purport to terminate the Caretaking Agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or has had a Receiver and Manager appointed to it.

2. A declaration that the [Body Corporate] is not entitled to terminate the Caretaking Agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or has had a Receiver and Manager appointed to it;
3. Costs, based on the principles espoused in *Beachcomber Management Pty Ltd ATF Kafritas Family Trust* v *Body Corporate for the Surfers Beachcomber* [2014] QCAT 453 (11 September 2014); and
4. Such further or other relief (including on the Interim Order) deemed appropriate.

[3] The facts material to this Application are not in dispute.

Background

[4] The original parties to the Caretaking Agreement were the Body Corporate and Gallery Vie Management Pty Ltd ('Gallery Vie'). Pursuant to the Caretaking Agreement, Gallery Vie agreed to undertake caretaking duties within the whole of the land comprising the '*Gallery Vie*' Community Titles Scheme Number 37760 on the terms contained in the agreement.

[5] The Caretaking Agreement, as varied, was assigned by Gallery Vie to the Applicant (with the Body Corporate's consent) on 31 October 2011.

[6] The provision of the Caretaking Agreement which is material to the present case is Clause 11. That clause provides:

11. This agreement may be terminated by the Body Corporate by written notice to the Caretaker upon any of the following events occurring:

(a) the [Applicant] assigns its interest in this agreement in breach of clause 10;
(b) the [Applicant] fails or neglects to carry out any of the duties and the failure or neglect continues for a further period of seven days after the Body Corporate has given written notice to the [Applicant] specifying the duty or duties which the [Applicant] has failed or neglected to carry out and requiring the [Applicant] to perform the duty or duties;
(c) the [Applicant] is guilty of gross misconduct or gross negligence in the performance of any one or more of the duties;
(d) a receiver or receiver and Caretaker of the undertaking or property of the [Applicant] or any part thereof is appointed;
(e) an order is made by a court that the [Applicant] be wound up;
(f) a liquidator or a provisional liquidator of the [Applicant] is appointed, whether or not under an order of a court;
(g) the [Applicant] enters into, or resolves to enter into, a scheme of arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them;
(h) the [Applicant] or its members resolve that it be wound up, or otherwise dissolved, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent, on terms approved by the Body Corporate;
(i) the [Applicant] is or states that it is unable to pay its debts when they fall due;
(j) the [Applicant] commits an act of bankruptcy or is declared bankrupt in accordance with the provisions of the Bankruptcy Act;
(k) the [Applicant] commits any indictable offence; or
(l) the [Applicant] becomes a person of unsound mind or a person whose person or estate is liable to be dealt with in any way under any law relating to mental health;

[140805]

(m) the registered owner from time to time of Lot 1 on SP 180452 terminates the service contract with the [Applicant] as a result of a breach by the [Applicant].

[7] Suncorp-Metway Ltd ('the Financier') holds registered security interests over all of the present and after acquired property of the Applicant with no exceptions.[1]

[8] On 24 September 2014, Mr Cronk caused to be served on the Body Corporate a notice entitled '*Notice to Body Corporate*' dated 24 September 2014 ('the September Notice').[2] The September Notice was executed by of both the Financier and the Applicant. That notice stated:

> This notice is issued in accordance with the requirements of sections 123(1) and 124 of the *Body Corporate and Community Management Act 1997* (Qld).
>
> Take notice that the Financier identified in the Schedule below/over is a financer of the Contract specified in the schedule. The Financier's address for service is:
>
> Suncorp Metway Ltd ABN 66 010 831 722
>
> c/- Herbert Smith Freehills
>
> Attn: Peter Smith
>
> Level 38, 345 Queen Street
>
> BRISBANE QLD 4000
>
> By fax: (07) 3258 6444, marked to the attention of Peter Smith

[9] The contracts referred to in the Schedule to the September Notice included the Caretaking Agreement.

[10] On 15 December 2014, Mr Cronk caused a further notice dated 15 December 2014 to be served on the Body Corporate.[3] This notice stated that it was issued in accordance with the requirements of s 126(3) of the *Body Corporate and Community Management Act* 1997 (Qld) ('the BCCMA'). This notice stated that the Financier intended to appoint Shaun McKinnon and Graham Killer of Grant Thornton ('the Receivers') as joint and several Receivers and Managers of property including the Contract specified in the schedule (which schedule referred to, inter alia, the Caretaking Agreement).

[11] On 16 December 2014, the Receivers were appointed to be receivers and managers of the '*Charged Property*' which was defined to mean all of the property, rights and undertaking charged or mortgaged by the '*Security*' including the whole of the Applicant's rights in relation to the management of the Gallery Vie CTS.[4]

[12] On 19 December 2014, the Supreme Court of Queensland ordered, inter alia, that the Applicant be wound up on the grounds of insolvency[5] and that Jonathan Paul McLeod ('the Liquidator') be appointed as liquidator for the purposes of the winding up.[6]

[13] By letter dated 28 January 2015 from the Body Corporate's solicitors to the Financier's solicitors,[7] it was asserted that the Body Corporate was of the view that the court orders of 19 December 2014 brought into play clauses 11(e) and 11(f) of the Caretaking Agreement and that in reliance upon s 126(7) of the BCCMA the Body Corporate asserted it had acquired a contractual right to terminate the Caretaking Agreement (and expressly reserved its rights under clause 11).

[14] The Financier's solicitors responded by letter dated 2 February 2015[8] asserting that s 126(7) did not apply because that provision only applies where a financier is acting under the contract in place of the contractor under s 126(2)(a).

[15] The Application was filed on 23 February 2015.

[16] On 26 February 2015 the Tribunal handed down a decision that, inter alia:

> The Body Corporate whether by its servants, agents, employees or otherwise is restrained from voting on the proposed motion to terminate the Caretaking Agreement at the Annual General Meeting to be held on 26 February 2015 (or any adjournment of that general meeting).

[17] By directions made by the Tribunal, by consent, on 6 March 2015, the Tribunal directed, inter alia:

> 1. The Body Corporate whether by its servants, agents, employees or otherwise is until these proceedings are determined or upon the earlier order of the tribunal or agreement of the parties restrained from:
>
> [140806]
>
> a. Voting on the proposed motion to terminate the caretaking agreement dated 12 December 2007 (as subsequently varied and assigned) at the annual general meeting to be held on 26 February 2015 (or any adjournment of that general meeting); and
> b. Taking any other steps to terminate or purporting to terminate the caretaking agreement on the basis that the Applicant is insolvent, is subject to a winding up order, has had a liquidator appointed to it, and/or had a receiver and manager appointed to it.

[18] The hearing of this matter took place on 24 April 2015.

[19] The Tribunal convened a directions hearing on 30 April 2015 and raised with the parties an issue concerning the jurisdiction of the Tribunal to deal with the matter, specifically the issue of whether the Applicant was a letting agent within the meaning of that phrase in the BCCMA. The Tribunal gave directions for the provision of any further evidence and supplementary written submissions.

[20] The Applicant filed a further affidavit from Graham Killer sworn on 30 April 2015 and a supplementary outline of submissions. The Body Corporate chose not file any affidavit material or submissions in reply.

[21] For completeness, I note that by letter dated 24 December 2014 from the Liquidator to the Financier's solicitors, the Liquidator consented to the Receivers continuing to trade the business of the Applicant pursuant to s 420C of the *Corporations Act* 2001 (Cth).[9] In my view, this fact is irrelevant to the determination of the issues in the present case. This case turns on the proper construction of s 126 of the BCCMA and that fact has no bearing on such construction. I also note that the Liquidator's consent was not given until five days after the winding up order was made. Any right of termination had arisen prior to that time.

Jurisdiction

[22] The Tribunal's original jurisdiction includes the jurisdiction conferred on the Tribunal under an enabling Act to decide a matter in the first instance.[10] The BCCMA is the enabling Act for the purposes of this Application. The Tribunal has jurisdiction to resolve a '*complex dispute*' by an order of the Tribunal exercising the Tribunal's original jurisdiction under the QCAT Act.[11] The definition of '*complex dispute*' in the BCCMA includes a dispute mentioned in s 149B of the BCCMA.

[23] Section 149B applies to a dispute about a claimed or anticipated '*contractual matter*' about, inter alia, the engagement of a person as a body corporate manager or caretaking service contractor for a community titles scheme.[12] Having regard to the terms of the Caretaking Agreement, I consider that the Applicant is a service contractor within the meaning of the BCCMA.[13]

[24] The definition of '*caretaking service contractor*' is contained in Schedule 6 to the BCCMA. It provides:

> ***caretaking service contractor***, for a community titles scheme, means a service contractor for the scheme who is also —
>
> (a) a letting agent for the scheme; or
> (b) an associate of the letting agent.

[25] The definition of '*letting agent*' is found in s 16. That provision provides:

> (1) A person is a ***letting agent*** for a community titles scheme if the person is authorised by the body corporate to conduct a letting agent business for the scheme.
> (2) A person conducts a ***letting agent business*** for a community titles scheme if the person conducts, subject to the *Property Occupations Act 2014*, the business of acting as the agent of owners of lots included in the scheme who choose to use the person's services for securing, negotiating or enforcing (including collecting rents or tariffs for) leases or other occupancies of lots included in the scheme.

[26] I accept the Applicant's submissions that the Applicant is a '*letting agent*' for the purposes of the BCCMA. In this regard I refer to [4] of the further affidavit of Mr Killer and exhibit 'GRK-2' (in particular clause 2(a) and the definition of '*letting service*' in the Letting Agreement). I find that the Applicant is a '*caretaking service contractor*' for the purposes of the BCCMA.

[27]

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The phrase '*contractual matter*' is defined to mean:

> ***contractual matter***, about an engagement or authorisation of a body corporate manager, service contractor or letting agent, means—
>
> (a) a contravention of the terms of the engagement or authorisation; or
> (b) the termination of the engagement or authorisation; or
> (c) the exercise of rights or powers under the terms of the engagement or authorisation; or
> (d) the performance of duties under the terms of the engagement or authorisation.

[28] In my view, the present dispute is one about a claimed or anticipated termination of the engagement of the Applicant as caretaker (subsection (b)). It also involves the exercise of rights (by the Body Corporate) under the terms of such engagement (subsection (c)). I conclude that this is a complex dispute being a dispute about a claimed or anticipated "contractual matter" about, inter alia, the engagement of a person as a caretaking service contractor for a community titles scheme and that the Tribunal has jurisdiction to determine the dispute.

The Applicant's challenge to the Body Corporate's right to terminate

[29] The Applicant contends that the Body Corporate is not entitled to terminate the Caretaking Agreement. The Applicant relies upon three principal grounds:

> a) s 126(2) of the BCCMA precludes the Body Corporate from terminating the Caretaking Agreement. The exception in s 126(7) does not apply to the facts of the present case because

that subsection applies only where a financier has '*started to act*' under s 126(2)(a) and, here, the Financier has appointed receivers and managers under s 126(2)(b);
b) in the alternative, s 126(7) does not apply because, upon its proper construction, the subsection requires something to have been done or not done by the Applicant or the Financier which is in the nature of a breach of the Caretaking Agreement and the substance of which occurs after the Financier started to act (and the making of the order to wind up the Applicant and appointment of a liquidator does not satisfy those requirements);
c) further in the alternative, the Body Corporate is not entitled to terminate the Caretaking Agreement because it has not served a notice on the Financier as required under s 126(1) and s 126(9) of the BCCMA.

[30] In order to address these arguments, I will first consider the history of s 126 and the operation of s 126(2).

The history of s 126

[31] Section 126 in its current form provides:

(1) The body corporate under a financed contract may terminate the contract if—

(a) the body corporate has given the financier for the contract written notice, addressed to the financier at the financier's address for service, that the body corporate has the right to terminate the contract; and
(b) when the notice was given, circumstances existed under which the body corporate had the right to terminate the contract; and
(c) at least 21 days have passed since the notice was given.

(2) However, the body corporate can not terminate the contract if, under arrangements between the financier and the contractor for the contract, the financier—

(a) is acting under the contract in place of the contractor; or
(b) has appointed a person as a receiver or receiver and manager for the contract.

(3) A financier may take the action mentioned in subsection (2)(a) or (b) only if the financier has previously given written notice to the body corporate of the financier's intention to take the action.
(4) The financier may authorise a person to act for the financier for subsection (2)(a) if—

(a) the person is not the contractor or an associate of the contractor; and
(b) the body corporate has first approved the person.

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(5) For deciding whether to approve a person under subsection (4), the body corporate—

(a) must act reasonably in the circumstances and as quickly as practicable; and (b) may have regard only to—

(i) the character of the person; and
(ii) the competence, qualifications and experience of the person.

(6) However, the body corporate must not—

(a) unreasonably withhold approval of the person; or
(b) require or receive a fee or other consideration for approving the person, other than reimbursement for legal or administrative expenses reasonably incurred by the body corporate for the application for its approval.

(7) Subsection (2) does not operate to stop the body corporate from terminating the contract for something done or not done after the financier started to act under the subsection.
(8) Nothing in this section stops the ending of a financed contract by the mutual agreement of the body corporate, the contractor and the financier.
(9) In this section—

address for service, for a financier, means the financier's address for service—

(a) for notices given by the body corporate under this division; and
(b) stated in a notice given to the body corporate under section 123 or 124.

[32] As originally enacted, the limitation on a body corporate terminating a financed contract was confined to circumstances in which the financier was acting under the contract in the place of the contractor for the contract.

[33] The Explanatory Notes for the *Body Corporate and Community Management Bill* 1997 provided that:

> clause 110 sets out the level of protection given to a financier of a contract of a person who is engaged as a service contractor or authorised as a letting agent when the body corporate terminates the contract.

[34] Section 126 was originally numbered as s 110. It was substituted in 2003.[14] Section 126(5) was subsequently amended but that amendment is not relevant for present purposes.

[35] When the subsection was substituted in 2003, among other amendments, s 126(2) was amended to include the reference to circumstances in which a financier has appointed a person as a receiver or receiver and manager for the contract.

[36] The Explanatory Notes for the *Body Corporate and Community Management and Other Legislation Amendment Bill* 2002 provide that:

> Section 110 has been substantially rewritten to clarify the rights and responsibilities of the financier of a finance contract and the body corporate. For instance the section now recognises the appointment of a receiver and manager for the financed contract. The section also places greater emphasis on the giving of appropriate notices between the financier and the body corporate.
>
> A new section 110A is included that, from the commencement of the section, will prohibit the financier requiring the body corporate to enter into a contract with the financier about the financier's rights under the financed contract. Such contracts have previously been used by the financiers to support and even extend the operation of section 110 and to prevent the body corporate from reaching an arrangement with a financed letting agent that the financier perceives may not be in the best interest of the financier. It is intended that the financier will rely on the expanded provisions of section 110.
>
> The new section does not act retrospectively. Rather it applies to contracts purportedly entered into after the section's commencement.

The operation of s 126(2)

[37] Section 126(2) provides that the body corporate cannot terminate a financed contract if (under arrangements between the financier and the contractor for the contract) the financier '*is acting under the contract*' in place

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of the contractor or '*has appointed*' a person as a receiver or receiver and manager for the contract. In these reasons, any reference to a '*receiver*' should be taken as also referring to a '*receiver and manager*'.

[38] Section 126(1) provides that the body corporate may terminate a financed contract if three conditions are satisfied. The second condition is that when the requisite notice was given '*circumstances existed under which body corporate had the right to terminate the contract*'. In my view (assuming that a compliant notice is given pursuant to s 126(1)) s 126(2) operates (subject to s 126(7)) to preclude a right to terminate a financed contract whether pursuant to an express contractual provision or by reason of the common law doctrines applying to the termination of contracts (e.g. repudiation or breach of an essential term). I consider that the broad terms of s 126(1)(b), in particular the reference to '*circumstances existed*' under which the body corporate had a right to terminate, support a conclusion that those circumstances encompass the grounds of termination identified above.

[39] Two further matters should be mentioned in relation to s 126(2).

[40] First, the Body Corporate submits that s 126(2) operates as a statutory '*standstill*' and that once the financier is no longer acting under the contract or the receiver has ceased to act in that capacity, any pre-

existing right of termination is '*reactivated*'. This raises the issue of whether the operation of s 126(2) merely suspends any right of termination or whether it extinguishes such right. It is unnecessary to decide that question in the present case because the Receivers continue to act pursuant to their appointment and I do not propose to decide the point. For this reason, I will refer to the operation of s 126(2) as effecting a '*limitation*' on the right of termination (reflecting the language of the BCCMA).

[41] Secondly, s 126(2)(b) refers to the appointment of a person as a receiver '*for the contract*'. There is no dispute between the parties that this subsection was engaged upon the appointment of the Receivers in the present case. In my view, it is inapt to refer to a receiver being appointed '*for the contract*'. However, it seems clear that the legislature intended that the subsection is to encompass circumstances in which a receiver is appointed to *the property of* the contractor *including the contractual rights* enjoyed under a financed contract (otherwise the purpose of the provision would be defeated because a receiver could not, literally, be appointed '*to a contract*').

[42] I will now address each of the grounds relied upon by the Applicant.

The first ground

[43] The Applicant's first contention is that s 126(2) gives a financier (of a financed contract) two alternative options, either to '*act*' under s 126(2)(a) or to appoint receivers under s 126(2)(b); that these two alternative options are treated differently throughout the balance of s 126; and that s 126(7) expressly applies only where financier is '*acting*' under s 126(2)(a).

[44] In my view, the phrase '*started to act*' sits more comfortably (in a grammatical sense) with the language of s 126(2)(a) than with the language of s 126(2)(b). However, the phrase '*started to act*' is expressly qualified by the words '*under the subsection*'. The subsection referred to is s 126(2) being the subsection referred to in the opening words of s 126(7). The ordinary grammatical meaning of '*under the subsection*' is a reference to both s 126(2)(a) and s 126(2)(b) in s 126(2).

[45] In my view, s 126(7), upon its proper construction, is not limited to the circumstances contemplated by s 126(2)(a); it applies to both scenarios in s 126(2). I consider that there are three factors that point to this construction being the proper construction of the subsection.

[46] First, as the Body Corporate submitted, the Parliamentary drafter has referred to the discrete subsections of s 126(2) in other provisions of s 126. Section 126(3) refers to s 126(2)(a) or s 126(2)(b) and s 126(4) refers to s 126(2)(a). There is no apparent reason why the drafter would not have made express reference to s 126(2)(a) in s 126(7) if it was intended that the exception provided by that subsection applied only to s 126(2)(a). Further, the words adopted in s 126(2)(a) refer to circumstances where the financier is acting '*under the contract*'. In its current form, s 126(7) refers to the financier starting to act '*under the subsection*'. I consider it unlikely

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that the Parliamentary drafter would have eschewed the use of the phrase '*under the contract*' and adopted the phrase '*under the subsection*' if it had been intended that s 126(7) was to apply only to s 126(2)(a).

[47] Secondly, s 126(3) provides that a financier may '*take the action*' mentioned in s 126(2)(a) or s 126(2)(b) (if the financier has previously given the requisite written notice). The phrase '*take the action*' necessarily contemplates that the appointment of a receiver constitutes the taking of action by a financier. '*Action*' is defined in the Macquarie Dictionary (5th edition) to mean, inter alia: '*1. The process or state of acting or of being active … 2. Something done: an act; deed …*'. '*Act*' is defined to mean, inter alia: '*1. Anything done or performed; a doing: deed. 2. The process of doing; caught in the act …*'.

[48] In my view, there is no warrant for construing the word '*act*' in s 126(7) as bearing a meaning materially different to the term '*action*' in s 126(3). In my view, the language adopted by the legislature supports a conclusion that the reference to a financier starting to '*act*' within the meaning of s 126(7) contemplates the '*act*' or '*action*' comprising one or other of the circumstances set out in s 126(2)(a) and s 126(2)(b) respectively.

[49] Thirdly, the effect of the Applicant's construction is that a body corporate would be precluded from terminating a financed contract after a receiver is appointed for the purposes of s 126(2)(b). This would

be so even if the conduct of the contractor (by the receiver) constituted a repudiation of, or a breach of an essential term of, the contract occurring after the receiver was appointed. I consider that there is nothing in the language of s 126, the purpose of Division 4 (or of the BCCMA generally), or in the Explanatory Notes which suggests that Parliament intended to permit a right of termination if a financier acts under the contract but not if a receiver (appointed by the financier) is acting pursuant to that appointment.

[50] In my view, the exception or carve out provided by s 126(7) applies to s 126(2) generally, that is, it applies to each of the circumstances in s 126(2)(a) and s 126(2)(b).

The second ground

[51] Based on the view that I have reached in relation to the first argument, I consider that a financier starts to act under s 126(2) either when the financier commences acting under the financed contract in place of the contractor[15] or when the financier appoints a person as a receiver '*for the contract*'.[16]

[52] In the present case, there is no dispute that the winding up order (which also appointed the Liquidator to the Applicant) was made *after* the appointment of the Receivers.

[53] In my view:

> a) the making of the order by the Supreme Court of Queensland that the Applicant be wound up was an event contemplated by clause 11(e) of the Caretaking Agreement; and
> b) the appointment of the Liquidator under that order was an event contemplated by clause 11(f) of the Caretaking Agreement.

[54] The Body Corporate contends that each of these events constituted '*something done or not done*' within the meaning of s 126(7) and, having occurred after the appointment of the Receivers, fell within the exception to s 126(2) provided by s 126(7).

[55] The Applicant's case is set out in [22] and [23] of its outline of submissions:

> 22. … the Applicant submits that section 126(7) does not apply in this matter because, when properly construed in light of its purpose discussed above, it requires something to have been *'done or not done'*:
>
> > (a) by the Applicant or the Financier;
> > (b) which is in the nature of a breach of the Caretaking Agreement; and
> > (c) the substance of which occurred after the Financier commenced enforcement action.
>
> 23. In this respect:
>
> > (a) liquidation is not a thing *'done or not done'*. It is a condition brought about by an Order of the Court;
> > (b) the making of the winding up order and appointment of the Liquidator arose by the acts of third parties. They did not arise from the direct actions of the
>
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>
> > Applicant or the Financier and could not have been readily avoided by either;
> > (c) In any event, neither the making of a winding up order or liquidation of the Applicant constitute *'breaches'* of the Caretaking Agreement. They are simply termination events, and do not constitute any breaches of any obligations under the Caretaking Agreement;
> > (d) the winding up application against the Applicant was filed on 28 November 2014 and all substantive affidavits were filed in the proceeding by 9 December 2014. This predates any enforcement action taken by the Financier, with the Receivers being appointed some 7 days later on 16 December 2014; and
> > (e) the liquidation of the Applicant has no impact on the conduct of the Applicant's business. The Receivers have priority and have the Liquidator's express statutory authorisation to continue to operate the Applicant's business as duly authorised agents of the Applicant.

[56] In her oral submissions, Ms Moody, who appeared for the Applicant, focused on three aspects (without abandoning reliance on the grounds contained in the written submissions):

a) that s 126(7), on its proper construction, contemplated something done or not done by the financier or by the contractor (in respect of whom receivers and managers had been appointed);
b) that the phrase '*something done or not done*' was referable to the parties' contractual obligations; and
c) that the winding up order (and the appointment of the liquidator) was not something done (or not done) within the meaning of s 126(7).

[57] It was also submitted on behalf of the Applicant that the rights granted under an agreement such as the Caretaking Agreement can be very valuable and that the financier of such a contract has an obvious interest in preserving the value of that agreement. So much may be accepted.

[58] The appointment of a receiver is the event upon which s 126(2)(b) is predicated. I consider that the primary question is whether the protection provided by s 126(2) was intended to extend to prevent termination by the Body Corporate for terminating events which arose by reason of something done or not done by an entity other than the financier or the contractor.

[59] I consider that neither the Explanatory Notes in relation to s 126 as originally enacted (then numbered s 110) nor the Explanatory Notes in relation to that provision as inserted in 2003 provides assistance in determining which construction should be preferred.[17] Such Notes leave open the question of whether the exception provided for by s 126(7) should be limited in the manner contended for by the Applicant.

[60] The essence of the Body Corporate's written submissions was that the phrase '*done or not done*' was '*perfectly general*' and the only limitation on the '*amplitude*' of the expression was the temporal limitation introduced by the words '*after the financier started to act …*'; the expression was satisfied by acts or omissions on the part of a third party, the Body Corporate or the contractor.[18] In his oral submissions, Mr Wilson, who appeared for the Body Corporate, submitted that the making of the order was a '*juridical act*' and was necessarily '*something done*' within the meaning of the subsection. The Body Corporate submitted that the Applicant's construction requires reading words of limitation into s 126(7) and that the Applicant could not satisfy the three limb test applicable to the reading in of words in a statute (citing *Bermingham v Corrective Services Commission of New South Wales*[19] and *R v Young*).[20]

[61] That test was espoused by Lord Diplock in *Jones v Wrotham Park Settled Estates* (sub nom *Wentworth Securities Ltd v Jones*) and provides that:[21]

(1) the Court must know the mischief with which the Act was dealing;
(2) the Court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved; and

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(3) the Court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

[62] This test has been applied by the High Court of Australia,[22] the Queensland Court of Appeal[23] and at appellate level in other States.[24]

[63] In *Taylor v Owners — Strata Plan No 11564*,[25] a majority of the High Court considered the operation of Lord Diplock's test in the context of the modern purposive approach to statutory interpretation. It is worthwhile setting out the relevant observations of the majority in full:[26]

[35] In *Young* Spigelman CJ suggested that the authorities do not warrant the court supplying words in a statute that have been "omitted" by inadvertence per se. Construing the words actually used by the legislature in "their total context", Spigelman CJ suggested that the process of construction admits of reading down of general words or giving the words used an ambulatory operation. His Honour cited *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* as an instance of the former and *Bermingham v Corrective Services Commission (NSW)* as an instance of the latter. In *PLV* his Honour expanded on his analysis in *Young*, observing (at [88]):

> [88] The authorities which have expressed the process of construction in terms of "introducing" words to an Act or "adding" words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has "introduced" words to or "deleted" words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. … There are many cases in which words have been *read down*. I know of no case in which words have been *read up*. [Emphasis in original.]

[36] In *Leys* the Victorian Court of Appeal was critical of Spigelman CJ's characterisation of purposive construction as a process of construing "the words actually used" (emphasis in original). Their Honours said that the process requires the court to determine whether the modified construction is reasonably open in light of the statutory scheme and against a background of the satisfaction of Lord Diplock's three conditions. Their Honours questioned the utility of the distinction between "reading up" and "reading down" and rejected the proposition that a purposive construction may not result in an expanded operation of a provision.

[37] Consistently with this court's rejection of the adoption of rigid rules in statutory construction, it should not be accepted that purposive construction may never allow of reading a provision as if it contained additional words (or omitted words) with the effect of expanding its field of operation. As the review of the authorities in *Leys* demonstrates, it is possible to point to decisions in which courts have adopted a purposive construction having that effect. And as their Honours observed by reference to the legislation considered in *Carr v Western Australia*, the question of whether a construction "reads up" a provision, giving it an extended operation, or "reads down" a provision, confining its operation, may be moot.

[38] The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

[39] Lord Diplock's three conditions (as reformulated in *Inco Europe*) accord with the statements of principle in *Cooper Brookes,* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as

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if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that 'the modified construction is reasonably open having regard to the statutory scheme' because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, '[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances'.

[40] Lord Diplock's speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock's conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of parliament: the alteration to the language of the provision in such a case may be 'too far-reaching'. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the Constitution. (citations omitted)

[64] The phrase '*something done or not done*' is very broad. On the ordinary grammatical meaning of the language of s 126(7), s 126(2) does not operate to '*stop*' a body corporate from terminating the contract for something done or not done at any time after the financier has started to act (as I have found, under either s 126(2)(a) or s 126(2)(b)). The Applicant seeks to read down the phrase by a process of construction which limits the exception to something done or not done by the contractor or the financier and is in the nature of a breach of the financed contract (and the substance of which occurred after the financier started to act). In my view, the Applicant's construction necessarily involves a modified construction, one requiring the reading of s 126(7) as if it contained additional words. The Applicant's modified construction requires substantial recasting of the provision to meet the construction placed upon it by the Applicant. Even if the construction proposed by the Applicant were limited in the manner set out in [22(a)] of the Applicant's written submissions (which it is not), I consider that the Applicant's case would involve a modified construction necessitating the reading in of words. In that event, the provision would be required to be read as '*… something done or not done by the financier or the contractor …*' or, perhaps, as '*… something done or not done by the financier or the contractor (by the receiver or receiver and manager for the contract) …*'.

[65] I consider that it is necessary to address whether the Applicant's construction satisfies the test espoused by Lord Diplock. In doing so, I note the unresolved issue of whether there is a fourth element requiring consistency with the wording of the provision.

What was the mischief with which the Act was dealing?

[66] The Applicant submitted that s 126 is intended to achieve a '*common sense and practical balance*' between the interests of '*body corporates*' (whose primary interest is in having their caretaking duties properly performed as agreed with the caretaker) and financiers of caretaking agreements (whose interest is in preserving the value of the security by avoiding termination of the caretaking agreement where the caretaker has defaulted, but the financier has taken appropriate action to ensure that the caretaking duties continue to be carried out).

[67] With respect to the amendment of what is now s 126 in 2003, the Body Corporate submitted that this involved a '*rebalancing*' of the rights and obligations as between the body corporate and the financier. As I

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understood the thrust of the submissions, it is suggested that this involved the tilting of the balance back towards the body corporate.

[68] Section 126 forms part of Division 4 of Part 2 of Chapter 3 of the BCCMA. The heading to the Division states '*Protection for financier of contract*'. The heading to s 126 states '*Limitation on termination of financed contract*'. The original Explanatory Notes stated that the provision sets out the '*level of protection*' given to a financier of a contract of a person who is engaged as a service contractor or authorised as a letting agent when the body corporate terminates the contract.

[69] In my view, the legislature intended to provide protection to financiers of financed contracts by permitting them to act (by an agent) in place of the contractor or to appoint receivers (to the contractor's property to the extent that it included the rights under a financed contract) without the prospect of the contract being terminated by reason of those acts. I am also of the view that additional protection was provided by precluding the body corporate from exercising any existing right of termination arising under an express contractual provision or by reason of common law doctrines applying to the termination of contracts (e.g. repudiation or breach of an essential term). This protection was maintained (at the least) while either of the circumstances in s 126(2) continued. This limitation assisted in preserving the value of the security comprising the bundle of rights bestowed upon the contractor under the relevant financed contract.

[70] In my view, the provision substituted in 2003 effected four main changes to the existing provision. First, the notice contemplated by (what is now) s 126(1)(a) was required to be addressed to the financier at the financier's address for service. Secondly, that if a financier elected to act under the contract it could not authorise the contractor or an associate of the contractor to do so. Thirdly, the limitation on a body corporate's right to terminate a financed contract extended to circumstances in which the financier appointed a person as a receiver (for the contract). Fourthly, for the reasons expressed above, I consider that the exception to the operation of s 126(2) was also extended to the circumstances in which the financier

appointed a person as a receiver. That is, both the limitation on termination applied, and the existing exception was extended, to circumstances in which a receiver was appointed '*to the contract*'. In my view, the substitution of the provision in 2003 did not affect the scope of the protection provided by s 126(2) other than by applying it to circumstances in which a receiver was appointed.

[71] However, in my respectful view, neither the language of s 126 (as originally enacted or in its subsequent form) or the BCCMA in general nor the Explanatory Notes sheds light on the precise scope of the '*level of protection*' intended to be provided to a financier after the financier started to act under s 126(2). There appears to be no dispute that the provision in its current form is intended to achieve a balance between the rights of bodies corporate and the protection of financiers of financed contracts. What is unclear is how that balance was to be struck in circumstances where a contractual right of termination arose after a financier started to act under s 126(2).

[72] Despite this lack of clarity, it is my view that the Body Corporate's construction does not lead to an absurd, unreasonable or capricious result. A financier still enjoys a level of protection. First, a body corporate is denied the right to terminate a financed contract in the event that receivers are appointed '*to the contract*' (in the present case, clause 11(d) of the Caretaking Agreement provided that the appointment of a receiver was an event of termination). Section 126(7) operates only '*after*' a financier starts to act under s 126(2). Secondly, as noted above, there is a limitation on the body corporate terminating a financed contract on any applicable *existing* ground of termination (for, *at least*, the duration of the occurrences of either of the events identified in s 126(2)).

[73] I will turn to the second limb of Lord Diplock's test which provides that the Court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved.

[140815]

Parliamentary inadvertence?

[74] With respect to '*inadvertence*' in this context, it was said by the New South Wales Court of Appeal in *Tokyo Mart Pty Ltd v Campbell*:[27]

> Legislative inadvertence may consist, inter alia, of either of two things. The draftsman may have failed to consider what should be provided in respect of a particular matter and so fail to provide for it. In such a case, though it may be possible to conjecture what, had he adverted to it, he would have provided, the court may not, in my opinion, supply the deficiency. In the other case, the legislative inadvertence consists, not in a failure to address the problem and determine what should be done, but in the failure to provide in the instrument express words appropriate to give effect to it. In the second case, it may be possible for the court, in the process of construction, to remedy the omission.

[75] These observations were cited with approval by the Queensland Court of Appeal in *Sevmere Pty Ltd v Cairns Regional Council*.[28] They have also been cited with approval by the Full Federal Court[29] and the South Australian Court of Criminal Appeal.[30]

[76] While greater protection would be afforded to financiers if the Applicant's construction were accepted, I cannot conclude that this was the intention of Parliament. I do not consider that a scenario in which a contractual right of termination may arise for something done or not done by an entity other than the financier or the contractor is an eventuality which must be dealt with if the purpose of s 126 is to be achieved. As noted above, financiers receive a level of protection in the event that the Body Corporate's construction is accepted. In my view, even if it were assumed that Parliament (if alerted to this issue) would have limited s 126(7) in the manner set out in [22(a)] of the Applicant's outline of submissions, this would be the result of the legislature's failure to consider the matter and to provide for it (and would fall within the first category identified in *Tokyo Mart*). In those circumstances, the Tribunal could not supply the deficiency.

[77] I am mindful that the Tribunal's task is one of construction and not legislation. I conclude that the Applicant's modified construction, even to the extent set out in [22(a)] of its outline of submission, would cross the boundary between construction and legislation.

[78] That the Applicant's construction crosses that boundary is plain in relation to the contentions in [22(b)] and [22(c)] of its outline of submissions.

[79] If, as I have found, s 126(2) operates to limit termination by the Body Corporate for breaches of essential terms, repudiation or pursuant to express contractual rights of termination, there is no indication in the language of the provision (or the Explanatory Notes) that the exception provided by s 126(7) is limited to breaches of contract only. The Applicant seeks to draw a distinction between the scope of events of termination limited by s 126(2) and the scope of the events of termination the subject of the s 126(7) exception. In my view, there is no warrant for adopting such a modified construction; it cannot be concluded that this was the result of Parliamentary inadvertence.

[80] I also reject the contention that the '*substance*' of the breach (or event) must occur after the Financier started to act. In my view, the reference to '*something done or not done*' is a reference to some occurrence, or a failure to do something, giving rise to a right to terminate the financed contract. The legislature has drawn a clear dividing line between events occurring before and after the time at which the financier starts to act. In my view, the concept of the '*substance*' of something being done after that time would introduce a significant degree of uncertainty in the application of the provision and it is unlikely that the legislature could have intended such a concept to apply to the operation of the provision.

[81] For the above reasons, the Applicant's construction is rejected. I find that s 126(7), upon its proper construction, applies to the contractual events of termination under clauses 11(e) and (f) of the Caretaking Agreement (which occurred after the appointment of the Receivers) notwithstanding that the

[140816]

events arose by the act of an entity other than the Applicant or the Financier.

[82] For completeness, I will consider the third limb of Lord Diplock's test.

Certainty of the words Parliament would have used to overcome any omission?

[83] As discussed above, the construction contended for by the Applicant as set out in [22] of its outline of submissions requires considerable modification of the language of s 126(7). In my view, even if relevant Parliamentary inadvertence existed, there is no formula of words which could be adopted which would reflect, with certainty, a construction that would overcome any such omission. In this regard, I note that the Applicant did not attempt to frame the modified terms of s 126(7) to encapsulate its preferred construction set out in [22] of its outline of submissions (other than in the general manner set out in that paragraph).

Was the making of the winding up order and appointment of the Liquidator "something done or not done"?

[84] The Applicant submitted that the liquidation was a '*condition*' brought about by an order of the court. No authority was cited for this proposition The Applicant did not, in my respectful view, make clear what is meant by the term '*condition*'. The phrase '*something done*' is expressed in very broad terms. I find that the appointment of a liquidator pursuant to an order of the Court is something done within the meaning of that phrase.

[85] In any event, I also find that the making of the winding up order was '*something done*' with the meaning of s 126(7). It is difficult to see how a formal Court order could not fall within the broad phrase '*something done*'. I reject the Applicant's argument that the grounds upon which the Body Corporate proposed to terminate the Caretaking Agreement did not fall within the phrase of '*something done or not done*'.

[86] Subject to the third argument raised by the Applicant, I consider that the Body Corporate would be entitled to terminate the Caretaking Agreement pursuant to clauses 11(e) and 11(f) of the agreement.

The third ground

[87] Section 126(1) provides that the Body Corporate under a financed contract) may terminate the contract '*if*' the matters specified are satisfied. In my view, compliance with the requirements of that subsection is necessary in order to terminate a financed contract.

[88] The purported notice was sent by email and was not addressed to the Financier. The Body Corporate conceded, in the course of oral submissions, that (prior to 23 April 2015) there was no notice compliant with s 126(1).

[89] On the basis of that concession, I am of the view that the Body Corporate is, presently, not entitled to terminate the Caretaking Agreement given the absence of the requisite notice under s 126(1) at any time prior to 23 April 2015. The relevance of that date is that the Body Corporate purported to serve a compliant notice on 23 April 2015. A copy of the purported notice is Exhibit 'MHB-1' to the affidavit of Mitchell Brown sworn on 24 April 2015. Despite objection by the Applicant, I admitted that affidavit only to the extent of [1]–[3] inclusive. The Body Corporate was concerned to avoid any argument that the grant of declaratory relief would be based on a hypothetical scenario. While it is not evident to me that evidence of the purported notice was necessary to demonstrate a proper basis for the grant of declaratory relief, I admitted the affidavit on that limited basis. The Applicant has not conceded that the purported notice is a compliant notice and the validity of same is not a matter that is the subject of determination in the present matter.

Conclusion

[90] For the reasons set out above, I consider that to resolve the dispute between the parties it is appropriate to declare, pursuant to s 60 of the QCAT Act, that:

> a) the making of the order by the Supreme Court of Queensland, on 19 December 2014, that the Applicant be wound up was something done, within the meaning of s 126(7) of the BCCMA, after the Financier started to act under s 126(2) of the BCCMA;
> b) the appointment of the Liquidator by that order was something done, within the meaning of s 126(7) of the BCCMA, after

> the Financier started to act under s 126(2) of the BCCMA;
> c) the Body Corporate is not presently entitled to terminate the Caretaking Agreement because of its failure to comply with the requirements of s 126(1) of the BCCMA prior to 23 April 2015.

[91] The Applicant also seeks the continuation of the interim orders made on 6 March 2015 for a further period of 21 days. In my view, in light of the declaration in [90(c)] above, it is just and convenient to make an order restraining the Body Corporate from voting on or taking any steps to terminate or purport to terminate the Caretaking Agreement (pursuant to s 59 of the QCAT Act). I consider that the period of 21 days sought by the Applicant is a reasonable period given that the validly of the purported notice of 23 April 2015 is yet to be determined. However, I consider that this order should be made as a final order albeit for that limited period because this is a hearing to determine the final relief to be granted in the Application.

[92] As to the question of costs, I direct that the parties are to file any written submissions in relation to costs within 14 days of the date of this Decision.

Footnotes

1 Affidavit of Mr Cronk, at [5].
2 Affidavit of Mr Cronk, at [7] and p 5 of Exhibit 'LIC-1'.
3 Affidavit of Mr Cronk, at [8] and p 7 of Exhibit 'LIC-1'.
4 Affidavit of Mr Killer, at [4] and p 1 of Exhibit 'GRK-1'.
5 Pursuant to *Corporations Act* 2001 (Cth), s 459A.
6 Affidavit of Mr Cronk, at [6] and p 4 and p 11 of Exhibit 'LIC-1'.
7 Affidavit of Mr Cronk, at [11] of pp 12–3 of Exhibit 'LIC-1'.
8 Affidavit of Mr Cronk, at [13] and p 14 of Exhibit 'LIC-1'.
9 Affidavit of Mr Cronk, at [8] and p 7 of Exhibit 'LIC-1'.
10 *Queensland Civil and Administrative Act* 2009 (Qld) (QCAT Act) s 10(1)(b).
11 BCCMA s 229(2)(a)(ii).

12 BCCMA s 149B(1)(a)

13 BCCMA definition of '*service contractor*' and s 15.

14 See the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 (Qld) (Act 6 of 2003, s 47).

15 BCCMA s 126(2)(a).

16 Ibid, s 126(2)(b).

17 *Acts Interpretation Act* 1954 (Qld), s 14B.

18 At [14] and [15].

19 (1988) 15 NSWLR 292 at 302.

20 (1999) 46 NSWLR 681 at [3] ff per Spigelman CJ.

21 [1980] AC 74 at 105–106.

22 See e.g. *Saraswati* v *The Queen* (1991) 172 CLR 1 at 22 per McHugh J; Toohey J agreeing; *Minister for Immigration & Citizenship* v *SZJGV* (2009) 238 CLR 642 at [9] per French CJ and Bell J.

23 See e.g. *Kelsall and Anor* v *State of Queensland and Anor* [2012] QCA 369 at [49]–[52] per White JA with whom Gotterson JA and North J agreed (Special leave refused: [2013] HCATrans 124); *Foster* v *Cameron* [2011] QCA 48 at [29] per Chesterman JA with whom McMurdo P and Ann Lyons J agreed; *Special Projects (Qld) Pty Ltd* v *Simmons* [2012] QCA 205 at [24] per Fraser JA.

24 See e.g. *Kingston* v *Keprose Pty Ltd [No 3]* (1987) 11 NSWLR 404 at 423 per McHugh JA, as he then was; *Director of Public Prosecutions* v *Leys* (2012) 296 ALR 96 at [45] per Redlich and Tate JJA and T Forrest AJA; *Victorian WorkCover Authority* v *Vitoratos* (2005) 12 VR 437 at [22]–[23] per Buchanan JA; *Rail Corporation (NSW)* v *Brown* (2012) 82 NSWLR 318 at [45]–[47] per Bathurst CJ; Beazley and Basten JJA agreeing; *McMahon* v *Permanent Custodians Ltd* [2013] NSWCA 275 at [55]–[56] per Ward JA; Meagher and Barrett JJA agreeing.

25 (2014) 306 ALR 547.

26 At [35]–[40] per French CJ, Crennan and Bell JJ.

27 (1988) 15 NSWLR 275 at 283 per Mahoney JA (McHugh and Clarke JJA agreeing). Cf *Cardinal Project Services Pty Ltd* v *Hanave Pty Ltd* (2011) 81 NSWLR 716 at [36]–[37] per Basten JA.

28 [2010] 2 Qd R 276 at [56], [65] per Holmes JA (with whom Dutney J agreed).

29 *VOAW* v *Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 79 ALD 422 at [13] per Ryan, Lindgren and Sundberg JJ.

30 *R* v *Di Maria* (1996) 67 SASR 466 at 474 per Doyle CJ; Prior and Nyland JJ agreeing. See also *R* v *Byerley* (2010) 107 SASR 517 at [108] fn 18 per Kourakis J.

ALBRECHT v AINSWORTH & ORS

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(2015) LQCS ¶90-205; Court citation: [2015] QCA 220

Queensland Supreme Court of Appeal

Decision delivered on 6 November 2015

Conveyancing — Body Corporate — Whether a body corporate had acted reasonably for the purposes of s 94 of the Body Corporate and Community Management Act 1997 in refusing to approve a proposal to allow a deck extension — Whether the test of reasonableness is objective — Body Corporate and Community Management Act 1997: s 94.

The applicant was the owner of a property in a multi dwelling complex situated in Noosa. The complex was comprised of apartments and villas.

The applicant's property had two decks which he wished to join together. Apparently the decks had been separated by the architect of the complex to avoid the decks being used to hold parties and to reduce external noise and activity.

In order to join the two decks together, the applicant needed the body corporate in an extraordinary general meeting to approve the proposal in his motion without dissent and amend its community management statement to grant him exclusive use of about 5 m^2 of the common property airspace between his existing deck spaces.

However only 7 of the 23 owners voted for the motion. The applicant then sought orders before an adjudicator that effect be given to his motion. Before the adjudicator, the applicant argued that the body corporate's refusal to pass the motion was unreasonable as the proposed deck alteration was objectively minor in scope and effect; utilised only a small volume of airspace which could never be of use to any other owner; would improve the safety and amenity of the decks; was consistent with the existing architectural design for the scheme; would not impede the view, aspect, privacy or use and enjoyment of any lot; and would comply with the conditions of approval for the scheme. The applicant also argued that the objections from the other owners that the deck amalgamation would set a precedent for other like alterations were without substance.

The adjudicator granted his application and made the orders sought. In reaching this decision, the adjudicator identified the issue for her determination as whether the opposition to the motion was unreasonable in the circumstances and whether the body corporate acted reasonably in refusing to give approval. The adjudicator noted that the test was objective, requiring a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable. In other words, the question was not whether the decision was "correct" but whether it was objectively reasonable.

The respondents, being other owners in the complex, appealed from those orders to the Queensland Civil and Administrative Tribunal Appeals ("QCATA"). QCATA allowed the appeal and set aside the adjudicator's orders finding that the adjudicator had erred in

[140819]

law in a number of material respects. On the material before the adjudicator and applying the test that should have been applied, QCATA determined that the adjudicator ought to have held that the applicant had not established that the body corporate acted unreasonably.

The applicant then applied for leave to appeal on a question of law to the Queensland Supreme Court of Appeal contending that the appeal to QCATA should have been dismissed. The applicant argued that questions of reasonableness and unreasonableness were questions of fact and it was not open to QCATA to review the correctness of the adjudicator's fact finding, except on orthodox administrative law grounds.

Held: for the applicant. Appeal allowed.

1. The adjudicator correctly identified that the issue was whether the opposition to the motion was unreasonable in the circumstances. Further, the adjudicator had correctly noted that the question of reasonableness is objective, requiring a consideration of all relevant circumstances and that the determination of whether opposition to the motion was unreasonable required a consideration in an objective and fair manner of all the relevant facts and circumstances.

2. The competing submissions and supporting material made the question of unreasonableness difficult to resolve. However the adjudicator's reasons made it clear that she conscientiously considered all the material and submissions relied upon by both parties, made findings of fact, all of which were open on that material, and was ultimately satisfied as a matter of fact that the applicant's motion was not passed because of the other owners' opposition to it that in the circumstances was unreasonable.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

D R Gore QC (instructed by Mahoneys) for the applicant.

K N Wilson QC, with D A Skennar (instructed by Morgan Conley Solicitors) for the respondents.

Before: Margaret McMurdo P and Morrison JA and Martin J

Editorial comment: This decision is important for its exploration of when a body corporate will be found to have fulfilled its obligation to act reasonably when carrying out its general functions for the purposes of s 94 of the *Body Corporate and*

Community Management Act 1997. The Appeal Court confirmed that the test of reasonableness is objective (ie what the ordinary person would consider to be fair), requiring a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable.

The decision makes it clear that a body corporate must carefully and thoroughly consider all of the circumstances surrounding a proposal and hear submissions both for and against the proposal before making a decision. Merely deciding yes or no without being able to back up the reasons for the decision, will leave the decision open to review. The reasons for the decision should also be recorded in the minutes of the meeting.

Margaret McMurdo P:

[1] The applicant and the respondents, together with others, are owners of homes in an architectural award-winning multi dwelling complex, the Viridian Noosa Residences. The applicant wanted to extend the deck area of his home but could do so only if the body corporate in an extraordinary general meeting approved the proposal in his motion without dissent and amended its community management statement to grant him exclusive use of the common property airspace between his existing deck spaces.[1] At an extraordinary general meeting on 10 August 2012, seven of the 23 owners voted for the motion, seven voted against, one abstained and the remainder did not vote. The applicant applied for a referral to an adjudicator under s 276 *Body Corporate and Community Management Act* 1997 (Qld) ("BCCM Act") and sought orders that effect be given to his

[140820]

motion. The adjudicator granted his application and made the orders sought.[2] The respondents appealed from those orders to the Queensland Civil and Administrative Tribunal Appeals ("QCATA") under s 290 BCCM Act. QCATA allowed the appeal and set aside the adjudicator's orders. The applicant applied for leave to appeal on a question of law to this Court under s 150 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("QCAT Act"), contending that the appeal to QCATA should have been dismissed.

[2] The reasons justifying the grant of leave, he submitted, are that there is a public interest in this Court making authoritative statements as to the correct approach, both in determining the test for unreasonableness under s 94 BCCM Act and as to the relationship between voting rights and the power of an adjudicator to make just and equitable orders under s 276 BCCM Act. He contended that he has reasonable prospects of success in the proposed appeal and a substantial injustice will result if leave is not granted.

[3] His proposed grounds of appeal, should leave be granted, are that QCATA erred in law:

(a)

(i) in reviewing the correctness of the adjudicator's decision, rather than its legal validity;
(ii) in concluding that the adjudicator had made any error of law;
(iii) in failing to apply s 289(2) BCCM Act;

(b)

(i) in failing to have regard to, or to correctly interpret, the terms of s 276 and Schedule 5 BCCM Act;
(ii) in deciding that the decision in *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd*[3] was relevant to this matter;
(iii) in deciding that the adjudicator had reversed the onus of proof;
(iv) in not applying the principles relating to reasonableness which had been applied by the adjudicator, and in developing new principles on the basis of distinguishable authority (namely, *McKinnon v Secretary, Department of Treasury*[4]);
(v) in carrying out a merits review of the adjudicator's decision; and
(vi) in receiving, without any power to do so, fresh factual material from the respondents at the hearing on 30 April 2014.

[4] With the support of the parties, this Court agreed to consider the merits of the proposed appeal in determining whether the application raised a matter of law and whether leave should be granted.

[5] I will set out the relevant statutory provisions and summarise the pertinent aspects of the decisions of the adjudicator and QCATA before discussing the competing contentions and stating my reasons for granting the application for leave to appeal, allowing the appeal, setting aside the QCATA orders and instead dismissing the appeal to QCATA.

The relevant aspects of the BCCM Act

[6] The primary object of the BCCM Act is to provide flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects[5] which relevantly include balancing the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;[6] ensuring that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;[7] providing bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;[8] and providing an efficient and effective dispute resolution process.[9]

[7] Chapter 3 BCCM Act deals with management of community titles schemes. Part 1, Management structures and arrangements, Div 1, Body corporate's general functions and powers, relevantly includes:

> **"94 Body corporate's general functions**
>
> (1) The body corporate for a community titles scheme must—
>
> [140821]
>
> (a) administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
> (b) enforce the community management statement …; and
> (c) carry out the other functions given to the body corporate under this Act and the community management statement.
>
> (2) The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection."

[8] Chapter 6 deals with dispute resolution and relevantly includes:

> **"227 Meaning of *dispute***
>
> (1) A ***dispute*** is a dispute between—
>
> …
> (b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme;
> …
>
> **228 Chapter's purpose**
>
> (1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about—
>
> …
> (b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements;
> …
>
> **229 Exclusivity of dispute resolution provisions**
>
> …
>
> (3) … the only remedy for a dispute that is not a complex dispute is—
>
> (a) the resolution of the dispute by a dispute resolution process; or
> (b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.

…

(5) Also, subsections (2) and (3) do not limit—

…

(b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act."

[9] Chapter 6, Dispute resolution, Pt 4, Applications, relevantly provides:

"238 Who may make an application

(1) A person … may make an application if the person—

(a) is a party to, and is directly concerned with, a dispute to which this chapter applies; and
(b) has made reasonable attempts to resolve the dispute by internal dispute resolution.

…"

[10] Chapter 6, Pt 9, Adjudication generally, Div 2, Procedural matters about adjudication, relevantly includes:

"269 Investigation by adjudicator

(1) The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application.

…

(3) When investigating the application or agreement, the adjudicator—

(a) must observe natural justice; and
(b) must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application or agreement; and
(c) is not bound by the rules of evidence.

…

271 Investigative powers of adjudicator

(1) When investigating the application, the adjudicator may do all or any of the following—

[140822]

(a) require a party to the application, an affected person, the body corporate or someone else the adjudicator considers may be able to help resolve issues raised by the application —

(i) to obtain, and give to the adjudicator, a report or other information; or
(ii) to be present to be interviewed, after reasonable notice is given of the time and place of interview; or
(iii) to give information in the form of a statutory declaration;

…"

[11] Chapter 6, Pt 9, Div 3, Adjudicators orders, relevantly includes:

"276 Orders of adjudicators

(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—

(a) a claimed or anticipated contravention of this Act or the community management statement; or
(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement;

…

(3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.

…"

[12] Schedule 5, Adjudicator's orders, relevantly includes:

"10 If satisfied a motion … considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable—an order giving effect to the motion as proposed, or a variation of the motion as proposed."

[13] Chapter 6, Pt 11, Appeal from adjudicator on question of law, relevantly includes:

"289 Right to appeal to appeal tribunal

(1) This section applies if—

…
(b) an adjudicator makes an order for the application …; and
(c) a person (the ***aggrieved person***) is aggrieved by the order; and
(d) the aggrieved person is—

(i)…

(A) an applicant;

…

(2) The aggrieved person may appeal to the appeal tribunal[10] , but only on a question of law."

294 Jurisdiction and powers of appeal tribunal on appeal

(1) In deciding an appeal, in addition to the jurisdiction and powers of the appeal tribunal under the QCAT Act, the tribunal may also exercise all the jurisdiction and powers of an adjudicator under this Act.

(2) The appeal tribunal may amend or substitute an order only if the adjudicator, who made the order being appealed, would have had jurisdiction to make the amended or substituted order or decision.

(3) Subsection (2) does not limit any power of the appeal tribunal to award costs for a proceeding under the QCAT Act."

The relevant aspects of the QCAT Act

[14] The QCAT Act Ch 2, Jurisdiction and procedure, Pt 8, Div 1, Appeals to appeal tribunal, relevantly provides:

"146 Deciding appeal on question of law only

[140823]

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

(a) confirm or amend the decision; or
(b) set aside the decision and substitute its own decision; or
(c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—

(i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
(ii) with the other directions the appeal tribunal considers appropriate; or

(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c).”

[15] Division 2, Appeals to Court of Appeal, relevantly provides:

“150 Party may appeal—decisions of appeal tribunal

…

(2) A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—

…
(b) the final decision.

(3) However, an appeal under subsection (1) or (2) may be made —

(a) only on a question of law; and
(b) only if the party has obtained the court’s leave to appeal.”

The proceedings before the adjudicator

[16] In determining the dispute the adjudicator considered extensive submissions from the applicant and respondents, together with submissions from other Viridian home owners.[11] Some submissions attached architects’ reports. The adjudicator requested and was supplied with the minutes of the extraordinary general meeting of August 10 2012, related explanatory material, and extensive landscaping and architectural information including plans, drawings, diagrams and a letter from the local Council stating the proposed deck extension did not contribute to site cover and was within the present planning approval.[12]

[17] In her reasons the adjudicator first set out the extraordinary general meeting’s consideration of the applicant’s motion to extend his decks, noting that it did not achieve the required resolution without dissent.[13]

[18] She then set out the applicant’s submissions. The motion was unreasonable as the proposed alteration was objectively minor in scope and effect; utilised only a small volume of airspace which could never be of use to any other owner; would improve the safety and amenity of the decks; was designed by Viridian’s original architect; was consistent with the existing architectural design for the scheme; would not impede the view, aspect, privacy or use and enjoyment of any lot; and would comply with the conditions of approval for the scheme. The objections that it compromised Viridian’s architectural integrity and would set a precedent for other like alterations were without substance.[14]

[19] The adjudicator identified the issue for her determination as “whether the opposition to [the] motion was unreasonable in the circumstances and whether the Body Corporate acted reasonably in refusing to give approval.”[15]

[20] The adjudicator noted that the matter was referred to her under s 248 BCCM Act.[16] She investigated the dispute by reviewing all submissions and seeking additional clarification and documentation from the applicant.[17] When the applicant’s submissions introduced new evidence, she distributed that material to the other owners so that they had an opportunity to comment. Five owners reviewed their submissions and the applicant responded with further submissions.[18] The adjudicator accurately summarised the history of the dispute;[19] the competing submissions;[20] and the architectural opinions both supporting (Noel Robinson of NRA Architects, Andrew Gutteridge of Arckhefield Architects, and Tom McKerrell of Tom McKerrell Architects) and opposing it, (the original Viridian architect, John Mainwaring of JMA Architects Qld Pty Ltd, Lindsay and Kerry Clare of ClareDesign, and Shane Thompson of Shane Thompson Architects).[21]

[21] She identified the sole issue as whether “there was something unreasonable in the decision not to pass the motion.”[22] After referring to BCCM Act s 276(1), Schedule 5, Item 10,[23] and s 94(2),[24] she noted that under

Schedule 5 the issue was "whether a body corporate has complied with its obligation to act reasonably,"[25] adding that in this application that question was whether the body corporate acted reasonably "in deciding not to approve the applicant's motion."[26]

[22] In determining the appropriate test for reasonableness, the adjudicator relying on *Zenith*[27] rejected the *Wednesbury*[28] test. Rather, the test was objective, requiring a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable.[29] QCATA had recently accepted this as the appropriate test in *Luadaka v Body Corporate for The Cove Emerald Lakes*.[30] The legislative objective to act reasonably was satisfied if the decision was objectively reasonable; this required a balancing of factors in all the circumstances according to the ordinary meaning of the term reasonable, a term which should be given a broad, common sense meaning. The question was not whether the decision was "correct" but whether it was objectively reasonable.[31] A logical and understandable basis for a decision was a relevant but not determinative factor in deciding reasonableness which was ultimately a question of a fact.[32] The subjective intention of the individual lot owners who opposed the motion was not the test; the opposition must be considered objectively, taking into account all relevant circumstances:[33] *Points North*[34] and *Ocean Plaza Apartments*.[35] What is a material fact will vary from case to case: *Zenith*.[36] Typically, this involved some balancing of the interests of the majority and minority and questions of fairness.[37] The adjudicator considered her role was to balance "the need to protect the genuine interests of owners and their voting entitlements, and upholding the justifiable position of proponents [in] the face of unfounded or vexatious opposition."[38]

[23] This was not a case where there was only a small minority opposing the motion.[39] The fact that around half of the voters opposed the proposal was not determinative, although it was relevant and significant. Adjudicators are reluctant to interfere with the views of owners expressed through a general meeting vote. But if the body corporate's decision was objectively unreasonable, the motion must be set aside.[40] The adjudicator then determined to consider the basis for the motion and the basis for the objections to it, so as to ascertain first, whether the opposition was unreasonable in the circumstances, and second, whether the decision not to approve it was unreasonable.[41]

[24] The primary purpose of the applicant's proposal, to improve the amenity of his decks which were intentionally designed with limited functionality, was a legitimate interest. But it was only one consideration and must be balanced against the impacts of the proposal on other lots and on the scheme as a whole.[42]

[25] The adjudicator determined that the safety issue relied on by the applicant was not a legitimate consideration for the body corporate in deciding whether to approve the proposal.[43]

[26] The proposal required granting the applicant the right to exclusive use of about 5m^2 of common property which was airspace only.[44] The right to use this airspace was of value to the applicant but of no material use to any other owner or occupier.[45] The proposed use of common property by the applicant was not a reasonable basis to oppose the motion.[46]

[27] The adjudicator identified but did not accept the submissions and architectural opinions that, if this motion were approved, it would be difficult to refuse other improvements to other lots and the appearance of the scheme would be changed.[47] The body corporate would have to consider any future motions on their merits. If it determined that another deck amalgamation would have no adverse impact on other owners or the scheme as a whole, then the cumulative effect of multiple identical improvements would not generate an adverse impact.[48] The body corporate would be entitled to reject a different proposed alteration on its merits if it had reasonable grounds to do so.[49] There was no evidence of any similar motions and the significant difficulties surrounding this proposal made it unlikely that other owners would consider they had an

automatic right to have a future proposed alteration approved.[50] The adjudicator was unpersuaded that the "floodgates" argument was a reasonable basis to oppose the motion.[51]

[28] If the only issue was the impact of the proposal on the appearance of Viridian, the motion could be approved by an ordinary resolution. The requirement for approval of a

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motion without dissent arose only because the proposal interfered with the exclusive use rights over a portion of common property airspace.[52]

[29] The original architect, Mr Mainwaring, the adjudicator noted, did not consider the applicant's proposed deck extension was consistent with Mr Mainwaring's vision but the body corporate was not obliged to ensure compliance with the original architectural intent.[53] The adjudicator was "not satisfied that it [was] reasonable to seek to prevent any deviation from the original design intent, or indeed any alteration at all to the exterior of the scheme." The architectural design and landscaping code in schedule D of Viridian's community management statement contemplated the possibility of developments to individual lots such as additions and alterations to the exterior appearance.[54] The body corporate was obliged to ensure that any proposed alterations were sympathetic with the current visual and functional design "rather than any subjective intention underlying the design."[55] The architectural opinions objecting to the extension appeared to import "a subjective view of the impact of the alteration rather than an objective one" and did not assist.[56] It was understandable that owners would rely on Mr Mainwaring's view as to the impact of the proposal on Viridian. The adjudicator considered, however, that his opinion took into account considerations that were not relevant for the body corporate when acting reasonably in balancing the competing interests.[57] The adjudicator could not "understand how combining two decks in one lot could conceivably have the broad social and/or economic impacts claimed" by some submissions.[58]

[30] After assessing the material before her, including the competing architectural opinions, the adjudicator was "not satisfied that the opponents of the proposal [had] demonstrated that the proposed modification materially offends the integrity of the architectural design of the scheme. While the deck does not exactly accord with the original design intent … [no] submission has demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme."[59] After viewing "before" and "after" images, the adjudicator found it very difficult to discern any "'visual disruption' or other appreciable change to the appearance, character or 'openness' of the scheme" resulting from the proposed deck alterations.[60] The opinions of the applicant's architects were more supportable.[61]

[31] It was not a relevant consideration that the motion would result in the applicant's lot having a larger useable external floor area if there were no consequential impacts as the applicant would be responsible for maintaining the decks. Nor was it a relevant consideration that allowing the motion would result in the applicant's lot having a higher standard of fittings when this did not affect other lot owners.[62]

[32] In discussing noise concerns, the adjudicator concluded that "[no] submitter has demonstrated that the expansion of the decks will inherently increase the disturbance to other occupiers or users of common property."[63] Whilst the proposed deck extension would result in greater use of the applicant's decks, it could not be assumed that this would lead to increased disturbance and there was no evidence that it would.[64] The current design is restrictive of the functionality of the decks, but improving their function and usability was not a reason to oppose their improvement.[65] Occupiers are entitled to use their lots as they wish provided they do not cause a nuisance.

[33] The owners of lot 10 contended that the deck extensions would adversely impact on their privacy, view and aspect, but the applicant contended that this could be ameliorated by the installation of an additional privacy "blade".[66] The adjudicator found that the level of vision between lot 10 and the applicant's lot may be increased by the deck extension,[67] but there was no common law or statutory right to a view and no

general absolute right to privacy or to not be overseen.[68] It would be unreasonable to oppose the motion unless the proposed decks amounted to an unreasonable interference with the use of lot 10.[69] There was opposing evidence as to the impact of the proposal on others' privacy and views, but the adjudicator preferred that of Mr McKerrell as it was the most comprehensive and substantiated. From a practical point of view, he considered there would be no greater overlooking than currently; and the

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installation of an additional privacy blade would considerably moderate this.[70] After considering the relevant material, the adjudicator concluded that any impact on lot 10's privacy and views would be minimal and was "not satisfied that the comparably slight increase in vision between Lot 10 and [the applicant's lot] resulting from the proposal [would] unreasonably interfere with the amenity of Lot 10."[71] Any impact could be addressed by additional privacy screening. The privacy and view issues were not sufficient for the body corporate to refuse approval for the proposal.[72]

[34] On the material before her, the adjudicator was not satisfied that the structural elements required to support the extended decks presented sufficient concern to reasonably oppose the proposal.[73] There was no evidence that the roofline was to be altered. It followed that submissions about the roofline were not a reasonable basis for opposing the proposal.[74]

[35] The adjudicator was concerned that the body corporate may not have had regard to the fact that the proposed deck was a "permissible development" under the architectural and landscaping code.[75] Further town planning approvals were not required to extend the decks. The only relevant consideration for the body corporate was whether any approval it might give would need to be subject to some further approval by a relevant authority.[76]

[36] As to the submissions concerning detrimental financial obligations arising from the proposal, the applicant would remain responsible for maintaining the decks. Any documented effect on the body corporate's insurance premiums would be paid for by the applicant under ss 180 and 181 of the accommodation module. The proposed deck extension had no financial impact on the body corporate and was an irrelevant consideration.[77]

[37] The contention by one submitter that the application was frivolous, vexatious and without substance was not made out; the applicant presented an arguable and substantiated case.[78]

[38] The adjudicator concluded:

> "On balance I am not satisfied that the Body Corporate acted reasonably in deciding not to pass Motion 1 at the EGM on 10 August 2012. Individual owners may have voted against the motion in good faith, and in genuine reliance on architectural and other advice. However I consider they have relied on irrelevant and unsubstantiated considerations. The most substantive objection is the potential impact on Lot 10, but based on the evidence submitted, I consider that any impact will be so slight that it does not constitute a reasonable basis to refuse the proposal."[79]

[39] The adjudicator stated that she would order that the extraordinary general meeting motion be passed,[80] noting that if the owners of lot 10 remained concerned about privacy, the applicant was willing to install a further privacy screen, subject to any necessary body corporate approval, and she expected him to honour that commitment without an order.[81]

The proceedings before QCATA

[40] QCATA heard the respondents' appeal on 30 April and 15 May 2014 and inspected relevant aspects of Viridian on 13 and 14 June 2014. At the hearing, the second respondent was represented by her husband, Mr Martoo, who was not a lawyer but had qualifications in town planning, surveying and urban design. His submissions sometimes descended into unsworn evidence to which the applicant's counsel understandably objected. QCATA noted that the appeal was on the grounds of an error of law, adding that the evidence

would assist to "understand the case" but that QCATA would not "be making findings on that evidence."[82] After a later objection, QCATA reminded Mr Martoo not to give evidence.[83] After still further objections, QCATA determined to let him say what he wanted because that was the "most efficient way to deal" with it.[84]

[41] The fifth respondent, Mr Mainwaring, the original architect of Viridian, also addressed QCATA without legal representation. His submissions also sometimes descended into unsworn evidence from the bar table but no objection was taken, apparently because that evidence in essence was before the adjudicator.

[42] In delivering its reasons, QCATA noted that this was an appeal from the adjudicator's decision, "overriding the will of a substantial majority of owners at Viridian"[85] and:

> "The appeal squarely throws up for consideration the question as to how to
>
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>
> resolve the tension between the provisions of the [BCCM Act] which give rights to owners to veto certain proposals by Bodies Corporate, and the duty of Bodies Corporate under s 94(2) of the BCCM Act to act reasonably. It also raises questions about the circumstances in which an Adjudicator can determine that opposition to a proposal which affects common property of all lot owners might be held to be unreasonable, and substitute a different decision, notwithstanding that to be effective at law, a resolution which permitted the relevant proposal to occur was required to be passed without dissent by lot owners in general meeting. It also squarely raises for consideration what is the relevant test for "unreasonableness" on the part of a Body Corporate, and how that conduct is to be assessed in particular circumstances where motions without dissent are a prerequisite to certain conduct by the Body Corporate affecting its common property."[86]

[43] QCATA noted the applicant had contended that opposition to the motion was unreasonable on a number of bases.[87] The adjudicator had heard the matter on the papers which made it difficult to resolve the many conflicting factual issues. After reviewing the evidence before her (which was also the material before QCATA together with some additional material in submissions) the adjudicator was not satisfied the body corporate had acted reasonably in deciding not to pass the motion.[88] QCATA set out the reasoning of the adjudicator,[89] her ultimate conclusion and orders[90] and the relevant statutory provisions.[91]

[44] QCATA next set out the lengthy, rambling and unfocussed grounds of appeal to it which were said to constitute errors of law,[92] before considering the relationship between s 94 and Schedule 5 BCCM Act[93] and the meaning of the duty to act reasonably.[94] QCATA identified that the adjudicator rightly rejected the *Wednesbury* test of unreasonableness.[95] After a lengthy review of cases concerning the meaning of reasonableness,[96] QCATA summarised over several pages the general principles it derived from the judgments of Gleeson CJ and Kirby and Hayne JJ in *McKinnon v Secretary, Department of Treasury*[97] insofar as they apply to the present case.[98]

[45] In applying those principles to the applicant's motion, QCATA identified the following matters as relevant in determining whether a body corporate in a general meeting was acting reasonably in rejecting a motion required to be without dissent:

> "a) The expression of corporate will ultimately is to be found only in the result of the motion having been put. That is, either it was passed or not passed.
> b) Notwithstanding that simple expression of will, it may in many cases, but not all, be possible to ascertain what the basis of individual lot holders was for their dissent.
> c) Where it is possible to ascertain what that reason or explanation was, one should examine insofar as it is known what it was, whether any of the expressed or known bases can be recognised as a reasonable basis.

d) If any of the known bases can be accepted as reasonable, even if there are a number, or even a majority of reasons which are unreasonable, the conduct of the Body Corporate reflected in that expression of will, will nevertheless be reasonable.
e) One does not need to examine all of the known reasons for dissent to decide whether a majority, or a large number or some other significant number are reasonable as against those which are unreasonable. In other words there is no balancing exercise to decide whether overall, the reasonable explanations outweighed the unreasonable ones.
f) In cases where all of the grounds of opposition are known and they are unreasonable, or perhaps even as one regularly encounters in Bodies Corporate, perverse or arising out of dysfunctional activity in Bodies Corporate, the conclusion in most cases would inevitably be to conclude that the Body Corporate had acted unreasonably.
…"[99]

[46] QCATA noted the legislature gave power of veto to any lot holder in respect of a motion to sell or otherwise dispose of any part

of the common property under s 159(2) of the accommodation module. This recognised that all lot owners own the common property as tenants in common. That entitlement gave effect to the objects of the BCCM Act.[100] The question was whether, notwithstanding that entitlement, s 94 BCCM Act gave an overriding power to an adjudicator to decide whether the refusal to allow the proposal to dispose of the common property was unreasonable because, in refusing the proposal, the body corporate was not acting reasonably. As the adjudicator put it, s 94 vested in an adjudicator power "to determine the balance between the need to protect the genuine interests of owners and their voting entitlements and upholding the justifiable position of opponents in the face of unfounded or vexatious opposition."[101]

[47] First, QCATA dealt with the ground of appeal alleging reversal of onus. QCATA considered the adjudicator did not accurately identify that her function was to determine whether there had been a contravention of the BCCM Act under s 276(1)(a) and whether she should make an order which was just and equitable in the circumstances. Instead, she considered whether she had been persuaded or had become satisfied that the body corporate had acted reasonably. The burden of proof lay upon the applicant to satisfy her that the body corporate had not acted reasonably within s 94. It was not enough that she was not persuaded that it acted reasonably.[102] She reached her conclusion on the basis of an erroneous understanding of what she was required to be satisfied of and she compounded this error by finding that she was not satisfied the body corporate had acted reasonably by reversing the onus of proof.[103]

[48] QCATA then considered the relationship between lot holders' voting rights and the power under s 276 to make just and equitable orders. This power was discussed in *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd*.[104]

[49] The adjudicator, QCATA considered, in dealing with the balancing of interests, did not identify that the body corporate should recognise that, on the one hand, the applicant had an interest in improving his amenity by obtaining exclusive use over common property in circumstances where the decks were intentionally designed with limited functionality and on the other, that all owners had purchased knowing of the limited functionality.[105] The fact that lot owners may have an interest in improving their lots is not a matter on its face which supports the granting of the applicant's proposal. It may be relevant to deciding what is a just and equitable result if unreasonableness were proven.[106]

[50] Next, QCATA turned to the design integrity issue. The adjudicator considered Mr Mainwaring's opinion that the proposed extended decks were an impermissible alteration to the original design intent was "importing a subjective view of the impact of the alteration rather than an objective one." She dismissed owners' concerns to maintain the original design intent as irrelevant considerations for the body corporate, having regard to balancing the competing interests and acting reasonably.[107] In doing so, she failed to ask the correct question under s 94 and also formed her own view as to the issue of architectural integrity and original design intent, deeming it an irrelevant consideration.[108] The views of the owners who wished to

maintain design integrity were objective in the sense that they motivated, justified or explained the decision of those who voted against the motion.[109] The adjudicator had put herself in the position of the body corporate and decided what was "just and equitable" under s 276(1)(b) before deciding whether the conduct was unreasonable.[110]

[51] In deciding whether a body corporate has acted unreasonably it is not necessary or ordinarily required to balance competing interests. Acting reasonably within s 94 does not imply even handedness, a conciliatory approach to a dispute or a recognition of the interests or wishes of others.[111] The adjudicator was not satisfied that the respondents had demonstrated that the proposed extensions materially offended the integrity of the architectural design of the scheme.[112] She then decided, by looking at photographs, that there was no discernable difference between the before and after images and preferred the applicant's architects, notwithstanding there were contrary opinions by other eminent architects. Her reasons do not explain

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how she resolved this conflict. She merely stated that she was not satisfied the respondents had demonstrated that the modification offended the integrity of the scheme.[113]

[52] QCATA then outlined Mr Mainwaring's design strategy for Viridian, doing away with large decks and instead employing six smaller balconies incorporating a stepping pattern tapered into landscaped breezeways and connectivity spaces with privacy screens. This was intended to avoid appeal to certain segments of the holiday market and to reduce external noise and activity. The proposed extensions could undermine these basic design principles. Viridian had won architectural awards. Since November 2005 Mr Mainwaring had informed the body corporate that an extended deck of this kind would change the verticality of Viridian's architectural elevation. In August 2011 he again contended it would compromise Viridian's architectural integrity and interfere with the privacy and amenity for all residences, particularly if expanded into other dwellings.[114] QCATA considered Mr Mainwaring's arguments were not inherently implausible or unreasonable and received support from other eminent architects including Mr Kerry Clare.[115] The applicant was supported by architects Mr Gutteridge and Mr Robinson, who considered the proposed extensions were sympathetic to the current architectural aesthetic.[116] In purchasing their homes for some millions of dollars, a number of lot owners placed a high priority on the architecture and design principles which they were afraid would be diminished if the proposal were allowed.[117]

[53] Next, QCATA addressed privacy and noise issues. It was difficult to say what effect the proposed extended decks would have but the adjudicator concluded that no submitter had demonstrated that the extension would inherently increase the disturbance to other occupiers or users of common property. She should have asked whether it was reasonable for any of those lot owners to have held those concerns; whether those concerns were reasonably held; and whether the applicant proved that there were no reasonable bases for any of these concerns.[118] The adjudicator accepted there would be some impact on privacy and views from lot 10 but considered them minimal; she was not satisfied that this would unreasonably interfere with the amenity of lot 10; it could be addressed by privacy screening. She did not consider that privacy and view issues amounted to sufficient basis for the body corporate to refuse approval for the proposal.[119] This invited the conclusion that the adjudicator was exercising her own judgment as to the appropriateness of allowing the improvements and engaging in the balancing act she described earlier.[120]

[54] The "floodgates" issue was next addressed. If the advantages the applicant saw in extending the decks were valid, they would be likely to appeal to other lot owners. QCATA's site inspections demonstrated that the development was well established, sympathetically blending into the forested Noosa Hill, with established gardens and backing onto the Noosa National Park. New construction activity would interfere with all this.[121]

The adjudicator rejected concerns about "floodgates"[122] as the applicant's difficulties in obtaining approval to extend the decks made a flood of similar applications unlikely.[123] She was naïve to think that if one owner was permitted to extend the decks, others would not seek to follow. Granting the applicant's motion

could reasonably lead to a multiplicity of like applications to the body corporate.[124] This would be disturbing for, and likely to lead to division and conflict between, owners. It was a reasonable basis to refuse the motion.[125] The applicant's letter of 13 April 2012 to other owners stating his deep and abiding commitment to ensuring they would not be subjected to similar campaigns to prevent improvements to their residences, whilst not greatly significant, showed that he saw himself as paving the way for other owners to make similar alterations.[126] Stating that there was no evidence that a similar deck extension or other external alterations had been proposed and that she did not consider "floodgate" concerns to be a reasonable basis to oppose the proposal, again suggested that she had reversed the onus and failed to give proper consideration to the "floodgates" argument. QCATA considered that the applicant did not demonstrate that it was not reasonable to refuse the motion because of "floodgate" concerns.[127]

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Finally, QCATA considered the absence of compensation for the acquisition of common property rights. The adjudicator identified that the proposal, if approved, would require granting the applicant the right to exclusive use of $5m^2$ of common property. This area would overhang the common property below and interfere with the airspace above it. To construct the decks would no doubt require access to the common property in the construction period.[128] The respondents submitted that the applicant's failure to offer compensation was a relevant basis to oppose the motion.[129] The adjudicator accepted that the airspace was of value to the applicant and might improve the value of his lot. Valuation evidence before the adjudicator was that the airspace was worth $10,000 and that its value was at least commensurate with the added value to the applicant of the proposed extensions, a sum in the range of $10,000 to $20,000.[130] A real estate agent without valuation qualifications gave evidence for the applicant that the airspace had no value whatsoever and would not diminish the value of the common property or increase the potential sale price of the applicant's lot.[131] The adjudicator did not reconcile this evidence. The better opinion was that of the qualified valuer.

[56] The adjudicator did not deal with whether the applicant's unwillingness to pay any compensation provided a reasonable basis for the body corporate to reject the applicant's motion.[132] In *Boston on Belgrave*[133] an adjudicator considered that an offer of only nominal compensation for the acquisition of common property in increasing a patio area provided a reasonable basis to oppose a motion as it was reasonable to expect that the body corporate should receive reasonable compensation for granting exclusive use of valuable property.[134] After reviewing *One Park Road*,[135] *Katsikalis v Body Corporate for "The Centre"*,[136] and *Zenith*,[137] QCATA concluded that the adjudicator erred in her approach to the valuation evidence of the airspace and in failing to conclude that the absence of any offer from the applicant for compensation was a reasonable basis to oppose the approval of the motion.[138] Had that been the only basis upon which the decision was successfully challenged, QCATA would have ordered that it be a pre-condition to the validation of the adjudicator's orders that compensation of $15,000 be paid to the body corporate by way of compensation. But there were other bases upon which the appeal would be upheld.[139]

[57] In conclusion, QCATA noted that the adjudicator erred in law in a number of material respects. She conducted the adjudication on the papers and the same material "and more" was before QCATA. On the material before her and applying the test that should have been applied, she ought to have held that the applicant had not established that the body corporate acted unreasonably. QCATA allowed the appeal and set aside the orders of the adjudicator.[140]

The applicant's contentions

[58] The applicant emphasised that the appeal to QCATA was confined, under s 289(2) BCCM Act, to a question of law. QCATA did not clearly identify the errors of law allegedly made by the adjudicator. The issue for her to determine was whether the body corporate had complied with its obligation under s 94(2) BCCM

Act to act reasonably. The adjudicator was empowered under s 276 and Item 10 in Schedule 5 BCCM Act to make orders deeming the applicant's motion to have been passed and that the body corporate lodge with the registrar of titles a request to order a new community management statement incorporating the amendments authorised by that motion if the opposition to it was unreasonable. Questions of reasonableness and unreasonableness were questions of fact. It was not open to QCATA to review the correctness of the adjudicator's fact finding except on orthodox administrative law grounds: *Buck v Bavone*;[141] *Ericson v Queensland Building and Construction Commission*[142] and see s 146 QCAT Act. Instead QCATA, the applicant contended, improperly substituted its own fact finding for that of the adjudicator. It conducted an impermissible merits review. QCATA did not identify any error on the part of the adjudicator as to the applicable test for reasonableness and unreasonableness.[143]

[59] If any error of law on the part of the adjudicator was identified, it was not for QCATA to decide the question of reasonableness or unreasonableness. The matter should have been remitted to the same

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adjudicator for determination according to law: *Ericson v Queensland Building and Construction Commission*;[144] *Flegg v Crime and Misconduct Commission*[145] and *B & L Linings Pty Ltd v Chief Commissioner of State Revenue*.[146] In any case, QCATA did not demonstrate any such error of law. This was manifest in QCATA's conclusion.[147] It was not QCATA's function to gainsay the adjudicator's decision; QCATA was limited to determining whether the adjudicator's decision was affected by legal error.

[60] QCATA also erred, the applicant contended, in stating that the adjudicator overrode "the will of a substantial majority of owners in Viridian" and also in placing reliance on *J Patterson Holdings*. This case did not concern s 276(3) and Item 10 in Schedule 5 and QCATA did not indicate how it was relevant.

[61] QCATA further erred, the applicant contended, in considering that the appeal highlighted the tension between provisions of the BCCM Act giving a right to owners to veto certain proposals, and s 94(2) which required bodies corporate to act reasonably.[148] There is in fact no tension, as s 276 read together with Item 10 in Schedule 5 empowered the adjudicator to reject the veto power if satisfied that the opposition is, in the circumstances, unreasonable.

[62] When the decision of the adjudicator was considered as a whole, the applicant contended, it was clear that she appreciated the onus was on the applicant to prove the body corporate did not act reasonably in refusing the motion because under s 276(3) and Item 10 in Schedule 5 the opposition to the applicant's motion was unreasonable. She was an experienced adjudicator who could not have overlooked such a basic point. She found it very difficult to see any difference in the before and after photographs of the proposed extended decks and could not discern the claimed change to Viridian's architectural integrity. These factual findings supported her conclusion that opposition on this ground was unreasonable. Her choice of words in stating that she was not satisfied about various matters reflected the forensic considerations pressed by the respondents in their evidence and submissions, including expert evidence from architects. Once the adjudicator rejected the respondents' individual contentions, it was only a short step for her to conclude that the opposition was unreasonable. The ultimate question was not whether the respondents' views were rationally and reasonably held but whether the opposition was in the circumstances unreasonable.

[63] The adjudicator correctly stated that the legislative obligation under s 94 BCCM Act to act reasonably was satisfied if the body corporate's decision was objectively reasonable and that this objective test requires a balancing of factors in all the circumstances according to the ordinary meaning of the term "reasonable," a term which should be given a broad, common sense meaning. The question was not whether the decision was "correct" but whether it was objectively reasonable. These principles were well supported by authority see: *Waters v Public Transport Corporation*,[149] *Secretary, Department of Foreign Affairs and Trade v Styles*;[150] and *Greiner v Independent Commission Against Corruption*.[151] The adjudicator also correctly held that whether a decision is reasonable is a question of fact: *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission*.[152] QCATA wrongly considered the application of these orthodox principles was capable of leading to error[153] and wrongly placed emphasis on *McKinnon* to develop its own

set of principles.[154] *McKinnon* concerned a different legislative regime and did not justify any departure from the orthodox principles applied by the adjudicator.

[64] QCATA erred, the applicant contended, in criticising the adjudicator for not considering whether the body corporate ought to have recognised the applicant's interest in improving his lot in circumstances where the decks were intentionally designed with limited functionality and all owners purchased with that knowledge. There was no legal foundation for that criticism which was also factually unfair because the adjudicator was obviously aware of the competing interests.[155]

[65] The applicant further contended that QCATA wrongly criticised the adjudicator for not properly considering the original architectural vision submissions when she

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correctly addressed that question by finding it was not reasonable to seek to prevent any deviation from the original design intent.[156] QCATA criticised the adjudicator for her treatment of privacy and noise concerns as she did not ask whether it was reasonable for the respondents to hold concerns about increased disturbance. But the ultimate issue was not whether these concerns were reasonably held but whether the opposition itself was in the circumstances unreasonable. The adjudicator correctly addressed privacy and noise issues by concluding that they were groundless.[157]

[66] QCATA's discussion of the "floodgates" concern used the language of a merits review, the applicant contended, particularly as QCATA relied upon site inspections which could not have assisted with the identification or determination of any question of law. QCATA erred in unfairly finding that the adjudicator reversed the onus of proof on this question; she was merely stating that opposition based on the "floodgates" concern was unreasonable.[158]

[67] QCATA also undertook a merits review on the compensation issue, the applicant contended. The common property involved was a small area of airspace which was unable to be used by anyone other than the applicant. Its loss would cause no material damage to any other owner.[159] These considerations supported the adjudicator's conclusion that opposition on this ground was unreasonable. There was no error of law and QCATA could not substitute its own factual findings.

[68] The applicant further contended that QCATA erred in law in receiving fresh factual material from the second, third, fourth and fifth respondents in their submissions at the hearing. These submissions impermissibly contained personal views about the impact of the proposed extended decks and untested factual assertions and sought to re-visit the adjudicator's factual findings. The QCATA appeal was limited to a question of law; it was not an appeal by way of re-hearing but an appeal in the strict sense so that QCATA had to decide it on the material before the adjudicator and had no power to receive further evidence. QCATA placed considerable weight on the evidence of Mr Mainwaring which included new evidence as to the design integrity issue. Mr Martoo, who appeared on behalf of the second respondent, was a town planner with asserted expertise in urban design, noise assessment, surveying and body corporate management. He stated the adjudicator misunderstood various factual issues and encouraged a site inspection.[160] This inadmissible material was likely to have influenced QCATA's decision. Further, QCATA engaged in inspections of Viridian over two days.

[69] As to the adjudicator's alleged reversal of onus, the applicant contended that this was an evidentiary point of law: *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*.[161] The adjudicator was not bound by the rules of evidence. In any case, when her reasons are read as a whole, it is apparent that she appreciated the applicant had to prove to her satisfaction that his motion failed because the opposition to it was unreasonable.

[70] In response to the respondents' reliance for the first time at the hearing of this application on *McColl v Body Corporate for Lakeview Park CTS 20751*,[162] the applicant submitted, in a note delivered by leave after the hearing, that *McColl* concerned s 87(2) BCCM Act. That provision is now repealed and did not contain the words in s 94(2), which replaced it, "including making, or not making, a decision for the sub-section." The ordinary meaning of the terms of s 94(2) is that s 94 applies to a resolution of the members

of the body corporate such as the present motion. By way of s 14B(1)(c) *Acts Interpretation Act* 1954 (Qld), that construction is supported by the relevant explanatory notes. The adjudicator, QCATA and the parties correctly proceeded on the footing that s 94(2) applied to the applicant's motion. The dispute over the applicant's motion was within s 276 BCCM Act: see *Independent Finance Group Pty Ltd v Mytan Pty Ltd*[163] and *Hablethwaite v Andrijevic*[164] and s 94 applied.

[71] QCATA's errors of law which concern matters of general importance, the applicant contended, warrant the grant of leave to correct a substantial injustice. The appeal should be allowed and the adjudicator's orders restored.

[140833]

The respondents' contentions

[72] The respondents' contentions were as follows. The adjudicator's task was to resolve the dispute arising from the proposal in the applicant's motion to extend his decks. If the opposition to it was unreasonable then the adjudicator could give effect to the motion. The question for the adjudicator was whether the opposition to the motion was unreasonable. In determining this issue the adjudicator erred in law in a number of ways. The first error was in reversing the onus of proof. She did this in her reasons at [46],[165] [51][166] and [66].[167] Most significantly, at [61] of her reasons she stated:

> "Having assessed the material submitted and the competing architectural opinions, I am not satisfied that the opponents of the proposal have demonstrated that the proposed modification materially offends the integrity of the architectural design of the scheme. While the deck does not exactly accord with the original design intent, I do not consider that any submission has demonstrated that the extension would have any noticeable detrimental impact on the appearance, structure or functionality of the architecture of the scheme."

[73] The onus was at all times on the applicant to demonstrate that the opposition to his application was unreasonable. The adjudicator's errors in reversing the onus of proof warranted QCATA allowing the appeal, setting aside the adjudicator's decision and substituting its own view.

[74] The adjudicator's second error was in not appreciating that she need only consider whether the opposition to the motion was unreasonable. She did not need to rehearse the evidence and make her own findings as to what was reasonable. She was required to determine whether the view of the owners opposing the applicant's motion was objectively unreasonable, that is, a view which could not be rationally and reasonably held. The respondents contended that she applied an incorrect test at [87] of her reasons.[168]

[75] The respondents contended that QCATA did not err in receiving new evidence or in participating in the inspections. In receiving the respondents' oral submissions, in so far as they included new factual contentions, QCATA was dealing with the unrepresented respondents' submissions in the most efficient way possible. QCATA in its judgment did not refer to the lay respondents' written submissions or new factual contentions. Allowing lay people to have their say at the hearing of a QCATA appeal does not amount to an error of law, especially as QCATA stated that the appeal was on a question of law only and that new factual submissions could not augment the evidence before the adjudicator.[169] The opinions of Mr Mainwaring upon which QCATA relied were all before the adjudicator. As to the respondents' written submissions, counsel for the applicant invited QCATA to act on them.[170] In any case, QCATA's reasons did not rely upon material which was not before the adjudicator.

[76] Next the respondents contended that QCATA correctly identified that the adjudicator erred in undertaking a balancing of competing interests in deciding the question of unreasonableness. QCATA identified this error in its reasons at [96] to [98],[171] [102],[172] [104],[173] [105],[174] and [130].[175] This ultimately resulted in the adjudicator applying the wrong test. She should have asked whether the opposition was unreasonable in the circumstances. Opposition will not be unreasonable if it might be reached by a reasonable person in the circumstances. Unfounded or vexatious opposition would be unreasonable but honestly held subjective views of opponents should not be discounted and can be considered in determining

the reasonableness of their opposition. Although the adjudicator identified the correct principles, she failed to act on them.

[77] Further, the respondents contended, QCATA correctly identified at [124] of its reasons[176] that the adjudicator erred in forming her own views as to the issues of architectural integrity in preserving the original design content; privacy; and noise. As QCATA noted, at [107] of its reasons,[177] the adjudicator failed to identify the basis on which she preferred the views of the applicant's architects over the respondents' architects. The respondents also contended that QCATA rightly identified at [143] of its reasons[178] that the adjudicator inappropriately assessed the evidence as to the value of the airspace above the proposed deck

[140834]

extensions and erred in concluding that the fact that the applicant offered no compensation was not a reasonable basis to oppose its approval. QCATA's consideration of the balancing of interests; the design integrity issues; privacy and noise issues; the "floodgates" concern; and the absence of compensation for the acquisition of common property rights was not an impermissible reconsideration of the merits of the application before the adjudicator but an identification of her errors of law. On the compensation issue, QCATA correctly identified the adjudicator's errors of law in her failure to reconcile inconsistent evidence placed before her as to the value of the common property airspace and her failure to identify that the applicant's omission to offer compensation was a reasonable basis to oppose the motion. QCATA, the respondents submitted, rightly identified the errors of law made by the adjudicator and their impact on her decision.

[78] QCATA's reference to *J Patterson Holdings* was not an error. That case referred to principles relevant to the application of s 276. In any case, QCATA identified the correct test at [55],[179] [58],[180] [84],[181] [85],[182] [94][183] and [105][184] of its reasons. QCATA correctly identified at [91] of its reasons[185] that the adjudicator had erred in, as she put it, not determining the balance between the need to protect the genuine interests of owners and their voting entitlements and upholding the justifiable position of opponents in the face of unfounded or vexatious opposition. Nor did QCATA err in its reference to *McKinnon*, a relevant authority dealing with the meaning of reasonableness.

[79] The respondents contended that the applicant had not identified that QCATA made any error of law so that the application for leave to appeal should be refused. In any case, this was not an appropriate case in which to grant leave to appeal as it involved common property airspace of a value of no more than $20,000. The application for leave to appeal should be dismissed with costs.

Conclusion

[80] The role of the adjudicator in this case was to investigate the applicant's application and to decide whether it was appropriate to give effect to his motion before Viridian's body corporate to allow him to extend his decks.[186] She was not bound by the rules of evidence;[187] must act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the application;[188] and must observe natural justice.[189] She had wide investigative powers to obtain information.[190] If satisfied the opposition to the motion is in all the circumstances unreasonable, she could give effect to the motion[191] and could make an order that is just and equitable in the circumstances (including a declaratory order) to resolve the dispute.[192]

[81] This application to have an adjudicator determine the dispute seems to have been made in September 2012. It is not clear when it was referred to the adjudicator but she gave her decision on 2 September 2013. She had before her the many submissions and supporting material of the applicant and respondents and used her investigative powers to obtain further information.[193] She determined the dispute on the papers, that is, without a hearing, and without undertaking an inspection of Viridian. The material before this Court does not suggest that any party requested either an oral hearing or an inspection.

[82] Her role under s 276 and Item 10 in Schedule 5 BCCM Act,[194] consistent with the objects of the BCCM Act[195] and the obligation on bodies corporate in carrying out their general functions to act reasonably under s 94 BCCM Act,[196] was to determine whether she was satisfied the body corporate did not pass the applicant's motion because of opposition from the respondents that was in the circumstances unreasonable. This was a question of fact to be determined by objectively considering all relevant circumstances: *Commonwealth Bank v Human Rights and Equal Opportunity Commission*.[197] What is relevant in determining reasonableness (or unreasonableness) will vary from case to case, depending on the issues raised and the relevant material: *Waters v Public Transport Corporation*.[198] Contrary to the respondents' contentions, the adjudicator was not limited to determining whether the respondents' opposition to the motion could have been reasonably held. She was required to reach her own conclusion after considering all relevant matters. This view as to the functions of a specialist adjudicator is

[140835]

consistent with the relevant provisions of the BCCM Act and with the ordinary meaning of "adjudicator" subject to the text and context of that Act.[199]

[83] In determining the ultimate question of fact (whether the respondents' opposition to the applicant's motion is in the circumstances unreasonable), the adjudicator appreciated that the body corporate could pass the applicant's motion to purchase common property only if there was no dissent.[200] She also appreciated that the BCCM Act allowed the applicant to apply to have the dispute referred to an adjudicator for resolution and empowered her to give effect to the motion if the opposition to it is unreasonable and it is just and equitable to give effect to it. It was also relevant, as she identified, that seven of the 23 Viridian home owners opposed the motion; that the applicant had a legitimate interest in improving his lot; and that the common property airspace required to give effect to the motion was of no use to anyone but the applicant.

[84] The competing submissions and supporting material in this case, particularly the architectural reports, made the question of unreasonableness difficult to resolve. As the reasons of both the adjudicator and QCATA demonstrate, views as to what was reasonable or unreasonable involved value judgments on which there was room for reasonable differences of opinion, with no opinion being uniquely right.[201] Had QCATA's views as to unreasonableness been the views of the adjudicator, and had the adjudicator made no errors of law, that finding would have been unassailable on a QCATA appeal which was limited to a question of law: see s 289 BBCM Act.[202]

[85] The respondents contended before the adjudicator that their opposition to the applicant's motion was not unreasonable and that the body corporate acted reasonably in refusing it because of a number of matters. Most relevantly for present purposes these included architectural integrity; "floodgates"; the absence of any offer of proper compensation to the body corporate; noise issues; and privacy issues especially concerning lot 10.

[86] The fifth respondent, Mr Mainwaring, the highly respected architect of Viridian, purposefully designed the decks so that they were discrete and did not interlink. He and other eminent architects opined before the adjudicator that the proposed deck extension would be harmful to the architectural integrity of Viridian, an architectural award winning development. Seven Viridian owners, having purchased their homes on the basis of Viridian's architectural merit, objected to the applicant's motion for reasons including those based on these architectural opinions. On the other hand, the same number of equally respected architects opined that extending the applicant's decks in the manner proposed would not have any detrimental impact on Viridian's architectural integrity and any appreciable change to its external appearance would be minimal. The applicant's proposed extended decks, the respondents argued, could result in increased use and noise generally and would have some detrimental privacy impacts on lot 10. The body corporate and other owners may be inconvenienced and the attractive Viridian landscaping disrupted whilst the proposed work was undertaken. Other owners would be likely to follow suit and extend their decks (the "floodgates" issue), so that the inconvenience and disruption would be compounded.

[87] According to the applicant's material before the adjudicator, any increased use would not significantly either increase noise or detrimentally impact on the privacy of lot 10; and disruption to other owners and the body corporate during the building period would be managed and kept to a minimum. Any concern about a "floodgates" issue was unwarranted. And no one other than the applicant had any use for the common property airspace required for the deck extension so that it was of no value to anyone else.

[88] I have discussed the adjudicator's reasoning in some detail earlier.[203] After considering the competing architectural opinions and relevant photographs, diagrams and drawings, the adjudicator preferred the opinions of the applicant's architects. She found that the proposed extensions would have no noticeable detrimental impact on Viridian's architectural integrity. She considered that she should balance the applicant's interest in improving his lot against the impacts of the proposal on the other owners

and on Viridian as a whole.[204] She found that no other owner or the body corporate would have any material use for the $5m^2$ of common property airspace required by the applicant to extend his decks and it was of value only to him.[205] As to the "floodgates" argument, she noted that there was no evidence of any similar pending applications by other owners to extend their decks. The history of the applicant's proposal showed that no one had an automatic right to have such a proposal approved.[206] Any future application would have to be determined on its merits. If the present application was found not to adversely impact on other owners or Viridian as a whole, it was difficult to see how the cumulative effect of multiple identical improvements would generate an adverse impact. The "floodgates" argument, the adjudicator found, was not a reasonable basis for opposing the proposal.[207]

[89] The adjudicator was unpersuaded on the evidence that the proposed deck expansion would increase the use of the applicant's decks and noise in a way which would disturb other occupiers or users of the common property and that the unsubstantiated risk of a potential nuisance was not a reasonable basis to refuse the proposal.[208] She accepted the evidence from the applicant's architect, Mr McKerrell, and concluded that there would be no greater overlooking of and from lot 10 than at present and that any slight increase in vision between the lots would not interfere with the amenity of lot 10. Any arising privacy issues could be ameliorated by a privacy blade and would not unreasonably interfere with the amenity of lot 10. This was not a sufficient basis to warrant the refusal of the motion.[209] The adjudicator also considered other issues placed before her to provide support for the respondents' contentions[210] but as these are not relevant to the application before this Court they need not be considered further. The adjudicator therefore was not satisfied that the body corporate acted reasonably in not passing the applicant's motion, and that individual owners in opposing it, whilst perhaps acting in good faith and with genuine concern about architectural and other issues, relied on irrelevant and unsubstantiated considerations.[211]

[90] The respondents contended the adjudicator applied an incorrect test, as identified by QCATA at [94] of its reasons,[212] and reversed the onus of proof in stating that she was not satisfied the body corporate had acted reasonably in deciding not to pass the motion.[213] That contention is not made out when the adjudicator's reasons are considered as a whole. Early in her reasons,[214] she referred to s 276(1) and set out the relevant portion of Item 10 in Schedule 5, correctly identifying that the issue was whether the opposition to the motion was unreasonable in the circumstances and noting that the applicant argued that the opposition to his motion was unreasonable.[215] She rightly rejected the *Wednesbury* test for unreasonableness;[216] accepted that the question of reasonableness was objective, requiring a consideration of all relevant circumstances; and that the determination of whether opposition to the motion was unreasonable required a consideration in an objective and fair manner of all the relevant facts and circumstances.[217]

[91] The adjudicator's reasons make clear that she conscientiously considered all the material and submissions relied upon by the applicant and the respondents, made findings of fact, all of which were open

on that material, and was ultimately satisfied as a matter of fact that the applicant's motion was not passed because of the respondents' opposition to it that in the circumstances was unreasonable.

[92] It is true, as the respondents contended, that from time to time[218] she stated that she was not satisfied that one or other of the respondents' objections was made out. It was, of course, for the applicant to demonstrate that the opposition to his motion was unreasonable. It is also true, as the applicant contended, that there is little practical difference between being satisfied that all the respondents' concerns about the motion were not reasonable and being satisfied that the respondents' opposition to the motion was in all the circumstances unreasonable. In any case, when the adjudicator's reasons are read in their entirety, it is clear that she fully appreciated it was for the applicant to demonstrate the unreasonableness of the respondents' opposition to his motion. She made primary findings of fact, after considering the competing material and submissions, that she was not satisfied the specific objections raised by the respondents were made out. But she did not reverse the onus

[140837]

on the ultimate question. Only after a careful and thorough analysis of all material considerations raised by the respondents and the applicant, was she ultimately persuaded by the applicant that the opposition was unreasonable. Her ultimate finding that she was "not satisfied that the Body Corporate acted reasonably" in not passing the applicant's motion was, in context, a finding by her that the respondents' opposition was based on "irrelevant and unsubstantiated considerations" and so was unreasonable in terms of s 176 and Item 10 in Schedule 5.[219] There can be no doubt from her reasons read as a whole that the applicant satisfied her that the opposition to the motion was unreasonable. She did not apply the wrong test or reverse the onus of proof. QCATA erred in finding that the adjudicator applied the wrong test and reversed the onus of proof.

[93] QCATA also erred in finding the adjudicator erred in law in making primary findings of fact about architectural integrity, "floodgates", the limited value of the common property airspace to anyone other than the applicant, and privacy and noise issues. These findings of fact were open on the material before the adjudicator. As the adjudicator found as a fact that the airspace was of no value to anyone other than the applicant, she did not err in failing to identify the applicant's omission to offer compensation as a reasonable basis to oppose the motion. Nor did she apply the wrong test in balancing the need to protect the genuine interests of the owners and their voting entitlements against the applicant's interest in improving his lot and the impacts of the proposal on other lots and Viridian as a whole.[220] In referring to these matters, she was rightly taking into account material considerations in determining the ultimate question: whether the respondents' opposition to the motion was in the circumstances unreasonable. QCATA erred in law in wrongly identifying that the adjudicator erred in these ways.

[94] The appeal to QCATA was limited to a question of law. It was an appeal in the strict sense, not an appeal by way of re-hearing. It had to be determined on the material before the adjudicator. But had QCATA correctly identified an error of law, I do not accept the applicant's contention that its only course was to remit the matter to the same adjudicator for determination according to law. Once an error of law affecting the adjudicator's decision was correctly identified, QCATA could exercise the adjudicator's powers and substitute its own decision based on the material before the adjudicator, consistent with the adjudicator's undisturbed factual findings. So much is clear from the terms of s 294 BCCM Act[221] and s 146 QCAT Act.[222]

[95] I do not consider QCATA's reliance on *McKinnon* in discussing the requirements of reasonableness and unreasonableness was an error of law. Although the case did not directly concern s 94 or s 276, Item 10 in Schedule 5, the general discussion of the meaning of "reasonableness" and "unreasonableness" was relevant. Similarly, while *J Patterson Holdings* may have had no direct relevance to Item 10 in Schedule 5, to refer to authority of only marginal relevance does not usually amount to an error of law and did not in this case.

[96] QCATA allowed material to be placed before it which was not before the adjudicator. QCATA's approach in not restricting references to facts by unrepresented respondents to those before the adjudicator, for reasons of expediency and practicality, was understandable. QCATA did not unequivocally state at the hearing that it would not consider any material which was not before the adjudicator in determining the

appeal. On the contrary, it stated, somewhat confusingly, that the new material would assist it to understand the appeal, although it would not make findings on it.[223] QCATA then referred to the additional material early in its reasons[224] and noted its inspections of Viridian on the judgment coversheet. In the penultimate paragraph of its judgment, however, QCATA stated that, "on the material before the adjudicator", she ought not have found the applicant established that the body corporate acted unreasonably. This suggests QCATA did limit itself to determining the matter on the material before the adjudicator. Unfortunately, it is not unequivocally clear from QCATA's reasons that the material which was before it but not before the adjudicator did not influence QCATA's decision. But in light of my conclusions as to QCATA's

[140838]

other established errors of law it is not necessary to reach a concluded view on this aspect of the applicant's contentions. I note, however, that while an inspection is not usually considered part of the evidence but merely an aid to understanding the evidence,[225] it will often be imprudent in an appeal of this kind for QCATA to undertake inspections, especially when, as here, none were undertaken by the adjudicator.

[97] In their oral submissions, the respondents relied on *McColl v Body Corporate for Lakeview Park CTS 20751*.[226] There the court considered the terms of s 87 BCCM Act (now repealed) and the body corporate's statutory responsibility to act reasonably in carrying out its general functions, including enforcing the community management statement. The court stated that this provision did not apply to regulate decisions made at meetings of the body corporate.[227] As the applicant pointed out, however, s 87 has been repealed since and replaced by s 94[228] which, unlike the repealed s 87, now contains the words, "including making, or not making, a decision for the sub-section." It seems likely these changes were enacted to overcome the construction of s 87 taken in *McColl*. From the ordinary meaning of the terms of s 94; from the s 94 heading, "Body corporate's general functions"; and from the explanatory notes for the relevant amendments to the BCCM Act,[229] it is clear that a body corporate is required to act reasonably in refusing motions such as the applicant's. *McColl* is of no assistance to the respondents.

Summary

[98] QCATA erred in identifying errors of law in the adjudicator's reasons. There were none. It followed that QCATA was not entitled to set aside the adjudicator's decision and to exercise the jurisdiction and powers of the adjudicator and to substitute its own decision. It is true that the value of the common property airspace involved in this dispute is, at its highest on the evidence, no more than $20,000 and is of no value to anyone other than the applicant. The low monetary value of the subject matter of the proposed appeal is not a factor in favour of the applicant's grant of leave. But the issues raised are of considerable importance to many of the owners of valuable homes in Viridian. The applicant would suffer a miscarriage of justice if the QCATA errors were uncorrected. More significantly, the application raises matters of general importance concerning the conduct of adjudications under the BCCM Act and of appeals from those adjudications to QCATA. For those reasons the application for leave to appeal should be granted and the appeal allowed with costs. The decision of QCATA should be set aside and the appeal to it dismissed. I would make the following orders:

Orders

1. Application for leave to appeal granted and appeal allowed with costs.

2. The decision of QCATA is set aside and instead it is ordered that the appeal to QCATA is dismissed.

Morrison JA:

[99] I agree with the orders proposed by the President and with the reasons given by her Honour.

Martin J:

[100] I agree with McMurdo P.

Footnotes

1 *Viridian Noosa Residences* [2012] QBCCMCmr 283.
2 *Viridian Noosa Residences* [2013] QBCCMCmr 351.
3 [2008] QDC 300.
4 (2006) 228 CLR 423.
5 BCCM Act s 2.
6 BCCM Act s 4(a).
7 BCCM Act s 4(e).
8 BCCM Act s 4(f).
9 BCCM Act s 4(i).
10 The appeal tribunal is the QCAT appeal tribunal: BCCM Act Sch 6, Dictionary "appeal tribunal."
11 Wayne Michelson and Mark Winter and Heather Coyne.
12 AB, 623.
13 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [2].
14 Above, [3].
15 Above, [4].
16 Above, [10].
17 Above, [11].
18 Above, [12].
19 Above, [13].
20 Above, [14] – [16].
21 Above, [18] – [20].
22 Above, [22].
23 Above, [24].
24 Above, [25].
25 Above, [28].
26 Above, [30].
27 [2007] QBCCMCmr 115.
28 *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.
29 *Viridian Noosa Residences* [2012] QBCCMCmr 351 [31] – [33].
30 [2013] QCATA 183.
31 [2013] QBCCMCmr 351, [33] – [34].
32 Above, [35].
33 Above, [36].
34 [2004] QBCCMCmr 423, [42] and [44].
35 [2004] QBCCMCmr 452, [23] and [26].
36 [2007] QBCCMCmr 115, p 5.
37 [2013] QBCCMCmr 351, [37].
38 Above, [38].
39 Above, [39].
40 Above, [40].
41 Above, [41].
42 Above, [42].
43 Above, [43] – [44].
44 Above, [45].

45 Above, [46].
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63 Above, [65] – [66].
64 Above, [67].
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66 Above, [70]–[71].
67 Above, [72].
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74 Above, [79].
75 Above, [80]–[81].
76 Above, [82].
77 Above, [83]–[84].
78 Above, [85]–[86].
79 Above, [87].
80 Above, [88].
81 Above, [89].
82 T1-70–T1-71.
83 T1-72.
84 T1-74.
85 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht and Anor* [2014] QCATA 294, [1]. This was an error of fact as only seven of the 23 owners opposed the motion.
86 Above, [2].
87 Above, [6].

88 Above, [7].
89 Above, [7]–[12].
90 Above, [13].
91 Above, [14]–[27].
92 Above, [28]–[30].
93 Above, [31]–[33].
94 Above, [34]–[83].
95 Above, [44].
96 Above, [45]–[83].
97 (2006) 228 CLR 423; (2006) 229 ALR 187.
98 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht and Anor* [2014] QCATA 294, [84].
99 Above, [85].
100 Above, [90].
101 Above, [91].
102 Above, [93].
103 Above, [94].
104 [2008] QDC 300, [94]–[100].
105 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht and Anor* [2014] QCATA 294, [97].
106 Above, [98].
107 Above, [100].
108 Above, [101].
109 Above, [102].
110 Above, [104].
111 Above, [105].
112 Above, [106].
113 Above, [107].
114 Above, [108]–[115].
115 Above, [117].
116 Above, [118]–[120].
117 Above, [121].
118 Above, [122].
119 Above, [123].
120 Above, [124].
121 Above, [126].
122 Above, [127].
123 Above, [128].
124 Above, [129].
125 Above, [130].
126 Above, [131].
127 Above, [132].
128 Above, [133].
129 Above, [134].
130 Above, [135].

131 Above, [136].

132 Above, [137].

133 [2005] QBCCMCmr 556.

134 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [138]–[139].

135 [2008] QBCCMCmr 3.

136 [2009] QCA 77.

137 [2007] QBCCMCmr 115.

138 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht and Anor* [2014] QCATA 294, [140]–[143].

139 Above, [145].

140 Above, [146]–[147].

141 (1976) 135 CLR 110, 118–119.

142 [2014] QCA 297, [11], [13] and [15].

143 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [49]–[85].

144 [2014] QCA 297, [13], [14] and [16].

145 [2013] QCA 376, [27]–[32].

146 (2008) 74 NSWLR 481, [39].

147 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [146].

148 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht and Anor* [2014] QCATA 294, [2].

149 (1991) 173 CLR 349.

150 (1989) 88 ALR 621.

151 (1992) 28 NSWLR 125.

152 (1997) 150 ALR 1.

153 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [53].

154 Above, [84] and [85].

155 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [15] and [16] sub-paras [b] and [f].

156 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [56].

157 Above, [66]–[69].

158 Above, [43].

159 Above, [45]–[46].

160 T1-71; T1-74; T1-75–T1-77.

161 (2003) 216 CLR 161, [122] and [123].

162 [2004] QCA 44; [2004] 2 Qd R 401.

163 [2003] 1 Qd R 374, [6], [32], [78] and [79].

164 [2005] QCA 336, [5] and [33].

165 Discussed in these reasons at [26].

166 Discussed in these reasons at [27].

167 Discussed in these reasons at [32].

168 Set out at [38] of these reasons.

169 T1-71, line 10 and T1-74, lines 33–37.
170 T2-58, lines 13–15.
171 Discussed in these reasons at [49].
172 Discussed in these reasons at [50].
173 Discussed in these reasons at [50].
174 Discussed in these reasons at [51].
175 Discussed in these reasons at [54].
176 Discussed in these reasons at [53].
177 Discussed in these reasons at [51].
178 Discussed in these reasons at [56].
179 Discussed in these reasons at [44].
180 Discussed in these reasons at [44].
181 Discussed in these reasons at [44].
182 Discussed in these reasons at [45].
183 Discussed in these reasons at [47].
184 Discussed in these reasons at [51].
185 Discussed in these reasons at [46].
186 Above, s 269(1).
187 Above, s 269(3)(c).
188 Above, s 269(3)(b).
189 Above, s 269(3)(a).
190 Above, s 269 and s 271 set out at [10] of these reasons.
191 Above, s 276, Item 10 in Schedule 5.
192 Above, s 276.
193 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [11], discussed in these reasons at [20].
194 Discussed in these reasons at [11] and [12].
195 BCCM Act, ss 2 and 4(a), (e), (f) and (i) discussed in these reasons at [6].
196 Above, s 94, set out at [7] of these reasons.
197 (1997) 150 ALR 1.
198 (1991) 173 CLR 349, Brennan J, 379; Deane J, 383 – 384; and McHugh J, 410 – 411.
199 BCCM Act, Schedule 6, Dictionary, defines “adjudicator” as “a person appointed …under chapter 6, part 8, as a specialist adjudicator” and “specialist adjudicator” as “a person to whom an application is referred under section 267” but these definitions do not assist in further clarifying the adjudicator’s role in this case.
200 *Viridian Noosa Residences* [2012] QBCCMCmr 283.
201 *Norbis* v *Norbis* (1986) 161 CLR 513, Mason and Deane JJ, 518.
202 Set out in these reasons at [13].
203 See [17]–[35] of these reasons.
204 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [42].
205 Above, [45]–[47].
206 *Viridian Noosa Residences* [2012] QBCCMCmr 283.
207 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [48]–[53].
208 Above, [65]–[69].
209 Above, [70]–[77].
210 Above, [78]–[84].

211 Above, [87].

212 Discussed in these reasons at [47].

213 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [87].

214 Discussed in these reasons at [21].

215 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [24] and [41], discussed in these reasons at [21] and [23].

216 Above, [33], discussed in these reasons at [22].

217 Above, [37], discussed in these reasons at [22].

218 *Viridian Noosa Residences* [2013] QBCCMCmr 351, [46], [51], [61] and [66].

219 Above, [87], set out at [38] of these reasons.

220 Above, [38].

221 Set out at [13] of these reasons.

222 Set out at [14] of these reasons.

223 T1-71.

224 *Re Body Corporate for Viridian*; *Kjerulf Ainsworth & Ors* v *Martin Albrecht & Anor* [2014] QCATA 294, [7].

225 Commissioner for Railways v Murphy (1967) 41 ALJR 77.

226 [2004] QCA 44, [2004] 2 Qd R 401.

227 Above, [24] and [25].

228 Set out at [7] of these reasons.

229 *Body Corporate and Community Management and Other Legislation Amendment Bill 2006*, Explanatory Notes Clause 8.

WESTPAC BANKING CORPORATION V BODY CORPORATE FOR THE WAVE COMMUNITY TITLE SCHEME 36237 [2014] QCA 73.

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(2014) LQCS ¶90-191}; Court citation: [2014] QCA 73

Supreme Court of Queensland — Court of Appeal

Decision delivered on 11 April 2014

Management and control — Body corporate powers, duties and liabilities, where the owners of a lot within the scheme had mortgaged their lot to the bank, failed to pay body corporate levies as and when due, failed to pay the mortgage as and when due to the bank, the body corporate took steps to recover unpaid contributions together with the recovery costs of seeking those contributions be paid, where the lot owners became bankrupt and the bank entered into possession of the lot after the body corporate had incurred significant legal fees , the body corporate claimed the bank should pay the recovery costs, including legal fees, the bank did not agree, where the primary judge found in favour of the body corporate in that the bank were liable for the recovery costs, whether a mortgagee in possession can be liable for recovery costs incurred prior to the mortgagee taking possession of the lot under s 143(3) of the Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld). Other sections of the Act considered: 94, 96, 150, 151 and 202.

Dr. and Mrs. Prins became owners of the lot in 2007 with the mortgage to St. George bank registered on the title. By April 2011 the owners were in arrears with their contributions. The body corporate claimed a debt of $5,514 and costs of $1,139.58 in the statement of claim filed in April 2011. Dr. and Mrs. Prins disputed the debt and there were issues with disclosure and unsuccessful negotiations between the body corporate and the lot owners. The body corporate continued to pursue the debt, applied for summary judgment, and had the issue regarding their recovery costs set down for a trial.

Meanwhile in December 2011, Dr. and Mrs. Prins lodged a complaint with the financial ombudsman service against Westpac which precluded Westpac from taking any steps to recover the mortgage debt between them and Dr. and Mrs. Prins.

Eventually, the body corporate obtained summary judgment regarding the unpaid levies and obtained an enforcement warrant for the seizure and sale of the lot and sent a copy of this to Westpac. Dr. and Mrs. Prins continued to fail to pay levies. The failure to pay body corporate levies was of course a default under their loan with Westpac.

After a trial lasting 5 days, on 19 October 2012 the body corporate obtained judgment against Dr. and Mrs. Prins for its recovery costs in the amount of $150,000.00. The warrant in respect of the judgment debt of $150,000.00 plus the enforcement costs of $531 was sent to Westpac.

Between 7 November 2012 and 10 August 2013, Westpac was permitted by the FOS terms of reference to take possession of the lot for the purposes of preserving it but was prohibited from taking any action against Dr. & Mrs. Prins to recover the debt between those owners and Westpac.

Dr. and Mrs. Prins filed an appeal in the District Court against the body corporate's judgment for legal fees. The appeal was dismissed on 25 March 2013 and applied for leave to the Court of Appeal but that did not proceed.

Dr. & Mrs. Prins became bankrupt on 12 April 2013. Westpac entered into possession on 5 July 2013 and on 23 July 2013 Westpac advised the Body Corporate it had taken steps to enforce the mortgage over the lot.

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Wesptac paid levies in the amount of $10,711.52 which was the original levies for which the body corporate obtained judgment in 2012. No amount for recovery costs was paid.

The Body Corporate claimed its recovery costs were recoverable. As at 20 August 2013 $347,533.17 made up of $12,475.83, $150,000.00 in recovery costs up to 19 October 2012 and the sum of $185,057.34 for recovery costs after 19 October 2012. On 27 August 2013 Westpac paid a further $12,475.83 for contributions. Nothing further was paid.

Held:

Holmes JA and Fraser JA agreeing with the orders proposed by Mullins J:

1. The definition of "body corporate debt" under section 143(1)(c) includes "recovery costs" and recovery costs are associated with the ownership of the relevant lot — support for that conclusion can also be found in section 143(5) of the Regulation which sets out the priority for payments made by an owner; and

2. The mortgagee in possession is liable to pay the recovery costs notwithstanding that those have been incurred by the Body Corporate prior to the bank taking possession of the property.

Parties:

L F Kelly QC with M J Luchich for the appellant — Minter Ellison

R M Derrington QC, with D E F Chesterman for the respondent — OMB Solicitors

Before: Holmes and Fraser JJA and Mullins J.

Holmes and Fraser JJA and Mullins J:

ORDERS:

1. **Appeal dismissed.**
2. **The appellant must pay the respondent's costs of the appeal to be assessed.**

HOLMES JA:

[1] I have had the advantage of reading the draft judgments of both Mullins J and Fraser JA. I agree with what their Honours have said, and with the orders Mullins J proposes.

FRASER JA:

[2] The comprehensive reasons for judgment of Mullins J, which I have had the advantage of reading in draft, enable me to state my reasons in brief terms.

[3] The critical question of statutory construction is whether paragraph (c) of the definition of "body corporate debt" in the schedule to the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld) as that defined term is used in s 143(3)(b) of that Regulation comprehends the "recovery costs" described in s 143(1)(c) of the same Regulation.[1] I would accept, as the appellant argued, that the examples given in paragraph (c) of the definition are more obviously "associated with the ownership of a lot" than are recovery costs, but in the present context that does not suggest a negative answer to the construction question. As Mullins J points out,[2] s 14D of the *Acts Interpretation Act* 1954 (Qld) provides that an example of the operation of a provision does not limit the meaning of the provision. Accordingly, the reach of the expression "associated with the ownership of a lot" must depend upon other aspects of the statutory context in which that expression is used. Here there are strong contextual indications that the expression does comprehend recovery costs.

[4] The word "another" in paragraph (c) of the definition of "body corporate debt" as "another amount associated with the ownership of a lot" conveys that the amounts identified in (a) and (b) ("a contribution or instalment of a contribution" and "a penalty for not paying a contribution or instalment of a contribution by the date for payment") are themselves "associated with the ownership of a lot". In the context that s 143(1) provides that both those amounts and the "recovery costs" reasonably incurred in recovering those amounts are recoverable by the body corporate as a debt, the conclusion seems all but inevitable that recovery costs are themselves to be regarded as being associated with the ownership of a lot for the purposes of the definition. It seems a most unlikely construction that a debt which one subsection of section 143 expressly makes

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recoverable by the body corporate without any qualification is not a "body corporate debt" for the purposes of another subsection of the same section dealing with a closely related topic.

[5] Subject to these reasons, I respectfully agree with all that Mullins J has written. I also agree with the orders proposed by her Honour.

MULLINS J:

[6] The learned primary judge made the following declaration:

> "Upon the proper construction of regulations 143(1) and 143(3) of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) a liability to the respondent for recovery costs (as that term is defined in regulation 143(1)(c)) with respect to Lot 2503 on SP173160, County of Ward, Parish of Gilston, Title Reference 50640122 (**the Lot**) is enforceable as a body corporate debt pursuant to regulation 143(3)(b) against:
>
> (a) the applicant as mortgagee in possession of the Lot; and
> (b) any purchaser from the applicant exercising power of sale under mortgage number 710242327 registered over the Lot."

[7] The appellant Westpac Banking Corporation (Westpac) appeals against the order on the basis that the primary judge erred in the construction of s 143(3) of the *Body Corporate and Community Management*

(Accommodation Module) Regulation 2008 (Qld) (the Regulation). In respect of the body corporate debt that was payable before it entered possession of the relevant lot, Westpac contends that its liability under s 143(3) of the Regulation for the body corporate debt as mortgagee in possession does not extend to "recovery costs" referred to in s 143(1)(c) of the Regulation.

Background

[8] In January 2007 Dr and Mrs Prins became the registered owners as joint tenants of Lot 2503 on SP173160 County of Ward Parish of Gilston, being a unit in the building known as "The Wave". The respondent is the body corporate for the building. Dr and Mrs Prins granted a mortgage over the lot to St George Bank Limited (now Westpac) which was also registered in January 2007.

[9] In 2011 the respondent engaged solicitors to recover unpaid body corporate debts from Dr and Mrs Prins. A claim and statement of claim was filed on 27 April 2011 claiming an outstanding debt of $5,514.42 and costs of $1,139.58. There were difficulties serving Dr and Mrs Prins; a defence was filed; there were disputes over disclosure; and unsuccessful negotiations between the respondent and Dr and Mrs Prins ensued.

[10] Around 5 December 2011 Dr and Mrs Prins lodged a complaint with the Financial Ombudsman Service (FOS) against Westpac. Between the lodgement of the complaint until or around 7 November 2012, Westpac was prohibited by the FOS terms of reference from taking any action against Dr and Mrs Prins to recover the debt the subject of the dispute between Dr and Mrs Prins and Westpac or to protect the lot.

[11] Eventually the respondent applied for summary judgment. On 2 May 2012 the respondent was granted leave to file an amended claim and obtained summary judgment against Dr and Mrs Prins for the outstanding contributions of $10,711.52 and penalty interest of $2,135.56 which made a total judgment sum of $12,847.08. Recovery costs were to be determined at a trial set down for July 2012. An enforcement warrant for the judgment of $12,847.08 and costs of the enforcement warrant of $532.10 was issued by the respondent against Dr and Mrs Prins on 9 May 2012.

[12] On 9 May 2012 the respondent's solicitors forwarded a copy of the summary judgment and the enforcement warrant for seizure and sale of the lot to Westpac and advised of the setting down of the trial on the issue of costs. The respondent's solicitors advised that costs currently were $46,068.26 and that if matters progressed to trial costs were estimated in the range of $70,000 to $100,000. The failure by Dr and Mrs Prins to pay levies was an event of default under the mortgage.

[13] Dr and Mrs Prins failed to pay levies to the respondent for the period 1 August to 30 November 2012 that were due on 1 August 2012. On 17 August 2012 the respondent's

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solicitors advised Westpac that the total debt claimed by the respondent in respect of Dr and Mrs Prins' lot was $133,638.97.

[14] After a trial lasting five days, the respondent obtained judgment against Dr and Mrs Prins on 19 October 2012 for its reasonable recovery costs in the amount of $150,000.

[15] An enforcement warrant for seizure and sale of the lot in respect of the judgment debt of $150,000 and costs of the enforcement of $531 was issued on 22 October 2012 in favour of the body corporate which forwarded a copy to Westpac.

[16] Between 7 November 2012 and 10 August 2013 Westpac was permitted by the FOS terms of reference to take steps to recover possession of the lot for the purpose of preserving the lot, but otherwise remained prohibited from taking any action against Dr and Mrs Prins to recover the debt the subject of the dispute between Westpac and them or to protect the lot.

[17] Dr and Mrs Prins filed an appeal to the District Court from the Magistrate's decision given on 19 October 2012. The appeal was dismissed on 25 March 2013. Dr and Mrs Prins applied for leave to appeal to the Court of Appeal, but that did not proceed.

[18] Dr and Mrs Prins became bankrupt on their own petition on 12 April 2013. Westpac entered into possession of the lot on 5 July 2013 by changing the locks on the property. On 23 July 2013 Westpac gave

written notice to the body corporate that it had taken steps on 5 July 2013 to enforce the mortgage over the lot.

[19] On 8 August 2013 Westpac paid the respondent the sum of $10,711.52 on account of the amount of contributions for which judgment had been obtained by the respondent against Dr and Mrs Prins on 2 May 2012.

[20] As of 20 August 2013 the respondent claimed from Westpac the sum of $347,533.17 comprising the sum of $12,475.83 for contributions, the sum of $150,000 for recovery of costs up to 19 October 2012 and the sum of $185,057.34 for recovery costs after 19 October 2012. On 27 August 2013 Westpac paid the respondent the outstanding amount of $12,475.83 for contributions.

Relevant legislative provisions

[21] The functions of the body corporate for a community title scheme are set out in s 94(1) of the *Body Corporate and Community Management Act* 1997 (the Act). These functions are to administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under the Act); and carry out the other functions given to the body corporate under the Act and the community management statement. There is an express prohibition in s 96(1) of the Act on a body corporate carrying on a business, subject to s 96(2) which permits the body corporate to engage in business activities to the extent necessary for properly carrying out its functions and invest amounts not immediately required for its purposes in the way a trustee may invest trust funds. Section 150(1) of the Act provides that, subject to s 151 of the Act, the financial management arrangements applying to a community title scheme are those stated in the regulation module applying to the scheme. Section 150(2) of the Act lists the subject matter for the regulation module, without limiting s 151(1). The topics covered include levying lot owners for contributions, discounts and penalties relating to the payment of contributions, and recovery of unpaid contributions.

[22] The Regulation is the relevant regulation module that applies to the respondent's scheme.

[23] Part 3 of ch 7 of the Regulation (s 139 to s 142) deals with contributions levied by the body corporate on owners.

[24] Under s 139 of the Regulation the body corporate by ordinary resolution on the basis of its budget for a financial year fixes the contributions to be levied on the owner of each lot for the financial year, the number of instalments and the date on or before which payment of each instalment of the contributions is required. The body corporate is required under s 140 of the Regulation to give the owner of each lot notice at the specified time of the total amount of the contribution levied on the owner, the amount of the contribution or

instalment of contribution whose payment is currently required, the due date for payment, any discount to which the owner is entitled for payment made by the due date for payment, any penalty to which the owner is liable for each month payment in arrears and the amount of any arrears applying to the owner.

[25] The body corporate is empowered under s 141 of the Regulation to fix by ordinary resolution the discount to be given to owners, if an instalment of a contribution is received by the body corporate by the date for payment, provided the discount is not more than 20 per cent of the amount to be paid. Section 142 of the Regulation also permits the body corporate by ordinary resolution to fix a penalty to be paid by owners, if an instalment of contribution is not received by the date for payment, provided the penalty is not more than 2.5 per cent for each month the instalment is in arrears.

[26] Section 143 of the Regulation is the sole provision in pt 4 of ch 7 of the Regulation which is headed "Payment and enforcement of body corporate debts".

[27] Section 143 of the Regulation provides:

> "**143 Payment and recovery of body corporate debts [SM, s 145]**
>
> (1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt—

(a) the amount of the contribution or instalment;
(b) any penalty for not paying the contribution or instalment;
(c) any costs (***recovery costs***) reasonably incurred by the body corporate in recovering the amount.

(2) If the amount of a contribution or contribution instalment has been outstanding for 2 years, the body corporate must, within 2 months from the end of the 2-year period, start proceedings to recover the amount.

(3) A liability to pay a body corporate debt in relation to a lot is enforceable jointly and severally against each of the following persons —

(a) a person who was the owner of the lot when the debt became payable;
(b) a person (including a mortgagee in possession) who becomes an owner of the lot before the debt is paid.

(4) If there are 2 or more co-owners of a lot, the co-owners are jointly and severally liable to pay a body corporate debt in relation to the lot.

(5) If an owner is liable for a contribution or a contribution instalment, and a penalty, an amount paid by the owner must be paid —

(a) first, towards the penalty; and
(b) second, in reduction of the outstanding contribution or instalment; and
(c) third, towards any recovery costs for the debt.

(6) If the body corporate is satisfied there are special reasons for allowing a discount of a contribution, or waiving a penalty or liability for recovery costs, the body corporate may allow the discount, or waive the penalty or costs in whole or part."

[28] There is a definition of "body corporate debt" in the schedule to the Regulation:

"***body corporate debt*** means a following amount owed by a lot owner to the body corporate —

(a) a contribution or instalment of a contribution;
(b) a penalty for not paying a contribution or instalment of a contribution by the date for payment;
(c) another amount associated with the ownership of a lot.

Examples of another amount—

• an annual payment for parking under an exclusive use by-law
• an amount owing to the body corporate for lawnmowing services arranged by the body corporate on behalf of the lot owner"

[29] The definition of "owner" in schedule 6 to the Act is:

"***owner***, of a lot (other than a lot that is a community titles scheme) included in a community titles scheme, means —

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(a) the person who is, or is entitled to be, the registered owner of the lot, and includes —

(i) a mortgagee in possession of the lot; and
(ii) if, under the Land Title Act, 2 or more persons are the registered owners, or are entitled to be the registered owners, of the lot—each of the persons; and

(b) for chapter 6, see section 226."

[30] There is also a definition of "mortgagee in possession" in schedule 6 to the Act:

"***mortgagee in possession***, of a lot included in a community titles scheme, means a mortgagee who has taken steps to enforce a mortgage of the lot and has notified the body corporate of the intention to enforce the mortgage (whether or not the mortgagee has actually gone into possession of the lot), but does not include a mortgagee who has notified the body corporate of a decision not to proceed with enforcement of the mortgage."

[31] Under s 191 of the Regulation notice must relevantly be given by the mortgagee to the body corporate of the mortgagee entering into possession of the lot that is the subject of the registered mortgage. It appears that the reference to a mortgagee entering into possession takes it meaning from the definition of "mortgagee in possession" in schedule 6 to the Act. Under s 202(1) of the Act, a mortgagee in possession of a lot included in a community title scheme must immediately give written notice of any decision not to enforce the mortgage. Section 202(2) provides that on the giving of such written notice, the mortgagee ceases to be a mortgagee in possession of the lot and is not the owner of the lot under the Act.

[32] The term "body corporate debt" first appeared in the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (the 1997 Regulation), as a result of the amendment made by the *Body Corporate and Community Management Legislation Amendment Regulation (No 1)* 2003 to replace s 97.

[33] Before the 2003 amendment, s 97 of the 1997 Regulation provided:

"**Payment and recovery of contributions [SM, s 99]**

> **97.(1)** If a contribution, or instalment, is not paid by the date for payment, the body corporate may recover the amount of the contribution or instalment, together with any penalty, as a debt.
> **(2)** A liability to pay a contribution, instalment, penalty or other amount payable to the body corporate in relation to a lot is enforceable jointly and severally against the person who was the owner of the lot when the contribution, instalment or other amount became payable and a person (including a mortgagee in possession) who becomes an owner of the lot before the contribution, instalment, penalty or other amount is paid.
> **(3)** If there are 2 or more owners of a lot, they are jointly and severally liable to pay a contribution, instalment or penalty under the Act or this regulation, or another amount payable to the body corporate in relation to the lot.
> **(4)** If an owner is liable for a contribution, or an instalment of a contribution, and a penalty, an amount paid by the owner must be paid first towards the penalty and then in reduction of the outstanding contribution or instalment.
> **(5)** If the body corporate is satisfied there are special reasons for allowing a discount of contributions, or waiving a penalty, the body corporate may allow the discount, or waive the penalty in whole or part."

[34] Section 97 after the 2003 amendment was entitled "Payment and recovery of body corporate debts" and was in identical terms to s 143 of the Regulation. The Explanatory Note for this amendment regulation dealt with the replacement of s 97 in these terms:

> "The recovery of contributions owed to the body corporate by lot owners is a significant issue for some bodies corporate, to the extent that in some instances contributions can be in arrears for a number of years. The problem of arrears can be such that it can
>
> [140655]
>
> cause severe financial hardship for the body corporate.
>
> The amendment is intended to give clear direction to the body corporate that it must take steps to recover arrears, including any applicable penalty and any costs reasonably incurred in the recovery. The arrears cannot be allowed to remain outstanding for more than 2 years.
>
> Whilst the body corporate must recover the contribution, it may waive the penalty or the costs if it considers the circumstances warrant this. This provision is necessary to allow some discretion, particularly where some special reason such as financial hardship exists."

[35] The 2003 amendment introduced the right of the body corporate to recover as a debt "recovery costs," being any costs reasonably incurred by the body corporate in recovering the amount of an outstanding contribution of instalment and any penalty for not paying that contribution or instalment. The 2003 amendment also mandated that the body corporate take proceedings to recover the amount of a contribution or contribution instalment that was outstanding for two years.

Decision of the primary judge

[36] The primary judge found it unnecessary to determine the proper construction of the definition of "body corporate debt." The primary judge observed:

> "It seems to me that the provisions have been drafted to establish a particular sequence. The first is the fixing of the contribution by resolution in section 139. The second is the giving of notice of the amount payable as well as the date for payment under section 140.
>
> Sections 141 and 142 deal with whether payments are made early or late. Section 143 it seems to me is important because it is the section which creates a legal liability in the event amounts are not paid."

[37] The primary judge decided that on the basis of the way the provisions are presented in sequence, s 143(3) identifies those who are liable in respect of the amounts referred to in s 143(1). The primary judge concluded that s 143(3) imposes a liability on the owner at the time when the amounts become payable and a subsequent owner or a mortgagee who goes into possession and that s 143(1)(c) would have no effect, unless s 143(3) identified the person or entity who was liable for those recovery costs. The primary judge noted that would have the consequence that the expression "body corporate debt" is used in s 143(3) in a way which includes recovery costs, whether or not that is the correct construction of the definition. The primary judge found support for the conclusion about s 143(3) in the terms of s 143(5), as otherwise it would be a strange result that s 143(5) specified an order of priority for payments made by an owner to whom notice is given under s 140, but not in respect of payments made by a mortgagee in possession (as had been contended by Westpac).

Issues

[38] Westpac's argument is that s 143(1) allows the body corporate to take advantage in recovering proceedings of the statutory deeming of any of the unpaid amounts described in s 143(1) as a debt: *Builders' Licensing Board* v *Inglis* (1985) 1 NSWLR 592, 597–598. It argues that the actual liability to pay the contributions arises by reason of the resolution of the body corporate fixing the contribution amount and the time for payment and the issuing of written notice to the owner of the lot. Westpac argues then, in contrast, s 143(3) of the Regulation imposes a liability to pay a "body corporate debt" upon a person who was not the owner of the lot at the time the debt became payable, but who becomes an owner of the lot before that body corporate debt is paid, including a mortgagee in possession, and that the defined expression "body corporate debt" is used deliberately for the purpose of limiting the liability of a person who is a stranger to the body corporate/registered owner relationship at the time the debt was incurred, but who becomes liable for amounts covered by the expression "body corporate debt" relating to the ownership of the lot. Westpac argues that the liability of the mortgagee in possession is limited, because the recovery costs under s 143(1)(c) do not align with the third limb of the definition of "body corporate debt."

[39]

The issues identified by Westpac on the appeal as relevant to the interpretation of s 143 of the Regulation are therefore:

> (a) whether the definition of "body corporate debt" in the schedule to the Regulation applies to that expression used in s 143(3)(b) of the Regulation;
> (b) whether the definition of "body corporate debt" includes "recovery costs," as that term is defined in s 143(1)(c); and
> (c) whether the persons identified in s 143(3)(b) of the Regulation are liable for "recovery costs," as that term is defined in s 143(1)(c) of the Regulation.

[40] The respondent supports the conclusion of the primary judge, although also seeks to maintain the primary judge's decision by applying the definition of "body corporate debt" to that expression used in s 143 of the Regulation and submitting that recovery costs are covered by paragraph (c) of the definition of "body corporate debt".

Construction of s 143 of the Regulation

[41] In order to deal with each of the interpretation issues identified by Westpac, s 143 of the Regulation must be construed in context. It was common ground between the parties that the proper approach to construing s 143 was a consideration of the text of the provision in conjunction with the context and purpose of the provision, relying on the authorities extracted in *Meridien AB Pty Ltd* v *Jackson* [2014] 1 Qd R 142 at 158.

[42] Under s 137 of the Regulation a body corporate must adopt for each financial year the administrative fund budget and the sinking fund budget. The administrative fund budget must contain estimates for the financial year of spending to cover the cost of maintaining common property and body corporate assets, the cost of insurance and other expenditure of a recurrent nature, and fix the amount to be raised by a way of contribution to cover the estimated recurrent expenditure. The sinking fund budget must allow for raising a reasonable capital amount to provide for spending from the sinking fund for the financial year and to reserve an appropriate proportional share of amounts necessary to be accumulated to meet anticipated major expenditure over at least the next nine years after the financial year, and fix the amount to be raised by way of contribution to cover the capital amount.

[43] By a combination of s 139 and s 140 of the Regulation the body corporate fixes the contribution to be levied on the owner of each lot for the relevant financial year on the basis of the budgets and gives the owner of each lot the written notice of the due date for payment of the instalment of contribution, whose payment is currently required and the other matters specified in s 140. The address for service for each owner to which the written notice about payment of contributions is sent is determined by the notice required to be given to the body corporate in relation to change of ownership under s 191 of the Regulation and reflected in the roll of lots and entitlements maintained by the body corporate under s 194 of the Regulation.

[44] Whereas pt 3 of ch 7 of the Regulation fixes the amount of the contribution to be levied on the owner of each lot and the mechanics for seeking the payment of the relevant instalment of contribution, pt 4 of ch 7 (which comprises s 143) covers the next stage where payment of a contribution instalment is not made by the due date. It also facilitates by s 143(3) the payment and recovery of amounts that are covered by the expression “body corporate debt,” apart from a contribution or contribution instalment. An example of such a debt is found in s 169(2) of the Regulation where the body corporate carries out work the owner or occupier has an obligation to carry out under statute, the community management statement or an order made by an adjudicator, court or tribunal, and the body corporate may then recover the reasonable cost of carrying out that work from the owner of the lot as a debt. Another example is found in s 173(1) where a monetary liability imposed under an exclusive use by-law on the owner of a lot may be recovered by the body corporate as a debt.

[45] By itself, s 143(1) is an unusual provision in that it specifies that the body corporate may recover each of the amounts specified in paragraphs (a), (b) and (c) as a debt, but does not specify the party against whom the body corporate may seek such recovery. There is force in Westpac’s submission that s 143(1) of the Regulation

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assists the body corporate in recovering the amounts that are specified in that provision by deeming the unpaid amount to be a debt with the procedural advantages that may give in litigation, as was acknowledged in *Inglis*.

[46] Section 143(1) is not such an unusual provision when it is construed in the context of s 143 and the purpose of s 143, taking into account the surrounding provisions of the Regulation. It is not unreasonable to presume that most lot owners pay the instalment of contribution on receiving the written notice from the body corporate which specifies the date for payment. The recovery of all payments due from lot owners for contributions is essential for the body corporate to carry out its functions. Section 143 of the Regulation focuses on that part of the process of collection where the lot owner has not made payment of the contribution in the usual course in accordance with the written notice issued by the body corporate. That suggests that the primary liability for payment of the contributions is imposed in a provision other than s 143.

[47] Although the term “liability” is not used in pt 3 of ch 7 of the Regulation to describe the obligation of the lot owner to pay the contribution or the instalment of contribution, equivalent terminology is used by the reference to “the contribution levied on the owner”.

[48] It is logical to conclude that the liability of the owner of each lot to pay the contributions determined as a result of the budgets adopted by the body corporate for the relevant financial year is created under pt 3 of ch 7 of the Regulation in the provisions dealing with the contributions levied by the body corporate on the owners and the requirement for notice to be given of the payment due by the owner of the instalment of contribution and any arrears.

[49] On this construction, s 143(3) extends the liability of the persons liable for a body corporate debt in relation to a lot and deals with the liability among those who are liable for the same debt by specifying that the liability is enforceable jointly and severally against each of them. Although the lot owner who received the written notice requiring the payment of the instalment of contribution was made liable for that amount by the operation of s 139 and s 140 of the Regulation, s 143(3) refers again to that liability in the context of dealing with the relationship of the liability of that owner with the liability that is imposed under s 143(3) on the parties to whom liability is extended. Section 143(3) of the Regulation reflects the deliberate policy choice of the Legislature to confer advantage on the body corporate by extending the parties who are liable with the owner of the lot when a body corporate debt became payable.

[50] The advantages given to the body corporate by the provisions in s 143 of the Regulation that assist the body corporate in recovering outstanding contributions are balanced by the obligation imposed on the body corporate under s 143(2) of the Regulation to take steps to recover arrears in contributions no later than two months from the end of the period of two years for which the contributions have been outstanding.

[51] Section 143(4) covers the liability of and between co-owners of a lot for a body corporate debt in relation to the lot.

[52] Section 143(5) of the Regulation sets out the priority in which a body corporate must apply any payment made by any owner for a contribution or contribution instalment and a penalty and specifies that, after applying the payment first towards the penalty, second in reduction of the outstanding contribution or instalment, any balance of the payment is applied towards any recovery costs for the debt.

[53] Section 143(6) gives the body corporate discretion in waiving a penalty or liability for recovery costs.

Whether the definition of "body corporate debt" applies to that expression used in s 143(3)(b) of the Regulation

[54] The expression "body corporate debt" is found in very few provisions in the Regulation. Apart from s 143, it is found in provisions that deal with the disqualification of an owner who owes a body corporate debt to be nominated for, or elected to, the committee or to vote at a general meeting: s 11, s 17, s 18, s 39, s 40, s 82, s 217 and s 218 of the Regulation. The subject matter of s 143 is concerned with the payment and enforcement of liabilities owed to the body corporate and the definition "body corporate debt" sets out

[140658]

categories of liabilities owed by the lot owner to the body corporate.

[55] Both parties ultimately contended that the definition of "body corporate debt" in the schedule to the Regulation applies to that expression used in s 143(3)(b) of the Regulation. That should be adopted as the correct interpretation of the expression "body corporate debt" in the context of s 143. As the definition of "body corporate debt" was introduced into the 1997 Regulation at the same time that s 97 was replaced by a provision in identical terms to what is now s 143 of the Regulation, and was given a new heading that referred to "body corporate debt," it would be an odd result to conclude the use of the expression "body corporate debt" in s 97 did not reflect the meaning of that newly introduced defined expression. Even allowing for the flexibility in the application of a definition that is provided for by s 32A of the *Acts Interpretation Act* 1954 (Qld) (as discussed in *Conde* v *Gilfoyle & Anor* [2010] QCA 109 at [20]–[21]), the context and subject matter of s 143 support giving the expression "body corporate debt" its defined meaning.

Whether the definition of "body corporate debt" includes "recovery costs," as that term is defined in s 143(1)(c)

[56] The issue is whether paragraph (c) of the definition of "body corporate debt" which specifies that, in addition to a contribution or instalment of a contribution and a penalty for not paying a contribution or

instalment of a contribution by the date for payment, “another amount associated with the ownership of a lot” includes “recovery costs” which are referred to in s 143(1)(c). Two examples are then given of such other amount associated with the ownership of a lot. They are an annual payment for parking under an exclusive use by-law (which suggests that the exclusive use by-law is for the benefit of the owner of the specified lot) and an amount owing to the body corporate for lawn mowing services arranged by the body corporate on behalf of a lot owner (which suggests that the body corporate organised for the lawn mowing to be undertaken on that part of the property that belonged to the relevant lot owner). Under s 14D of the *Acts Interpretation Act* 1954 (Qld), an example of the operation of a provision is not exhaustive and the example does not limit, but may extend, the meaning of the provision. Section 14D also provides that the example and the provision are to be read in the context of each other and the other provisions of the relevant legislation.

[57] Paragraphs (a) and (b) of s 143(1) are mirrored by paragraphs (a) and (b) of the definition of “body corporate debt.” Paragraph (c) of the definition of “body corporate debt” covers other debts that are not the subject of s 143(1)(c). Putting to one side the issue of whether recovery costs provided for in s 143(1)(c) fall within paragraph (c) of the definition of “body corporate debt,” that definition has wider application than what is specified in s 143(1).

[58] Westpac emphasised its lack of control in being able to prevent the escalation of recovery costs as a stranger to the relationship between Dr and Mrs Prins with the respondent, in circumstances where it can be inferred that the relationship had broken down. Westpac argued that any interpretation of s 143(3) which made Westpac liable for what it claimed was exorbitant recovery costs that devalued the security interest of Westpac as mortgagee in possession could not have been the intention of the Legislature.

[59] The policy that prevailed when s 97 was introduced to the 1997 Regulation by the 2003 amendment is evident from the Explanatory Note. The severe financial hardship for the body corporate caused by arrears in contributions was intended to be addressed by the amendment. The body corporate depends on each lot owner making its payment of the contributions reflecting the proportionate share of the body corporate’s projected expenditures, so that the body corporate meets those expenditures. Ultimately, it is the other lot owners who are meeting their share of the expenditures who will be disadvantaged by the non-payment by one lot owner of that lot owner’s contributions.

[60] The advantage given to the body corporate under s 143(1)(c) of being able to recover recovery costs as a debt is qualified by the express statement that it applies only to costs reasonably incurred by the body corporate

in recovering the amount of the unpaid contributions and any penalty.

[61] Recovery costs are incurred by the body corporate in taking steps to recover from the lot owner the outstanding contributions and penalty in respect of the relevant lot. On the plain and ordinary meaning of paragraph (c) of the definition of “body corporate debt”, recovery costs are associated with the ownership of the relevant lot. In addition, they are of a similar nature to the expenditures that are illustrated by the two examples as payments made by the body corporate associated with the ownership of a lot.

[62] As the primary judge observed, support for that conclusion is also found in s 143(5) of the Regulation which specifies the priority for payments made by an owner. There is no basis for applying s 143(5) in a different manner when the outstanding amounts are paid by the mortgagee in possession.

Whether the mortgagee in possession is liable for recovery costs

[63] By the express terms of s 143(3) of the Regulation, the Legislature has resolved the different interests between a mortgagee in possession and the body corporate where there are contributions and penalty outstanding in respect of the relevant lot in favour of the body corporate (and consequentially the owners of the other lots in the community title scheme.) Under s 143(3) of the Regulation, Westpac as mortgagee in possession is therefore liable for recovery costs (as that term is defined in s 143(1)(c) of the Regulation), notwithstanding that those recovery costs have been incurred by the body corporate before Westpac became the mortgagee in possession for the purpose of the Regulation. The complication for Westpac in endeavouring to observe the FOS terms of reference can have no bearing on the interpretation of s 143 of the Regulation.

[64] There remains an issue between the parties as to the reasonableness of the total amount claimed by the respondent for recovery costs, but that is for another hearing.

Orders

[65] The above analysis of s 143 of the Regulation reaches the same conclusion as the primary judge, although with some variations in the reasoning. The orders which should be made therefore are:

1. Appeal dismissed.
2. The appellant must pay the respondent's costs of the appeal to be assessed.

Footnotes

1 These provisions are reproduced in [27] and [28] of the reasons of Mullins J.

2 In [56] of the reasons of Mullins J.

ALEXANDRA BEACH RESORT APARTMENTS

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(2014) LQCS ¶90-192; Court citation: [2014] QBCCMCmr 251 (10 JULY 2014)

Queensland Body Corporate and Community Management Commissioner — Adjudicators Orders

Decision delivered on 10 July 2014

Pet by-law, the body corporate's refusal to grant approval to the keeping of a cat within a lot, reasonableness of the body corporate's decision, whether an alternative by-law should be recorded for the scheme — Sections of the Act considered include s 169, 180, 94(2) and 100(5).

[140660]

The applicant owned a lot in a scheme which had originally been a resort. Most of the lots within the resort were either small studio apartments or one bedroom units designed for holiday rental. The complex included a large lagoon pool, spa, play area and landscaped tropical gardens. A number of the lots were used for holiday and tourist rentals.

The applicant occupied her lot with her cat. The applicant sought the body corporate's approval for her to keep her cat within her lot and the Committee refused her application noting by-law 11 prohibited the keeping of animals within lots on the scheme.

The applicant brought her application and argued that the by-law was oppressive and unreasonable in contravention of s 180(7) of the Act.

In response, the other owners argued that the scheme was a holiday resort, animals were not conducive to high density living, they were concerned for the cat's welfare if it was locked inside a unit, other occupiers might be scared or allergic to the animal, the animal may create noise and smell, the agreement to allow one animal into the scheme might mean more were introduced, rental demand may suffer which would lead to a drop in the vales of the other units.

Held:

1. The by-law prohibited, rather than regulated, a normal use of lots within the scheme.

2. There was no particular characteristic or design which would support the retention of the by-law.

3. No evidence was produced to suggest that the keeping of an animal would pose a letting, marketing or valuation risk.

4. By-law 11 was beyond the power of the body corporate to make under s 169 of the Act and contrary to s 180(7) of the Act.

5. The body corporate did not act reasonably in failing to pass the motion which would replace by-law 11.

6. Ultimately the motion was deemed to have passed and the body corporate had three months to record a new community management statement which recorded the amendments to by-law 11.

Before: P Dowling, adjudicator

P Dowling, Adjudicator:

ORDERS MADE:

1. **I hereby order** that By-law 11 recorded in the community management statement for the body corporate for Alexandra Beach Resort Apartments CTS 30867 is void.
2. **I further order** that Motion 7 at the annual general meeting dated 15 February 2014 is deemed passed by special resolution.
3. **I further order** that, within three months of the date of this order, the body corporate for Alexandra Beach Resort Apartments CTS 30867 must lodge a request to record a new community management statement giving effect to the resolution on Motion 7.
4. **I further order** that Janice Burton, the owner of Lot 31, is deemed to have body corporate approval to keep, on the lot, the cat identified in her letter to the body corporate dated 3 July 2013 subject to the conditions detailed in Motion 7.
5. **I further order** that in all other respects the outcomes sought are dismissed.

P Dowling, Adjudicator:

Introduction

[1] On 18 April 2013, the applicant asked the body corporate for approval to keep her cat on Lot 31. On 18 June 2013, the body corporate informed the applicant the committee did not approve her request as the

scheme “is essentially a holiday resort with high density living and the living areas are generally not large…it is not considered suitable for a cat to live in a unit, even a cat which lives indoors”.

[2] The committee made the above decision on 17 June 2013. At this time, the community management statement [1] included By-law 11 prohibiting the keeping of animals on lots except where section 181 of the Act is applicable. At its annual general meeting dated 15 February 2014 (**AGM**), the body corporate did not pass Motion 7 that proposed amending by—law 11 and having a new community management statement recorded.

[3] The applicant seeks the following outcomes:

1. That the body corporate call an extraordinary general meeting to overturn the decision on Motion 7.
2. That the body corporate amend By-law 11 to provide that subject to section 181 of the Act, an occupier must not, and must not permit an invitee to, bring or keep an animal on a lot or the common property except with prior written consent of the committee.

[140661]

3. That a new community management statement be recorded to insert the amended by-law.
4. That the body corporate consents to the applicant keeping her cat.

Procedural matters

[4] The commissioner has invited the committee and the other lot owners to make submissions about the matters raised (s 243, Act). Submissions were made by the committee and the owners of 15 lots. After the applicant replied to submissions, the commissioner referred the application to departmental adjudication (s 248, Act).

Jurisdiction

[5] I am satisfied this dispute falls within the dispute resolution provisions of the legislation (ss 227, 228, 276, Act). I may make an order that is just and equitable in the circumstances to resolve the dispute.

Analysis

Applicable law regarding animal by-laws

[6] Section 169 of the Act empowers a body corporate to make by-laws for the administration, management and control of common property and body corporate assets, and the regulation of the use and enjoyment of lots, common property, body corporate assets, and services and amenities supplied by the body corporate. Section 180 of the Act sets out various by-law limitations, including that a by-law must not be oppressive and unreasonable having regard to the interests of all owners and occupiers and the use of the common property (s 180(7), Act).

[7] These sections have been the subject of disputation in recent years, including in the Queensland Civil and Administrative Tribunal (**QCAT**). *McKenzie* v *Body Corporate for Kings Row Centre* CTS 11632 [2010] QCATA 57 and *Body Corporate for River City Apartments CTS 31622* v *McGarvey* [2012] QCATA 47 have been adopted as authority in adjudications dealing with by-law disputes, particularly disputes about by-laws of the nature of by—law 11 and the keeping of animals on lots.

[8] In *McKenzie*, the Tribunal said a by-law regulating the keeping of animals in lots seeks to regulate the use and enjoyment of lots and falls within the power given by section 169(1)(b)(i) [2] . The Tribunal indicated that “Prohibition of an activity in part, in a particular case, or in a particular way, may however in some circumstances be needed in order to achieve effective regulation”[3] .

[9] Later in *McGarvey*, the Tribunal decided a by-law prohibiting keeping pets in lots was invalid because the by-law did more than just regulate the use and enjoyment of lots. It was found that such a by-law prohibited (rather than regulated) a particular use and enjoyment of a lot and was therefore beyond the power to regulate provided in section 169. The Tribunal said:

1. "…the power to regulate an activity implies that the activity will, despite such regulation, be capable of continuing, which it would not do if it were completely prohibited. Prohibition of an activity in part, in a particular case, or in a particular way, may in some cases be needed to achieve effective regulation" [4] .
2. "…the blanket prohibition of an activity that an owner or occupier of a lot would normally, according to the ordinary rights of a land owner or occupier, be entitled to carry on in using and enjoying the lot is *prima facie* invalid"[5] .
3. "…a by-law that prohibits the keeping of animals except with the prior written consent of the body corporate, and without setting out any objective criteria by which such consent may be given or refused, would be a valid by-law" provided the body corporate acts reasonably. [6]
4. "…a by-law that prohibits altogether the keeping of pets in lots is not a by-law regulating the use or enjoyment of lots, but purports to prohibit a particular use and type of enjoyment altogether. It therefore goes beyond the scope of a valid by-law permitted by s169 and is invalid" [7] .

[10] With respect to section 180 of the Act, in *McKenzie* the Tribunal found that a by-law providing an absolute ban on the keeping of dogs and cats was unreasonable as there were circumstances in which dogs and cats could be kept in community titles schemes without causing an inconvenience to other residents[8] . In *McGarvey*, the Tribunal said section 180(7) requires consideration of the by-law in the

[140662]

context of the particular scheme for which it operates [9] . At paragraph 62, the Tribunal stated:

> "Although, in many cases, a by-law which did not provide for the body corporate to consider individual circumstances in determining whether or not to allow a particular lot owner to keep a certain type of pet would be unreasonable or oppressive, it is necessary for that question to be considered in each case having regard to the facts before the adjudicator and, in the context of those facts, the interests of all owners and occupiers in the scheme and the use of the common property."

By-law 11

[11] The applicant submits By-law 11 is oppressive and unreasonable contravening section 180(7) of the Act.

[12] Owners opposing the application submit:

1. The resort contains over 200 units and is unique. Most units are small studio and one bedroom that are designed for holiday rentals. There is a large lagoon pool, other pool and spa areas, a playground and recreational facilities located in tropical surroundings.
2. Animals are not conducive to high density living in a tourist resort. Tourists do not expect or want animals. Any animal is inappropriate for the scheme.
3. An animal in a confined space can be a potential health hazard: with the development of unsanitary conditions; as the disposal of kitty litter in the garbage chutes and large waste bins will emit offensive odours; or if it scratches or bites a resort guest.
4. Concern for an animal's welfare if locked inside a unit.
5. An occupier of a lot: may be allergic to animals; maybe scared of animals; and should not have to put up with animal noise, faeces or spraying. The owner of Lot 9 submits if an animal is allowed, it could result in many animals being in the complex and members of his family are allergic to animals particularly cats. The owner fears they could not use the unit if animals are allowed, family members would suffer physical distress and he would suffer financial distress if the by-law is changed as they could not longer use the unit as intended.
6. Property devaluations may occur as the presence of animals would make the resort less attractive to buyers. Rental income may be at risk.
7. Once one animal is allowed, it would be difficult to control the number of animals kept on lots.

[13] The committee supports overturning the decision on Motion 7. When it submitted the motion, the committee provided an explanation to voters to the effect: that a by-law prohibiting keeping animals has been determined by adjudicators and courts as unreasonable, invalid and unenforceable; the body corporate must

consider a request on its merits; and the proposed amendment to By-law 11 ensures the body corporate has authority to control a request and impose conditions to minimise any inconvenience or nuisance to occupiers.

[14] In reply to submissions, the applicant says:

1. A blanket ban of the nature of By-law 11 is unreasonable.
2. An owner retains control over allowing a pet in his or her unit even if the by-law is changed. The body corporate would administer the by-law. If approval conditions are not met, then a by-law breach would be enforced.
3. There is noise from occupiers of units in the resort living their lives. The applicant cannot see how noise from a pet could have a further impact.
4. Conditions of approval of the proposed by-law set out requirements for disposal of litter. She has to put up with smells produced by guests.
5. As pets could not roam on common property, there should not be health problems including allergy issues.
6. There is no evidence there would be a detrimental effect on property values.

[15] By-law 11 prohibits animals in lots or on common property. Prima facie, the provision prohibits, rather than regulates, a normal use of lots. Owners have made submissions about the by-law being appropriate for the scheme given its resort nature and features.

[140663]

However, these claims are not substantiated. It has not explained how the resort configuration or accommodation arrangement distinguishes the scheme from other schemes in the vicinity or in other parts of Queensland, including schemes that contain lots available for short-term occupation or that contain facilities comparable to a ‘resort lifestyle'. The relevance of the views of tourists (either generally or with respect to this scheme) is not established. The claim about the by-law being appropriate given the size of “most” lots is not substantiated. There is no evidence of an independent assessment of any of these factors by a person with appropriate qualification or expertise that supports the retention of the by-law.

[16] I am not satisfied there is any particular characteristic or design factor that provides a basis for retaining By-law 11. It is not established the size or location of lots, or the configuration of common property are relevant considerations. Neither do I consider the availability of lots for short term residential purposes is relevant. There has not been any authoritative analysis submitted establishing that keeping an animal on this scheme or a scheme of a similar nature poses a letting, marketing or valuation risk. It is not established that a health issue justifies general prohibition.

[17] In my view, By-law 11 is beyond the power of the body corporate to make under section 169 of the Act.

[18] Further, taking into consideration the abovementioned authorities and submissions, I am satisfied By-law 11 is contrary to section 180(7) of the Act. This is because automatically prohibiting the keeping of an animal within the confines of a lot, without any consideration whether the keeping of that animal in a particular lot is likely to unreasonably interfere with any other users of the scheme, is failing to have regard for the interests of all owners and occupiers. I am not satisfied from submissions there is any particular characteristic, design factor or circumstance establishing that By-law 11 is not contrary to section 180(7) of the Act.

[19] For the above reasons, I consider By-law 11 is invalid. I have made an order to this effect (items 20 and 21, schedule 5, Act).

Alternative animal by-law

[20] It is generally accepted that a more appropriate approach to regulating animals is to permit them subject to body corporate approval. This would seem to have been the basis for the committee's Motion 7. A by-law of the nature proposed in Motion 7 allows the body corporate to consider each request to keep an animal on its merits. The question raised in outcome 1 is whether the body corporate acted reasonably deciding Motion 7 (s 94(2), Act). The test of whether the decision is reasonable is not whether the decision was ‘correct', but whether it was dictated by reason and rationality [10] .

[21] The motion has the applicant's support. In my view, reasons of the nature outlined above at paragraph 12 do not establish the body corporate acted reasonably deciding Motion 7. It is not established the proposed

by-law is not reasonable for the scheme or having regard to the interests of all owners and occupiers of lots. The concerns held by the owner of Lot 9 do not prevent the body corporate regulating the keeping of animals on a lot in a way contemplated by the proposed by-law. It is not established it was reasonable for the body corporate to oppose any condition in the proposed by-law.

[22] In these circumstances, I consider the opposition to Motion 7 was unreasonable. If I am satisfied a decision to not pass a motion at a general meeting was unreasonable, I may make an order giving effect to the motion as proposed (item 24, schedule 5, Act). In my view, it is appropriate that such an order is made (s 284(1) and (4), Act). It is therefore not necessary that the body corporate hold another general meeting to consider the motion or to impose a by—law limited in terms to those specified in outcome 2. As I have deemed Motion 7 passed, the body corporate must now take steps to have a new community management statement recorded by the registrar of titles. I have made provision for the body corporate taking these steps.

The applicant's cat

[23] The last outcome sought is that the body corporate consents to the applicant keeping her cat.

[24] After receiving the committee's 18 June 2013 correspondence, on 3 July 2013 the

[140664]

applicant wrote to the body corporate saying: the cat had lived with her in a body corporate unit for three years; that unit was only a fraction bigger than Lot 31; the cat is a totally indoors cat; and she bases the care of the cat on the RSPCA's Five Freedoms model. The applicant asked that the committee reconsider her request. On 8 July 2013, the committee informed the applicant its decision "was made in consideration of the expectations and rights of owners, not in relation to the welfare of the cat" and that it confirms its decision.

[25] On 9 September 2013, the committee informed the applicant that following a conciliation session [11] the committee agreed not to give her a by-law contravention notice if she brought the cat onto Lot 31 if: the cat remained indoors at all times; the cat is transported in a suitable carrier; and the cat's waste is disposed of in a way that does not create noxious odours or otherwise contaminate the complex. The committee said if a written complaint is made, a contravention notice may be necessary. Later on the same date, the applicant agreed with all conditions other than one about balcony use. On 17 September 2013, the applicant informed the committee she was happy to comply with the condition that the cat remain indoors and is permitted on the balcony only under the control and supervision of the owner. She added it would not be appropriate for a cat to be roaming on common property.

[26] The applicant says the cat, which has lived in Lot 31 since on or about September 2013, does not cause a nuisance. She says: she disposes of kitty litter and excrement away from the resort; she changes the cat litter regularly; and the cat is vaccinated and treated regularly for fleas and worms. The applicant provided a letter dated 9 August 2013 from Greg Isaac of the Tamara Gardens body corporate committee saying the cat is quiet, did not disturb anyone and did not roam around that scheme.

[27] The applicant submits there have not been any complaints about the cat being kept on Lot 31. While the committee does not make submissions supporting outcome 4, it has not identified any problems. Nor have any problems been mentioned in owners' submissions, including from the owner of Lot 9. I find no evidence that the cat is likely to adversely impact on any other owner or occupier if it is kept in compliance with the conditions that will apply when the new community management statement is recorded (s 179, Act). The applicant welcomes these conditions being imposed.

[28] For these reasons, I consider it just and equitable to make an order of the nature of the terms sought.

Footnotes

1 No. 713778283.

2 At paragraph 19.

3 At paragraph 18.

4 At paragraph 37.

5 At paragraph 38.
6 At paragraphs 40 and 41.
7 At paragraph 49.
8 At paragraphs 27 to 31.
9 At paragraphs 59 to 61.
10 *Luadaka* v *Body Corporate for The Cove Emerald Lakes* [2013] QCATA 183 at paragraph 16.
11 Conducted under the dispute resolution provisions of the Act.

HARBOUR LIGHTS

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(2014) LQCS 90-193; Court citation: [2014] QBCCMCmr 264

Queensland Body Corporate And Community Management Commissioner — Adjudicator's Orders

Decision delivered on 21 July 2014

Pet by-law, the body corporate's refusal to grant approval to the keeping of a dog within a lot, reasonableness of the body corporate's decision. — Sections of the Act considered include s 94(2) and 100(5).

The applicant owned a lot in the scheme which was tenanted. The by-laws of the scheme provided that animals could not be kept on a lot or common property with the prior written approval of the body corporate. That approval could be rescinded on the receipt of three separate written substantial complaints. The applicant sought approval for his daughter and her husband to keep a dog within the lot and the committee resolved to refuse to provide its consent.

No reason for the refusal of consent was given. The applicant made a further request and the applicant was advised that unless the dog was a trained hearing dog it would be considered to be a pet and refused by the committee.

The applicant made a third request which was also refused after his tenants purchased a dog, brought it onto the scheme and were handed a contravention notice within three days of the dog's arrival.

The applicant's daughter was profoundly deaf and could not hear without hearing aid which she could not wear whilst asleep or whilst showering. The dog was trained to alert her to alarms, provide support, let her know when someone was knocking at the door and when the baby cried.

After conciliation was unsuccessful, the adjudicator determined that the main issue was whether the body corporate's refusal to grant permission for the dog was reasonable and whether or not approval for the dog ought to have been given.

The committee opposed the application and argued that the dog was a Staffordshire which was associated with aggression and provided a petition signed by 17 lot owners who supported the committee's refusal of the body corporate's consent. Other owners argued that the complex was a "no dog" complex, that the dog barked and howled when its owners were not at home, that the courtyard was not big enough for the dog and that if one dog was allowed more applications for dogs would disturb the quiet within the scheme.

Held:

1. The by-law allowed the committee the discretion to allow pets within the scheme.

2. In considering this particular dog, the committee ought to have considered whether there was a genuine likelihood of the animal causing an adverse impact on common property or any other owner or occupier and what reasonable conditions would alleviate those concerns to make the decision more reasonable than an outright refusal.

3. No evidence was provided to suggest the dog was aggressive or dangerous or to suggest that the dog's breeding would predispose it to being aggressive or dangerous.

4. The petition signed by 17 other lot owners and two proxies was not, in and of itself, sufficient reason to make an unreasonable decision.

5. The concern that a precedent would be created was not a reasonable consideration for the body corporate in refusing consent.

6. The "no dogs" policy was not a reasonable consideration for denying the applicant's pet application.

7. The size of the unit and courtyard were not inappropriate for keeping a dog merely because it was a "unit" as opposed to a house. No evidence was presented to suggest the dog was too large.

8.

[140666]

The complaint about the dog barking was unsubstantiated. Evidence produced by the body corporate was unable to be linked to the applicant's dog and other dogs of the scheme did bark in the vicinity of the applicant's unit. In any event, the applicant's tenants purchased a barking collar. If the dog did cause a disturbance, that nuisance could be pursued under the Act whilst the noise could also form the basis for subsequently withdrawing permission for the dog.

9. Permission (on conditions) was granted for the dog to be kept on the lot given the body corporate's decision had been unreasonable.

10. The adjudicator stressed that the decision was made on the specific facts of the case and the dog and that the decision should not in any way be taken as a general precedent allowing owners or occupiers to bring or keep an animal in their lot without the body corporate's approval.

Before: S Zeidler, adjudicator

S Zeidler:

ORDERS MADE:

1. **I hereby order** that Robert Hoey (owner of lot 27) and his tenants, Daniel and Anna—Claire Rodgers (occupiers of Lot 27) shall be permitted to keep 'Bailey' a Maltese x Toy Poodle x American Staffordshire terrier dog in Lot 27 subject to the following conditions:

a. The dog must be kept within the lot while it is present on the scheme;
b. The dog must traverse common property only for the purpose of being brought onto or taken off scheme land, at which time the dog must be appropriately restrained;
c. The dog is not permitted to cause a nuisance or interfere unreasonably with any person's use or enjoyment of another lot or common property;
d. Reasonable steps must be taken to minimise the transmission of airborne allergens from the dog to other lots or common property, for example, by vacuuming the lot and grooming the dog;
e. Reasonable steps must be taken to keep the dog in good health and free from fleas and parasites;
f. Any animal waste must be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme;
g. The committee shall be entitled to rescind permission for the dog if it reasonably considers the applicant has not complied with these conditions and that the applicant has failed to respond appropriately to warnings about their concerns;
h. Any approval granted only applies to one dog and does not authorise the keeping of any additional, replacement, or substitute animals on the lot.

S Zeidler:

Introduction

[1] This application relates to the applicant's request for approval to keep a dog within Lot 27.

[2] Harbour Lights has an animal by-law (by-law 9) which provides that animals cannot be kept on a lot or common property without the prior written approval of the body corporate. In May 2013 the applicant sought approval for his tenants, who are his daughter and her husband, to be permitted to have a dog in lot 27. The committee resolved, by a vote outside a committee meeting, to refuse the request. No reason was given. A further request in June 2013 was refused. The applicant was advised that unless the dog was a trained hearing dog it would 'simply be a pet' and would be refused by the committee.

[3] The tenants purchased a Maltese x Toy Poodle x American Staffordshire terrier puppy (named 'Bailey') in August 2013 and brought it onto the lot without approval. Three days later they were issued with a by-law contravention notice and subsequently removed the dog from the scheme. In September 2013, the applicant made a third request to the committee for approval to keep the dog. It was again refused.

[4] The applicant's daughter and tenant, Anna Rogers, is profoundly deaf and cannot hear without hearing aids, which she cannot wear while sleeping or in water. One of the reasons for the tenants seeking the dog is to provide her with extra support when her

husband is away. It is indicated that the dog will be trained to alert her to alarms, door knocks, a crying baby and similar noises which she would not otherwise hear when she is not wearing her hearing aids. Her doctor has stated that the dog would be of benefit to her mental and physical health. The dog is also vaccinated and has completed puppy training.

[5] The applicant seeks an order for approval to keep the dog in lot 27. The key issue to determine is whether the decision of the body corporate to refuse permission for the dog was reasonable, and whether or not approval for the dog should be given.

Jurisdiction

[6] I am satisfied that this matter falls within the legislative dispute resolution provisions.[1]

[7] An adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute, in the context of a community titles scheme, about a claimed or anticipated contravention of the Act or the CMS, or the exercise of rights or powers or performance of duties under the Act or the CMS.[2] An order may require a person to act, or prohibit a person from acting, in a way stated. An order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate.[3]

Procedural matters

[8] Initially the applicant applied for conciliation.[4] Conciliation was conducted in October 2013 but the conciliation certificate states no agreement was reached. This application was then lodged.

[9] The Commissioner invited submissions on the application from the committee and all owners.[5] Submissions were received from the committee and the owners of 14 lots. The applicant inspected and responded to the submissions received.[6] A dispute resolution recommendation[7] was made referring the file to department adjudication.

Submissions

[10] The Committee submission opposes the application. Its comments include:

a. The dog was initially refused permission because it was identified as being an American Staffordshire terrier. The committee had concerns regarding the level of aggression often associated with this breed.
b. At no time did the committee indicate that the application would be refused if the dog was a correctly trained assistance dog from a suitable training organisation. The committee accepts that a trained hearing dog would pose little or no threat.
c. The submission is accompanied by a petition signed by 17 lot owners and apparent proxies for a further two lot owners supporting the committee's refusal of approval.
d. The dog was returned to lot 27, without approval, on 4 December 2013.

[11] Submissions from the owners of 13 lots oppose the application.

a. Several submissions refer to the dog as potentially aggressive or dangerous, and express concern for the safety of children and elderly residents if they were to come into contact with the dog.
b. Several submissions say this scheme is known as a ‘no dog’ complex.
c. Two submissions claim the by-laws do not allow for the keeping of dogs.
d. The owner of lot 28 (next to the applicant's lot) says the dog howls and barks when the tenants are not home. The owner says this is stressful for her and annoying when she is trying to sleep.
e. One submitter raises concern about defecation in the complex.
f. Some submissions argue that the courtyard area is not sufficient room for a dog to be exercised, and it is not fair to confine a dog to such an area.
g. Some submissions claim that if one dog is allowed, there will be more applications for dogs which will disturb the currently quiet scheme.

[12] One submission received supports the application. The submitter argues that the refusal of approval was unreasonable. He queries the conduct of the committee, including the failure to give reasons for their decision; approval of other dogs in the past; and false information about the breed of dog with a petition to current occupiers.

[13]

[140668]

In responding to the submission the applicant makes the following comments:

a. All or most of the submissions are based on the premise that the breed of dog sought is a pure bred American Staffordshire terrier. Originally approval was sought for such a dog but the request was refused (without reason). Subsequently approval was sought for a Maltese x Toy Poodle x American Staffordshire terrier.

b. Incorrect information has been given to owners about the potential danger of the dog. There is an element of fear about the dog.
c. Concerns about noise and behaviour are dealt with by the by-laws. Approval can be rescinded if there are substantiated complaints.
d. The applicant purchased in the scheme on the basis that allowance was made in the by-laws for occupiers to keep a pet.
e. The applicant applied for a companion dog, not a hearing dog as claimed. It takes at least two years to obtain a trained hearing dog but Mrs Rogers (one of the tenants) would benefit from the dog now.
f. The tenants complied with the contravention notice. The dog was returned to the scheme after the failed conciliation application while awaiting the adjudicator's decision.
g. The dog has been kept on the scheme in compliance with the by-laws. She is walked regularly, does not bark, is well behaved and has been desexed. She is not expected to be a big dog.

Analysis

[14] The issue in this matter is whether the body corporate has validly refused to give approval for the dog in question. In determining this application, I will consider the animal by-law in this scheme, the applicant's request, and the objections to the dog.

Does the by-law allow the keeping of pets?

[15] by-law 9 governs the keeping of animals. This by-law states:

> ***By-law 9 — Keeping of animals***
>
> *Subject to Section 30(12) a proprietor or occupier may keep an animal on site with prior written approval of the Committee of the Body Corporate subject to the following rules:*
>
> *1. Noise and behaviour from the animal must not interfere with other proprietors or occupiers.*
> *2. No animal is to be permitted to roam free on common property.*
> *3. Any approval WILL be rescinded by the Committee on the receipt of three separate written substantial complaints.*

[16] Although several submissions appear to believe that the current by—law prohibits the keeping of animals in the scheme, that is not correct. by-law 9 is a permissive by—law. This means it allows occupiers to keep animals if they have the prior written permission of the committee. This gives the committee and/or body corporate discretion to allow pets.

Did the committee act reasonably when considering the applicant's pet application?

[17] In determining any pet application, the committee and/or body corporate must act reasonably[8] and consider each case on its individual merits. That is, the committee and/or body corporate must consider whether there is any genuine likelihood of the animal causing an adverse impact on common property or any owner or occupier. Where there are genuine concerns, it is then necessary to consider whether the imposition of conditions on the keeping of the pet would alleviate any such concerns and in turn be more reasonable than the outright refusal of the pet.

[18] Whether a decision is ‘reasonable’ is a question of fact. It is an objective test which requires a balancing of factors in all the circumstances according to the ordinary meaning of the term ‘reasonable’. The question is not whether the decision was the “correct” one but whether it is objectively reasonable.[9]

[19] In the remainder of the application, I will consider the committee and individual owners’ reasons for denying the applicant's pet application and consider whether the decision is objectively reasonable having regard to any conditions which may be imposed.

[140669]

Breed of the Dog and Aggression

[20] The committee says it initially refused permission for the dog because it was identified as being an American Staffordshire terrier. The committee had concerns regarding the level of aggression allegedly associated with this breed. While the committee acknowledge that the applicant has subsequently been applying for a 'cross breed' dog (as opposed to a pure bred American Staffordshire terrier) the committee and opposing submissions hold concerns regarding the 'American Staffordshire terrier' element of the dog's breeding and the alleged potential for aggression within this breed.

[21] The applicant disputes these concerns and says that the dog's temperament is friendly. The applicant says that the dog has no dangerous or aggressive behaviours and that the initial misunderstanding regarding the breed of the dog (i.e. that the dog is not a pure bred American Staffordshire terrier) has created an element of fear about the dog.

[22] On 18 February 2014 our Office wrote to the committee and asked:[10]

> a. Whether the committee had any evidence to support its concern that the dog, with the stated breed combination (i.e. Maltese x Toy Poodle x American Staffordshire terrier) will demonstrate dangerous, aggressive or otherwise inappropriate behaviour (as distinct from the genetic potential for aggression in one of the dog's component breeds); and
> b. Whether the dog has displayed any dangerous, aggressive or otherwise inappropriate behaviour while it has been present on the scheme;

[23] The committee declined to provide any information with respect to these issues.

[24] The onus is on the body corporate to provide sufficient evidence to substantiate its claims. An Adjudicator has no jurisdiction to make orders with respect to hypothetical or potential concerns. In this instance, no evidence has been provided to suggest that the dog in question is aggressive or dangerous or has ever displayed any aggressive or dangerous qualities. Further, no evidence has been presented to suggest that the dog, with its particular breeding (i.e. Maltese x Toy Poodle x American Staffordshire terrier) has any predisposition towards aggressive or dangerous behaviour. Accordingly, I am not satisfied the pet request should be denied on the basis of these concerns.

Petition

[25] The committee argues that the majority of owners do not want the dog in question to remain on the scheme. In this regard, the committee makes reference to a petition (circulated in September 2013) signed by 17 lot owners and 2 apparent proxies supporting the committee's decision to refuse the dog.

[26] While the views of owners are relevant, and there may be a general preference against animals in the scheme, the body corporate and the committee have a legal obligation to act reasonably in making a decision. A decision that is objectively unreasonable will still be unreasonable even if a majority agree with it. Accordingly, I am not satisfied that the presence of the petition, in and of itself, is a sufficient basis to deny the applicant's pet request. Rather, it is necessary to examine owners' individual views for objecting to the pet request as identified through the submissions process.

Precedent

[27] Several owners oppose the applicant's pet request on the basis that any approval granted for this dog would set a precedent leading to other owners or occupiers believing they can also bring animals onto the complex.

[28] The issue of creating a precedent is a concern for many bodies corporate. However, any decision to approve a pet is made on the specific circumstances of a matter (including the situation of the applicant and the type of pet) and does not entitle others in different circumstances to assume they can also have a pet. Accordingly, I am not satisfied any issues regarding the creation of a precedent are a reasonable consideration in the circumstances. Further, I note that there are already several animals in the scheme (with and without body corporate approval) including a dog in lot 7 and cats in lots 5, 12, 19, 22, 25 and 29.

'No dogs' policy

[29] Several owners oppose the application arguing that the scheme has a ‘no dogs’ policy (these owners may be unaware of the existence of the dog in lot 7). However, irrespective of this issue, by—law 9 does not

prohibit the keeping of animals, including dogs. Rather, the by-law allows occupiers to keep animals if they have the written permission of the committee. Accordingly, I am not satisfied any such policy (if in fact stringently enforced) is valid or forms a reasonable basis to deny the applicant's pet application.

Suitability of the Scheme

[30] Many owners object to the pet request saying the applicant's unit and courtyard is too small for the keeping of a dog.

[31] In *McKenzie* v *Body Corporate for Kings Row Centre*[11] the scheme in question was a high rise building. Despite this, the Tribunal found the scheme could prima facie be suitable for the keeping of pets. Following this decision, I am not satisfied the unit in question is inappropriate for the keeping of this dog merely because it is a ‘unit’ (as opposed to a house or other dwelling type) or contained in a high density housing area. Further, I note that no evidence whatsoever has been presented to suggest that the dog in question is too large or otherwise inappropriate to be housed in the applicant's unit. Accordingly, I am not satisfied these arguments form a reasonable basis to deny the applicant's pet request.

Dog on Common Property

[32] The committee disputes the applicant's pet application arguing that the dog, on one occasion, has been outside the unit on common property and near the pool area without restraints. In support of their arguments, the committee has provided one photograph showing the dog outside the front of lot 27, near the unit's garage.

[33] In response, the applicant's tenants (the owners of the dog) note that the photo shows the gate to the backyard is open. The tenants say they do not know why or how the gate was opened. However, in order to ensure the incident does not happen again, they have purchased and installed a lock for the gate. The tenants say this is the only time the dog has been unrestrained on common property.

[34] Whether or not this incident forms a reasonable basis to reject to applicant's pet application is a difficult question. While it is reasonable to expect that a pet would remain on the lot unless appropriately restrained, on balance, I am not satisfied this one incident alone forms a sufficient basis to reject the applicant's pet request. In this regard, I note that no information has been received to suggest that any detriment was caused from this event. Further, no information has been received to suggest that the dog has since escaped or otherwise interfered with common property.

[35] However, I wish to caution the applicant and his tenants, that should permission be granted for the dog, they must take all necessary steps to ensure that such incidents do not occur in the future.

Defecation

[36] One owner opposes the applicant's pet request raising a concern about defecation in the complex.

[37] An Adjudicator has no jurisdiction to make orders with respect to hypothetical or potential concerns. An Adjudicator can only make an order where there is actual (as opposed to hypothetical) evidence of a dispute. While I note this concern, no evidence has been presented to suggest that the applicant's dog has caused any defecation problems in the scheme. Accordingly, I am not satisfied the pet request should be denied on the basis of this concern.

[38] However, in order to alleviate this concern, I consider any permission (if granted) could be subject to a condition requiring any animal waste to be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme.

Barking

[39] The committee and one lot owner dispute the applicant's pet application on the basis that the dog barks and howls when the tenants are not home. In support of these assertions, the committee provided our Office with two videos of the alleged barking. In these videos you can hear a dog barking and howling. However, it is not clear from the videos where the barking/howling is coming from or which dog (or dogs) is causing, or contributing to, the barking. Rather, all the videos show is the floor, screen door and outside area of a dwelling.

[40]

[140671]

The committee has also provided several emails from the owner of lot 28 detailing the dates of the alleged barking as follows:

a. Email dated 16 March 2014 stating that the dog is barking, howling and crying;
b. Email dated 14 March 2014 stating that the dog is barking and howling;
c. Email dated 23 March 2014 stating, *"I've just had Karen from unit 26 at my door about the dog. She's just called the tenants to complain and they're adamant its not their dog barking even though they're [sic] not home to even hear it!".*
d. Two emails dated 23 March 2014 stating that this is the third night in a row the tenants have left the dog at home alone and allowed it to continuously bark.

[41] In response, the applicant and his tenants state:

a. One of the tenants (the applicant's daughter) is on a disability pension and works only two days per week. The dog does not bark or howl while the tenants are home. The dog is always left with friends or family if the tenants are away overnight.
b. The tenants have crept outside and listened at the door when they have returned home (and the dog is unaware of their return). The tenants say they have heard no barking or howling on these occasions.
c. The tenants have had numerous friends and family visit the unit and although the dog gets excited it does not bark or howl.
d. Some months ago a dog became resident in the neighbouring complex which does bark quite a lot. However, the tenants' dog does not join in with the barking. The committee and opposing owners may be confused as to the source of the barking. This is particularly the case given that the rear boundary of lots 26, 27 (the applicant's lot) and 28 are common to the other complex.
e. The committee's videos do record a dog barking but do not identify the dog or the property in which the dog is located. As previously stated, there is a dog which is at the rear of lots 26, 27 and 28 which often barks/howls.
f. The only person who has provided a written complaint of the dog allegedly barking is the owner of lot 28. No other occupier or owner has complained in writing.
g. In relation to the email dated 23 March 2014 which alleges that the dog has been left on its own for 3 nights and allowed to bark, the tenants say that although they were out on the date of the email (Sunday 23 March 2014) they were home all night on the previous night (Saturday 22 March 2014). On Saturday 22 March 2014, the dog did not bark or howl as alleged.
h. After receiving a call from the owner of lot 26 on Sunday 23 March 2014 the tenants came straight home. When the tenants arrived home they heard no barking or howling from their dog.
i. The tenants have bought a barking collar and will place it on the dog.

[42] The applicant has also provided three videos to support his assertion that the tenants' dog is not the source of the barking. The first video is taken from inside the applicant's unit. In this video, you can hear a dog (or dogs) barking from an unknown location, however you can see that the source of the barking is not the tenants' dog as the tenants' dog is standing silently in the applicant's unit at the time. The second video is taken from outside the front of the applicant's unit. In this video, you can also hear a dog (or dogs) barking from an unknown location, however you can see that the source of the barking is not the tenants' dog as the tenants' dog is standing silently at the time. The third video is taken from inside the applicant's unit. In this video you can again hear a dog (or dogs) barking from an unknown location, however you can see that the source of the barking is not the tenants' dog as the tenants' dog is sleeping inside the unit at the time.

[43] On 26 June 2014, I sent these videos to the committee for comment. In their response (dated 28 June 2014) the committee notes that the dog is calm and quiet when the owners are home.

[44] Based on the evidence presented, I am satisfied there is a regular occurrence of barking in or around the scheme. However, whether or not this barking is coming from the applicant's

[140672]

tenants' dog (as opposed to another dog/s) is a very difficult question of fact.

[45] While the committee has provided video evidence in which you can hear a dog (or dogs) barking, it is not clear from the evidence presented where the barking/howling is coming from and/or which dog (or dogs) is causing, or contributing to, the barking. The applicant on the other hand, has provided video evidence in which you can hear a dog (or dogs) barking, but see that the source of the barking is not the tenants' dog as the tenants' dog is silent in the video frame at the time.

[46] Further, while the committee has provided emails from the owner of lot 28 detailing three occasions (namely 14 March 2014, 16 March 2014 and 23 March 2014) on which she alleges the dog was barking, these emails do not provide any specific details or other information to indicate that it was the applicant's dog (as opposed to another dog/s) that was barking. The applicants however, refer to one of the nights that the dog allegedly barked (namely Saturday 22 March 2014 per the email dated Sunday 23 March 2014) and say that they were home the whole night and their dog did not bark.

[47] On balance, while I note the committee's and opposing owners' emails and video evidence, I am not satisfied sufficient evidence has been provided to demonstrate that the barking in question is coming from this particular dog (as opposed to another dog in or around the scheme). Accordingly, I am not satisfied that the allegations of barking form a reasonable basis for the committee to reject the applicant's pet application.

[48] However, I wish to caution the applicant and his tenants, that should permission be granted for the dog, they must ensure that the dog does not bark in a manner that unreasonably interferes with others' use and enjoyment of their lot. If the dog does cause a disturbance in the future, that issue could be pursued through the nuisance provision of the Act in the same way as any noise.[12] Alternatively, it could be a basis for subsequently withdrawing permission for the dog.

Tenant's Circumstances

[49] In deciding whether to approve a pet, the committee must consider all of the circumstances of the request. The application includes a letter from Dr Wyld, dated 30 August 2013, stating that the presence of a companion dog would be beneficial for one of the tenant's (Anna Rogers) physical and mental health.

[50] In the preceding paragraphs, I have considered the committee's arguments as to why it denied the applicant's pet application. In the absence of sufficient evidence as to why this dog, with conditions, should not be allowed in the scheme, I do not consider it necessary to address the applicant's purported ‘special circumstances’ in this matter. Rather, such considerations are only necessary where the committee and/or opposing owners have presented objectively reasonable opposition to the particular animal.

Summary

[51] Based on the material presented, I am not satisfied the committee's decision to deny the applicant's pet request was reasonable in the circumstances. Accordingly, I consider the applicant and his tenants should be granted permission to keep the dog in lot 27 pursuant to by-law 9. However, in order to alleviate some owners' concerns, I consider it reasonable to make this permission subject to certain conditions.

[52] Firstly, I consider a condition should be imposed stipulating that the dog must be kept within the lot while it is present on the scheme.

[53] Secondly, I am stipulating that the dog must traverse common property only for the purpose of being brought onto or taken off scheme land, at which time the dog must be appropriately restrained. This would ensure the animal is never ‘loose’ or unrestrained on common property and therefore unable to come into direct contact with other owners.

[54] Thirdly, I have stipulated that the dog is not permitted to cause a nuisance or interfere unreasonably with any person's use or enjoyment of another lot or common property. This does not mean that the dog cannot make any sound or bark, but rather the dog must not create unreasonable levels of noise (or other impacts).

[55]

[140673]

Fourthly, I consider it appropriate for the applicant and his tenants to take reasonable steps to minimise the transmission of airborne allergens. As the dog is not to have any direct contact with owners or common property, I would not anticipate it would trigger allergic reactions. Nevertheless, I am ordering that the applicant and his tenants take reasonable steps to minimise the transmission of airborne allergens from the dog to other lots, for example, by vacuuming the lot and grooming the dog. I do not envisage onerous obligations in this regard and normal levels of vacuuming the lot and grooming the dog should be adequate for this purpose.

[56] Fifthly, I consider there would be benefit for all occupiers in requiring that the dog be kept in good health and free from fleas and parasites. Although there is little risk of impact from an indoor pet on other owners in this regard, I consider this condition is a general requirement of responsible pet ownership and should not be onerous.

[57] Sixthly, I consider it appropriate to place some parameters around the disposal of the dog's waste. On this basis, I am ordering that any animal waste must be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme.

[58] Seventhly, I am ordering that the committee may rescind permission for the dog to remain on the scheme if the specified conditions are not complied with. However, the committee must act reasonably in doing so, which would include giving the applicant and his tenants the opportunity to respond to any complaints.

[59] Finally, I am ordering that the approval granted only applies to this dog and does not authorise the keeping of any additional, replacement, or substitute animals on the lot.

Conclusion

[60] I have made an order allowing the dog to remain in the applicant's lot, subject to certain conditions aimed at ensuring the dog does not create a nuisance or interfere unreasonably with the use and enjoyment of lots and common property.

[61] I wish to stress that my decision to allow this dog is based on the specific facts of this case, and should in no way be taken as a general precedent allowing owners or occupiers to bring or keep an animal in their lot without the approval of the body corporate.

Footnotes

1 See *sections 227, 228, 276* and *Schedule 5* of the Act
2 *Section 276* of the Act
3 *Section 284(1)* of the Act
4 Application reference 0894-2013
5 *Section 243* of the Act
6 See *sections 246* and *244* of the Act respectively
7 *Section 248* of the Act
8 *Sections 94* and *100(1)* of the Act.
9 *Q1* [2010] QBCCMCmr 433 (21 September 2010).
10 See the investigative powers of an Adjudicator in *section 271* of the Act.
11 *McKenzie* v *Body Corporate for Kings Row Centre CTS 11632* [2010] QCATA 57.
12 Section 167 of the Act.

PITT v BODY CORPORATE FOR AQUEOUS ON PORT CTS 33821

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(2014) LQCS ¶90-194; Court citation: [2014] QCAT 245

Queensland Civil and Administrative Tribunal

Decision delivered on 5 June 2014

Contribution schedule lot entitlements, basis for adjustment, powers of the tribunal to order an adjustment, no basis for application and no motion or material change, costs — Whether to award costs where the legislation is novel and untested — Legislation considered s 32 of the Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act).

The applicant owned a lot within the scheme and brought an application seeking that the tribunal adjust the contribution schedule lot entitlements for the scheme given the different sizes and positions of the units within the scheme. The respondent body corporate wanted the application to be dismissed for want of jurisdiction and merit.

In this case, there was no body corporate resolution to change the contribution entitlements — the applicant simply sought an order.

The member discussed each of the circumstances upon which the tribunal could adjust the contribution schedule lot entitlements.

Held:

1. As there was no evidence of a motion before the body corporate to change the contribution schedule lot entitlements, the passing of a motion to change the contribution schedule lot entitlements provided the basis for the application — without that motion there was no basis.

2. Was the scheme affected by a material change since the last time the entitlements were decided? The tribunal was not provided with any evidence to suggest a material change had taken place — in fact, there was no evidence to a change from the original CMS lodged to commence the scheme.

3. Was the scheme established after s 47B of the Act commenced? No, the scheme was established in 2005, well prior to the commencement of the section.

4. Had a formal acquisition taken place to affect the scheme? There was no evidence to suggest a formal acquisition had taken place and the CMS remained unchanged from the original lodged.

5. Were there grounds for the change to bring back the pre-adjustment order following a motion proposing adjustment? There was no evidence of a motion and so there were no grounds.

6. Had the body corporate committee made a decision about the adjustment? There was no evidence of a decision and so there were no grounds.

7. Had a subdivision taken place within the scheme? There was no evidence of a subdivision and therefore there were no grounds.

8. Had an amalgamation of lots taken place within the scheme? There was no evidence of an amalgamation and therefore there were no grounds.

9. Had a lot boundary changed? There was no evidence of a lot boundary change and therefore there were no grounds.

10. Did the tribunal have jurisdiction? As there was no evidence of any compliance with the above grounds, it was outside of the tribunal's limited jurisdiction. The application was premature.

11. The application was dismissed.

12. Costs: the tribunal elected not to award costs given that this aspect of the legislation was untested and relatively novel.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Before: Member Hughes

[140675]

Member Hughes:

What is this Application about?

[1] Warren Douglas Pitt wants the Tribunal to adjust the contribution schedule lot entitlements for Aqueous on Port CTS 33821 to reflect the different sizes of the units and their position within the complex, consistent with the interest schedule.

[2] The Body Corporate for Aqueous on Port CTS 33821 wants the Tribunal to dismiss Mr Pitt's application. Aqueous claims that Mr Pitt's application is wanting, both in jurisdiction and merit.

What is the basis for the Application?

[3] As the Tribunal has noted in prior decisions, its power to order an adjustment is limited.[1]

[4] Mr Pitt owns Lot 26. He can apply under the *Body Corporate and Community Management Act* 1997 (Qld) for the Tribunal to adjust the contribution schedule lot entitlements in the below circumstances.

The Body Corporate passes a motion without dissent to change the entitlements[2]

[5] Aqueous states there has been no resolution to change contribution entitlements. Certainly, the Tribunal has no evidence of any resolution.

[6] It is the passing of the motion to change entitlements that provides the basis for an application. There is no evidence of any motion even being put to the body corporate and therefore no change to the entitlements.

[7] Accordingly, the absence of any motion and consequential change means that this does not provide a basis for Mr Pitt's application.

The scheme is affected by a material change since the last time entitlements were decided[3]

[8] A "material change" means a physical change such as the building of units or the partial demolition of the scheme.[4] Although this was previously considered in the context of section 384 of the Act, the reasoning applies *pari passu* to this ground because of the comparable wording.

[9] The Tribunal has no evidence of any material change. Indeed, the evidence is of no change to the community management statement since establishing the scheme.[5]

[10] Accordingly, this does not provide a basis for Mr Pitt's application.

The scheme is established after the commencement of section 47B(2) of the Body Corporate and Community Management Act 1997 and there has been no prescribed change to contribution entitlements[6]

[11] Section 47B commenced on 14 April 2011. The scheme was established in 2005, well before then.

[12] Accordingly, this does not provide a basis for Mr Pitt's application.

A change to contribution entitlements because of a formal acquisition affecting the scheme[7]

[13] The Tribunal has no evidence of any acquisition affecting the scheme. Again, the evidence is of no change to the community management statement since establishing the scheme.[8]

[14] Accordingly, this does not provide a basis for Mr Pitt's application.

To reflect pre-Adjustment Order entitlements following a motion proposing adjustment[9] ; a decision of the Body Corporate or committee about the adjustment[10] ; and a subdivision[11] , amalgamation[12] , lot boundary change[13] or material change[14] since the Adjustment Order

[15] The Tribunal has no evidence of any of these. Again, the evidence is of no change to the community management statement since establishing the scheme.[15]

Does the Tribunal have jurisdiction?

[16] Because Mr Pitt has failed to provide evidence of compliance with any of the above grounds, his application falls outside the Tribunal's limited jurisdiction. His application is at the very least premature.

[17] The Tribunal therefore does not have jurisdiction to determine Mr Pitt's application and it must therefore fail.

What are the appropriate Orders?

[18] The appropriate Orders are that the application is dismissed.

[19] Costs in the Tribunal are not awarded as a matter of course. Each party must bear their own costs[16] , unless the interests of justice require the Tribunal to order a party to pay the costs of another party.[17]

[20]

[140676]

There is therefore a strong indicator against awarding costs:

> Under the QCAT Act the question that will usually arise in each case in which costs are sought is whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' point so compellingly to a costs award that they overcome the strong contra-indication against costs orders in s.100.[18]

[21] Aqueous did not seek its costs and there is no compelling reason to depart from the strong indicator against costs. As the Tribunal has previously noted, this aspect of the legislation is relatively novel and untested.[19]

Footnotes

1 See for example, *Thompson* v. *Capricorn Pacific Apartments CTS 5587* [2013] QCAT 227 and *Higham* v. *The Body Corporate* for the Palms No. 3 Warana CTS [2013] QCAT 228.

2 *Body Corporate and Community Management Act 1997* (Qld) section 47AA.

3 *Body Corporate and Community Management Act 1997* (Qld) s 47B(1)

4 *Heaton* v. *Body Corporate for "Windsong Apartments" CTS 31804* [2012] QCAT 45 at paragraphs [5], [6], [9] and [10].

5 First / New Community Management Statement dated 18 March 2005.

6 *Body Corporate and Community Management Act* 1997 (Qld) s 47B(2).

7 Ibid s 47B(2A).

8 First / New Community Management Statement dated 18 March 2005.

9 *Body Corporate and Community Management Act* 1997 (Qld) s 379.

10 Ibid s 385.

11 Ibid s 381.

12 Ibid s 382.

13 Ibid s 383.

14 Ibid s 384.

15 First / New Community Management Statement dated 18 March 2005.

16 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 100.

17 Ibid s 102.

18 *Ralacom Pty Ltd* v. *Body Corporate for Paradise Island Apartments* (No. 2) [2010] QCAT 412 at paragraph [29].

19 *Heaton* v. *Body Corporate for "Windsong Apartments"* CTS 31804 [2012] QCAT 45 at paragraph [12].

FORSTER & ANOR v BODY CORPORATE FOR 2nd AVE CTS 5755

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(2014) LQCS ¶90-195; Court citation: [2014] QCAT 68

Queensland Civil And Administrative Tribunal

Decision delivered on 24 February 2014

Where the applicants had failed to substantiate their claim, putting the body corporate to the expense of retaining lawyers to represent them and responding on the basis of natural justice having been denied to the lot owners. The tribunal dismissed their application as it did not articulate a cause of action and it lacked substance. The body corporate argued that the applicant was frivolous and vexatious. The applicants argued QCAT was a low cost jurisdiction, that as a group they did not have the funds to retain lawyers — Costs — Whether the interests of justice provided costs should be awarded.

Held:

1. The tribunal has the jurisdiction to award costs.

2. Did the interests of justice point compellingly to a costs award? The applicants failed to properly present their case in such a way as to allow for the strengths of the claims to be assessed. The tribunal found that the material provided by the applicants was vague, lacked detail and was based solely on their own opinions. This unnecessarily disadvantaged the body corporate.

3. The tribunal found that the applicants failed to refer to any relevant provisions of the BCCM Act so no evidence to support the relief sought was provided.

4.

[140677]

The tribunal was satisfied that it was in the interests of justice for the applicants to pay at least part of the body corporate's costs.

5. Indemnity costs were not appropriate as the tribunal was not satisfied that the application was vexatious.

6. That the Applicants pay the body corporate $1,000.00 within 28 days of the date of the order.

Before: Member Quinlivan

Member Quinlivan:

What is this application about?

[1] The Body Corporate for 2nd Avenue CTS 5755 wants Mrs Helen Maree Forster and Mr Robin James Forster to pay its costs arising from it having to respond to the application brought by Mr and Mrs Forster. In their application Mr and Mrs Forster sought the following:

> 1. … a legal injunction… be put in place against the Body Corporate Committee for 2nd Avenue Apartments preventing them from proceeding with the reversion process motion of 9.5.13 on the grounds of NATURAL JUSTICE DENIED to 50 other unit owners.
> 2. … a determination from QCAT that in view of the procedural irregularities and denial of NATURAL JUSTICE apparent throughout the approval process, the Body Corporate committee for 2nd Ave Apartments be directed to have the Leary Report of 2009 reviewed and made compliant with the current legislation by the inclusion of the RELATIVITY PRINCIPLE (Market Value) in the revised report.

[2] The Tribunal dismissed Mr and Mrs Forster's application on 3 January 2014 basically because it did not articulate a cause of action and it lacked substance.

Does the Tribunal have jurisdiction to award costs?

[3] Mr and Mrs Forster are aggrieved by a decision of the Body Corporate to implement the recent amendments of the *Body Corporate and Community Management Act* 1997(Qld). They sought relief from the Tribunal as outlined above. The Body Corporate had to respond to their claims and were required to incur costs, having been granted leave by the Tribunal to obtain legal representation.

[4] Section 100 of the *Queensland Civil and Administrative Act* 2009 (Qld) provides that each party to a proceeding must bear their own costs except as provided for in the Act. The considerations that the Tribunal

must undertake when determining whether to award costs “in the interests of justice” are set out in section 102 of the Act.

[5] The issue of costs has been addressed by the Tribunal President in his decision in *Ralacom Pty Ltd* v *Body Corporate for Paradise Island Apartments* (No 2) [2010] QCAT 412 at paragraph 29 where he says:

> “Under the QCAT Act the question that will usually arise in each case in which costs are sought is whether the circumstances relevant to the discretion inherent in the phrase ‘the interests of justice’ point so compellingly to a costs award that they overcome the strong contra—indication against costs orders in s 100”.

What are the relevant considerations?

[6] The first issue to consider is whether any party has acted in a way that unnecessarily disadvantaged another party. The Body Corporate contend that Mr and Mrs Forster's application was frivolous and vexatious because it raised issues that were completely obscure and erroneous.

[7] Mr and Mrs Forster argue that QCAT offers a low cost Tribunal to the community and from their point of view it was an obvious platform to have their case heard. They say that the “appeal” was submitted in good faith as their only logical course of redress. They state that any assumption that their “appeal” was in any way vexatious, frivolous or an abuse of process is strongly denied.

[8] The Body Corporate next submits that the proceedings brought by the Mr and Mrs Forster were an abuse of process. They claim that the Mr and Mrs Forster attempted to invoke the Tribunal's powers for an illegitimate claim They argued that *“the use of the Tribunal's processes is unjustifiably oppressive to the respondent and the use of the Tribunal's processes in such blatant disregard for truth*

[140678]

and justice, make a mockery of the Tribunal and bring the administration of justice into disrepute”.

[9] Further the Body Corporate claims that Mr and Mrs Forster's actions have been burdensome, harsh and wrongful. They say that they had to meet the claim despite no cause of action existing. This has resulted in the respondent incurring costs. The Tribunal notes that the respondents were granted leave to be represented on 31 July 2013.

[10] Mr and Mrs Forster sought to assure the Tribunal that their “appeal” was genuine and “was submitted with the intent to secure a just and fair outcome for unit holders”. They say that the unsubstantiated and emotional statements contained in the Body Corporate's submissions are incorrect and inconsistent with the majority of unit holders.

[11] Mr and Mrs Forster continued to assert that the current legislation is flawed and subject to further review by the Attorney General. As a result they decided that there had been a denial of Natural Justice and they based their claim on that principle. The Tribunal noted that they continued to seek to revisit the decisions and actions of the Body Corporate in their submissions regarding the costs application.

[12] The Tribunal also noted that they attached two documents to their submissions, which appear to be an account from a firm of solicitors regarding a Lot entitlement Reversion Dispute in 2011-2012. Mr and Mrs Forster did not address the relevance of these documents in their submissions.

[13] Finally Mr and Mrs Forster claim that in the interests of justice they believed they had a case to be heard by an independent authority and that they had a responsibility to explore all avenues of redress. They said that they now accept that they must await any new legislation. They request the Tribunal to reject the claim by the Body Corporate for costs.

[14] The failure of Mr and Mrs Forster to properly present their case made it next to impossible to determine the actual nature and complexity of the dispute. Consequently the relative strengths of the claims could not be assessed.

[15] The failure to adequately articulate their claim ultimately resulted in its dismissal. In *Kehl* v. *Board of Professional Engineers of Queensland* [2010] QCATA 77 at paragraph 10, Deputy President Kingham pointed out:

> The factors listed in s 102 are a guide to the considerations the Tribunal may take into account in deciding whether this is an appropriate case in which to award costs. In any given case, the relative importance of each criterion will vary. Further, their significance may relate to what stage the proceedings have reached. For example, questions about the relative strengths of the parties' cases may assume less significance upon an initial hearing, yet loom large when it comes to the costs of an application for leave to appeal.

[16] In this instance the matter proceeded to a hearing on the papers. No attempt appears to have been made by the respondents to have the matter dismissed at an earlier stage. This is often an option when it is apparent that there is no substance to a claim.

[17] The Tribunal was conscious of the submission by the Body Corporate that the Mr and Mrs Forster have consistently alleged that up until the determination of this matter every decision maker has acted unfairly, with bias and without detachment. The Body Corporate asserts that this was not the case and that at all times they, in particular, have complied with their legal obligations under the legislation.

What is the outcome?

[18] The Body Corporate sought an order for costs. In order to ensure procedural fairness to Mr and Mrs Forster, both parties were allowed 28 days to make further submissions regarding costs. This matter was also heard on the papers

[19] In the substantive decision, the Tribunal found that the material provided by Mr and Mrs Forster was based solely on their own opinions about the issues that they claimed were in dispute. The Tribunal found that their material was vague, contained unsupported statements and lacked specific detail and context. The attachments to their application were largely irrelevant, dated, repetitious and self-serving.

[20] The Tribunal accepted that they had not made any reference to the relevant provisions of the BCCM Act. As a result Mr and Mrs Forster had not provided any evidence to convince the Tribunal to grant the relief that they sought.

[21]

[140679]

Mr and Mrs Forster continued to argue that "… (a)s a group we do not have the funds to engage legal representation". There is no evidence to demonstrate that they represented a group. They refer to funds raised previously to fight a earlier action. They claim that the members of the Body Corporate have unlimited funds to meet their legal costs. They submit that if they had access to similar funds then they could provide " a more professional submission with reference to BCCM Act".

[22] In the circumstances the Tribunal is satisfied that it is in the interests of justice that Mr and Mrs Forster pay at least part of the Body Corporate's costs.

[23] Section 107 of the QCAT Act states that if the Tribunal makes a costs order under the Act then it must fix costs if possible. This is not a situation where indemnity costs would be appropriate. The conduct of Mr and Mrs Forster does not justify such an outcome. The Tribunal is not satisfied that the application was vexatious.

[24] However the Tribunal is satisfied that it was necessary for the respondents to incur a reasonable amount of costs to answer the application. This would have included obtaining initial advice, preparing a response and preparing submissions. Neither party has attempted to quantify the costs involved. The Tribunal has therefore have therefore determined that in order to finalise these matters it is appropriate to fix costs in the amount of $1,000.

Order

[25] Helen Maree Forster and Robin James Forster are to pay The Body Corporate for 2nd Avenue CTS 5755, $1,000 within 28 days of the date of this order.

O'KEEFE v BODY CORPORATE FOR BREAKWATER VILLAS II CTS 25808

(2014) LQCS ¶90-196; Court citation: [2014] QCAT 266

Queensland Civil and Administrative Tribunal

Decision delivered on 11 June 2014

Contribution schedule lot entitlements — Basis for adjustment — Powers of the tribunal to order an adjustment — Where there was a change to part of the scheme developed progressively — Whether the equity principle provides a test to be applied — Whether a report is necessary evidence — Where the focus of the report is on differing maintenance requirements of the scheme — Costs — Whether to award costs — Interests of justice — Legislation considered: Queensland Civil and Administrative Tribunal Act 2009 (Qld) (QCAT Act), s 32.

The applicants were owners of two lots within the scheme and brought an application seeking that the tribunal adjust the contribution schedule lot entitlements for the scheme, which comprised of 18 lots. The application was little more than a covering page and a quantity surveyor's report was commissioned by the applicants leaving the tribunal to deduce the basis for the application.

In this case, the applicants had moved a motion to adjust the contribution schedule lot entitlements and that motion was defeated. Had the motion been successful, the applicants could have applied to overturn it, however, that would not have been to their advantage. Accordingly, there was no body corporate resolution to change the contribution entitlements.

The member discussed each of the circumstances upon which the tribunal could adjust the contribution schedule lot entitlements.

Held: application dismissed.

1. Was the scheme affected by a material change since the last time the entitlements were decided? The tribunal was presented with the quantity surveyor's report which contained scant evidence to support there being a change in the plan format.

[140680]

Whilst the scheme was intended to be developed progressively, the definition of material change excluded the change arising from a progressively staged development.

2. Was the scheme established after s 47B of the Act commenced (14 April 2011)? No, the scheme was established in 2000, well prior to the commencement of the section.

3. Had a formal acquisition taken place to affect the scheme? There was no evidence to suggest a formal acquisition had taken place. There were no changes to any entitlements since the registration of the scheme.

4. Were there grounds for the change to bring back the pre-adjustment order following a motion proposing adjustment? There was no evidence of an earlier adjustment order therefore no grounds.

5. Had the body corporate committee made a decision about the adjustment? There was no evidence of a decision and so therefore no grounds.

6. Had a subdivision taken place within the scheme? There was no evidence of a subdivision and therefore no grounds.

7. Had an amalgamation of lots taken place within the scheme? There was no evidence of an amalgamation and therefore no grounds.

8. Had a lot boundary changed? There was no evidence of a lot boundary change and therefore no grounds.

9. What was the relevance of the report? The report referred to the "equity principle". The equity principle contained within the Act did not in and of itself provide a basis to apply to adjust contribution entitlements. It was not a requisite "trigger" for the application and was therefore not a proper basis upon which to bring or base the application. The report was very detailed but not of much assistance to the tribunal.

10. Does the tribunal have jurisdiction? As there was no evidence of any compliance with the prescribed grounds, it was outside of the tribunal's limited jurisdiction.

11. The application was dismissed.

12. Costs: the tribunal elected not to award costs given the body corporate did not seek its costs and there were no "interests of justice" grounds to suggest a departure from the provision that parties bear their own costs.

Before: Member Hughes

Member Hughes:

What is this Application about?

[1] Kevin John O'Keefe and Joanne Marie O'Keefe as the owners of Lot 5 and Janice Isabel Leonard Short as the owner of Lot 6 wants the Tribunal to adjust the contribution schedule lot entitlements for Breakwater Villas II CTS 25808 — an 18 lot residential complex.

[2] Breakwater opposes the proposed adjustment.[1]

What is the purported basis for the Application?

[3] The application itself does not refer to any basis. Instead, the application attaches a covering letter and many attachments from which the Tribunal was to deduce a basis for the application.

[4] These attachments include a Quantity Surveyor report commissioned by Mr and Mrs O'Keefe and Ms Short "to assess the justice and equity"[2] of the contribution schedule lot entitlements. The report avers that:

> • The scheme has two Standard Format Plan townhouses and 16 Building Format Plan units constructed as two separate double level buildings;[3]
> • The original development was intended to comprise four townhouses in a first stage and 11 townhouses in a second stage. The authors of the report claim to have been informed by an unidentified source that instead, the developer constructed only two townhouses in the second stage due to financial difficulties.[4] Another developer then completed 16 Building Format Plan lots and registered these in December 2000;[5] and
> • It is not possible to "establish authoritatively" the basis for setting the contribution entitlements, although it "appears likely" that the entitlements for Lots 5 and 6 were those that would have
>
> [140681]
>
> applied if the development had been completed in its original form.[6]

Is there a basis in law for the Application?

[5] As the Tribunal has noted in prior decisions, its power to order an adjustment to contribution entitlements is limited to prescribed circumstances.[7] I will address each.

The Body Corporate passes a motion without dissent to change the entitlements[8]

[6] On 4 November 2013, Mr and Mrs O'Keefe and Ms Short moved a motion at an Extraordinary General Meeting of the Body Corporate. That motion was to adjust the contribution lot entitlements as recommended by the Quantity Surveyor report.

[7] The motion was defeated by a vote of nine against and two in favour. Had the motion passed without dissent, a lot owner could have applied for an Order that the changed entitlements are not consistent with the relevant principle.[9] Clearly, this would not form the basis for the current application as it would have been contrary to the interests of Mr and Mrs O'Keefe and Ms Short to have applied for an Order to override their own motion.

[8] In any event, there is no evidence of any motion passed without dissent to change the entitlements.

[9] Accordingly, this does not provide a basis for the application.

The scheme is affected by a material change since the last time entitlements were decided[10]

[10] The report asserts:

> The change in the plan format used to register the lots… has significant implications for the justice and equity of the contribution entitlement schedule. The body corporate' maintenance responsibility for BFP lots is far more extensive than it is for SFP lots. This in turn creates a substantial difference between the BFP and SFP lot' (sic) cost impact on the body corporate budget. The contribution entitlements were not set in a manner that reflects this difference…[11]

[11] There is scant evidence to support there being a “change in the plan format”. Any change in the plan format appears to have arisen due to the development progressing in stages. If a scheme is intended to be developed progressively, a change arising from development is specifically excluded from being a ‘material change’[12] :

> It seems based on the limited evidence before the Tribunal that the development was intended to be developed progressively. The definition of material change expressly excludes a change arising from such a development, which would include the subdivisions and re—subdivisions sought to be relied upon.[13]

[12] The definition therefore excludes a change arising from a progressively staged development, including any change to the plan.

[13] Accordingly, there is no material change to provide a basis for the application.

The scheme is established after the commencement of section 47B(2) of the Body Corporate and Community Management Act 1997 and there has been no prescribed change to contribution entitlements[14]

[14] Section 47B commenced on 14 April 2011. It appears that the scheme was established in 2000[15] , well before then.

[15] Accordingly, this does not provide a basis for the application.

A change to contribution entitlements because of a formal acquisition affecting the scheme[16]

[16] A formal acquisition means an acquisition made of a lot included in, or common property for, the scheme.[17]

[17] There is no evidence of this. Moreover, there is no change to any entitlements because the entitlements have remained the same since registration of the scheme.

[18] Accordingly, this does not provide a basis for the application.

To reflect pre—Adjustment Order entitlements following a motion proposing adjustment[18] ***; a decision of the Body Corporate or committee about the adjustment***[19] ***; and a subdivision***[20] ***, amalgamation***[21] ***, lot boundary change***[22] ***or material change***[23] ***since the Adjustment Order***

[19] The Tribunal has no evidence of any Adjustment Order.

[20] Consequently, there can be no pre—Adjustment Order entitlements.

[21] Accordingly, this does not provide a basis for the application.

[140682]

What is the relevance of the report and other material?

[22] The report commissioned by Mr and Mrs O’Keefe and Ms Short refers extensively to the ‘equity principle’:

> In our analysis of expense items we have used the equity method’ default position of ‘all costs shared equally’ unless compelling evidence is present to prove that for a specific cost item a more just and equitable allocation can be calculated and should be applied. This requires both proof that a significant variation in cost impact exists and that there is an appropriate method to establish its monetary value over a reasonable future time period.
>
> Having analysed each of the expense items, we will recommend the equity method’ default of ‘all contribution entitlements equal’ unless, in our opinion, the total cost allocated to each lot varies sufficiently for justice and equity to demand a non—equal entitlement schedule.[24]

[23] However, the equity principle enshrined in the Act[25] does not of itself provide a basis to apply to the Tribunal to adjust contribution entitlements:

> [Section] 46A is not in itself a ground of application, but a test to be applied if, and only if, one of the two grounds in s47B is established. (Similarly, if an adjustment of an interest schedule lot entitlement were sought, the test in s46B could only be applied if the ground in s48 were first shown to exist.) In other words, s47B must provide a "trigger" before s46A can come to the aid of the Applicants.[26]

[24] Thus, the equity principle does not provide the requisite "trigger" for the application and therefore cannot provide a proper basis for the application.

[25] The report also includes an "Administrative Budget Expense Inclusions"[27] , "Allocation Methodology for Administrative Fund Expense Items"[28] , "Allocation Methodology for Sinking Fund Expense Items"[29] , "Additional Apportionment Calculations"[30] and a "Cost Impact Assessment & Recommended Entitlement Schedule"[31] .

[26] Mr and Mrs O'Keefe and Ms Short also attached further material to their application including a "Sinking Fund Forecast Report" containing a "Sinking Fund Forecast Movement", "Itemised Expenditure By Year", "Proposed Annual Budgets", "Detailed Income and Expenditure Statements", "Balance Sheets" and "Topics 2, 3 and 4 from the Office of the Commissioner for Body Corporate and Community Management' online training course notes"[32] .

[27] The Tribunal has previously admonished parties and those who prepare reports about unnecessarily incurring expenditure in these types of applications:

> Unfortunately, the process of detailed analysis of the expenses and budget of the body corporate, that has been undertaken by each of the experts, is not ultimately of much assistance to the Tribunal.
>
> This process seems to be common to many applications of this nature, particularly those involving high rise community title schemes. It seems to me that it is also likely to be of little assistance to the Tribunal in many other cases. That should be of concern to parties and the Tribunal, as it simply adds to the expense and delay of proceedings, contrary to the philosophy of the *Queensland Civil and Administrative Tribunal Act* 2009.
>
> The BCCM Act prescribes that the starting point for contributions is that they be equal between all lots. Having regard to that starting point, there seems little point in expending considerable sums of money, quite possibly once every several years, to try to make minimal adjustments to annual contribution levies. Indeed, this exercise disregards the proper construction of the BCCM Act, which requires equality except to the extent that any lots give rise disproportionately to expenses or disproportionately consume the body corporate' services. A minute analysis of expenses and the use of services to which they relate ignores the requirement of disproportionate expense or consumption.[33]

[28]

[140683]

And further:

> I urge parties who are in a position to influence the conduct of such matters – body corporate managers and those engaged in writing such reports – to exercise judgment and restraint. It seems to me that the continuation of the practice of obtaining separate, minutely detailed reports may, in future applications, give rise to a successful application for costs.[34]

[29] Even if the Application had a proper basis, the focus of any adjustment was the differing maintenance requirements for standard format plan townhouses and building format plan units. This is adumbrated as:

> All maintenance of the townhouse lots is the private responsibility of the townhouse lot owners. By contrast, the body corporate is responsible for maintaining the exterior of the BFP unit buildings, the common areas such as the stairs within the BFP unit buildings and certain sections of utility service infrastructure within the unit buildings.[35]

[30] This does not warrant the volume and minutiae of the Applicant' report and other material.

Does the Tribunal have jurisdiction?

[31] Because the Application fails to establish any of the prescribed grounds, the application falls outside the Tribunal' limited jurisdiction.

[32] The Tribunal therefore does not have jurisdiction to determine the application and it must therefore fail.

What are the appropriate Orders?

[33] Because there is no basis in law for the Application, it is appropriate to dismiss the Application.

[34] Costs in the Tribunal are not awarded as a matter of course. Each party must bear their own costs[36] , unless the interests of justice require the Tribunal to order a party to pay the costs of another party.[37]

[35] There is therefore a strong indicator against awarding costs:

> Under the QCAT Act the question that will usually arise in each case in which costs are sought is whether the circumstances relevant to the discretion inherent in the phrase 'the interests of justice' point so compellingly to a costs award that they overcome the strong contra—indication against costs orders in s.100.[38]

[36] Despite the dismissal of the Application and much unnecessary supporting material, Breakwater did not seek its costs and from its submissions, it appears they would have been minimal.

[37] Therefore, the interests of justice do not dictate a departure from the indicator against awarding costs.

[38] The appropriate Orders are therefore:

1. The Application is dismissed; and
2. Each party bears its own costs of the Application.

Footnotes

1 Submissions dated 8 April 2014. The applicants claimed not to accept these as an objection as they were submitted three weeks after the date required by Directions dated 27 February 2014 and not copied to the Applicants. However, it is clear from the Applicants' response to those submissions that they have had an opportunity to consider the submissions and were able to file their own submissions later. The Applicants have therefore failed to demonstrate any prejudice from the short delay. It is also clear that the submissions do not accept the proposed adjustment.

2 Contribution Lot Entitlement Analysis For Breakwater Villas Stage II CTS 25808 of Leary & Partners Pty Ltd dated 26 April 2013.

3 Ibid 3.

4 Ibid 4.

5 Ibid 4 – 5.

6 Ibid 5.

7 See for example, *Thompson* v *Capricorn Pacific Apartments CTS 5587* [2013] QCAT 227 and *Higham* v *The Body Corporate for the Palms No. 3 Warana CTS 20039* [2013] QCAT 228.

8 *Body Corporate and Community Management Act* 1997 s 47AA.

9 Ibid s 47AA(2) and (3).

10 *Body Corporate and Community Management Act* 1997 s 47B(1).

11 Contribution Lot Entitlement Analysis For Breakwater Villas Stage II CTS 25808 of Leary & Partners Pty Ltd dated 26 April 2013 at page 5.

12 *Body Corporate and Community Management Act* 1997 Schedule 6 definition of 'material change'.

13 *Moses* v *Body Corporate for Rhode Island Community Title Scheme 20573* [2012] QCAT 322 at [36].

14 *Body Corporate and Community Management Act* 1997, s 47B(2).

15 Community Management Statement 25808 executed 31 July 2007 with Certified Plan dated 31 October 2000.

16 *Body Corporate and Community Management Act* 1997 s 47B(2A).

17 Ibid Schedule 6 definition of 'formal acquisition'.

18 Ibid s 379.

19 Ibid s 385.

20 Ibid s 381.

21 Ibid s 382.

22 Ibid s 383.

23 Ibid s 384.

24 Contribution Lot Entitlement Analysis For Breakwater Villas Stage II CTS 25808 of Leary & Partners Pty Ltd dated 26 April 2013 at 5 and 6.

25 Ibid s 46A.

26 *McGahey and Anor* v *Body Corporate for Ambience on Burleigh CTS 37449* [2012] QCAT 61 at [14].

27 Contribution Lot Entitlement Analysis For Breakwater Villas Stage II CTS 25808 of Leary & Partners Pty Ltd dated 26 April 2013, Table 1.

28 Ibid Table 2.

29 Ibid Table 3.

30 Ibid Table 4.

31 Ibid Table 5.

32 Sinking Fund Forecast Report of QIA Group Pty Ltd dated 21 September 2012.

33 *Buist Investments Pty Ltd* v *Body Corporate* "Sonata" [2010] QCAT 407 at [20] to [22].

34 *Emanuele* v *Body Corporate for Riverscape Central* [2010] QCAT 500 at [8].

35 Contribution Lot Entitlement Analysis For Breakwater Villas Stage II CTS 25808 of Leary & Partners Pty Ltd dated 26 April 2013 at page 10.

36 *Queensland Civil and Administrative Tribunal Act* 2009 s 100.

37 Ibid s 102.

38 *Ralacom Pty Ltd* v *Body Corporate for Paradise Island Apartments (No. 2)* [2010] QCAT 412 at [29].

THE SHORE

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(2014) LQCS ¶90-197; Court citation: [2014] QBCCMCmr 347

Queensland Body Corporate And Community Management Commissioner — Adjudicators Orders

Decision delivered on 24 September 2014

By-law — Whether an owner must obtain body corporate approval to keep an animal on a lot — Whether the owner has sought body corporate approval — Whether it is just and equitable in the circumstances to make an order to impose conditions on keeping an animal on a lot — Where the respondents kept a dog in their lot and sought approval to under by-law 14 — The applicant body corporate committee did not approve the keeping of the dog and sought an order that the respondents obtained proper approval and accept the committee's conditions for keeping the dog within their lot — Where the conciliation was unsuccessful and the matter proceeded to adjudication — The respondents did not go back and seek further approval and their responses during the conciliation tended to suggest that they did not intend to seek any further approval — Given that lack of approval, the body corporate had an obligation to enforce its by-laws — Act, s 94, 182, 276.

Held:

1. The respondents were required to obtain body corporate approval to keep their pet in the lot.

2. If the respondents make a decision to keep the dog then the body corporate can assess that application and arrive at conditions under which the pet can be kept.

3. In all other requests the outcomes sought were dismissed.

Parties:

The body corporate for The Shore CTS 14539 (applicant).

Daniel Suter (respondent).

All owners (affected persons).

Before: P Dowling, Adjudicator

P Dowling, Adjudicator:

ORDERS MADE:

1. **I hereby order** that Sonya McDermott and Daniel Suter, the owners of Lot 7 must in writing and within 14 days of the date of this order inform the body corporate whether they intend to keep the Chihuahua cross dog on Lot 7 and if they do intend to keep the dog they must seek body corporate consent under By-law 14.
2. **I further order** that in all other respects the outcomes sought are dismissed.

P Dowling, Adjudicator:

Introduction

[1] The respondent is a co-owner of Lot 7. In April last year, the owners of Lot 7 sought committee approval to keep a dog on the lot. Body corporate approval is required because of scheme By-law 14. The committee did not approve the request. Subsequently, the owners of Lot 7 obtained a Chihuahua cross dog and continue the keep this dog on the lot.

[2] The body corporate seeks orders that the respondent obtains proper approval in accordance with By-law 14.1 and 14.2, and accepts and signs the "Conditions for Approval for the Keeping of a Dog in Lot 7".

[3] The commissioner has invited the respondent and the other lot owners to make submissions about the matters raised (s 243, Act). Submissions were made by the owners of Lot 7 and the owners of twelve lots. After the committee replied to submissions, the commissioner referred the application to departmental adjudication (s 248, Act).

[4] I am satisfied this is a dispute that falls within the dispute resolution provisions of the legislation (ss 227 to 229 and 276, Act). I note that the body corporate has sought an order against only one co-owner of Lot 7. Both owners made submissions to the commissioner. There is nothing to suggest the outcomes sought

relate particularly to the respondent and not to both co-owners. I have determined the application on the basis that it relates to the owners of Lot 7.

Analysis

By-law 14

[5] By-law 14 included in the scheme's community management statement[1] regulates keeping animals. The by-law provides:

> 14.1 Subject to section 143 of the Act, an occupier must not, except with the consent in writing of the body corporate committee:
>
> (a) bring or keep an animal or bird on the lot or the common property; or
> (b) permit an invitee to bring or keep an animal or bird on the lot or the common property.
>
> 14.2 Any consent of the body corporate committee may be:
>
> (a) given on conditions; and
> (b) withdrawn at any time.

[6] No question has been raised about the validity of the by-law. It is a by-law that provides for the regulation of , including conditions applying to, the use and enjoyment of lots included in the scheme and common property (s 169(1)(b)(i) and (ii), Act)[2] . There is nothing to suggest the by-law breaches section 180 of the Act which prescribes limitations for by-laws. The by-law is binding on the owners of Lot 7 as they occupy the lot (s 59(2), Act).

[140686]

Do the owners of Lot 7 have to obtain approval under By-law 14?

[7] This means the owners of Lot 7 must have body corporate committee approval before they can bring or keep an animal on the lot or common property.

[8] It is undisputed that the owners sought body corporate approval on 15 April 2013 to keep a "Pug, Chihuahua or a Cross of one of these breeds with a small dog breed" and that on 19 April 2013 the committee did not approve the request. The respondent then made a conciliation application under the Act seeking approval to keep a dog[3] . An agreement was reached as a consequence of a conciliation process.

[9] While the terms of the agreement are relied on in submissions, these terms are irrelevant to the determination of this application. It is relevant that the owners of Lot 7 admit they have kept the Chihuahua cross dog on the lot since on or about 27 November 2013; the owners have not sought body corporate approval to keep this dog on Lot 7; and the body corporate has not approved the keeping of the dog on the lot.

[10] The owners of Lot 7 submit they complied with By-law 14 when they sought approval to keep a dog and they have acted in good faith. They say as the committee do not want animals in the building and would not negotiate the conditions for keeping a dog, they believed they were legally entitled to have a dog and as the process had taken over seven months and the committee had ceased acting in good faith they obtained the dog.

[11] The fact the owners of Lot 7 sought approval on one occasion to keep a dog is not enough to comply with By-law 14. Circumstances have changed since April 2013. For example, the April 2013 request sought general approval when the owners were not keeping a dog on the lot. The owners are now keeping a dog on the lot. In addition, in April 2013 the owners sought body corporate approval on conditions that are different to those which, given submissions, the owners would now agree to.

[12] By-law 14 requires body corporate committee approval before a dog is brought or kept on a lot or common property. The owners of Lot 7 have not sought and do not have body corporate approval. None of the circumstances outlined above at paragraph 10 excuses the owners from seeking approval. The body

corporate is obliged to enforce By-law 14 (s 94(1)(b), Act). Now that the owners of Lot 7 are keeping a dog on the lot without consent, the body corporate could enforce By-law 14 by giving the owners a contravention notice (s 182, Act). If the notice is not complied with, the body corporate could seek a dispute resolution outcome that the dog ceases being kept on the lot or commence proceedings in the Magistrates Court.

[13] In deciding to make this application, the committee has not chosen this path. There is nothing to prevent the body corporate from seeking outcome 1 in this application. This is because submissions suggest the owners of Lot 7 want to continue keeping the Chihuahua cross dog on Lot 7 and they do not intend to seek body corporate approval under By-law 14. In these circumstances, I consider it is reasonable that the committee seek an order that the owners of Lot 7 obtain body corporate committee approval under By-law 14.1. I have made an order to this effect (ss 276(1) and 284(1), Act).

[14] Therefore, if the owners of Lot 7 want to continue keeping a dog on Lot 7 they have 14 days to make a request to the body corporate. If the owners do not make the request and continue keeping the dog, the body corporate may decide to commence proceedings to enforce the order (ss 286 to 288, Act). The body corporate may, alternatively or in conjunction, decide to commence by-law enforcement proceedings (ss 182, 183 and 184 to 188, Act)

The body corporate's consideration of a request?

[15] If they make a request, it will be a matter for the owners of Lot 7 when submitting the request to propose conditions of approval for keeping the dog. It will then be a matter for the body corporate to decide whether consent would be given and whether that consent would only be given on specific conditions (limited to those proposed by the owners or other conditions).

[16] In outcome 2, the body corporate seeks an order to impose the ten "Conditions for

Approval for the Keeping of a Dog" attached to the 7 January 2014 body corporate letter to the owners of Lot 7. The owners of Lot 7 do not agree with four of the ten conditions.

[17] A dispute may arise with respect to conditions for approving the keeping of an animal on a lot where for example, the body corporate has made a decision to refuse approval unless certain conditions are imposed and the relevant occupier considers the imposition of one or more of those conditions are unreasonable. A dispute of this nature can arise because the body corporate has an obligation to act reasonably when making a decision (ss 94(2) and 100(5), Act).

[18] The committee has to "consider each case upon its facts and, in making a decision whether or not to approve the keeping of a particular animal in a particular lot, the committee would have to act reasonably"[4] . In decisions such as *Tahlia Court* [2012] QBCCMCmr 209, *Tarcoola* [2012] QBCCMCmr 235 and *Spinnaker Blue* [2012] QBCCMCmr 255, adjudicators indicated it was reasonable to impose conditions to a specific request to avoid genuine problems arising. The adjudicators cautioned that it was not reasonable to refuse permission based on hypothetical concerns or potential problems without any evidence that the animal in question would actually cause those problems or the occupier would not comply with reasonable conditions.

[19] As discussed above with respect to outcome 1, the owners of Lot 7 have yet to make a request to the body corporate to keep the Chihuahua cross dog on the lot. Therefore, this application cannot be about a request made to the body corporate by the owners of Lot 7 to keep the Chihuahua cross dog on the lot. Nor can it be about a hypothetical body corporate decision made on a hypothetical request. Even though the committee has a point of view on what its response would be to a request from the owners of Lot 7 and even though the committee and the owners of Lot 7 have discussed the conditions in submissions, a dispute can only arise if the body corporate has been asked to give approval under By-law 14 and that request has been denied[5] . In my view, there is not yet a dispute to be determined about the conditions. For this reason, I have dismissed the outcome sought.

[20] If the owners of Lot 7 make a request to keep the Chihuahua cross dog on the lot and if the body corporate, after considering that request, refuses permission the owners have the choice of removing the dog or disputing the body corporate decision. I have outlined the options available to the body corporate if the owners do nothing.

[21] As I have dismissed the outcome, I do not intend to comment on the "Conditions for Approval for the Keeping of a Dog". However, with respect to general issues raised in submissions, it should be noted:

> 1. When it has a discretionary by-law of the nature of By-law 14, it would not be reasonable for the body corporate to oppose a request to keep an animal on a lot because of a "no pets or dog policy" or because of a concern about precedent or because of a concern about how another dog may have been kept on another lot.
> 2. Submissions do not establish that an owner cannot occupy a lot in this scheme or that an owner's right to use and enjoy the lot by for example keeping an animal is affected because of: how the building was constructed; the size of lots; or a motel type accommodation arrangement for some lots. It has not proven these factors distinguish the scheme from the multitude of other schemes in Queensland that contain lots that are available for short-term occupation. Nor is it established these factors justify opposition to keeping any type of animal on a lot.
> 3. There has not been any authoritative analysis submitted establishing that keeping a dog on this scheme poses a letting, marketing or valuation risk. In the absence of substantiation, it is merely speculative to claim there would for example be rental issues if a dog is kept on a lot.
> 4. It is reasonable to consider the interests of all owners and occupiers in the scheme and the use of the common property (s 94(1)(a), Act). Therefore, it may be reasonable to consider the age of residents, the use and size of the main entrance to the building or the use of building lifts when considering a

> request to keep a particular animal. However, a condition cannot be imposed to prevent the exercise of body corporate approval. The compulsory aspect of a condition should have regard to the individual circumstances of the request and should relate to it being rationally established that the animal would cause a difficulty to another owner or occupier in the circumstances of this scheme in the absence of the condition. In other words, the condition should not be arbitrary.
> 5. Approving the keeping of an animal under By-law 14 does not affect the body corporate's or an individual's right to take an action if it is believed the animal causes nuisance. Neither does it limit the body corporate's power to withdraw approval if a condition is not complied with. Section 167 of the Act prohibits an occupier from using or permitting the use of a lot in a way that causes a nuisance or interferes unreasonably with the use or enjoyment of another lot or common property. An owner or occupier of a lot in the scheme can take action under the Act by making a complaint to the body corporate and if the body corporate reasonably believes (including if it rescinds approval) there has been a contravention of a by-law, the body corporate may give the relevant owner or occupier a by-law contravention notice seeking rectification of the complaint. Further, section 167 of the Act may be applied under the dispute resolution provisions of the Act. If there is adequate evidence of nuisance, an order can be made by an adjudicator requiring a person to remove a dog[6]. In addition, a person may be able to ask the local authority to investigate a nuisance complaint.

Footnotes

1 No. 704781800.

2 *McKenzie* v *Body Corporate for Kings Row Centre* CTS 11632 [2010] QCATA 57 at paragraph 19.

3 Application No. 0726-2013.

4 *McKenzie* v *Body Corporate for Kings Row Centre* CTS 11632 at paragraph 31.

5 *K.G. Tully & Anor.* v *The Proprietors The Nelson Body Corporate* [2000] QDC 031 at [3].

6 See for example, *Mango Terrace* [2014] QBCCMCmr 238.

BROOKFIELD MULTIPLEX LTD v OWNERS CORPORATION STRATA PLAN 61288

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Court Ready PDF

(2014) LQCS ¶90-198; Court citation: [2014] HCA 36

High Court of Australia

Decision delivered on 8 October 2014

Contracts — Torts — Negligence — Duty of care — Pure economic loss — Strata-titled serviced apartments — Commercial property — Latent defects in the building — Contracts between builder, developer and purchasers of the apartment units — Detailed terms dealing with and limiting defects liability — Owners corporation sued builder — Builder did not owe a duty of care to the owners corporation for latent defects — Detailed contracts meant builder did not owe duty of care.

This was an appeal from the court in NSW and although a NSW case, it has implications for bodies corporate in Queensland. When it comes to building defect cases brought by a body corporate against a builder, recourse will have to be had to the building contract between the parties. Aside from that, the contractual sophistication between the parties will be taken into account, including whether the contract was at arms' length or whether the parties were on equal footing. Importantly in this case there was no damage alleged to a person or property.

The key issue was whether a builder owed the owners corporation of strata-titled serviced apartments a duty of care to avoid causing the owners corporation to suffer

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reasonably foreseeable pure economic loss resulting from having to repair latent defects in the building. This duty was alleged by the owners corporation.

Facts

The apartments were built under a design and construct contract between the appellant, Brookfield Multiplex Ltd (the builder), and the respondent, Chelsea Apartments Pty Ltd (the developer), who was the owner of the land. The developer had agreed with the Stockland Trust Group that certain apartments in the building would be leased and used as serviced apartments. Individual apartments would be sold by the developer to investors, subject to the leases. In other words, the purchasers of the apartments were investors in the serviced apartment hotel business. The design and construct contract annexed a standard form contract of sale of the apartments to investors.

After the apartments were completed, a strata plan for the serviced apartments was registered, which had the effect of creating the first respondent (the owners corporation) and making it the legal owner of the common property. The owners corporation had no contractual relationship with the builder or the developer. The owners corporation held the common property as agent for the developer, and later the owners of the individual apartments. The owners corporation was controlled by the developer and the Stockland subsidiary that held the leases.

The design and construct contract between the builder and developer included the following terms:

- detailed terms relating to the quality of the builder's work, requiring due skill, care and diligence, fitness for the stated purpose, compliance with all contractual and legislative requirements, suitable new materials and proper and tradesmanlike workmanship
- a Defects Liability Period, meaning that the builder would be liable to rectify construction defects for 52 weeks commencing upon practical completion
- testing of any material or work by the Superintendent at any time before the end of the Defects Liability Period, and a power for the Superintendent to direct the builder to fix defects
- a Final Certificate, issued by the Superintendent at the end of the Defects Liability Period, evidencing that the works had been completed in accordance with the contract, with an exception protecting the developer in relation to the cost of repairing latent defects in the building after the Defects Liability Period had ended: [85]
- a requirement that the builder maintain professional indemnity insurance with a run-off period of four years after the Final Certificate was issued.

The builder and developer were experienced and sophisticated companies negotiating on an equal footing, at arms' length.

The standard form contract for sale by the developer to purchasers of the apartments included the following terms:

- a requirement for the developer to ensure the property and common property were finished as specified, in a proper and workmanlike manner
- a requirement for the developer to pay for repairs of any defects *in the property* due to faulty materials or workmanship notified by the purchaser within six months after completion (cl 32.6)
- a requirement for the developer to pay for repairs of any defects *in the common property* due to faulty materials or workmanship notified by the owners corporation within seven months after the registration of the strata plan (cl 32.7).

[140690]

Primary judge and Court of Appeal

The owners corporation commenced proceedings against the builder to recover the cost of rectifying defects in the construction of the common property of the serviced apartments.

The primary judge (McDougall J) held that the builder did not owe the owners corporation a duty of care to avoid an economic loss to the owners corporation in having to repair latent defects.

In contrast, the NSW Court of Appeal held that the builder owed a duty of care to the owners corporation to avoid causing it to suffer loss resulting from latent defects in the common property that were structural, constituted a danger to persons or property in, or in the vicinity of, the serviced apartments or made the apartments uninhabitable. The Court of Appeal held the builder owed the developer a tortious duty of care, concurrently with its contractual duties. The developer was "vulnerable" to the builder in the sense that it was reliant on the builder's expertise, care and honesty in performing its obligations under the design and construct contract. The Court of Appeal ultimately held that the builder owed an equivalent duty to the owners corporation, as the developer's successor in title and that the owners corporation was at least as vulnerable to the risk of economic loss from latent defects as the developer.

Parties' submissions

The builder appealed to the High Court, submitting that its obligations to the developer regarding the quality of the work were comprehensively set out in the design and construct contract, leaving no room for a concurrent tortious duty of care. The builder also argued that the contracts of sale protected the purchasers of the apartments, and the owners corporation as their agent, from the risk of economic loss due to construction defects, meaning that they were not "vulnerable" to the builder.

There were two key cases that formed the background to this case. The first was the High Court case of *Bryan* v *Maloney* (1995) 182 CLR 609; [1995] HCA 17, where it was held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, which could be breached by careless construction leading to latent defects, supporting an action in negligence for economic loss.

The other key case was *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16, where the High Court held that an engineering company, which had designed inadequate foundations for a warehouse and office complex resulting in structural damage, did not owe a duty of care in relation to economic loss suffered by a subsequent purchaser.

Held: appeal allowed; cross-appeal dismissed (unanimously).

Per Crennan, Bell and Keane JJ

1. Contract law has primacy when protecting against unintended harm to economic interests consisting of disappointed expectations under a contract. The common law is not designed to alter the allocation of economic risks between contractual parties by supplementing or supplanting contractual terms with duties in tort. [133]

2. The builder's liability to the developer was governed by a complex contractual matrix that detailed terms relating to the risk of latent defects in the builder's work. To supplement these terms with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to repair latent defects caused by the builder's defective work would alter the allocation of risks set by the parties' contract. [145]

3. *Bryan v Maloney* should be distinguished. However, a distinction based on whether the building is a dwelling house or a commercial investment was an unstable distinction,

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because liability would change depending on the intended use of the building. The material distinctions were:

> (a) the detailed terms of the design and construct contract between the builder and the developer, in contrast to the simple obligation in *Bryan v Maloney* between the builder and the original owner to exercise reasonable skill and diligence in constructing the dwelling, and
> (b) the developer's express promises (cl 32.6 and 32.7) in its sale contracts with the purchasers of the apartment units which protected the purchasers and the owners corporation from economic loss due to defects, in contrast to *Bryan v Maloney*, where there was no promise as to quality given to Mrs Maloney when she acquired the dwelling.

In this case, there was no substantial equivalence between the obligations of the builder to the developer and the alleged duty, unlike *Bryan v Maloney*. Such a conclusion would impose a more onerous obligation on a builder in favour of a subsequent purchaser than was owed by the builder to the person for whom it agreed to complete the building work and was paid. [136], [137], [138], [140]

4. The developer was expressly obliged to repair defects brought to its attention within a specified period (cl 32.7). The purchasers had a contractual right against the developer which could have protected them against the risk of which the owners corporation now complained, if those rights had been pursued in accordance with their terms. The existence of cl 32.7 showed that the purchasers were aware of the risk, and the term was a means of dealing with the risk. It was true that the developer's promises did not protect the purchasers of apartments or the owners corporation if the developer was not financially able to meet the claim or if the defects were not discovered in time to make a claim. However, this merely emphasised the point that the individual purchasers' contractual rights were expressly limited in their scope and duration, in a way that was inconsistent with the open-ended liability alleged by the owners corporation. The builder had nothing to do with the purchaser's decisions to accept the developer's promise, and to not investigate for defects. If a purchaser was not satisfied that its investment was adequately protected, it could have avoided the risk of loss by investing elsewhere. [141], [156]–[157]

5. There was no evidence that the purchasers were deprived by the builder's conduct of the option of bargaining with the developer for a more extensive promise as to quality, or of investing elsewhere. There was no encouragement given by the builder or suggestion that the builder assumed responsibility to them for their decision. [149]

6. The Court of Appeal held that the developer was vulnerable to the builder. But the terms in the design and construct contract provided for supervision and assessment of the builder's performance by the Superintendent, which was linked to the builder's payment, and this placed the risk of deficient work squarely on the builder. [142]–[143]

7. The fact that the owners corporation did not exist when the defective work was carried out pointed against, rather than for, the alleged duty of care because it could not have relied on the builder in any way. There was no evidence that the builder assumed responsibility for the owners corporation, or that there was known reliance on the builder by the owners corporation, in relation to the quality of the common property. [151] (However, see [47] per Hayne and Kiefel JJ, which assumed that nothing turned on the fact that the owners corporation did not exist.)

8. The expansive view of the builder's duties to the owners corporation which was taken by the Court of Appeal was not supported by *Bryan v Maloney*, and it did not accord with *Woolcock*. *Bryan v Maloney* does not mean that a builder who breaches its contractual obligations to the first owner of a building should be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. It would reduce

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the common law to incoherence if the court imposed on a builder a greater liability to a disappointed purchaser than to the builder's original customer. It would be inconsistent with *Woolcock* for the court to hold that a subsequent purchaser of a building is vulnerable to a builder so far as the risk of making an unfavourable bargain is concerned. [70]

9. It was critically important that the owners corporation's loss was economic loss, ie the expense it was required to incur due to the emergence of latent defects. The loss was not the damage to its property, nor physical injury. There is a crucial distinction between physical injury and economic loss. The builder may have been liable for physical injuries to third parties due to defective work under its contract with the developer. However, physical injury is protected by the law even when, in similar circumstances, economic loss is not. The owners corporation's claim was based on the failure of the purchasers of the apartments to get value for money from the developer, instead of the builder causing damage to the owners corporation's property. [68], [124]–[125] (See [48] per Hayne and Kiefel JJ at Held #25.)

10. One difficulty with the owners corporation's claim was that it paid nothing for the common property. Therefore, it suffered no "loss" by acquiring the common property, assuming that the common property was worth more than the cost of repairing latent defects (and there was no suggestion that it was worth less). Saying that the common property, for which it paid nothing, was less valuable to it by the cost needed to repair it did not show that any of the builder's acts or omissions caused the owners corporation's assets to be diminished. Therefore, if the owners corporation was considered independently of the individual apartment owners, it had not suffered any loss due to the quality of the common property vested in it. [68], [151]

11. The statutory description in s 20 of the Strata Schemes Management Act of an owners corporation being an agent of lot owners confirms that the detriment to the economic and financial interests of the owners corporation is, in substance, suffered by the owners of lots. There is nothing in the Strata Schemes Freehold Development Act that suggests that the cost incurred by the owners corporation in complying with its obligation to repair and maintain the common property is not a loss truly incurred on individual lot owners. The lot owners are levied in accordance with their unit entitlements under s 75 and 76 of the Strata Schemes Management Act to meet that obligation. [152]

12. If the owners corporation was viewed as the alter ego of the purchasers of the apartment (which might be the better view), its position was no stronger, for the reasons given above (at Held #4; [156]–[157]). [152] (See [46] where Hayne and Kiefel JJ agreed with this "better view".)

13. Statutory warranties under the *Home Building Act 1989* (NSW) protected consumers who acquired buildings as dwellings. This Act did not cover claims by purchasers of serviced apartments. This did not mean that the Act implicitly denied the alleged duty of care. However, the legislature made a policy choice to favour consumers over investors. [134], [135]

14. There were cases supporting concurrent duties in contract and tort. However, in those cases, the content of the duty was the same in contract and tort. That was not true in this case. [144]

15. Unintentionally inflicted economic loss became compensable in negligence only after *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465. Even then, liability depended on proof of assumption of responsibility and reliance. [122]

16. The fact that economic loss was a foreseeable consequence of a lack of reasonable care by the builder was not, by itself, sufficient to make the loss compensable in negligence, even where acceptance of the claim would not create indeterminate liability. [69]

17. Cases for recovery of economic loss were exceptions to a general rule that damages for economic loss which is not consequential upon damage to person or property are not

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recoverable in negligence even if the loss is foreseeable: *Woolcock* per Gleeson CJ, Gummow, Hayne and Heydon JJ. [128]

18. In Canada, a builder owes a duty of care in tort to a subsequent purchaser of the building in relation to substantially dangerous defects. This approach is difficult in practice because the existence of the duty will not be known until after the defects occur and can be confidently categorised as dangerous. More importantly, the Canadian approach assumes that the cost of repair or diminution in the building's market value is a reflex of the liability for physical damage which may occur if the defect is not repaired. This incorrectly detaches the duty not to inflict harm from the harm which is the gist of the cause of action. [158], [162] (See also [54] per Hayne and Kiefel JJ at Held #26.)

Per Hayne and Kiefel JJ

19. The outcome of this appeal had to be decided according to the question of vulnerability. Vulnerability meant a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way that would cast the consequences of loss on the defendant. [52] There may be a lively debate about whether the owners corporation itself suffered any loss as a result of defects in the common property and the better view may be that and such loss was suffered by the lot owners for whom the owners corporation held the common property as "agent". [45]

20. The fact that the parties made contracts for the construction of the building and for the sale of parts of the building which included express terms regulating the quality of the promised work was enough to demonstrate the parties' ability to protect against, and denied their vulnerability to, any lack of care by the builder in performing its contractual obligations. [56], [59]

21. Both the developer and the original purchasers made contracts which gave rights to have remedied defects in the common property vested in the owners corporation. There was no suggestion that the parties could not protect their own interests. The builder did not owe the owners corporation a duty of care. [59]

22. This conclusion did not depend on any *a priori* assumption about the proper provinces of contract and tort law. There are previous cases that make it difficult to argue that negligence claims for pure economic loss should be excluded merely because they might outflank or undermine contract law. [60] (French CJ agreeing at [36], see [176] per Gageler J at Held #40.)

23. The conclusion about absence of vulnerability did not depend on detailed analysis of the particular contracts in this case. [61]

24. It was unnecessary to decide whether disconformity between the duties owed to the original owner and the alleged duty to the subsequent owner would necessarily deny the existence of that duty. The absence of disconformity was an essential step in *Bryan v Maloney*. That step was not available in this case. [61] (However, see [28] per French CJ, at Held #33.)

25. It could be assumed, without deciding, that the developer and the purchaser of an apartment relied on the builder to do its work properly. The purchaser of an apartment and the owners corporation could not check the quality of the builder's work as it was being done. Depending on the meaning of the superintendence terms of the contract, the developer might not have been able to check either. Therefore, it could be said that these parties relied on the builder to do its work properly. This reliance might be necessary to demonstrate vulnerability, but it was not sufficient. [57]–[58]

26. The nature of the damage suffered was important. The defects were not alleged to have caused any damage to person or property. If the owners corporation suffered damage, it was pure economic loss. [48] (See [68], [124]–[125] per Crennan, Bell and Keane JJ at Held #9.)

27.

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It was not useful to examine decisions of other jurisdictions about builders' tortious liability for economic loss occasioned by negligent building construction without recognising that the decisions necessarily reflect the particular ways that those jurisdictions have developed and applied principles about recovery for negligently caused pure economic loss. [54] (See [158], [162] per Crennan, Bell and Keane JJ at Held #17.)

Per French CJ

28. The nature and content of the contractual arrangements, including detailed provisions for dealing with and limiting defects liability, the sophistication of the parties and the relationship of the developer to the owners corporation were all factors contributing to the finding that there was no duty of care owed to either the developer or the owners corporation. [3]

29. The owners corporation held the common property as an agent for the proprietor or proprietors of the lots. The interest of lot owners has been characterised as an equitable interest as a tenant in common with other lot owners and accordingly, the owners corporation has been described as holding the common property as trustee for all the lot owners in accordance with their unit entitlements. [10]

30. The builder did not owe a duty of care to the owners corporation independently of the existence of a duty of care owed to the developer. The builder did not owe a duty of care to the developer (and therefore it could not be argued that it owed a similar duty of care to the owners corporation). [8], [36]

31. The owners corporation's statutory relationship (under strata legislation) to the developer and subsequent purchasers of the apartments was a factor which, taken with the contractual arrangements, counted against a finding of vulnerability which would have supported the existence of a duty of care. [12], [8], cf [23], [34]

32. An extended concept of proximity was previously adopted in this court until approximately the beginning of the century. That concept was used to identify certain types of cases in which a duty of care in negligence arose rather than as a test for determining whether the circumstances of a specific case brought it within such a category. The concept of proximity was invoked in *Bryan v Maloney* but since then has been sidelined. This did not mean that previous cases such as *Bryan v Maloney* were not correct in stating that the factors that were indicative of "proximity" gave rise to a duty of care. The factors were correctly included in the concept of proximity as part of the consideration of the existence of a duty of care and these factors continue to remain relevant. [21]

33. *Bryan v Maloney* referred to factors counting against the recognition of a duty of care for pure economic loss other than in special cases. Special cases would generally, but not necessarily, involve known reliance or dependence by the plaintiff and/or the assumption of responsibility by the defendant. *Bryan v Maloney* included these factors: lack of detail in the contract between the prior owner and the builder, no exclusion or limitation of liability in that contract, and probable lack of skill and experience in the subsequent owner who would probably assume that the building had been competently built. These factors were elements of

"vulnerability", which is an important factor in deciding the existence of a duty of care for pure economic loss. Vulnerability refers to the plaintiff's incapacity or limited capacity to protect itself from economic loss arising out of the defendant's conduct. There was a sharp distinction between *Bryan v Maloney* and this case in relation to vulnerability. The distinction being analogous to that made in *Woolcock*. [22]–[23]

34. The High Court has avoided formulating a general test for deciding the existence or non-existence of a duty of care in negligence. Often, with novel cases, the court can reason using analogy. None of the earlier cases were precisely applicable in this case. To decide this case, the court must consider the salient features of the relationship between the owners

[140695]

corporation and the builder, including whether the builder owed the developer a duty of care and whether the owners corporation was vulnerable. [24]–[25], [30]

35. The existence of an anterior duty of care to the prior owners assisted the finding that a duty of care was owed in *Bryan v Maloney*. In that case, there was no disconformity between the duty owed by the builder to the first owner and the alleged duty to the subsequent purchaser. There is no reason to treat the existence, or non-existence, of an earlier duty of care to a prior owner as anything more than an important factor relevant to the existence of a duty of care in relation to pure economic loss to a subsequent purchaser. [28] (However, see [61] per Hayne and Kiefel JJ at Held #23.)

36. The responsibility assumed by the builder in relation to the developer, as the initial owner of the apartments, was defined in detail by the contractual matrix that governed the construction of the building. The developer could not be taken to have relied on any responsibility by the builder, and the builder assumed no responsibility, in relation to pure economic loss flowing from latent defects extending beyond the contractual responsibility. The statutory relationship between the owners corporation and the developer as first owner meant that there was no duty of care owed to the owners corporation as a proxy for the developer. [33]

37. The purchasers of apartments were effectively investors in a serviced apartment hotel venture under standard form contracts which were an integral part of the overall contractual arrangements. The standard form contract contained specific terms about the building construction and the developer's obligations to undertake repairs. The subsequent owners could not be treated as vulnerable. Nor, therefore, could the owners corporation as their statutory "agent". [34]

38. The relationship between the builder and the owners corporation was not analogous to the relationship in *Bryan v Maloney* between the builder and the downstream, arms' length purchaser of the dwelling house, who suffered economic loss due to latent defects. It was analogous, although not identical, to the position of the purchaser of the building in *Woolcock*. [35]

Per Gageler J

39. An owners corporation is a creature of statute and does not choose to become the legal owner of common property and to bear the ongoing responsibility for keeping it in good repair. This obligation is imposed upon an owners corporation on its creation. However, the existence and the scope of a duty of care cannot turn on this peculiar circumstance. It is not the function of the common law to create a principle of tortious liability which would give a right to compensation exclusively to a unique product of legislation. [172]

40. If a builder of a strata development is to be recognised as having a putative duty of care, it is due to the fact that the owners corporation acts as a proxy for the lot owners. The beneficial interest in the common property is vested as tenants in common and the owners corporation is the agent of the lot owners. [173]

41. Whether or not a duty of care can be recognised in a particular circumstance must be determined by applying general principles to determine the existence and scope of the duty. The duty being the obligation that a builder has to avoid a subsequent owner incurring the cost of repairing latent defects in the building. [174]

42. A common law duty of care can coexist with a duty in contract. A duty of care can be to avoid economic loss. Therefore, legal taxonomy alone cannot be used to say that any liability of a builder to a subsequent owner of a building belongs solely to the province of contract law, to the exclusion of tort law. [175] (See also [60] per Hayne and Kiefel J and [36] per French CJ at Held #21.)

43.

[140696]

Bryan v Maloney would not be decided differently today. The continuing authority of *Bryan v Maloney* should be limited to cases where the building is a dwelling house (but see [136] per Crennan, Bell and Keane JJ at Held #3) and where the subsequent owner is incapable of protecting themselves from the consequences of the builder's lack of reasonable care. Apart from such cases, a builder has no duty in tort to exercise reasonable care to avoid a subsequent owner incurring the cost of repairing latent defects in the building. This is because subsequent owners can ordinarily protect themselves against this kind of economic loss because they have liberty to determine what contractual terms they agree to. [185]–[186]

44. If legal protection is now to be extended further than the current statutory warranty regime in New South Wales the protection would be best done by legislative extension of the current statutory warranties. [186]

[Headnote by the CCH COMMON LAW EDITORS]

DF Jackson QC with TJ Breakspear (instructed by Gilbert + Tobin Lawyers) for the appellant.

F Corsaro SC with PJ Bambagiotti (instructed by Grace Lawyers Pty Ltd) for the first respondent.

Submitting appearance for the second respondent.

Before: French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ

French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ:

ORDER

1. Appeal allowed.
2. Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 25 September 2013 and, in its place, order that the appeal to that Court be dismissed with costs.
3. Special leave to cross-appeal granted.
4. Cross-appeal treated as instituted and heard instanter and dismissed with costs.
5. First respondent to pay the appellant's costs of the appeal.

On appeal from the Supreme Court of New South Wales

French CJ:

Introduction

1. The Court of Appeal of New South Wales held that the builder of strata-titled serviced apartments on land at Chatswood owed a duty of care to the owners corporation to avoid causing it to suffer loss resulting from latent defects in the common property which were structural or constituted a danger to persons or property in the vicinity or made the apartments uninhabitable[1] . An owners corporation is created by statute whenever a strata plan is registered. The common property is vested in it as manager of the strata scheme and as "agent" for the owners of the apartments. In this case, the owners corporation ("the Corporation") is the first respondent. The serviced apartments were incorporated in levels one to nine of a 22 storey development[2] . The apartments had been built under a design and construct contract made in November 1997 between the appellant, Brookfield Multiplex Ltd ("Brookfield"), and the registered proprietor of the land and property developer, Chelsea Apartments Pty Ltd ("Chelsea"). All of the apartments were subject to leases given by Chelsea to Park Hotel Management Pty Ltd ("Park Hotel"), a subsidiary of the Stockland Trust Group ("Stockland"), which was to operate them collectively as a serviced apartment hotel under the "Holiday Inn" brand.

2. The principal question raised on this appeal from the decision of the Court of Appeal is whether Brookfield owed the Corporation a duty to exercise reasonable care in the construction of the building to avoid causing the Corporation to suffer pure economic loss resulting from latent defects in the common property. The Corporation has filed a notice of contention asserting, contrary to the conclusion of the Court of Appeal, that the duty owed to it was not contingent upon the existence of a similar duty of care owed to Chelsea. The Corporation also seeks special leave to cross-appeal in relation to the limited ambit of the duty as defined by the Court of Appeal.

3. The contractual arrangements between Brookfield, Chelsea and Stockland had as their

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purpose the creation of a commercial venture which comprised serviced apartments to be operated collectively as a serviced apartment hotel. The Corporation, a creature of statute, came into existence as the statutory agent of Chelsea, albeit controlled pursuant to the lease arrangements by the hotel operator. The purchasers of individual apartments from Chelsea were effectively investors in the hotel venture. The nature and content of the contractual arrangements, including detailed provisions for dealing with and limiting defects liability, the sophistication of the parties and the relationship of Chelsea to the Corporation all militate against the existence of the asserted duty of care to either Chelsea or the Corporation. The appeal should be allowed. Special leave to cross-appeal should be granted and the cross-appeal dismissed.

4. The text of relevant statutory and contractual provisions, the reasoning at first instance and the reasoning of the Court of Appeal are set out in the joint judgment of Crennan, Bell and Keane JJ. Reference to the salient features of the statutory framework and the contractual arrangements appears later in these reasons.

Procedural history

5. By summons issued out of the Supreme Court of New South Wales on 3 November 2008, the Corporation claimed from Brookfield the cost of rectifying alleged defects in the common property[3] . The claim was in negligence and depended upon the existence and breach of a relevant duty of care owed by Brookfield to the Corporation.

6. On 10 October 2012, McDougall J delivered judgment on the separate question of the existence of a duty of care[4] . The alleged duty of care, as propounded by the Corporation, was a duty "to take reasonable care to avoid a reasonably foreseeable economic loss to the [Corporation] in having to make good the consequences of latent defects caused by the building's defective design and/or construction"[5] . His Honour held that the Corporation had not established that Brookfield owed it the duty of care alleged[6] . He made orders directing entry of judgment for the defendants and ordered the Corporation to pay their costs. The Corporation appealed to the Court of Appeal.

7. On 25 September 2013, the Court of Appeal allowed the appeal and set aside the orders made by McDougall J. Their Honours answered the separate question thus[7] :

> "[Brookfield] owed the [Corporation] a duty to exercise reasonable care in the construction of the building to avoid causing the [Corporation] to suffer loss resulting from latent defects in the common property vested in the [Corporation], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable."

Brookfield appeals to this Court by special leave granted on 14 March 2014[8] .

The questions

8. The appeal raises two questions:

1. Did Brookfield owe a duty of care to the Corporation independently of the existence of a duty of care owed to Chelsea, and, if so, what was its content?
2. Did Brookfield owe a duty of care to Chelsea and thereby a similar duty of care to the Corporation, and, if so, what was its content?

As appears from the reasons that follow, the interaction between the statutory scheme and the contractual matrix causes the two questions to converge. It requires a negative answer to both. An outline of the statutory and contractual arrangements follows.

The strata schemes statutes

9. Under strata schemes laws in New South Wales, a parcel of land, including any building or buildings which comprise part of it, can be subdivided into lots in accordance with a strata plan[9] . A strata plan for freehold lots is registered in the office of the Registrar-General pursuant to s 8 (read with s 5(1)) of the *Strata Schemes (Freehold Development) Act* 1973 (NSW) ("the Strata Freehold Act"). Common property is so much of a parcel as is not comprised in any lot[10] . Under the *Strata Schemes Management Act* 1996 (NSW) ("the Strata Management Act"), the owners of the lots from time to time in a strata scheme constitute a body corporate designated "The

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Owners — Strata Plan No X", where "X" is the registered number of the strata plan to which that strata scheme relates[11] . The owners corporation comes into existence upon registration of the strata plan[12] . The Corporation came into existence on 11 November 1999. An owners corporation has the functions conferred upon it by the Strata Management Act or any other Act[13] . The common property is vested in it[14] . It holds its estate or interest as "agent" for the proprietor or proprietors of the lots[15] . If different persons are proprietors of each of two or more lots, it holds the common property as agent for the proprietors as tenants in common in shares proportional to the unit entitlements of the respective lots[16] . The content of the term "agent" is to be derived from the statutory functions conferred upon the owners corporation.

10. The interest of a lot owner in the common property has been characterised by the Supreme Court of New South Wales as an equitable interest as a tenant in common with other lot owners[17] . On that basis, the owners corporation has been described as holding the common property "as trustee for all the lot proprietors in proportion to their unit entitlements"[18] . Leeming JA in the Court of Appeal also referred to the relationship as "analogous to trustee and beneficiary"[19] . That cautious description may avoid attachment to the functions of the Corporation of the full panoply of equitable and statutory incidents of the trust relationship. In any event, the characterisation of the Corporation as a trustee or an analogue of a trustee was not in dispute before the Court of Appeal or in this appeal[20] .

11. The owners corporation has a statutory duty to properly maintain the common property and keep it in a state of good and serviceable repair[21] . It must renew or replace any fixtures or fittings comprised in the common property[22] . Those duties do not apply to a particular item of property if the owners corporation, by special resolution, determines that it is inappropriate to do any of those things[23] , albeit that exemption does not apply if the safety of any building, structure or common property is affected or the appearance of any property in the strata scheme detracted from[24] . The duties of the owners corporation do not depend upon whether someone was to blame for the common property being other than in a state of good and serviceable repair. As the primary judge correctly observed[25] :

> "The duty to maintain and repair common property is not limited by reference to the source of the problem that gives rise to the need for maintenance or [repair]. The duty will extend, in an appropriate case, even to the rectification of defective work left unrectified by the builder."

Generally speaking, funding for repairs and maintenance of the common property must come from the lot proprietors by way of levies. The owners corporation must establish an administrative fund and a sinking fund and can, and in some circumstances must, impose a levy so that it can meet particular maintenance and repair obligations[26] . Insurance payments, damages awards and negotiated settlements with persons said to be liable for damages for defects in the common property comprise other obvious sources of funding.

12. The connection between the Corporation and Chelsea, created by the Strata Management Act and Strata Freehold Act, was said in argument to be relevant to the question whether the Corporation was "vulnerable" with respect to economic loss arising from latent defects in the common property caused by Brookfield's alleged lack of care. As appears from these reasons, the Corporation's statutory relationship to Chelsea and subsequent purchasers of the lots is a circumstance which, taken with the contractual arrangements described below, militates against a finding of vulnerability supportive of the existence of a duty of care.

The Deed of Master Agreement

13. The working of the statutory relationship between the Corporation on the one hand and Chelsea and the purchasers of the apartments on the other was affected by the provisions of a Deed of Master Agreement made between Chelsea and Stockland. Under the Master Agreement, the apartments were to be leased to Park Hotel and operated collectively as a serviced apartment hotel under the "Holiday Inn" brand[27] . Under the leases, Park Hotel was to acquire Chelsea's rights, in effect, to direct the operation of the Corporation. Individual purchasers of the apartments were to acquire their interests subject to the leases

to the operator[28] . The leases required that the owners yield their voting rights in the Corporation to the operator by appointing it as their proxy[29] . In the Master Agreement, Chelsea provided detailed warranties to Stockland in relation to the quality of the building work[30] .

The design and construct contract

14. The design and construct contract between Brookfield and Chelsea was made on 5 November 1997. The contract sum was $57,539,000. The contract contained detailed provisions relating to the quality of the services to be provided by Brookfield[31] . It imported the Australian Standard General conditions of contract

for design and construct AS 4300-1995. It is not in dispute that Brookfield and Chelsea were experienced and sophisticated entities negotiating on an equal footing and at arms length. The contract contemplated the sale of the apartments to individual investors and annexed a standard form contract of sale to such investors. Brookfield was required to register the strata plan by 31 March 2000.

15. There was provision in the contract for a Defects Liability Period of 52 weeks, which commenced upon practical completion[32] . A Final Certificate would stand as evidence that the Works had been completed in accordance with the contract[33] . An exception was made in cl 42.6(b) for:

> "any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate".

The contract also contained an express provision requiring Brookfield to maintain professional indemnity insurance with a run-off period of four years after issue of the Final Certificate[34] .

The standard form contract of sale

16. The standard form contract of sale to purchasers of the apartments, annexed to the design and construct contract, required Chelsea to cause the property and "the Common Property" to be finished in accordance with the schedule of finishes and "in a proper and workmanlike manner" before completion[35] . Chelsea was obliged to repair defects or faults in the common property due to faulty materials or workmanship of which written notice was served on it by the Corporation within seven months after the date of registration of the strata plan[36] . Notice of Special Faults, which were structural or required urgent attention or might cause danger to persons in the property or made the property uninhabitable, could be served by a purchaser[37] .

17. Basten JA said in his judgment in the Court of Appeal that there were no specific provisions in any of the contractual arrangements between Brookfield and Chelsea, and Chelsea and the purchasers of the lots, dealing with latent defects or limiting liability with respect to such defects[38] . There was, however, the qualification in cl 42.6(b) of the design and construct contract on the effect of the Final Certificate with respect to defects not apparent at the end of the Defects Liability Period.

The nature of the defects

18. It was conceded before the primary judge that it was reasonably foreseeable, at the time of construction, that if there were defects in the building, some of them might be latent at the time of registration of the strata plan[39] . His Honour observed that if the defects alleged by the Corporation existed, then many of them would properly be characterised as latent defects not readily detectable by any reasonable process of inspection[40] . So much can be assumed for present purposes. The question whether the defects existed and were latent and/or structural and/or dangerous would be a matter to be determined at trial if the appeal were to be dismissed.

The duty of care

19. The existence of a relevant duty of care is a necessary condition of liability in negligence. As this Court said in *Sullivan* v *Moody*[41] :

> "A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care."

20. Historically, duties of care were attached to particular categories of relationships. The search for "some larger proposition" covering

differing sets of circumstances was foreshadowed by Brett MR in *Heaven* v *Pender*[42] . Later, as Lord Esher MR, in *Le Lievre* v *Gould*[43] , he introduced what Lord Atkin characterised in *Donoghue* v *Stevenson* as a "notion of proximity" underpinning the existence of a duty of care. That "doctrine" was said by Lord Atkin to be reflected in his famous description of the "neighbour" in law to whom a duty of care is owed[44] . His generalisation, as refined in later decisions bearing with them the metaphor of "proximity", was restated in *Wyong Shire Council* v *Shirt*[45] :

> "prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant's position would foresee that carelessness on his part may be likely to cause damage to the plaintiff".

21. An extended concept of proximity was adopted in this Court as a criterion of the existence of a duty of care in the 1980s and until the beginning of this century[46] . It was used to identify categories of cases in which a duty of care arose under the common law of negligence, rather than as a test for determining whether the circumstances of a particular case brought it within such a category[47] . It was invoked in 1995 in *Bryan* v *Maloney*[48] , in which the Court held that the builder of a dwelling house owed a duty of care to a subsequent purchaser of the house, a breach of which, by careless construction giving rise to latent defects, would support an action in negligence for economic loss. Thereafter it became a metaphor under threat. McHugh J in *Perre* v *Apand Pty Ltd*[49] regarded it as already despatched[50] . In *Sullivan* v *Moody*, it was put to rest by the whole Court, which observed that despite its centrality for more than a century[51] :

> "it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established".

That was not to say, and the Court did not say, that its application in previous cases such as *Bryan* v *Maloney*, which was of a classificatory and conclusionary character, falsified the underlying judgments that the circumstances said to be indicative of "proximity" gave rise to a duty of care. As Basten JA observed in the Court of Appeal, "the factors which were apt to be included" in "the concept of 'proximity' as a touchstone of the existence of a duty of care … remain relevant"[52] .

22. Abstracting the reference to proximity in *Bryan* v *Maloney*, the decision adverted to factors adverse to the recognition of a duty of care for pure economic loss other than in special cases. The special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two[53] . The contract between the prior owner and the builder in that case was "non-detailed and contained no exclusion or limitation of liability"[54] . The subsequent owner would ordinarily be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner would be likely to assume that the building had been competently built and that the footings were adequate[55] . Those considerations may be seen as elements of the notion of "vulnerability", which has become an important consideration in determining the existence of a duty of care for pure economic loss. In this context, it refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct[56] .

23. It is in relation to vulnerability that there is a sharp distinction between *Bryan* v *Maloney* and the present case. That distinction is analogous to that made in the subsequent decision of this Court in *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd*[57] , which is discussed below. Before turning to *Woolcock*, the point should be made that there are special features of the present case, generated by the contractual and statutory matrix in which the duty of care is asserted, that give it an element of novelty not overcome by a straightforward application of precedent.

24. This Court in *Sullivan* v *Moody* eschewed any attempt at formulating a general test for determining the existence or

non-existence of a duty of care for the purposes of the law of negligence. As the Court said, different classes of case raise different problems, requiring "a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle"[58] . The development of the law of negligence had revealed "the difficulty of identifying unifying principles that would allow ready solution of novel problems"[59] .

25. Much legal reasoning in relation to novel cases can proceed by way of analogy, as McHugh J pointed out in *Crimmins* v *Stevedoring Industry Finance Committee*[60] . The advantage of the analogical approach appears from an observation by Professor Cass Sunstein quoted by McHugh J[61] :

> "[A]nalogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work. Thus judges who disagree on a great deal can work together far more easily if they think analogically and by reference to agreed-upon fixed points."

Reasoning by analogy should be conducive to coherence in the development of the law. Concerns about coherence may also inform the determination of the existence or non-existence of a duty of care in particular classes of case. As the Court said in *Sullivan* v *Moody*, the problems in determining the duty of care[62] :

> "may [sometimes] concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".

26. The reference to analogical reasoning directs attention to the decision in *Woolcock*. This Court held that an engineering company, which had designed inadequate foundations for a warehouse and office complex resulting in subsequent structural damage, did not owe a duty of care in respect of economic loss suffered by a subsequent purchaser of the complex. The case came to the Court on appeal from a decision of the Court of Appeal of the Supreme Court of Queensland, which had decided the matter on a case stated to that Court from a single judge[63] . It was decided on a restricted set of agreed and pleaded facts.

27. *Bryan* v *Maloney* was held not to support the plaintiff's claim. On the agreed and pleaded facts in *Woolcock*, the prior owner had exercised control over geotechnical investigations carried out by the engineering company[64] . There was no allegation of any assumption of responsibility by the engineering company or of known reliance by the prior owner[65] . There was no duty of care owed to the prior owner[66] .

28. In *Bryan* v *Maloney*, the existence of an anterior duty of care to the prior owner was supportive of a duty of care to the subsequent purchaser. Its existence overcame a "policy" concern that liability to the subsequent purchaser would be inconsistent with the defendant's legitimate pursuit of its freedom to protect its own financial interests by limiting its liability to the prior owner[67] . The building contract had left the way open for concurrent tortious liability to the prior owner. There was no disconformity, therefore, between the duty owed by the builder to the first owner and the duty asserted by the subsequent purchaser[68] . This Court in *Woolcock* did not decide whether such a disconformity would always deny the existence of a duty of care to a subsequent purchaser[69] . There is no reason to regard the existence, or non-existence, of an anterior duty of care to a prior owner as more than an important factor relevant to the existence of a duty of care in respect of pure economic loss to a subsequent purchaser.

29. The question whether the plaintiff in *Woolcock* was vulnerable, so as to attract a duty of care, could not be answered definitively in that case. The agreed and pleaded facts were insufficient to demonstrate vulnerability. Specifically[70] :

- It was not shown that the plaintiff could not have protected itself against the economic loss which it suffered.
- No warranty of freedom from defect was included in the contract entered into by the plaintiff in purchasing the complex.
- There was no assignment to the plaintiff by the prior owner of the prior owner's rights in respect of any claim for defects.

• There was nothing to demonstrate what could have been done to cast on to the engineering company the burden of the

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economic consequences of any negligence by it.
• There was nothing about whether the plaintiff could have obtained the benefit of terms of that kind in the contract.

In the end, *Woolcock* was not a "special" case in the sense in which that term was used in *Bryan* v *Maloney*.

30. The present appeal falls for decision against a background of prior decisions about classes of case in which a person performing a contract may have a concurrent duty of care to another contracting party, classes of case in which a party to a contract may owe a duty of care to a person who is not a party to the contract, classes of case involving pure economic loss, and classes of case in which the careless performance of a building contract has left latent defects in the building and thereby caused economic loss to a subsequent purchaser. Those decisions interact with each other but none is precisely applicable in this case. Consistently with the approach taken in *Woolcock* and, before that, in *Bryan* v *Maloney*, the determination of this appeal requires consideration of the salient features of the relationship between the Corporation and Brookfield, including whether Brookfield owed Chelsea a relevant duty of care and whether the Corporation was vulnerable in the sense discussed above.

Whether Brookfield owed a duty of care to the Corporation

31. When Brookfield entered into the design and construct contract with Chelsea, Chelsea was the owner of the parcel of land upon which the apartment block was to be constructed. It remained the registered proprietor of that parcel until it was subdivided into lots and common property when the strata plan was registered by Brookfield in November 1999. Upon that registration, the Corporation came into existence and became the legal owner of the common property. It had no contractual relationship with Brookfield or with Chelsea. Nevertheless, it held the common property as agent for Chelsea within the meaning of the Strata Freehold Act. It was effectively subject to Chelsea's control, albeit Chelsea's controlling rights and those of its successors in title to the strata lots were ceded to Park Hotel under the prior leasing arrangements.

32. The Corporation had a function under the standard form contract of sale whereby it could, within seven months of registration of the strata plan, serve written notice of defects or faults in the common property on Chelsea which would enliven Chelsea's contractual obligation to the lot owners to repair such defects and faults. No doubt control of the Corporation, which was effectively conferred on Park Hotel by the leases from the lot owners, enabled Park Hotel to require the Corporation to issue such notices. Chelsea, as initial owner of all of the lots, was at the outset the directing mind of the Corporation, albeit it had delegated its powers of direction to Park Hotel. The Corporation was controlled by Chelsea and Park Hotel, who were party to and therefore can be taken to have been fully apprised of the contractual arrangements and in particular the extent and limits of Brookfield's obligations and liabilities in relation to defects in the common property.

33. The responsibility assumed by Brookfield with respect to Chelsea, as initial owner of the lots, was defined in detail by the design and construct contract. Chelsea cannot be taken to have relied upon any responsibility on the part of Brookfield, and Brookfield assumed none, in relation to pure economic loss flowing from latent defects extending beyond the limits of the responsibility imposed on it by the contract. The statutory relationship between the Corporation and Chelsea as first owner meant that there was no duty of care owed to the Corporation as a proxy for Chelsea. The question that follows is whether there was a duty of care owed to the Corporation by virtue of its relationship to subsequent purchasers from Chelsea.

34. The purchasers of lots from Chelsea were effectively investors in a hotel venture under standard form contracts which were an integral part of the overall contractual arrangements. The standard form contract contained specific provisions relating to the construction of the building and Chelsea's obligations to undertake repairs. Those provisions have already been mentioned. This is not a case in which, for the purposes

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of the subsistence of a duty of care, the subsequent owners could be regarded as vulnerable. Nor, therefore, could the Corporation as their statutory "agent". The position of the subsequent owners and the interaction

of the contractual and statutory frameworks are antithetical to the proposition that Brookfield owed the Corporation the duty of care found to exist by the Court of Appeal.

35. Against that background, the relationship between Brookfield and the Corporation is not analogous to the relationship in *Bryan* v *Maloney* between the builder of a dwelling house and the downstream, arms-length purchaser of the house, who suffered economic loss by reason of latent defects in the construction. It is analogous, although not identical, to the position of the purchaser of the complex in *Woolcock*.

36. There was no duty of care in respect of pure economic loss flowing from latent defects owed by Brookfield to Chelsea. Nor was there a duty of care owed by Brookfield to the subsequent owners. There was therefore no duty of care owed to the Corporation. That conclusion means that the appeal must be allowed. It is fatal to the notice of contention and to the proposed cross-appeal. In so holding, I would also wish to associate myself with the observation by Hayne and Kiefel JJ that that conclusion does not depend upon any *a priori* assumption about the proper provinces of contract and tort.

Conclusion

37. The following orders should be made:

1. Appeal allowed.
2. Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 25 September 2013 and, in its place, order that the appeal to that Court be dismissed with costs.
3. Special leave to cross-appeal granted.
4. Cross-appeal treated as instituted and heard instanter and dismissed with costs.
5. First respondent to pay the appellant's costs of the appeal.

Hayne and Kiefel JJ:

The issue

38. The first respondent ("the Owners Corporation") claimed damages from the appellant ("the builder"). The Owners Corporation alleged that the builder owed it a duty of care in carrying out certain building works on land at Chatswood, New South Wales. The Owners Corporation alleged that, because the builder had breached that duty of care, the building had various latent defects in common property vested in the Owners Corporation and that, as a result, the Owners Corporation had suffered loss and damage. The Owners Corporation particularised that loss and damage as the cost of rectifying the defects and "the diminished value to the Building and the loss of rents and income during the period of and due to the rectifying of the defects".

39. Did the builder owe the Owners Corporation the alleged duty of care?

The decisions below and the appeal to this Court

40. In the Supreme Court of New South Wales, McDougall J held[71] that the builder did not owe the alleged duty and entered judgment for the builder. On appeal, the Court of Appeal of the Supreme Court of New South Wales held[72] that the builder owed the Owners Corporation "a duty to exercise reasonable care in the construction of the building to avoid causing [the Owners Corporation] to suffer loss resulting from latent defects in the common property vested in [the Owners Corporation], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable".

41. By special leave the builder appeals to this Court. The Owners Corporation applies for special leave to cross-appeal seeking orders providing for a larger duty of care than that found by the Court of Appeal. The builder's appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and the appeal to that Court dismissed with costs. The Owners Corporation should have special leave to cross-appeal but the cross-appeal should be dismissed with costs.

The essential facts

42. The building works were to construct “a mixed use retail, restaurant, residential and serviced apartments building” on the land. The builder undertook these works under a “design and construct” contract it made with a

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developer: Chelsea Apartments Pty Ltd (“the developer”). The contract obliged the builder to construct the building in general accordance with detailed plans and specifications for a contract price of more than $57 million. The contract incorporated detailed provisions regulating the performance and superintendence of the work. The contract provided for certain warranties by the builder about the work and for the builder to remedy defects or omissions in the work. It provided that the issue of a “final certificate” under the contract was evidence, subject to specified exceptions, that the works had been completed in accordance with the contract.

43. Before a final occupation certificate was granted by the relevant municipal council, a strata plan was registered in relation to that part of the building which was to be used for serviced apartments. Initially, the developer owned the lots in the strata scheme. The lots were later sold by the developer to different proprietors under standard sale contracts, the form of which was fixed by agreement between the developer and the builder. Those contracts obliged the developer, as vendor, to “cause the Building to be constructed in a proper and workmanlike manner” and made detailed provision about the repair of defects or faults (including defects or faults in the common property).

44. Upon registration of the strata plan, the Owners Corporation was created by operation of law[73] . The owners of the lots from time to time in the strata scheme constitute[74] a body corporate under the name of the Owners Corporation. The estate or interest of that body corporate in the common property is held[75] by the Owners Corporation as agent for the owner or owners of the lots the subject of the strata scheme. Initially, the Owners Corporation held the common property as agent for the developer as the owner of all of the lots. Now that the lots are owned by different proprietors, the Owners Corporation holds the common property as agent for those proprietors as tenants in common in shares proportional to their unit entitlements[76] . The Owners Corporation is bound[77] to properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation and to renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the Owners Corporation.

The damage

45. There may be a real and lively debate about whether the Owners Corporation itself suffered any loss as a result of defects in the common property. The better view may be that any loss constituted or occasioned by defects in the common property was suffered by the owners of the lots for whom the Owners Corporation held the common property as “agent”[78] . It is not necessary, however, to pursue that question.

46. Nor is it necessary to explore what follows from observing that, at the time the builder is alleged not to have taken reasonable care in the execution of the building works, the Owners Corporation did not exist. It is convenient to assume, without deciding, that nothing turns on this observation. It is sufficient to instead focus on whether the builder owed a duty of care to a subsequent owner of part of the building.

47. The nature of the damage suffered is important to resolving the issue about duty of care. The defects which the Owners Corporation identifies in the common property are not alleged to have caused any damage to person or property. Steps can be taken, therefore, to prevent damage to person or property. If the Owners Corporation has suffered damage, that damage is pure economic loss.

Duty of care to avoid pure economic loss?

48. Determination of whether, under the common law of Australia, the builder owed a duty of care to a subsequent owner of part of the building (in this case, the Owners Corporation) depends on applying the principles which have been established by the decisions of this Court. Immediately, it requires close attention to what this Court decided in *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd*[79] . No doubt *Woolcock*

Street must be read and understood in the light of the Court's earlier decisions including, in particular, *Bryan* v *Maloney*[80] . No party suggested, however, that *Woolcock Street* should be reopened. Hence, that decision must be the starting point for considering the issue in this appeal.

[140705]

Woolcock Street Investments Pty Ltd v CDG Pty Ltd

49. In *Woolcock Street*, six members of the Court held[81] that an engineering company which designed the foundations of a warehouse and office complex did not owe a subsequent purchaser of the building a common law duty of care to avoid economic loss. That decision was reached recognising[82] that similar questions had been considered by the courts of other jurisdictions and resolved by applying principles about recovery for negligently inflicted pure economic loss which differ from those which this Court has held are to be applied in Australia.

50. Four members of the Court observed[83] that the decision in *Bryan* v *Maloney* had depended upon an anterior demonstration that the builder owed a duty to take reasonable care to avoid economic loss to the original owner of the kind suffered by the subsequent purchaser. And the plurality further observed[84] that in *Woolcock Street* there had been neither reliance by the original owner on, nor an assumption of responsibility by, the engineering company. Hence, the plurality held[85] that the reasoning in *Bryan* v *Maloney* by which an original duty owed by the builder to the owner was extended to a subsequent purchaser did not apply.

51. The plurality founded[86] their conclusion that the engineering company did not owe the subsequent purchaser a duty of care on the proposition that the subsequent purchaser was not vulnerable to the economic consequences of the engineering company's negligence in designing the foundations. In the context, vulnerability was said to refer[87] to a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant. It is the question of vulnerability which, consistent with the decision in *Woolcock Street*, must determine the outcome of this appeal.

Matters that need not be considered

52. Before dealing with the issue of vulnerability, two other aspects of the matter, mentioned in argument, should be noted but then put aside from consideration.

53. First, it is not useful to examine particular decisions made in other jurisdictions about the tortious liability of a builder for economic loss occasioned by the negligent construction of a building without recognising that those decisions necessarily reflect the particular ways in which those jurisdictions have developed and applied principles about recovery for negligently caused pure economic loss. It was not submitted that this Court should revisit those principles as they have been developed by this Court.

54. Second, some argument was directed in this Court to the proper construction of the contract pursuant to which the builder built the building. In particular, there was debate about three aspects of that contract: the provisions which stated the builder's obligations; the provisions for superintendence of the work by a superintendent appointed by the developer; and the provisions about the defects liability period and the issuance of the final certificate. In addition, argument was directed to the proper construction of the standard form agreements for purchase of lots in the relevant strata scheme.

55. It will not be necessary to pursue the arguments about the proper construction of these provisions to their conclusion. It is enough to notice that the relevant parties made contracts for the construction of the building and for the subsequent sale of parts of the building which were contracts that could (and did) make provisions regulating the quality of what was to be received in return for payment of the price. The making of those contracts denies vulnerability. It is necessary to explain that conclusion.

Vulnerability?

56. It may be assumed, without deciding, that the developer and the purchaser of a lot from the developer relied on the builder to do its work properly. The purchaser of a lot could not check the quality of the builder's work as it was being done. Perhaps the developer was in no different position. (That would turn on what meaning is given to the superintendence provisions of the developer's contract with the builder.) The Owners Corporation was in no better position to check the quality of the builder's work as it was being done than the original purchaser of a lot. Because these parties could not check the

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quality of what the builder was doing, it can easily be said that each relied on the builder to do its work properly.

57. Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability, but it is not a sufficient element. As noted earlier, vulnerability is concerned with a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.

58. It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests[88] . The builder did not owe the Owners Corporation a duty of care.

Contract and tort

59. The conclusion just expressed denies the existence of a duty of care. The conclusion does not depend, however, upon making any a priori assumption about the proper provinces of the law of contract and the law of tort. As McHugh J pointed out[89] in *Woolcock Street*, "[t]he decisions in *Hedley Byrne* [*& Co Ltd* v *Heller & Partners Ltd*[90]], *Donoghue* [v *Stevenson*[91]], *White* [v *Jones*[92]] and *Hill* [v *Van Erp*[93]] … make it difficult to argue that claims in negligence for pure economic loss should be excluded merely because such claims may outflank or undermine fundamental doctrines of the law of contract". And as McHugh J also observed[94] , this Court rejected in *Bryan* v *Maloney* "the notion that in Australia contract and tort were so neatly compartmentalised that it would be an error to give a remedy in tort for economic loss". That rejection manifests the necessary premise for earlier decisions of this Court about liability for pure economic loss, such as *Mutual Life & Citizens' Assurance Co Ltd* v *Evatt*[95] , as well as later decisions like *Perre* v *Apand Pty Ltd*[96] .

60. Nor does the conclusion about absence of vulnerability depend upon detailed analysis of the particular content of the contracts the parties made. As in *Woolcock Street*[97] , it is not necessary to decide in this case whether disconformity[98] between the obligations owed to the original owner under the contract and the duty of care allegedly owed to the subsequent owner would necessarily deny the existence of that duty. It may again be observed, as it was in *Woolcock Street*[99] , that in *Bryan* v *Maloney* there was the *absence* of disconformity of that kind. The absence of disconformity was an essential step in the reasoning in *Bryan* v *Maloney*. That step is not available in this case.

Conclusion

61. The appeal to this Court should be allowed. The first respondent should pay the appellant's costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside and, in their place, there should be orders that the appeal to that Court is dismissed with costs. The Owners Corporation should have special leave to cross-appeal; the cross-appeal should be treated as instituted and heard instanter and dismissed with costs.

Crennan, Bell And Keane JJ:

62. The first respondent, which is conveniently referred to as "the respondent"[100] , is the owners corporation in respect of the common property in a strata-titled serviced apartment complex in Chatswood, New South Wales. The appellant built the complex pursuant to a contract with a developer, who owned the land on which it was built.

63. The respondent brought proceedings against the appellant in the Supreme Court of New South Wales to recover damages for the cost of repairing what were said to be latent defects in the common property of the serviced apartment complex. The respondent contended that the appellant was liable in negligence for breach of a duty "to take reasonable care to avoid a reasonably foreseeable economic loss to the [respondent] in having to make good the consequences of latent defects caused by the building's defective design

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and/or construction."[101] The respondent's contention was rejected[102] at first instance, but was upheld[103] (albeit subject to limitations presently contested by the respondent) by the Court of Appeal of New South Wales.

64. The Court of Appeal proceeded to its conclusion on the basis that the duty of care propounded by the respondent matched an equivalent tortious duty of care owed by the appellant to the developer of the serviced apartment complex. The appellant contended that the Court of Appeal had erred in supplementing the appellant's obligations to the developer by adding a tortious duty equivalent to that propounded by the respondent: the appellant's obligations to the developer as to the quality of the work were comprehensively stated in the contract pursuant to which the complex was built. The respondent disputed the contention that it was not permissible to supplement the appellant's contractual obligations to the developer in this way, and argued that, in any event, imposing an equivalent tortious duty in favour of the developer was not an essential step on the path to holding the appellant liable in negligence to the respondent.

65. To the latter contention the appellant replied that dispensing with the need for an equivalent liability on its part to the developer, for whom it built the complex, would reduce the law to incoherence, in that, in relation to defects in the quality of construction, a builder of a building may find itself potentially liable in tort to every subsequent owner of the building and yet not be liable to the party for whom the building was originally constructed.

66. The appellant also contended that the contracts pursuant to which the owners of apartments acquired their rights in the common property afforded those owners, and the respondent as their agent, such protection against the risk of economic loss attributable to defects in construction that the owners and the respondent were not relevantly vulnerable to the appellant, for the purposes of the law of negligence, in respect of the risk of economic loss by reason of such defects.

67. The appellant's contentions should be accepted. It is of critical importance in this regard that, as was common ground between the parties, the loss for which the respondent claimed damages is truly characterised as economic loss. The respondent's claim is based on the failure of the purchasers of the apartments to get value for money from the developer rather than on the appellant's causing damage to the respondent's property. One difficulty with the respondent's claim is that the respondent itself paid nothing for the common property: it suffered no "loss" arising out of the acquisition of the common property. And to say that the common property, for which it paid nothing, is less valuable to it by the amount which it must expend to repair it, is distinctly not to show that any act or omission on the part of the appellant caused the respondent's assets to be diminished[104] . As Stanley Burnton LJ said in *Robinson* v *P E Jones (Contractors) Ltd*[105] :

> "the crucial distinction is between a person who supplies something which is defective and a person who supplies something (whether a building, goods or a service) which, because of its defects, causes loss or damage to something else. …
>
> I do not think that a client has a cause of action in tort against his negligent accountant or solicitor simply because the accountant's or solicitor's advice is incorrect (and therefore worth less than the fee paid by the client). The client does have a cause of action in tort if the advice is relied upon by the client with the result that his assets are diminished."

68. If that preliminary difficulty is put to one side on the basis that the respondent acquired the common property as a proxy for the purchasers of apartments who are disappointed with the bargains they made with the developer, a substantial difficulty remains. The circumstance that economic loss of this kind is a foreseeable consequence of a want of reasonable care by the appellant is not of itself sufficient to make the loss compensable in negligence, even where acceptance of the claim will not give rise to indeterminate liability[106] .

69. The expansive view of the appellant's obligations to the respondent which was upheld by the Court of Appeal in this case is not supported by the decision in *Bryan* v *Maloney*[107] ; and it does not accord with the decision of this Court in *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd*[108] . This Court's decision in *Bryan* v *Maloney* does not sustain the proposition that a builder that breaches its contractual obligations to the first owner of a building is to be held responsible for the consequences of what is really a bad bargain made by subsequent purchasers of the building. To impose upon a defendant builder a greater liability to a disappointed purchaser than to the party for whom the building was made and by whom the defendant was paid for its work would reduce the common law to incoherence[109] . Moreover, to hold that a subsequent purchaser of a building is vulnerable to the builder so far as the risk of making an unfavourable bargain for its acquisition is concerned would involve a departure from what was held by this Court in *Woolcock Street Investments*[110] .

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The commercial background

70. The serviced apartment complex was constructed by the appellant as part of a transaction between Chelsea Apartments Pty Ltd ("the developer") and companies in the Stockland Group ("Stockland"). The development involved the construction of a 22-storey building, with two major components, the serviced apartment complex being floors one to nine, and residential apartments being floors 10 to 22.

71. The respondent is the owners corporation in respect of the serviced apartment lots on floors one to nine.

72. Pursuant to the terms of a Deed of Master Agreement dated 11 August 1997 ("the Master Agreement"), the developer, who was the registered proprietor of the land on which the building was to be constructed, agreed with Stockland to design and construct the building and then to lease apartments on certain floors to a Stockland subsidiary, Park Hotel Management Pty Ltd ("Park"), to be operated by Park as serviced apartments[111] . The apartments were to be sold to investors, subject to the leases granted to Park; and Park would operate a business of servicing those apartments under the "Holiday Inn" brand[112] .

73. Under the Master Agreement, the developer warranted the quality of its building work to Stockland[113] .

74. On 5 November 1997, the developer and the appellant entered into a design and construct subcontract ("the D&C contract") for the construction of the building for the sum of $57,539,000. It was common ground that the D&C contract was negotiated between sophisticated and experienced parties at arms' length and on an equal footing[114] .

The D&C contract

75. The D&C contract contained detailed provisions with respect to the quality of the work to be performed by the appellant as "Contractor" for the developer as "Principal".

76. Clause 3.1 of the D&C contract provided that "[t]he Contractor shall execute and complete the work under the Contract in accordance with the requirements of the Contract."

77. Clause 4 of the D&C contract provided relevantly:

> **"4.1 Contractor's Warranties**
>
> Without limiting the generality of Clause 3.1, the Contractor warrants to the Principal that the Contractor—

(a) … shall exercise due skill, care and diligence in the execution and completion of the work under the Contract;
…
(e) shall execute and complete the work under the Contract in accordance with the Design Documents so that the Works, when completed, shall—

(i) be fit for their stated purpose; and
(ii) comply with all the requirements of the Contract and all Legislative Requirements."

78. Clause 30 of the D&C contract provided relevantly:

"30.1 Quality of Material and Work

The Contractor shall use the materials and standards of workmanship required by the Contract. In the absence of any requirement to the contrary, the Contractor shall use suitable new materials and proper and tradesmanlike workmanship.

…

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30.3 Defective Material or Work

If the Superintendent discovers material or work provided by the Contractor which is not in accordance with the Contract, the Superintendent shall as soon as practicable notify the Contractor. The Superintendent may direct the Contractor—

…
(c) to … reconstruct, replace or correct the material or work; or
…

The Superintendent may direct the times within which the Contractor must commence and complete the … reconstruction, replacement or correction.

…

30.6 Generally

…

Nothing in Clause 30 shall prejudice any other right which the Principal may have against the Contractor arising out of the failure of the Contractor to provide material or work in accordance with the Contract."

79. Clause 55 of the D&C contract obliged the appellant to:

"(a) cause the Building to be constructed in general accordance with the Development Consent (including, without limitation, the plans and specifications in the Development Application);
(b) cause the Serviced Apartments Parcel to be constructed in general accordance with the Serviced Apartments Floor Plan;
(c) cause the Serviced Apartments Parcel to be finished in general accordance with the Serviced Apartments Finishes; and
(d) install in each of the Serviced Apartments the FF&E Package (as amended by the Trade Off List) relevant to the particular Serviced Apartments."

80. The D&C contract provided for a Defects Liability Period. In this regard, cl 37 provided that the appellant would be liable to rectify construction defects for a period of 52 weeks commencing from the date of practical completion[115] .

81. Clause 31 of the D&C contract made provision for the Superintendent to test any material or work at any time before the expiry of the Defects Liability Period. To this end the Superintendent was authorised by

cl 31.2 to direct that any part of the work under the contract shall not be "covered up or made inaccessible without the Superintendent's prior approval."

82. Clause 42.6 provided for the Superintendent, at the expiry of the Defects Liability Period, to issue to the developer a "Final Certificate" of "the amount which, in the Superintendent's opinion, is finally due from the Principal to the Contractor or from the Contractor to the Principal arising out of the Contract or any alleged breach thereof."

83. Clause 42.6 continued:

> "Unless either party, either before the Final Certificate has been issued or not later than 21 days after the issue thereof, serves a notice of dispute … the Final Certificate shall be evidence that the Works have been completed in accordance with the terms of the Contract … except in the case of—
>
> (a) fraud, dishonesty or fraudulent concealment relating to the work under the Contract or any part thereof or to any matter dealt with in the said Certificate;
> (b) any defect (including omission) in the Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate".

84. The effect of cl 42.6(b) was that the developer had contractual protection against the appellant in respect of the expense of repairing latent defects in the building after the Defects Liability Period had expired.

85. The D&C contract also provided for the terms on which the developer would offer individual lots for sale to investors. Annexed to the D&C contract was a form of standard contract for sale, which conferred on each purchaser of a lot specific contractual rights in relation to defects in the property, including the common property[116] .

The contracts for sale

86. By cl 26.1 of the standard form contract for sale the purchaser represented and warranted that it "did not rely on any

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representations or warranties about the subject matter of this contract … except those representations and warranties set out in this contract", and had "obtained appropriate independent advice on and is satisfied about … the purchaser's obligations and rights under this contract".

87. Clause 32.1 of the standard form contract set out the purchaser's rights in respect of the quality of construction. In particular, the developer was obliged "[b]efore completion … [to] cause the property and the Common Property to be finished as specified in the Schedule of Finishes … in a proper and workmanlike manner."

88. Clause 32.6 obliged the developer to:

> "repair in a proper and workmanlike manner, at the [developer's] expense, within a reasonable time after the applicable notice has been served by the purchaser, any defects or faults in the property due to faulty materials or workmanship (including Special Faults but excluding minor shrinkage and minor settlement cracks) of which notice is served by the purchaser within 6 months after completion. The purchaser may not serve notice of defects or faults other than Special Faults on more than 3 occasions."

89. Clause 32.7 obliged the developer to:

> "repair in a proper and workmanlike manner, at the [developer's] expense, within a reasonable time after the applicable written notice has been served on the [developer], any defects or faults in the Common Property due to faulty materials or workmanship … of which written notice is served on the [developer] by the Owners Corporation within 7 months after the date of registration of the Strata Plan."

The strata scheme legislation and the owners corporation

90. After a construction period of approximately two years, the serviced apartments were completed. On 11 November 1999, the appellant registered the strata plan for the serviced apartments. By virtue of that registration, the respondent was brought into existence[117] and the common property in the serviced apartment complex was vested in it[118] .

91. The developer, as the registered proprietor of the serviced apartment lots, sold them to investors subject to the leases which enabled them to be deployed by Park in its "Holiday Inn" business.

92. Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW) ("the SSFD Act") provides:

> "The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:
>
> > (a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned — for that proprietor or those proprietors, or
> > (b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned — for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots."

93. Section 61(1)(a) of the *Strata Schemes Management Act* 1996 (NSW) ("the SSM Act") provides that "[a]n owners corporation has, for the benefit of the owners … the management and control of the use of the common property of the strata scheme".

94. Section 62(1) of the SSM Act provides that "[a]n owners corporation must properly maintain and keep in a state of good and serviceable repair the common property".

The proceedings

95. The respondent commenced an action against the appellant in 2008[119] to recover the cost of rectifying defects found in the construction of the common property of the serviced apartment complex. Initially, the respondent also claimed that the appellant was liable for breaching statutory warranties relating to the quality of workmanship under Pt 2C of the *Home Building Act* 1989 (NSW), but that claim was resolved before trial[120] .

96. The respondent particularised the defects of which it complained[121] . The primary judge accepted that "if the defects alleged exist, then many of them are properly to be characterised as latent defects"[122] . For present purposes, it is necessary to note only that of the five categories

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of alleged defects, the complaint made by the respondent in relation to two categories, namely, the steel lintels and windows, was that the work does not comply with the specifications under the D&C contract. The complaint in respect of the third category was that "[t]he external render to the façade of the building is defective." The complaint in respect of the fourth category, namely, the sheet metal cowlings to the fire services shutters, is that they "were fabricated and coated with materials which were unsuitable for exterior exposure." The complaint in respect of the fifth category of defects, namely, the water leak from the spa, is that there were "defects to the waste connection and inadequate waterproofing to the enclosure below the spa."

97. Whether such defects as may be proved to exist are structural or likely to render the building dangerous to person or property or uninhabitable is an issue contested by the appellant. It has not yet been decided.

The decision of the primary judge

98. The parties asked the primary judge (McDougall J) to determine the question whether the appellant owed the respondent the duty propounded by the respondent separately from the other issues in the proceedings.

99. On 10 October 2012, the primary judge answered the separate question, holding[123] that the appellant did not owe the respondent the duty of care propounded by the respondent. In consequence, his Honour gave judgment for the appellant in the action.

100. His Honour held[124] that "[w]here the parties have negotiated in full their rights and obligations, there is no reason for the law to intervene by imposing some general law duty of care." His Honour concluded that the duty of care propounded by the respondent was not supported by this Court's decision in *Bryan* v *Maloney*[125] ; and, given the difficulties of principle involved in imposing on the appellant what Brennan J in *Bryan* v *Maloney* referred to as a transmissible warranty of quality[126] , any alteration to the position at common law should be undertaken by the legislature[127] .

The decision of the Court of Appeal

101. The respondent appealed to the Court of Appeal of the Supreme Court of New South Wales. The Court of Appeal (Basten JA, Macfarlan and Leeming JJA agreeing) allowed[128] the appeal.

102. Basten JA proceeded on the basis "that no general law duty of care can arise with respect to successive owners unless there [is] a general law duty owed to the original owner with whom the builder contracted to construct the building."[129] His Honour concluded[130] that the appellant owed the developer a duty under the law of tort to take reasonable care that it should not suffer economic loss concurrently with the contractual duties which arose under the D&C contract. In this regard, his Honour held[131] that the developer was "vulnerable" to the appellant in the sense that it was reliant on the appellant's "expertise, care and honesty … in performing its obligations under the [D&C] contract."

103. Basten JA rejected the argument that the contractual arrangements between the appellant and the developer dealt comprehensively with their relationship so as to leave no room for the imposition of a duty of care in tort[132] . His Honour held that the D&C contract:

> "did not purport expressly, or by necessary implication, to exclude any liability for defects or omissions which might arise otherwise than during [the Defects Liability Period], whether under contract or under the general law."[133]

104. It may also be noted here that Macfarlan JA, melding a number of lines of argument, including a reference to this Court's decision in *Astley* v *Austrust Ltd*[134] , said[135] :

> "The existence of a contract between the developer and a builder for the latter to construct a building does not preclude the existence of a duty of care owed by the builder to the developer as similar contractual and tortious rights may exist concurrently[136] . Further, it was not suggested in *Astley* that proof of the existence of a tortious duty of care concurrent with contractual obligations was dependent upon proof by the party to whom it was owed that it could not have negotiated with the party subject to the duty for contractual protection against the loss that came to be suffered. This being the case, it is difficult to see why a successor in title, or
>
> [140712]
>
> a party otherwise related to that to whom the duty of care was owed, should have to show that it could not have negotiated contractual protection in order to establish that a duty of care was owed to it."

105. Basten JA went on to conclude[137] that the appellant owed the propounded duty to the respondent, as successor in title to the developer. His Honour reasoned that, as the respondent was at least as vulnerable as the developer to the risk of economic loss from latent defects, so the respondent was owed a duty in tort equivalent to that held to be owed by the appellant to the developer. Basten JA said[138] :

> "[the respondent] was vulnerable with respect to latent defects in the same way that the developer was. Indeed, its position was weaker than that of the developer, which may have had some opportunity to carry out inspections during the course of the construction and before the defective materials were no longer examinable."

106. Basten JA summarised his conclusions[139] :

> "Accepting that the general law does not impose a general duty of care to avoid economic loss, and that the decision in *Bryan* v *Maloney* does not in terms dictate the outcome in the present case, there are significant features which militate in favour of the existence of a duty of care covering loss resulting from latent defects which (a) were structural, (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made them uninhabitable. The existence of a duty expressed in those terms should be accepted."

107. It is to be noted that Basten JA confined[140] the appellant's duty so that the appellant was bound only to avoid causing economic loss in relation to those defects which were "dangerous" in the sense that, if left unrepaired, they could cause personal injury or damage to property or made the premises uninhabitable. The respondent had not argued for a duty of care confined in this way; and consequently, in this Court, the respondent contended that the duty owed to it by the appellant should not be qualified or limited as indicated by Basten JA.

108. Macfarlan and Leeming JJA made some additional observations upon which the respondent was disposed to rely in this Court in support of its argument that it was unnecessary that there be a duty owed by the appellant to the developer equivalent to the duty propounded by the respondent against the appellant. In this regard, Macfarlan JA said[141] :

> "[T]he [appellant] argued that the [respondent] did not show that it had been vulnerable, in the sense that it had been unable to protect itself from the consequences of the [appellant's] lack of care[142] , because it did not show that it could not have bargained with the developer for contractual protection. One answer to this argument is that the [respondent] only came into existence on registration of the strata plan and was not a conventional successor in title which acquired the property in question under a contract with the previous owner (here the developer)."

109. Leeming JA referred to the SSM Act and to s 20 of the SSFD Act, adding[143] :

> "There is nothing antithetical in those provisions to a duty of care owed by the builder to that special creature of statute which is intended by builder and developer to come into existence following the performance of the builder's obligations. The legislative scheme is such that the owners' corporation is much more vulnerable than, say, a company which owns land on which is to be erected a company title building. To the contrary, what would be strange, to my mind, would be an imputed legislative intention to deny to that corporation the ordinary rights legal persons enjoy at common law."

110. In the upshot, the Court of Appeal set aside the orders made by the primary judge and answered[144] the separate question posed by the parties by holding that the appellant owed the respondent a duty:

> "to exercise reasonable care in the construction of the building to avoid causing the [respondent] to suffer loss resulting from latent defects in the common property vested
>
> [140713]
>
> in the [respondent], which defects (a) were structural, or (b) constituted a danger to persons or property in, or in the vicinity of, the serviced apartments, or (c) made those apartments uninhabitable."

The appeal to this Court

111. The appellant appealed to this Court pursuant to special leave granted on 14 March 2014.

112. The respondent filed a notice of contention to the effect that the Court of Appeal had erred in restricting the scope of the appellant's duty of care to latent defects that were "dangerous". The respondent also sought to cross-appeal on the basis that the appellant owed the respondent the duty propounded by it even if the appellant did not owe an equivalent duty to the developer.

The appellant's submissions

113. The appellant's first submission was that the appellant's obligations to the developer were so comprehensively stated in the D&C contract that there was no room for the imposition by the law of tort of a concurrent duty of care to the developer.

114. The appellant's second submission was that, whatever its obligations to the developer, it did not owe the respondent the duty of care propounded by it.

The respondent's submissions

115. The respondent submitted that the duty of care propounded by it does not depend on finding an equivalent duty of care owed by the appellant to the developer. The respondent argued that, in determining whether the appellant owed the respondent a duty of care, the correct approach was to focus on the salient features of the relationship between the appellant and the respondent separately from the relationship between the appellant and the developer. The salient features on which the respondent relied were the appellant's power of administration of the D&C contract (which gave the appellant control of the developer's rights and expectations), the expertise of the appellant in business matters, the commercial cost to the developer of monitoring the construction work, and, based on the foregoing, general notions of assumption of responsibility and reliance.

116. The respondent also embraced the point made by Macfarlan and Leeming JJA that, because the respondent did not come into existence until the registration of the strata plan, it was vulnerable to the risk of loss from latent defects because it had no opportunity to take steps to protect itself against the financial consequences of latent defects in the construction of the common property.

117. In this regard, the respondent emphasised that cl 65 of the D&C contract obliged the appellant to register the strata plan which brought the respondent into existence, so that from the moment of its coming into existence it was obliged by s 62(1) of the SSM Act to rectify defects in the common property as they became apparent. Because the respondent had no opportunity to accept or reject the vesting in it of the common property and to protect itself from the expense of having to make good any defects in the construction, it should be held, so it was said, that the respondent was relevantly vulnerable to a risk of loss in respect of which the appellant owed it the propounded duty. This was said to be so irrespective of whether the appellant owed an equivalent duty to the developer.

118. In the alternative, the respondent submitted that there was an assumption by the appellant of liability to the developer for latent defects, and reliance by the developer on the appellant, which gave rise to a duty in tort equivalent to the duty propounded by the respondent.

119. In addition, and contrary to the conclusion of the Court of Appeal, the respondent contended that, in establishing the nature and scope of the propounded duty, it is the significance of the loss in value of the building or the expenditure necessary to make good the defects that is germane, rather than the characterisation of the defects as "dangerous".

120. Before addressing these submissions directly, it is desirable to make some general observations in relation to the protection afforded to economic interests by the common law.

The common law and economic loss

121. Economic interests are protected by the law of contract and by those torts that are usually described as the economic torts, such as

[140714]

deceit, duress, intimidation, conspiracy, and inducing breach of contract[145] . Generally speaking, the common law protects the interest of a party in having its contractual expectations met by the law of contract[146] . The law of negligence developed as part of the common law in this context. As Blackmun J said in delivering the opinion of the Supreme Court of the United States in *East River Steamship Corp* v *Transamerica Delaval Inc*[147] , "the failure of the purchaser to receive the benefit of its bargain [is] traditionally the core concern of contract law."

122. The causes of action known as the economic torts were established in the common law before the decision of the House of Lords in *Donoghue* v *Stevenson*[148] . In *Allen* v *Flood*[149] in 1897, the House of Lords held that a person may deliberately cause economic harm to another without liability in tort provided that the defendant was not part of a conspiracy and that the means employed to inflict the harm were not

themselves unlawful. Unintentionally inflicted economic loss was held to be compensable by an action for negligence only after the decision in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd*[150] . Until then, the common law of tort passed the burden of economic loss from plaintiff to defendant only where the defendant intentionally inflicted harm on the plaintiff by conduct which was unlawful for reasons other than that it was likely to, and did, cause economic loss[151] . And even then, the expanded liability for economic loss established by *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* depended upon proof of the fact of assumption of responsibility by a person giving advice to another, and that other having relied upon the advice.

123. The respondent sought to rely upon the decision of this Court in *Voli* v *Inglewood Shire Council*[152] . That case establishes that the appellant may have been liable in damages for physical injuries to third parties resulting from defective work performed in the course of its contract with the developer. But the respondent's argument fails to observe the crucial distinction between physical injury and economic loss. Under the common law, "[t]he former is protected by the law even when, in similar circumstances, the latter is not."[153]

124. A cause of action in negligence does not arise unless and until the plaintiff suffers damage[154] . Damage is the gist of the cause of action in negligence[155] . As Brennan J said in *John Pfeiffer Pty Ltd* v *Canny*[156] , a "duty of care is a thing written on the wind unless damage is caused by the breach of that duty." It is of critical importance to appreciate that the loss for which the respondent seeks damages is the expense which it is obliged to incur as a result of the emergence of latent defects after its acquisition of the common property. It was common ground that this expense is properly understood as a species of economic loss as distinct from damage to its property. The gist of the respondent's cause of action is that the interest in the common property it acquired from the developer was not as valuable as it should have been if the purchasers had got value for their money.

125. Quite apart from "the traditional common law approach" reflected in the maxim "caveat emptor"[157] , the loss incurred by a purchaser of a building who, it turns out, has paid more for the building than it should have, is significantly different from a liability in the owner to third parties who have suffered personal injuries or damage to their property as a result of a defect in the building. An owner who is, or should presumably be, aware of a defect in a building may incur liability to third parties injured by the defect because the owner decided not to incur the expense of repairing the defect in the building. The decision which attracts that liability will usually not be one to which the negligent builder has contributed[158] .

126. These considerations were reflected in the observations of McPherson JA in *Fangrove Pty Ltd* v *Tod Group Holdings Pty Ltd*[159] that the common law maintains the distinction between the protection afforded to personal or property interests and economic interests because the common law "values the physical integrity of a person at a level well above the interests of commerce", and because of "the capacity of those who engage in commerce to protect themselves against the kind of loss that the plaintiff sustained here." These observations accord with this Court's decision in *Woolcock Street Investments*.

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Woolcock Street Investments

127. In *Woolcock Street Investments*[160] , Gleeson CJ, Gummow, Hayne and Heydon JJ accepted that the general rule of the common law is that damages for economic loss which is not consequential upon damage to person or property are not recoverable in negligence even if the loss is foreseeable. Their Honours said:

> "In *Caltex Oil (Australia) Pty Ltd* v *The Dredge 'Willemstad'*[161] , the Court held that there were circumstances in which damages for economic loss were recoverable. In *Caltex Oil*, cases for recovery of economic loss were seen as being exceptions to a general rule, said to have been established in *Cattle* v *Stockton Waterworks*[162] , that even if the loss was foreseeable, damages are not recoverable for economic loss which was not consequential upon injury to person or property."

128. In *Woolcock Street Investments*[163] , the plurality noted that the exception to the general rule for negligent misstatement recognised in cases such as *Mutual Life & Citizens' Assurance Co Ltd* v *Evatt*[164]

and *Shaddock & Associates Pty Ltd* v *Parramatta City Council [No 1]*[165] depends on proof of an assumption of responsibility by the defendant and known reliance on the defendant by the plaintiff.

129. In *Woolcock Street Investments*[166] , *Bryan* v *Maloney* was explained as an example of a decision based on "notions of assumption of responsibility and known reliance." The plurality said[167] that *Bryan* v *Maloney*:

> "depended upon considerations of assumption of responsibility, reliance, and proximity. Most importantly, [the principles that were engaged] depended upon equating the responsibilities which the builder owed to the first owner with those owed to a subsequent owner."

130. Further in this regard, the plurality in *Woolcock Street Investments*[168] noted that in decisions such as *Perre* v *Apand Pty Ltd*[169] , *Hill* v *Van Erp*[170] and *Esanda Finance Corporation Ltd* v *Peat Marwick Hungerfords*[171] , the concept of vulnerability could be invoked as the rationale explaining the exceptions to the general rule. Vulnerability, in this field of discourse, is concerned not only with the reasonable foreseeability of loss if reasonable care is not taken by the defendant, but also, and importantly, with the inability of the plaintiff to take steps to protect itself from the risk of the loss. Their Honours held[172] that the concept of vulnerability did not afford a basis for holding the defendant liable in that case because the facts of the case did:

> "not show that the appellant could not have protected itself against the economic loss it alleges it has suffered. It is agreed that no warranty of freedom from defect was included in the contract by which the appellant bought the land, and that there was no assignment to the appellant of any rights which the vendor may have had against third parties in respect of any claim for defects in the building. Those facts describe what did happen. They say nothing about what could have been done to cast on the respondents the burden of the economic consequences of any negligence by the respondents."

131. To similar effect McHugh J said[173] :

> "The first owners and subsequent purchasers of commercial premises are usually sophisticated and often wealthy investors who are advised by competent solicitors, accountants, architects, engineers and valuers. In the absence of evidence, this Court must assume that the first owner of commercial premises is able to bargain for contractual remedies against the builder. It must also assume that a subsequent purchaser is able to bargain for contractual warranties from the vendor of such premises."

132. These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort[174] .

133. Statutory provisions may supplement the common law of contract by providing for special protection to identified classes of purchasers on the ground, for example, that they may not be expected to be sufficiently astute to protect their own economic interests.

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Part 2C of the *Home Building Act* 1989 (NSW) is an example of such a statutory regime.

134. By enacting the scheme of statutory warranties, the legislature adopted a policy of consumer protection for those who acquire buildings as dwellings. To observe that the *Home Building Act* does not cover claims by purchasers of serviced apartments is not to assert that the Act contains an implied denial of the duty propounded by the respondent. Rather, it is to recognise that the legislature has made a policy choice to differentiate between consumers and investors in favour of the former. That is not the kind of policy choice with which courts responsible for the incremental development of the common law are familiar[175] ; and to the extent that deference to policy considerations of this kind might be seen to be the leitmotif of this Court's decision in *Bryan* v *Maloney*, the action taken by the New South Wales legislature served to relieve the pressure, in terms of policy, to expand the protection available to consumers.

Bryan v Maloney

135. It might be said that this Court's decision in *Bryan* v *Maloney* is distinguishable from the present case because it was concerned with the construction of a dwelling house rather than a commercial investment. But this distinction was not said to be material by either party in this Court. That is understandable, given that the distinction between purchases of buildings for domestic and commercial purposes is an unstable one (at least in the absence of statutory definition), because its application means that liability is apt to come and go depending on the use intended for a building by its successive purchasers[176] .

136. The material distinctions between the present case and *Bryan* v *Maloney* lie, first, in the detailed prescriptions of the D&C contract between the appellant and the developer, in contrast to the simple obligation in *Bryan* v *Maloney* between the builder and the original owner to exercise reasonable skill and diligence in the construction of the dwelling; and, secondly, in the express promises in cll 32.6 and 32.7 of the sales contracts, in contrast to the situation in *Bryan* v *Maloney*, where there was no promise as to quality given to Mrs Maloney when she acquired the dwelling.

137. As to the first of these grounds of distinction, in *Bryan* v *Maloney*[177] the builder's obligations as to the quality of design and construction were not expressed in the specific and detailed provisions to be found in the D&C contract. That being so, it could also be said that the relationship between the builder and the original owner in *Bryan* v *Maloney* was:

> "characterized by the kind of assumption of responsibility on the one part (ie the builder) and known reliance on the other (ie the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss."[178]

138. A conclusion that the builder owed to the first owner obligations equivalent in content to the tortious duty asserted by the subsequent owner was apparently thought to lessen the force of the objection to imposing a more onerous obligation on a builder in favour of the subsequent owner than was owed by the builder to the person for whom it agreed to carry out the building work and by whom it was paid[179] . In *Woolcock Street Investments*[180] , the plurality noted that:

> "In *Bryan* v *Maloney*, it was found that there was no disconformity between the duty owed to the original owner and the duty owed to the subsequent owner. As Toohey J said[181] , that case was 'uncomplicated by anything arising from the contract between the appellant and Mrs Manion' (the original owner)."

139. In this case, by contrast, there was no substantial equivalence between the obligations of the appellant to the developer and the duty propounded by the respondent. That may be seen by a consideration of the terms of the contract between the appellant and the developer to which reference will be made in the next section of these reasons.

140. As to the second ground of distinction noted above, in the present case each purchaser from the developer exercised its contractual wisdom to bargain for protection against the risk of defects in the work. Purchasers of units in the serviced apartment complex from the developer, and the respondent, were protected by reason of the developer's promises

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in cll 32.6 and 32.7 of the sales contracts against the risk of economic loss because of defects of quality. It is true that these provisions did not protect purchasers or the respondent against the possibilities that the developer would not be of sufficient substance to meet the liability or that any defect would not be discovered within time to make a claim under the warranty. But as to these possibilities, the appellant had nothing to do with the purchaser's decision to accept the value of the developer's warranty or with the decision by the purchaser not to investigate for defects. Had a purchaser not been satisfied that its investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing elsewhere. As McHugh J said in *Woolcock Street Investments*[182] :

> "A commercial building is constructed or bought because it is perceived to be a suitable vehicle for investment. … [N]o prudent purchaser would contemplate buying a building without determining whether it has existing or potential construction defects. Knowledge of its defects, actual or potential, is central to any evaluation of its worth as an investment. In so far as risks are uncertain or unknown, the prudent purchaser will factor the risk into the price or obtain contractual protections or, if necessary, walk away from the negotiations."

The obligations of the appellant to the developer

141. Basten JA held that the developer was "vulnerable in the relevant sense" to the appellant. In this regard, his Honour said[183] :

> "The defects, so far as one can tell, do not involve complaints about the design stage of the project, but rather the execution of the building works. There was a superintendent appointed under the design and construct contract, but there can be no doubt that the developer relied upon the expertise, care and honesty of the builder in performing its obligations under the contract. Whatever may be possible in theory, there is no suggestion that in practical terms the contract was not administered in accordance with usual industry practices, which inevitably involve reliance by the developer on the exercise of responsibility by the builder. There is no reason in these circumstances to treat the developer as otherwise than vulnerable in the relevant sense."

142. This passage suggests that one may disregard the role of the Superintendent under the D&C contract as a mechanism apt to afford protection to the developer against loss of value due to latent defects. But, whatever the "usual industry practices" to which his Honour was referring, the provision made by cll 31 and 42 of the D&C contract for supervision and assessment of the appellant's performance by the Superintendent, linked as it was to payment of the appellant for its work, was a contractual mechanism which squarely placed the risk of deficient work upon the appellant.

143. The respondent referred to *Barclay* v *Penberthy*[184] to support its argument that the duty propounded by the respondent was owed by the appellant to the developer concurrently in contract and tort. In *Barclay*, the plaintiff succeeded in its claim for damages for economic loss suffered when the aircraft it had chartered crashed as a result of the pilot's negligence, killing the plaintiff's valued employees and thus depriving it of their services. The Court held that it was an implied term of the contract of charter that the charter would be carried out with reasonable skill and diligence. There was no express provision in the contract which dealt with the subject of this term. The obligation created by this implied term was sufficient to entitle the plaintiff to recover the loss suffered as a result of negligent performance of the contract between the plaintiff and the defendant. The content of the duty which arose from the defendant's assumption of responsibility under that contract was the same as that which arose under the implied term of the charter. That was also the case in *Astley* v *Austrust*[185] , to which Macfarlan JA referred. In each of these cases, the content of the duty was the same in contract and tort. That is not the case here.

144. In the present case, the liability of the appellant to the developer was the subject of detailed provisions relating to the risk of latent defects in the appellant's work. The provisions in cll 4, 30, 31, 37 and 42 of the D&C

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contract expressly cast onto the appellant the risk of expense required to make good any defect in the work. These detailed provisions were apt to secure performance of cl 55 of the D&C contract, which required that the construction be completed in accordance with detailed specifications. They set out the extent of the appellant's obligations to ensure that the developer should "get what it paid for". To supplement them with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to make good the consequences of latent defects caused by the appellant's defective work would be to alter the allocation of risks effected by the parties' contract.

145. The provisions of the D&C contract regulated the appellant's obligations to the developer and the extent of the appellant's liability for failing to meet those obligations. To the extent that the respondent's complaints in relation to the steel lintels and windows are grounded in an alleged failure to comply with the contract's

specifications, reliance on a duty in the terms propounded by the respondent would be unnecessary and indeed embarrassing. Either the work and materials of the appellant complied with the specifications, in which case the appellant had fulfilled its obligations to the developer, or they did not. In relation to the other categories of alleged defect, whether the respondent's claims of defective work could be established would necessarily depend upon the specifications and other documents referred to in cl 55 of the D&C contract, rather than upon the general duty propounded by the respondent.

A duty owed by the appellant to the respondent independently of its obligations to the developer?

146. Basten JA analysed the position of the respondent in terms of its vulnerability to the appellant. His Honour said[186] :

> "[T]he [respondent] is to be viewed as a true successor in title to the interests of the developer. However, it was vulnerable with respect to latent defects in the same way that the developer was. Indeed, its position was weaker than that of the developer, which may have had some opportunity to carry out inspections during the course of the construction and before the defective materials were no longer examinable."

147. In relation to the ability of purchasers of lots from the developer to protect themselves against the risk of economic loss, Basten JA said[187] :

> "The question of legal protection is more complicated. The standard sale contracts did not include such protection. They were agreed between the builder and the developer and the builder retained a contractual right to be informed of and to approve any change in their terms. It seems inconsistent with the concept of vulnerability, in relation to the existence of a liability on the part of the [appellant] in tort, to say that the purchasers were not vulnerable because they could have insisted upon a contractual right as against the builder or the developer."

148. That reasoning is not consistent with *Woolcock Street Investments*[188] . And, in any event, in this case the purchasers did insist upon "a contractual right as against … the developer" in cl 32.6 of the sales contracts. It may also be noted that there was no factual basis for a conclusion that each purchaser was deprived by the appellant's conduct of the choice of bargaining with the developer for a more extensive warranty as to quality or of walking away from the negotiation and investing elsewhere if a satisfactory warranty at an acceptable price was not forthcoming. In this regard, there was no encouragement given by the appellant or suggestion that the appellant assumed responsibility to them for their decision.

149. As to the points made by Macfarlan and Leeming JJA in the Court of Appeal upon which the respondent relied in this Court, the question on which the liability asserted by the respondent depends is not whether the legislative scheme of the SSM Act and the SSFD Act excludes a duty of care in favour of the owners corporation. Rather, the question is whether the owners corporation itself suffered a loss in terms of the value of the common property vested in it when, viewed separately from the individual lot owners, it came into existence.

150.

[140719]

The circumstance that the respondent did not exist at the time that the defective work was carried out points against, rather than in favour of, the duty of care propounded by the respondent given that on this basis it could not have relied upon the appellant in any way. There is no basis for a finding of fact that there was an assumption of responsibility by the appellant in favour of the respondent, or known reliance on the appellant on the part of the respondent, in relation to the quality of the common property of the serviced apartment complex. Further, an owners corporation acquires the common property in a strata scheme without any outlay on its part. Its assets are not diminished by the acquisition, at least if the common property is worth more than the cost of repairing latent defects (and there is no suggestion here that the common property is worth less than the cost of repair). Accordingly, if one considers the owners corporation independently of the individual lot owners, it is impossible to see that it has suffered any loss by reason of the quality of the common property vested in it.

151. If the respondent is viewed as the alter ego of the purchasers from the developer, the respondent's position is not any stronger. Before explaining why that is so, it is desirable to acknowledge that it may be the better view of the position to regard the respondent for present purposes as the representative of the lot owners.

152. In *Owners — Strata Plan No 43551* v *Walter Construction Group Ltd*[189] , Spigelman CJ, with whom Ipp and McColl JJA agreed, said that the statutory description of an owners corporation in s 20 of the SSFD Act as agent for the proprietors of individual lots should not be understood "solely in terms of an agency at common law." The precise significance of the reference to agency in s 20 of the SSFD Act is debatable[190] , but it is sufficient for present purposes to say that it tends to confirm, rather than to deny, that the detriment to the economic or financial interests of the owners corporation is, in substance, suffered by the owners of lots. There is nothing in the SSFD Act to suggest that the cost incurred by an owners corporation in meeting the need to keep the common property in good repair is not a loss truly borne by the individual lot owners, given that they are called upon to make proportionate contributions by way of levy under ss 75 and 76 of the SSM Act in order to meet that expense.

153. That view is supported by s 227(2) of the SSM Act, which provides in relation to common property that "[i]f the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person … the proceedings may be taken by … the owners corporation." Section 227(3) goes on to provide that "[a]ny judgment … given … in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment … given … in favour of or against the owners." These provisions are consistent with the view that the legislation, while establishing the owners corporation as a convenient vehicle for the vindication of the interests of the individual lot owners, does not deny or diminish those interests.

154. On the basis that the respondent is to be regarded as making its claim as a proxy for the purchasers from the developer, counsel for the respondent argued that cl 32.7 of the standard form contracts was concerned not with the protection of the purchasers, but with the conferral on the developer of a right to repair defects and thereby to mitigate the damages which might otherwise be recovered from it by the purchasers if they incurred expense in repairing defects themselves. Counsel's argument was evidently intended to lessen the force of the appellant's argument that the tortious duty propounded by the respondent was more extensive than the contractual protection which purchasers had obtained from the developer. As an argument in favour of discounting the protection conferred on the purchasers it is not persuasive.

155. Clause 32.7 expressly obliged the developer to repair defects brought to its attention within a specified period. The purchasers had a contractual right against the developer which could have protected them against the risk of which the respondent now complains had those rights been pursued in accordance with their terms. It is true that the purchasers would have been required to be alert to the possibility of latent defects in order to exercise their rights under cl 32.7, but the very existence of the provision reflects an awareness

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of the relevant risk as well as a means of dealing with it.

156. Counsel for the respondent also said that, if individual lot owners might have brought claims against the developer under cl 32.7 in respect of their proportionate share of the loss incurred by reason of the defects in the common property which have emerged, this right might not now be valuable, for example, because it might be unenforceable due to the lapse of time and associated expiration of the applicable limitation period for bringing an action in contract against the developer, or because of the financial inability of the developer to meet the claims. But these arguments serve only to make the point that the contractual rights of individual purchasers for which they bargained were cast in terms which expressly limited their scope and duration in a manner inconsistent with the open-ended liability now asserted by the respondent.

Winnipeg Condominium and dangerous defects

157. Basten JA derived support[191] for his answer to the separate question from the decision of the Supreme Court of Canada in *Winnipeg Condominium Corporation No 36* v *Bird Construction Co*[192] . In that case the Supreme Court of Canada held that a builder owes a duty of care in tort to a subsequent purchaser of

the building if it can be shown that it is foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of occupants. Where such defects become manifest before any damage to persons or property occurs, a subsequent purchaser may recover the reasonable cost of making good the defects in order to put the building into a non-dangerous state.

158. The respondent argued that the Court of Appeal erred in limiting the duty said to be owed by the appellant to the respondent to cases where the repair of defects in construction was necessary to obviate a situation of danger to person or property. Nevertheless, counsel for the respondent sought to rely upon the decision of the Supreme Court of Canada in *Winnipeg Condominium* as a last resort to support the Court of Appeal's answer to the separate question.

159. It may be noted that in *Winnipeg Condominium* the Supreme Court of Canada chose not to follow the approach of the House of Lords in *D & F Estates Ltd* v *Church Commissioners for England*[193] and *Murphy* v *Brentwood District Council*[194] .

160. The approach in *Winnipeg Condominium* was noted, but not followed, by this Court in *Bryan* v *Maloney*[195] and in *Woolcock Street Investments*[196] . In *Fangrove Pty Ltd* v *Tod Group Holdings Pty Ltd*[197] , de Jersey CJ, in the Court of Appeal of Queensland, noted that no Australian authority had adopted this approach. In terms of Australian authority, the position has not improved for the respondent in this regard in the years since that case was decided.

161. The approach in *Winnipeg Condominium* is attended by the practical difficulty that "the existence of the duty will not be known until after the defects have occurred and they can be confidently categorised as dangerous."[198] More importantly, in point of principle the approach in *Winnipeg Condominium* is driven by the assumption that the cost of repair or diminution in market value of a building is a reflex of the liability for physical damage to person or property which may occur if the defect is not repaired. Quite apart from the haphazard nature of this notion of equivalence of damage, this approach is flawed in that it detaches the duty not to inflict harm from the harm which is the gist of the cause of action.

162. As Lord Oliver of Aylmerton said in *Murphy* v *Brentwood District Council*[199] :

> "If one assumes the … case of one who has come into possession of a defective chattel … which may be a danger if it is used without being repaired, it is impossible to see upon what principle such a person, simply because the chattel has become dangerous, could recover the cost of repair from the original manufacturer.
>
> The suggested distinction between mere defect and dangerous defect … is, I believe, fallacious. … [O]nce the danger ceases to be latent … [t]he plaintiff's expenditure is not expenditure incurred in minimising the damage or in preventing the injury from occurring. The injury will not now
>
> [140721]
>
> ever occur unless the plaintiff causes it to do so by courting a danger of which he is aware and his expenditure is incurred not in preventing an otherwise inevitable injury but in order to enable him to continue to use the property or the chattel."

The position in other common law jurisdictions

163. The conclusion that the duty propounded by the respondent should not be accepted is in accord with the position in the United Kingdom[200] . In addition, the preponderance of judicial authority in the United States accords with the conclusion that the respondent's claim should fail[201] .

164. That a different view prevails in Canada has already been noted. For the reasons set out above, that approach should not be followed in Australia. The respondent's preferred position is also supported by the decision of the Judicial Committee of the Privy Council on appeal from New Zealand in *Invercargill City Council* v *Hamlin*[202] . But in that decision it was acknowledged that it departed from the approach which has

prevailed in the United Kingdom[203] . For the reasons set out above, the latter view better accords with the coherent development of the common law.

Conclusion and orders

165. The appeal should be allowed.

166. The orders of the Court of Appeal of New South Wales should be set aside, and in their place it should be ordered that the appeal to the Court of Appeal of New South Wales should be dismissed with costs.

167. The first respondent should be granted special leave to cross-appeal, but the cross-appeal should be dismissed with costs.

168. The first respondent must pay the appellant's costs of the appeal to this Court.

Gageler J:

169. A duty of care at common law is a duty of a specified person, or a person within a specified class, to exercise reasonable care within a specified area of responsibility to avoid specified loss to another specified person, or to a person within another specified class. Whether or not a particular duty of care should be recognised in a novel category of case is determined on the understanding that "[t]here are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application"[204] .

170. The question in this appeal from the Court of Appeal of the Supreme Court of New South Wales is whether the builder of a strata development should be recognised to have a duty to exercise reasonable care, in executing the building work undertaken pursuant to a contract with the developer, to avoid specified loss to the owners corporation, which is the body corporate brought into existence on registration of the strata plan[205] , as the legal owner of the common property[206] , with an ongoing statutory responsibility for keeping the common property in a good state of repair[207] .

171. The specified loss, on the widest formulation of the putative duty, would extend to the cost of repairing all defects in common property not apparent at the time of registration of the strata plan. A narrower formulation of the duty, which the Court of Appeal accepted, would limit the specified loss to the cost of repairing only those defects in common property not apparent at the time of registration of the strata plan which are structural, are dangerous to persons or other property, or make an apartment in the building uninhabitable.

172. Neither the existence nor the scope of the putative duty of care can turn on the peculiar feature of an owners corporation that the corporation has no option but to be brought into existence as the legal owner of common property and to shoulder the ongoing responsibility for keeping that common property in a good state of repair. It is not the function of the common law to fashion a principle of tortious liability which would confer a right to compensation exclusively on the unique statutory creation of a particular statutory scheme.

173. If the builder of a strata development is to be recognised as having the putative duty of care, it is because the owners corporation stands in relation to the builder as proxy for the owners from time to time of the registered lots corresponding to apartments in the building. In them the beneficial interest in the common property is vested as tenants in common[208] . For them the corporation is constituted agent[209] . To

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them the corporation can ultimately look to cover the cost of repair if that cost cannot be recouped elsewhere[210] . It is they who bear the economic burden of the loss.

174. Whether or not the putative duty of care should be recognised therefore falls to be determined by applying principles which must be capable of general application to determine the existence and scope of such duty as a builder may have to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building.

175. It has long been accepted that a common law duty of care can coexist with a duty in contract and that a duty of care can be to avoid economic loss. That being so, legal taxonomy alone cannot assign

such common law liability as a builder may have to a subsequent owner of a building to the province of contract to the exclusion of the province of tort. Nor is recognition of a duty on the part of a builder to avoid a subsequent owner incurring the cost of remedying a latent defect in the building open to criticisms of indeterminacy which often count against recognising a common law duty of care to avoid economic loss.

176. Markedly divergent approaches to whether a builder should be recognised to have such a duty of care to a subsequent owner have now prevailed for more than two decades in other common law jurisdictions. In the United Kingdom, a duty of care has been rejected[211] . In Canada, a duty of care has been recognised, limited to the cost of remedying dangerous defects in the building[212] . In New Zealand, a duty of care has been recognised, extending to the cost of remedying all latent defects[213] . There is no reason to consider any one of those approaches to result in a greater net cost to society than any other. Provided the principle of tortious liability is known, builders can be expected to accommodate it in the contractual terms on which they are prepared to build and subsequent owners can be expected to accommodate it in the contractual terms on which they are prepared to purchase.

177. There is a net cost to society which arises from uncertainty as to the principle to be applied. McHugh J made that point in the context of discussing tortious liability for economic loss more generally when he referred to costs to parties and to the public of principles or rules whose application cannot confidently be predicted, and stated that "[i]f negligence law is to serve its principal purpose as an instrument of corrective justice, the principles and rules which govern claims in negligence must be as clear and as easy of application as is possible"[214] . Concern to minimise the cost of legal uncertainty was identified as a factor in overruling, rather than attempting to distinguish, prior authority so as to arrive at the position in respect of the liability of a builder to a subsequent owner which has prevailed in the United Kingdom[215] .

178. Part of the difficulty encountered by the Court of Appeal in the present case was in discerning the principle for which *Bryan* v *Maloney*[216] remains authority after *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd*[217] .

179. The question addressed in *Bryan* v *Maloney* was identified by the plurality in that case (Mason CJ, Deane and Gaudron JJ) as "whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a prima facie duty to a subsequent owner of the house to exercise reasonable care to avoid … foreseeable damage" specified as "the diminution in value of the house when a latent and previously unknown defect in its footings … becomes manifest"[218] equating to "the amount which would necessarily be expended in remedying the inadequate footing[s] and their consequences"[219] . Their Honours gave a positive answer to that question. They said that the contrary approach which had then recently come to prevail in the United Kingdom rested on "a narrower view of the scope of the modern law of negligence and a more rigid compartmentalization of contract and tort than is acceptable under the law of this country"[220] .

180. The plurality in *Bryan* v *Maloney* referred to the relationship between the builder and the subsequent owner of a house as one characterised "by assumption of responsibility on the part of the builder and likely reliance on the part of the owner"[221] , and emphasised that the decision in that case turned, "to no small extent, on the particular kind of economic loss

[140723]

involved" and, in particular, on the building having been "erected to be used as a permanent dwelling house"[222] . The other member of the majority, Toohey J, similarly emphasised that the decision related to "the building of a house that is a non-commercial building"[223] . Subsequent decisions of intermediate courts of appeal treated its holding as confined to buildings of that description[224] . The plurality in *Woolcock Street Investments* (Gleeson CJ, Gummow, Hayne and Heydon JJ) nevertheless expressed doubt that *Bryan* v *Maloney* should be "understood as depending upon drawing a bright line between cases concerning the construction of dwellings and cases concerning the construction of other buildings" and pointed to difficulties of maintaining such a distinction[225] .

181. The question addressed in *Woolcock Street Investments* was whether an engineering company owed a duty to exercise reasonable care, in designing the foundations of a warehouse and office complex, to avoid a subsequent purchaser of the building sustaining economic loss when it became apparent after purchase that the building was suffering substantial structural distress. The plurality noted that the engineering company designed the foundations in circumstances where "the original owner asserted control over the investigations which the engineer undertook for the purposes of performing its work"[226] . Their Honours did not, however, treat the alleged defect in the design of the foundations as outside the scope of the work undertaken. Their stated ground for concluding that the engineering company did not owe the putative duty was that the subsequent purchaser did not allege that it "could not have protected itself against the economic loss"[227] . They mentioned as a possible means of achieving that protection that the subsequent purchaser might have contracted on terms which would have cast on the engineering company the "economic consequences" of any negligence[228] .

182. The ground so stated by the plurality for denying the putative duty accorded with the observation of McHugh J, who also formed part of the majority in *Woolcock Street Investments*, that "the capacity of a person to protect him or herself from damage by means of contractual obligations is merely one — although often a decisive — reason for rejecting the existence of a duty of care in tort in cases of pure economic loss"[229] . In *Woolcock Street Investments*, it was the decisive factor.

183. McHugh J referred in *Woolcock Street Investments* to a variety of ways in which a subsequent purchaser might take steps to protect against the risk of latent defects by adjusting the terms on which the subsequent purchaser is prepared to contract with the vendor[230] . He also referred to the possibility of commissioning expert investigation of the building prior to purchase[231] . He pointed to disadvantages of imposing tortious liability on a builder which included the practical difficulties in determining whether there has been a breach of an appropriate standard of care and the incentive to create artificial business structures to avoid a long tail of claims[232] . He continued[233] :

> "Of course … contractual protections and expert investigations may turn out to be inadequate. In that event, a remedy in tort — particularly a remedy against secondary parties such as architects, engineers and sub-contractors — would be desirable. But cases where contractual protection will be found deficient are likely to be the exception rather than the rule. Whether exceptional or not, the ultimate question is whether the residual advantages that an action in tort would give are great enough to overcome the disadvantages to which I have referred. This involves a value judgment, and the data that might permit that judgment to be made, if the data exists at all, is not before us. Because that is so, the better view is that this Court should not take the step of extending the principle of *Bryan* v *Maloney* to commercial premises. That is, this Court should hold that, in the absence of a contract between the owner of commercial premises and a person involved in the design or construction of those premises, the latter does not owe a duty to the current owner to prevent pure economic loss."

184. Turning specifically to the continuing authority of *Bryan* v *Maloney*, McHugh J said[234] :

> "Nothing in this judgment is intended to suggest that *Bryan* v *Maloney* would now be
>
> [140724]
>
> decided differently. Whether a different decision would now be reached under current doctrine almost certainly depends on whether evidence would reveal that the purchasers of dwelling houses are as vulnerable as the Court assumed in that case."

185. Absent any application that *Bryan* v *Maloney* should be overruled, and absent data which might permit the making of a value judgment different from that made in *Woolcock Street Investments*, the view expressed by McHugh J in *Woolcock Street Investments* should in my opinion be accepted. The continuing authority of *Bryan* v *Maloney* should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in

the building. That is because, by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature.

186. The plurality in *Woolcock Street Investments* noted that the actual decision in *Bryan* v *Maloney* had by then been "overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective"[235] . The Court of Appeal in the present case referred in detail to the current statutory regime in New South Wales[236] . If legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection. Neither version of the putative duty of care should be recognised.

187. I agree with the orders proposed by the Chief Justice.

Footnotes

1 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

2 The balance of the development comprised residential apartments which are the subject of a separate strata scheme and a different owners corporation.

3 There was one other defendant, the second respondent in this Court, whose involvement is not material for present purposes.

4 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219.

5 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [18].

6 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [109].

7 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [132] per Basten JA, Macfarlan JA agreeing at 511 [133], Leeming JA agreeing at 512 [139].

8 [2014] HCATrans 052 (French CJ and Crennan J).

9 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 7.

10 Strata Freehold Act, s 5(1).

11 Strata Management Act, s 11(1). The body corporate constituted under s 11 is referred to as an owners corporation elsewhere in the Act: see s 8 and the Dictionary definition of "owners corporation" in the Strata Management Act.

12 Strata Management Act, s 8(1).

13 Strata Management Act, s 12.

14 Strata Freehold Act, s 18.

15 Strata Freehold Act, s 20.

16 Strata Freehold Act, s 20(b).

17 *Houghton* v *Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56 per Handley JA, Mason P agreeing at 48, Beazley JA agreeing at 60; *Young* v *Owners — Strata Plan No 3529* (2001) 54 NSWLR 60 at 64 [14] per Santow J; *Lin* v *The Owners — Strata Plan No 50276* (2004) 11 BPR 21,463 at 21,464 [7] per Gzell J.

18 *Segal* v *Barel* (2013) 84 NSWLR 193 at 209 [81] per Barrett JA, McColl JA agreeing at 195 [1], Preston CJ of LEC agreeing at 218 [140].

19 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 512 [142].

20 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 498 [74]–[76] per Basten JA.

21 Strata Management Act, s 62(1).

22 Strata Management Act, s 62(2).

23 Strata Management Act, s 62(3)(a).

24 Strata Management Act, s 62(3)(b).

25 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [64].

26 Strata Management Act, ss 66–71, 75–76 and 78.

27 Master Agreement, cll 9.1, 10 and 25.4(a).

28 Standard form contract, cl 53.2. The leases were each for a term of 10 years commencing 10 November 1999, with options to renew for two further successive terms of five years each.

29 Lease agreement, cl 19; see also *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [36]–[37]. Stockland's interest in Park Hotel was subsequently sold to the Mantra Group and the apartments became known as the "Mantra Chatswood". Nothing turns on that for the purposes of this appeal.

30 Master Agreement, cll 5.2, 6.1 and 9.9.

31 Design and construct contract, cll 4.1 and 30.1.

32 Design and construct contract, cl 37 read with Annexure Pt A, item 44.

33 Design and construct contract, cl 42.6.

34 Design and construct contract, cl 21 read with Annexure Pt A, item 32.

35 Standard form contract, cl 32.1.

36 Standard form contract, cl 32.7.

37 Standard form contract, cll 23.1, 32.5 and 32.6.

38 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496 [68].

39 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [67].

40 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [71]. The defects alleged related, inter alia, to the failure to hot-dip galvanised steel lintels, the failure to properly fabricate and coat sheet metal cowlings above certain windows to the exterior of the building and the defective installation of picture windows and a spa.

41 (2001) 207 CLR 562 at 576 [42]; [2001] HCA 59.

42 (1883) 11 QBD 503 at 509.

43 [1893] 1 QB 491 at 497.

44 [1932] AC 562 at 580–581.

45 (1980) 146 CLR 40 at 44 per Mason J, Stephen J agreeing at 44, Aickin J agreeing at 50; [1980] HCA 12.

46 *Wyong Shire Council* v *Shirt* (1980) 146 CLR 40 at 44 per Mason J, Stephen J agreeing at 44, Aickin J agreeing at 50; *San Sebastian Pty Ltd* v *The Minister* (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ; [1986] HCA 68; *Cook* v *Cook* (1986) 162 CLR 376 at 381–382 per Mason, Wilson, Deane and Dawson JJ; [1986] HCA 73; *Gala* v *Preston* (1991) 172 CLR 243 at 252–253 per Mason CJ, Deane, Gaudron and McHugh JJ; [1991] HCA 18; *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 179 CLR 520 at 542–543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; [1994] HCA 13.

47 *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

48 (1995) 182 CLR 609; [1995] HCA 17.

49 (1999) 198 CLR 180; [1999] HCA 36.

50 (1999) 198 CLR 180 at 209–210 [74] referring to *Hill* v *Van Erp* (1997) 188 CLR 159 at 176–177 per Dawson J, 210 per McHugh J, 237–239 per Gummow J; [1997] HCA 9 and *Pyrenees Shire Council* v *Day* (1998) 192 CLR 330 at 414 per Kirby J; [1998] HCA 3.

51 (2001) 207 CLR 562 at 578 [48].

52 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 486 [24].

53 (1995) 182 CLR 609 at 619 per Mason CJ, Deane and Gaudron JJ.

54 (1995) 182 CLR 609 at 622 per Mason CJ, Deane and Gaudron JJ.

55 (1995) 182 CLR 609 at 627 per Mason CJ, Deane and Gaudron JJ.

56 *Perre* v *Apand Pty Ltd* (1999) 198 CLR 180 at 225 [118] per McHugh J; see also Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 554–561.

57 (2004) 216 CLR 515; [2004] HCA 16.

58 (2001) 207 CLR 562 at 579–580 [50].

59 (2001) 207 CLR 562 at 580 [53].

60 (1999) 200 CLR 1 at 32 [73]; [1999] HCA 59.

61 (1999) 200 CLR 1 at 33 [74] citing Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, (1999) at 42–43.

62 (2001) 207 CLR 562 at 579–580 [50].

63 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2002) Aust Torts Reports ¶81-660.

64 (2004) 216 CLR 515 at 531–532 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

65 (2004) 216 CLR 515 at 532 [26] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

66 (2004) 216 CLR 515 at 532 [27] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

67 (1995) 182 CLR 609 at 623–624 per Mason CJ, Deane and Gaudron JJ.

68 (1995) 182 CLR 609 at 665 per Toohey J.

69 (2004) 216 CLR 515 at 533 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

70 (2004) 216 CLR 515 at 533 [31] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

71 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219.

72 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [132].

73 *Strata Schemes Management Act* 1996 (NSW), s 8(1).

74 *Strata Schemes Management Act* 1996 (NSW), s 11(1).

75 *Strata Schemes (Freehold Development) Act 1973* (NSW), s 20.

76 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 20(b).

77 *Strata Schemes Management Act* 1996 (NSW), s 62.

78 cf *Colonial Mutual Life Assurance Society Ltd* v *Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 50 per Dixon J; [1931] HCA 53, observing the difficulties created by the many senses in which the word "agent" is employed.

79 (2004) 216 CLR 515; [2004] HCA 16.

80 (1995) 182 CLR 609; [1995] HCA 17.

81 (2004) 216 CLR 515 at 534 [35] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 559–560 [114]–[116] per McHugh J, 586–587 [208]–[210] per Callinan J.

82 (2004) 216 CLR 515 at 534 [34] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 538–541 [49]–[55] per McHugh J, 593 [232] per Callinan J.

83 (2004) 216 CLR 515 at 531 [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

84 (2004) 216 CLR 515 at 532 [26].

85 (2004) 216 CLR 515 at 532 [27].

86 (2004) 216 CLR 515 at 533 [31].

87 (2004) 216 CLR 515 at 530 [23] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

88 cf *Smith* v *Eric S Bush* [1990] 1 AC 831; Stapleton, "Comparative Economic Loss: Lessons from Case-Law-Focused 'Middle Theory'", (2002) 50 *UCLA Law Review* 531 at 555–556.

89 (2004) 216 CLR 515 at 552 [92].

90 [1964] AC 465.

91 [1932] AC 562.

92 [1995] 2 AC 207.

93 (1997) 188 CLR 159; [1997] HCA 9.

94 (2004) 216 CLR 515 at 552 [92].

95 (1968) 122 CLR 556; [1968] HCA 74. See, on appeal, *Mutual Life & Citizens' Assurance Co Ltd* v *Evatt* (1970) 122 CLR 628; [1971] AC 793.

96 (1999) 198 CLR 180; [1999] HCA 36.

97 (2004) 216 CLR 515 at 532 [28].

98 cf *Voli* v *Inglewood Shire Council* (1963) 110 CLR 74 at 85 per Windeyer J; [1963] HCA 15.

99 (2004) 216 CLR 515 at 532 [29].

100 The second respondent played no part in the appeal beyond filing a submitting appearance.

101 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [18].

102 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [4], [110].

103 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

104 *Murphy* v *Brentwood District Council* [1991] 1 AC 398 at 477, 478, 479, 487–488.

105 [2012] QB 44 at 64–65 [93]–[94].

106 *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465; *Mutual Life & Citizens' Assurance Co Ltd* v *Evatt* (1970) 122 CLR 628 at 632–636; [1971] AC 793 at 801–804; *Caltex Oil (Australia) Pty Ltd* v *The Dredge "Willemstad"* (1976) 136 CLR 529 at 555, 572–574, 590–592; [1976] HCA 65; *Candlewood Navigation Corporation Ltd* v *Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sillavan Ltd* v *Aliakmon Shipping Co Ltd* [1986] AC 785.

107 (1995) 182 CLR 609; [1995] HCA 17.

108 (2004) 216 CLR 515; [2004] HCA 16.

109 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28]. See also *Woollahra Municipal Council* v *Sved* (1996) 40 NSWLR 101 at 120.

110 (2004) 216 CLR 515 at 530 [23], 533 [31], 548–553 [80]–[96].

111 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [34]; *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496–497 [69]–[70].

112 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [33].

113 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [38].

114 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [44]; *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 496 [67].

115 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 494 [58].

116 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [45]; *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 495–496 [63].

117 *Strata Schemes Management Act 1996* (NSW), s 8(1).

118 *Strata Schemes (Freehold Development) Act* 1973 (NSW), s 18.

119 The respondent also commenced proceedings against the second respondent. The respondent's pleadings did not disclose a cause of action against the second respondent; and as noted above, the second respondent has no involvement in this appeal.

120 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [8]–[9].

121 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [65].

122 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [71].

123 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [4], [110].

124 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [90].

125 (1995) 182 CLR 609.

126 (1995) 182 CLR 609 at 644.

127 *Owners Corporation Strata Plan 61288* v *Brookfield Multiplex* [2012] NSWSC 1219 at [88]–[92].

128 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479.

129 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 503 [100].

130 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509 [127], 510 [129].

131 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508 [118]–[120].

132 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 501–504 [91]–[100].

133 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 503 [98].

134 (1999) 197 CLR 1; [1999] HCA 6.

135 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 511 [136].

136 *Astley* v *Austrust Ltd* (1999) 197 CLR 1 at 20–23 [44]–[48]; see also *Bryan* v *Maloney* (1995) 182 CLR 609 at 619–620.

137 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [129].

138 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508–509 [122].

139 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510 [129].

140 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509–510 [127]–[128], [132].

141 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 511 [135].

142 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 530–531 [23].

143 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 513 [144].

144 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 510–511 [132].

145 See generally, Heydon, *Economic Torts*, 2nd ed (1978).

146 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 534–535 [37]. See also *East River Steamship Corp* v *Transamerica Delaval Inc* 476 US 858 at 870 (1986).

147 476 US 858 at 870 (1986).

148 [1932] AC 562.

149 [1898] AC 1.

150 [1964] AC 465.

151 cf *D* v *East Berkshire Community Health NHS Trust* [2005] 2 AC 373 at 404–405 [76]–[78].

152 (1963) 110 CLR 74; [1963] HCA 15.

153 *Fangrove Pty Ltd* v *Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 at 242 [19].

154 *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 425.

155 *Tame* v *New South Wales* (2002) 211 CLR 317 at 388 [208]; [2002] HCA 35.

156 (1981) 148 CLR 218 at 241; [1981] HCA 52.

157 *Gatsios Holdings* v *Kritharas Holdings (In Liq)* (2002) ATPR ¶41-864 at 44,800 [29].

158 *Murphy* v *Brentwood District Council* [1991] 1 AC 398 at 479–480, 488.

159 [1999] 2 Qd R 236 at 242 [19]–[20]. See also *Perre* v *Apand Pty Ltd* (1999) 198 CLR 180 at 299 [328]; [1999] HCA 36.

160 (2004) 216 CLR 515 at 530 [22].

161 (1976) 136 CLR 529.

162 (1875) LR 10 QB 453.

163 (2004) 216 CLR 515 at 531 [24].

164 (1968) 122 CLR 556; [1968] HCA 74; on appeal to the Privy Council (1970) 122 CLR 628; [1971] AC 793.

165 (1981) 150 CLR 225; [1981] HCA 59.

166 (2004) 216 CLR 515 at 531 [24].

167 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 527 [15].

168 (2004) 216 CLR 515 at 530–531 [23].

169 (1999) 198 CLR 180.

170 (1997) 188 CLR 159; [1997] HCA 9.

171 (1997) 188 CLR 241; [1997] HCA 8.

172 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 533 [31].

173 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 553 [96].

174 *Downsview Nominees Ltd* v *First City Corporation Ltd* [1993] AC 295 at 316; *Hill* v *Van Erp* (1997) 188 CLR 159 at 179, 223, 231–234.

175 Stevens, *Torts and Rights*, (2007) at 312; Arvind and Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change*, (2013) at 3, 469–470.

176 cf *Zumpano* v *Montagnese* [1997] 2 VR 525 at 528–534.

177 (1995) 182 CLR 609 at 623.

178 *Bryan* v *Maloney* (1995) 182 CLR 609 at 624.

179 *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* (2004) 216 CLR 515 at 532 [28].

180 (2004) 216 CLR 515 at 532–533 [29].

181 *Bryan* v *Maloney* (1995) 182 CLR 609 at 665.

182 (2004) 216 CLR 515 at 558 [110].

183 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508 [120].

184 (2012) 246 CLR 258 at 284–285 [42]–[48]; [2012] HCA 40.

185 (1999) 197 CLR 1 at 22–23 [47]–[48].

186 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 508–509 [122].

187 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509 [125].

188 (2004) 216 CLR 515 at 533 [31], 553 [96].

189 (2004) 62 NSWLR 169 at 178–179 [43]–[45]. See also *Vero Insurance Ltd* v *The Owners — Strata Plan No 69352* (2011) 81 NSWLR 227 esp at 240–241 [60], 243 [73].

190 It may be of some significance in this regard that, in *Salomon* v *Salomon & Co* [1897] AC 22 at 31, the great case which established that a company formed under the *Companies Act* 1862 (UK) and its analogues is a legal person separate from its shareholders, Lord Halsbury LC expressly rejected the

proposition that a limited liability company could be regarded as the "agent" of its shareholders; see also at 35, 54–55. The terms of s 20, in deploying the concept of agency, are at least apt to ensure that an owners corporation is not the owner of the common property as an entity distinct from the lot owners. Rather, it is a convenient statutory conduit for the funds necessary to maintain and conserve the beneficial interests of lot owners in the common property.

191 *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 509–510 [127]–[128].

192 [1995] 1 SCR 85.

193 [1989] AC 177.

194 [1991] 1 AC 398.

195 (1995) 182 CLR 609 at 621 fn 66, 649–651.

196 (2004) 216 CLR 515 at 534 [34] fn 108.

197 [1999] 2 Qd R 236 at 239–240 [12].

198 *Fangrove Pty Ltd* v *Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236 at 248 [46].

199 [1991] 1 AC 398 at 488–489.

200 *D & F Estates Ltd* v *Church Commissioners for England* [1989] AC 177; *Murphy* v *Brentwood District Council* [1991] 1 AC 398; *Robinson* v *P E Jones (Contractors) Ltd* [2012] QB 44.

201 *East River Steamship Corp* v *Transamerica Delaval Inc* 476 US 858 at 870 (1986); *Redarowicz* v *Ohlendorf* 441 NE 2d 324 (Ill 1982); *Sensenbrenner* v *Rust, Orling & Neale, Architects Inc* 374 SE 2d 55 (Va 1988); *Casa Clara Condominium Association Inc* v *Charley Toppino and Sons Inc* 620 So 2d 1244 (Fla 1993); *Calloway* v *City of Reno* 993 P 2d 1259 (Nev 2000); *Moglia* v *McNeil Co Inc* 700 NW 2d 608 (Neb 2005); *Association of Apartment Owners of Newtown Meadows ex rel its Board of Directors* v *Venture 15 Inc* 167 P 3d 225 (Haw 2007); *Davencourt at Pilgrims Landing Homeowners Association* v *Davencourt at Pilgrims Landing LC* 221 P 3d 234 (Utah 2009). But see *Brown* v *Fowler* 279 NW 2d 907 (SD 1979); *Morris* v *Holt* 401 NE 2d 851 (Mass 1980); *Terlinde* v *Neely* 271 SE 2d 768 (SC 1980); *Cosmopolitan Homes Inc* v *Weller* 663 P 2d 1041 (Colo 1983); *Oates* v *Jag Inc* 333 SE 2d 222 (NC 1985).

202 [1996] AC 624. See also *Bowen* v *Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Mount Albert Borough Council* v *Johnson* [1979] 2 NZLR 234; *Chase* v *de Groot* [1994] 1 NZLR 613.

203 [1996] AC 624 at 648–649.

204 *Sullivan* v *Moody* (2001) 207 CLR 562 at 579 [49]; [2001] HCA 59.

205 Section 8 of the *Strata Schemes Management Act* 1996 (NSW).

206 Section 18 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

207 Section 62 of the *Strata Schemes Management Act* 1996 (NSW).

208 Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

209 Section 20 of the *Strata Schemes (Freehold Development) Act* 1973 (NSW).

210 Sections 69–71, 75(2)(e) and 76 of the *Strata Schemes Management Act* 1996 (NSW).

211 *Murphy* v *Brentwood District Council* [1991] 1 AC 398; *Department of the Environment* v *Thomas Bates and Son Ltd* [1991] 1 AC 499.

212 *Winnipeg Condominium Corporation No 36* v *Bird Construction Co* [1995] 1 SCR 85.

213 *Invercargill City Council* v *Hamlin* [1996] AC 624.

214 *Perre* v *Apand Pty Ltd* (1999) 198 CLR 180 at 216 [91]; [1999] HCA 36.

215 *Murphy* v *Brentwood District Council* [1991] 1 AC 398 at 471–472.

216 (1995) 182 CLR 609; [1995] HCA 17.

217 (2004) 216 CLR 515; [2004] HCA 16.

218 (1995) 182 CLR 609 at 617.

219 (1995) 182 CLR 609 at 616.

220 (1995) 182 CLR 609 at 629.

221 (1995) 182 CLR 609 at 627.

222 (1995) 182 CLR 609 at 630.

223 (1995) 182 CLR 609 at 665.

224 *Woollahra Municipal Council* v *Sved* (1996) 40 NSWLR 101; *Zumpano* v *Montagnese* [1997] 2 VR 525; *Fangrove Pty Ltd* v *Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236.

225 (2004) 216 CLR 515 at 528 [17].

226 (2004) 216 CLR 515 at 531–532 [25].

227 (2004) 216 CLR 515 at 533 [31].

228 (2004) 216 CLR 515 at 533 [31].

229 (2004) 216 CLR 515 at 552 [94].

230 (2004) 216 CLR 515 at 550 [85], 558–559 [111].

231 (2004) 216 CLR 515 at 559 [111].

232 (2004) 216 CLR 515 at 557–558 [107]–[109].

233 (2004) 216 CLR 515 at 559 [112].

234 (2004) 216 CLR 515 at 560 [116] (footnote omitted).

235 (2004) 216 CLR 515 at 534 [35].

236 Part 2C of the *Home Building Act* 1989 (NSW). See *The Owners — Strata Plan No 61288* v *Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479 at 498–500 [77]–[82].

THE TIMBERTOP TERRACES

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(2014) LQCS ¶90-199; Court citation: [2014] QBCCMCMR 366

Queensland Body Corporate And Community Management Commissioner Adjudicators Orders

Decision delivered on 10 October 2014

Pet by-law — Whether the respondent's dog should be removed under the current by-law — Whether the current by-law is valid — Act, s 94, 169, 108(7).

Where the respondent kept a dog in her lot even though the complex was designated as a "no dogs" complex in its by-laws and via signs at the front of the complex. Residents could seek the body corporate's approval to keep one cat per lot. The by-laws for the scheme provided that no dogs were allowed. At the interim stages of the matter the adjudicator wrote to the body corporate expressing his interim view that the by-law was unreasonable; however, owners provided submissions supporting the keeping of the by-law.

Held.

1. If the by-law went beyond simply providing for the regulation of the use and enjoyment of the lots in the scheme it prohibited the use and enjoyment of the lots.

2. In this instance the by-law did not prohibit the keeping of pets, only the keeping of certain types of pets.

3. If the by-law was oppressive or unreasonable under section 180(7) the adjudicator had the power to order that it be removed.

4. The context in which the by-law prohibited the keeping of certain animals or certain classes of animals had to be considered including the scheme's "no dog" policy, the extent to which the environment would be suitable, the effect on owners and occupiers use and enjoyment of lots and common property and the dangerous nature of dogs.

5. On all the material provided, there was no evidence to suggest that the circumstances of the scheme are such that they required a prohibition on all dogs.

6.

[140732]

By-law 13 was unreasonable and invalid pursuant to section 180(7) of the Act. The body corporate was to amend its pet by-law and following that the respondent would need to apply to the committee for permission to keep her dog.

[Headnote by Joanne Bennett of Active Lawyers]

The Body Corporate for The Timbertop Terraces (applicant).

Susan Carter (respondent).

Before: Adjudicator M Tsui

M. Tsui, Adjudicator:

ORDERS MADE:

1. **I hereby order** that the application is dismissed.
2. **I further order** that By-law 13 in the community management statement for the Body Corporate for The Timbertop Terraces which states:

> *"No dogs are allowed on scheme land. The body corporate must place appropriate signs at the main entrance on Pineridge Road, Runaway Bay. The committee may, at its absolute discretion, grant permission for one cat to be kept in any lot, after receipt of a written request from the occupier (and if the occupier is not the owner, written permission from the owner) with accompanying veterinary evidence that the cat has been de-sexed."*

is **invalid**.

3. **I further order** that, within three (3) months of the date of this order, the Body Corporate for The Timbertop Terraces shall lodge a request to record a new community management statement which replaces the current By-law 13 with either:

> A. An alternative pet by-law passed by special resolution at a general meeting of the body corporate;

or, if no alternative by-law is passed by the body corporate:
B. The wording of By-law 11 contained in Schedule 4 of the Act.

M. Tsui, Adjudicator:

Introduction

[1] This is a dispute concerning a dog that is being kept on the respondent's lot. The pet by-law (**by-law 13**) for the scheme states that no dogs are allowed on scheme land. The body corporate says the respondent is in contravention of by-law 13 by keeping a dog on her property and seeks to have the dog removed.

[2] The main issues that have arisen out of this application are whether the respondent has breached by-law 13, whether by-law 13 is in fact a valid by-law, and whether there is any basis to require the removal of the respondent's dog.

Jurisdiction

[3] I am satisfied this matter falls within the legislative dispute resolution provisions.[1] It is a dispute between the body corporate and a lot owner about a claimed contravention of a by-law under the scheme's community management statement (**CMS**).

[4] An adjudicator's order may require a person to act, or prohibit a person from acting, in a way stated in the order.[2] Further, an adjudicator's order may contain ancillary and consequential provisions the adjudicator considers necessary or appropriate.[3]

Procedural Matters

[5] In November 2013, the Commissioner's Office attempted to organise a conciliation session to assist in the resolution of this dispute. Unfortunately conciliation did not proceed. The body corporate then lodged the current adjudication application to resolve the dispute.

[6] Under *section 243* of the Act, a copy of the adjudication application was provided to the respondent and all lot owners in the scheme, with an invitation for written submissions in response to the application. Submissions were received from five lot owners however the respondent has not made a submission.

[7] In the course of investigating the application, I wrote to the body corporate setting out my provisional views in this matter. In particular, I explained that it was my provisional view that by-law 13 is unreasonable as it prohibits the keeping of dogs absolutely,

[140733]

without provision for the body corporate to consider individual circumstances to determine whether it would be appropriate to allow the keeping of a particular dog. I put the parties on notice that I was considering dismissing the application and instead, making an order to invalidate by-law 13 and requiring the body corporate to replace the by-law. Therefore I invited the body corporate committee and all lot owners to make further submissions in light of my provisional views and to comment on the appropriateness of making an order regarding the validity of the by-law and requiring its replacement.

[8] In response to this invitation, I received eight further submissions from lot owners. Seven of these submissions support the keeping of the current by-law 13 for various reasons which will be considered below.

Analysis

[9] In determining this application, I will consider the pet by-law in this scheme, the relevant legislative provisions, the case-law on pet by-laws and the respondent's particular circumstances.

Has the respondent breached by-law 13?

[10] By-law 13 of the scheme's CMS states:

"No dogs are allowed on scheme land. The body corporate must place appropriate signs at the main entrance on Pineridge Road, Runaway Bay. The committee may, at its absolute discretion, grant permission for one cat to be kept in any lot, after receipt of a written request from the occupier (and if the occupier is not the owner, written permission from the owner) with accompanying veterinary evidence that the cat has been de-sexed."

[11] The body corporate says since the scheme was established in 1989, this by-law has been upheld with signs being displayed at the front entry indicating dogs are prohibited.

[12] On 13 September 2013, the body corporate issued the respondent with a contravention notice advising that she was in breach of by-law 13 by keeping a dog on her lot. The notice required the respondent not to repeat the contravention. The body corporate says the respondent did not respond to the contravention notice and continued to keep the dog on her lot.

[13] The respondent has not made a submission in response to the application. On face value, the respondent has breached by-law 13 by keeping a dog on her lot contrary to the by-law.

Is by-law 13 a valid by-law?

[14] However, as raised with the parties in my provisional views, I have concerns regarding the validity of by-law 13. There are two key provisions in the body corporate legislation relating to by-laws that are of particular relevance here.

a) Does the by-law regulate the use and enjoyment of lots?

[15] *Section 169* of the Act deals with the content and extent of by-laws. Under *section 169(1)(b)(i)*, a by-law may only provide for the *regulation of* the use and enjoyment of lots in the scheme. A by-law that goes beyond regulating and instead *prohibits* a particular use and enjoyment of a lot has been found to be an invalid by-law.

[16] In the Queensland Civil and Administrative Tribunal (**Tribunal**) decision of *Body Corporate for River City Apartments* v *McGarvey*[4] ***(River City Apartments)***, Mr Barlow SC considered a by-law which purported to prohibit the keeping of any animals on the scheme. He said [at para 49] that "*a by-law that prohibits altogether the keeping of pets in lots is not a by-law regulating the use or enjoyment of lots, but purports to prohibit a particular use and type of enjoyment altogether. It therefore goes beyond the scope of a valid by-law permitted by s 169 and is invalid*."

[17] In the current dispute, by-law 13 is not a blanket ban on all animals. Rather, the by-law prohibits the keeping of dogs and allows the keeping of one cat upon permission being granted by the body corporate. A similar by-law was considered in the decision of *McKenzie* v *Body Corporate for Kings Row Centre* (McKenzie)[5] in which the by-law in question did not prohibit the keeping of pets, but only the keeping of certain types of pets. In that decision, Mr Barlow SC concluded that the by-law did purport to regulate, rather than to prohibit, a use of lots in the scheme — namely, the keeping of pets.

[18]

[140734]

As such, I am of the view that while by-law 13 in the current application is restrictive in the type of pets it permits, it does not seek to prohibit all pets. Therefore, I consider the by-law falls within the regulation power provided by *section 169* of the Act and is not invalid for this reason.

b) Is the by-law oppressive or unreasonable?

[19] The second legislative provision that needs to be considered is section *180(7)* of the Act, which states:

"A by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme."

[20] If a by-law is found to be contrary to *section 180(7)*, an adjudicator has the power to order that the by-law be removed.[6]

[21] There has been considerable discussion in recent years over the validity of by-laws that purport to prohibit all animals in a scheme, or to prohibit certain classes of animals.

[22] In *McKenzie*, the by-law in question specifically prohibited the keeping of cats and dogs (apart from those that already had the approval of the committee as of a certain date). There, the Tribunal found that such a by-law was unreasonable as there were circumstances in which dogs and cats which are "*ordinary domestic pets*" could be kept in community titles schemes, subject to reasonable conditions without causing an inconvenience to other residents.[7]

[23] The issue was further considered by Mr Barlow SC in *River City Apartments* in which he clarified that *section 180(7)* requires consideration of the by-law in the context of the particular scheme within which it operates. Mr Barlow SC stated [at para 62]:

> *"It cannot be said that in all cases a by-law prohibiting the keeping of certain pets in a scheme is automatically unreasonable or oppressive. It must be determined in the context of each particular scheme. Although, in many cases, a by-law which did not provide for the body corporate to consider individual circumstances in determining whether or not to allow a particular lot owner to keep a certain type of pet would be unreasonable or oppressive, it is necessary for that question to be considered in each case having regard to the facts before the adjudicator and, in the context of those facts, the interests of all owners and occupiers in the scheme and the use of the common property."*

[24] It is therefore necessary for me to consider by-law 13 in the context of the circumstances of this particular scheme to determine whether it is unreasonable or oppressive.

No dog policy

[25] One of the arguments raised in support of the application is that owners have purchased into the complex knowing that dogs are not permitted. It is submitted that the prohibition against dogs is not only spelt out in the by-law but it is also clearly signed at the entry to the complex. Some owners state they have chosen to live in this scheme on the basis that dogs are not permitted.

[26] While it may seem unfair that some owners are keeping dogs on their lots in apparent disregard of the by-law while others may have bought into the scheme in reliance on the by-law, this has no bearing on whether the by-law is valid. All owners and occupiers are subject to their scheme's by-laws however this does not prevent an owner from challenging the validity of an existing by-law or an adjudicator from determining its validity as is the case here.

Suitability of environment

[27] One of the arguments raised by several of the submissions is that the complex is unsuitable for dogs as the units are closely joined together and the backyards are too small.

[28] In *McKenzie*, the scheme in question was a high rise building of units. Despite this, the Tribunal accepted that cats and dogs could potentially be kept in the scheme without incident. Following this decision, I am not satisfied that Timbertop Terraces is inappropriate for the keeping of dogs merely because the units are within close proximity of each other. That is the nature of community living. There has been nothing presented in the submissions evidencing anything in the nature, structure or environment of this scheme which convinces me that the lots here are

automatically unsuitable for dogs of every kind in every situation.

[29] Further, while I note owners' concerns regarding the size of the yards, no expert evidence has been presented to suggest that the yards are inappropriate for the keeping of a dog.

Effect on owners' and occupiers' use and enjoyment of lots and common property

[30] The submissions also raise concerns regarding the detriment that dogs cause to an owner or occupier's use and enjoyment of their lot and common property. Some say there are already dogs in the complex that bark while others suggest that barking is a very foreseeable problem. There are also concerns raised about

dogs being allowed to wander over and defecate on common property. One owner says he is allergic to dogs (and cats) which would cause issues with sneezing and sleeping.

[31] Although I appreciate these issues may be genuine concerns for some owners, I am not satisfied they form a reasonable basis to ban all dogs from the scheme. One owner submitted that *"dogs, no matter how well intended…will ALWAYS cause a nuisance"*. I do not accept this proposition. Rather, I consider there are circumstances in which some dogs could be kept on the scheme without causing such inconveniences to other residents. It has become very common place for domestic pets like dogs to live in community titles schemes. While some may cause nuisance problems, a number do not.

[32] Further, the committee can impose a variety of reasonable conditions to minimise the risk of any dog creating a nuisance or interfering with other residents' use and enjoyment of their lot or common property. Additionally, if a dog is permitted to be kept on a lot and does create a nuisance, the body corporate may seek its removal pursuant to the nuisance provisions. One should also bear in mind what actually constitutes a nuisance. The test for nuisance is an objective, rather than a subjective one such that the activity complained of needs to be of "*such volume or frequency that it would interfere unreasonably with the life of another lot owner of ordinary sensitivity*".[8]

Dangerous nature of dogs

[33] One submission stated that despite what dog owners may think about the non-vicious nature of their dogs, they are potentially unsafe. The owner in his submission recounts his personal experience of being attacked by a dog which has left him with a fear of dogs of any shape or size. He also submits that there are a number of small children living in the complex and that even a small dog can be dangerous with small children around. As such, it is submitted that keeping them as pets is not practical or safe in this kind of complex.

[34] While I am aware and sympathetic to the fact that dog attacks can and do happen, I do not consider that the possibility of this risk should preclude all dogs from being kept on the scheme. Dogs are an ordinary part of everyday life and by large, they are a peaceable domestic pet. Modern day living has meant that we are living in closer proximity to our neighbours and as a result, one expects to come into contact with neighbouring dogs in our daily travels.

[35] I do not consider it reasonable to say that because there are small children in a complex, dogs cannot be allowed there. This would be like saying cars are not permitted in the complex as driving can cause accidents, especially if there are children around. How this sort of "risk" is normally addressed in a complex is for by-laws to be implemented and signs to be put in place requiring a speed limit to be adhered to, to prevent the likelihood of such accidents. Similarly, it is not reasonable to ban all dogs from the complex because of the possibility that dogs may attack. Instead, what would be reasonable is for each dog to be assessed on its own merits and where a dog is permitted, conditions may be put in place for example, requiring the animal to only traverse common property for the purpose of entering and exiting the scheme and to be appropriately restrained or transported by vehicle during such times. This would ensure the animal is never 'loose' or unrestrained on common property and therefore unable to come into direct contact with other residents.

Summary

[36] Based on the material submitted before me, there is nothing to suggest the circumstances of this scheme are such that it

requires a prohibition of all dogs. Rather, I consider there may be instances where dogs could be kept on the scheme without causing an inconvenience to other residents. Accordingly, after considering the arguments raised, I consider by-law 13 is unreasonable pursuant to *section 180(7)* of the Act and is invalid.

Replacement of by-law 13

[37] As I have determined that the current pet by-law is invalid, the next question to be addressed is what should be implemented as an alternative pet by-law.

[38] One option is to restore an earlier by-law.[9] By-law 11 as recorded for The Timbertop Terraces on 8 August 1989 states:

> *"Keeping of Animals. Subject to Section 30(12), a proprietor or occupier of a lot shall not, without the approval in writing of the Committee keep any animal upon his lot or the common property."*

[39] While this by-law appears appropriate, as it refers to *section 30(12)* of the *Building Units and Group Titles Act 1980* and not the current Act which the scheme is registered under, it would require an amendment to the legislative references and terminology.

[40] A more appropriate alternative in the circumstances would be to implement the standard pet by-law in *Schedule 4* of the Act which has the same effect as the previous By-law 11. The by-law in Schedule 4 states:

> *(1) The occupier of a lot must not, without the body corporate's written approval —*
>
> *(a) bring or keep an animal on the lot or the common property; or*
> *(b) permit an invitee to bring or keep an animal on the lot or the common property.*
>
> *(2) The occupier must obtain the body corporate's written approval before bringing, or permitting an invitee to bring, an animal onto the lot or the common property.*

[41] Under this by-law, the committee may decide on a case by case basis, whether or not to approve a particular animal sought to be kept on the scheme. The committee should note the requirement under *section 94(2)* of the Act which requires a body corporate to act reasonably in anything it does including making a decision. In considering a pet application, the committee may impose reasonable conditions on the approval to alleviate any risk of nuisance or unreasonable interference with the peace and enjoyment of other residents.

[42] Alternatively, the body corporate may adopt its own new pet by-law by special resolution at a general meeting. In doing so, the body corporate should take into consideration the comments I have made above to ensure the new by-law is valid.

What should happen with the respondent's dog?

[43] I note that the respondent does not have body corporate approval for the dog kept on her lot. Once the body corporate amends the pet by-law, the respondent will need to apply to the committee for permission to keep the dog. In considering the request, the committee must act reasonably. The following are conditions that adjudicators have previously placed on the keeping of pets:

- The dog must be kept within the lot while it is present on scheme land.
- The dog must traverse common property only for the purpose of being brought onto or taken off scheme land, at which time the dog must be appropriately restrained.
- The dog must not cause a nuisance to any other occupiers or unreasonably interfere with the enjoyment of their lots.
- The dog must be cleaned, trimmed, immunised and treated for worms, fleas and ticks, in accordance with the recommendations of a qualified veterinary surgeon.
- The dog's waste must be disposed of in such a way that it does not create noxious odours or otherwise contaminate the scheme.
- The committee shall be entitled to rescind permission for the dog if it reasonably considers the applicant has not complied with these conditions and that the applicant has failed to respond appropriately to warnings about their concerns.

[44] Finally, I note that none of the submissions have made any specific complaints about the respondent's dog to suggest that it causes a nuisance. Neither has the

body corporate identified how the respondent's dog is interfering with other residents' enjoyment of their lots or common property. Rather, the sole basis for the application is that the respondent is keeping a dog on her property in contravention of the current by-law 13, which I have determined to be invalid. Accordingly, unless evidence is given to suggest otherwise, it would be difficult to see how the committee would have any reasonable basis for not approving the respondent's dog. The parties should note that if the committee

refuses to grant its approval for the dog, it is open for the respondent to lodge an application with this Office to dispute the committee's decision.

Conclusion

[45] Although prima facie, the respondent has breached by-law 13, I am dismissing the application on the basis that the by-law is unreasonable pursuant to section *180(7)* and cannot be relied upon by the body corporate to require the removal of the respondent's dog.

[46] I have ordered that the by-law must be replaced. Owners may pass a resolution at a general meeting within the next three months to adopt an alternative pet by-law. If no alternative by-law is passed within that stated period, the new pet by-law shall be By-law 11 in *Schedule 4* of the Act.

[47] The cost of amending the by-law and recording the new CMS will be the responsibility of the body corporate. It is then open for the respondent to apply for approval from the body corporate to keep her dog in accordance with the new by-law.

[48] Finally, it should be noted that if the respondent does not apply for approval under the new by-law, or the body corporate refuses to give approval on reasonable grounds, the respondent should then remove the dog from the scheme.

Footnotes

1 See *sections 227, 228, 276* and *Schedule 5* of the Act.

2 *Section 276(2)* of the Act.

3 *Section 284(1)* of the Act.

4 *Body Corporate for River City Apartments CTS 31622* v *McGarvey* [2012] QCATA 47.

5 *McKenzie* v *Body Corporate for Kings Row Centre CTS 11632* [2010] QCATA 57.

6 See Item 20 of Schedule 5 of the Act.

7 At paragraphs 27 to 31.

8 *Norbury* v *Hogan* [2010] QCAT (Unreported, Application Number KA007-09, 13 May 2010) at para 26 & 28.

9 See Item 20 in Schedule 5 of the Act.

THE BODY CORPORATE FOR LIBERTY CTS 27241 v BATWING RESORTS PTY LTD

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(2012) LQCS ¶90-181; Court citation: [2012] QSC 340

Supreme Court of Queensland

12 November 2012

Conveyancing — Community schemes — Arbitration generally — Enforcing the award made by an arbitrator — Management rights — Review of resident unit manager's annual salary — Removal of duties from resident manager's duty schedule — Reduction in salary — Body Corporate and Community Management Act 1997 (Qld), Ch 6, s 227(1)(d), 229(2), 312.

The applicant body corporate received complaints from lot owners regarding the security services provided by the respondent resident unit manager who had operated as the caretaker and letting agent within the scheme since 1999. The parties agreed that the body corporate would assume the security duties and would deduct an amount which was to be agreed upon from the resident unit manager's salary as a result of its resumption of those duties.

An agreement as to the correct reduction in salary could not be agreed upon after three meetings with numerous quotes provided by the body corporate and the resident unit manager. The body corporate moved to seek an independent valuation of the security services. Solicitors for the resident unit manager wrote to the body corporate noting that the resident unit manager had not requested an independent valuation.

Nevertheless, the body corporate wrote to the Queensland Law Society and asked for an arbitrator to be appointed. The resident unit manager was copied into all correspondence and later signed an acknowledgement noting its agreement for an arbitrator to be appointed.

Less than a month after his appointment, the arbitrator received correspondence from the resident unit manager advising that it would no longer be participating in the arbitration and that there would not be any point as the relationship between the resident unit manager and the body corporate chairperson had become strained.

Ultimately after seeking to withdraw, the resident unit manager partially participated in the arbitration by continuing to provide requested material to the arbitrator. The arbitrator found in favour of the body corporate and awarded a reduced salary.

The resident unit manager objected to the award and the body corporate sought the enforcement of the award.

Held: body corporate's application dismissed.

1. The arbitration was in fact ineffective to resolve the dispute between the parties: [36].

2. The dispute was a "complex dispute" and came under the provisions of s 227(1)(d) within Ch 6 of the *Body Corporate and Community Management Act 1997* (Qld): [36].

3. The dispute could only have been resolved using the remedies set out in s 229(2) — arbitration was not an option under that section: [36].

[Headnote by the CCH CONVEYANCING LAW EDITORS/JOANNE BENNETT]

DA Keane (instructed by Ledger & Co Lawyers) for the applicant body corporate.

C Carrigan (instructed by Mathews Hunt Legal) for the respondent resident unit manager.

Before: Dalton J

[140542]

Dalton J:

[1] The applicant, Liberty, is the body corporate of a community titles scheme which runs a large (predominantly) residential block on the Gold Coast. In 2004 Batwing took an assignment of an On-site Management Agreement (OMA) originally dating from 15 September 1999. Batwing under the agreement was both the letting agent and service contractor within the meaning of the *Body Corporate and Community Management Act* 1997 (Qld) (BCCMA). Something named "Security Objective" is set out in the schedule to the OMA as part of the services which the service contractor must provide. The parties fell into dispute about the provision of security services by Batwing. There was an arbitration conducted and the arbitrator delivered an award on 19 May 2011.

[2] Liberty makes an application pursuant to s 33 of the *Commercial Arbitration Act* 1990 (Qld) for leave to enforce the arbitration award and for a declaration that Batwing's annual remuneration under the OMA be reduced. Batwing makes a cross-application for declarations that the award is a nullity.

[3] The OMA provided for a yearly on-site manager's fee payable in monthly instalments – cl 6.2. At cll 6.12 and 6.13 it contained express provisions for the body corporate to reduce services provided by the service contractor and reduce the fee paid to the service contractor accordingly. Clause 19.2(b) mentioned security services in particular in this context. Strangely the provisions were never relied upon by the applicant. Nonetheless there is no suggestion that they are exclusive of the parties' rights and obligations.

[4] Clause 12 of the OMA deals with default and termination. Clause 12.1 lists a number of specific defaults, none of which is said to have occurred here. Clause 12.2 then provides that on such default there is a procedure to terminate the OMA. Clause 12.7 provides that if there is any dispute between the parties with respect to the subject matter of default or termination (which must mean as those words are used in the preceding subclauses), there is a particular dispute procedure which applies. That dispute procedure includes at cl 12.10:

> "If the dispute is not resolved by the exchange of notices the parties must confer in the presence of a mediator appointed by the Queensland Law Society Incorporated. If the dispute has not been resolved within thirty days after the appointment of a mediator by the parties, the dispute shall be submitted to arbitration administered by the Queensland Law Society Incorporated. …"

[5] On 4 March 2010 the chairman of the body corporate committee sent an email to Batwing attaching a complaint about security services from a lot-holder. One gathers that this is not the first such complaint as it is described in the email as the "straw that broke the camel's back". The email continues:

> "I will be recommending to Committee that the Body Corporate takes over the responsibility of Security as soon as we can vote on it at the next meeting and deduct the allowance from your contract … you can contest the issue, but I am confident we have more than adequate justification for making this move. …"

[6] Batwing replied on 5 March 2010 saying:

> "I have never contested the issue of BC taking on security.
>
> It's all yours.
>
> Make me an offer, and if acceptable by me, draw up the deed of variation and it's done."

[7] Later that same day the chairman replied, taking issue with some of the Batwing email not extracted and continuing:

> "Nevertheless, this will all become the Body Corporate's concern now that you have again agreed to relinquish Security. I'm sure the Committee will pass a VOC to confirm it, and set up an EGM as soon as it can be arranged.
>
> The price is already set, as a breakdown of your Salary was determined in 2001-2002 and attached to the Contract.
>
> The original Security figure of $183,750.00, adjusted annually at 5% is now $271,482.44, as shown for year 8 on the attached chart. That is the amount by which your remuneration will be reduced. GST is not included in these figures.
>
> [140543]
>
> We'll make immediate arrangements for the VOC and EGM and get Security off your plate for you as soon as possible."

[8] On 8 March 2010 Batwing replied saying:

> "Your calculation is totally flawed.
>
> …
>
> I will collect 3 quotes 'like for like' to provide the same service security has provided for Liberty over the last 6 years.
>
> You will collect 3 quotes for the same service 'like for like'.
>
> We then average out each of our quotes to determine a contract amount.

If we both fail to come to an agreement on the amount, a Law Society/Real Estate Institute of Qld will make the final decision on the contract amount.

His decision is final.

How fair is that.

Please advise when you have collected your 3 quotes."

[9] The same day the chairman responded saying:

"I won't argue about the price at this stage, but I believe the breakdown was part of the contract and should apply.

Nevertheless, there are other ways of calculating the right deduction as you suggest. The committee has not recently discussed those alternatives, but I'm sure that we would accept them if the breakdown of your remuneration is not applicable.

For the moment, suffice to say you have agreed to relinquish Security and the Body Corporate Committee has agreed to take direct control of Security, if the owners vote accordingly.

I think it can all be achieved by 1 May 2010, if we move along reasonably quickly with care.

We have to resolve by VOC to put the matter to an EGM. Those processes will take some time. Please confirm we can commence the procedure by taking the first step – the VOC, while quotes etc are being obtained."

[10] The same day a reply was received from Batwing:

"Please proceed with your VOC.

Hopefully I will have my quotes by week's end.

I am happy to proceed in a business like manner.

The stress is not worth it Greg."

[11] On 17 March 2010 the committee of the body corporate unanimously resolved:

> "1. THAT an Extraordinary General Meeting be convened on 23 April, 2010 to consider a motion to vary the On-Site Management Agreement with Batwing Resorts Pty Ltd by changing the annual remuneration increase during the next option period from a minimum of 5% to a fixed 3%.
> 2. THAT the same Extraordinary General Meeting consider a motion to remove security duties from the On-Site Management Agreement and reduce the annual remuneration accordingly, and also consider a motion to approve the engagement of an external security firm to provide the required security duties."

[12] An EGM was conducted on 23 April 2010. The second resolution foreshadowed above was passed in the following terms:

"THAT the On-Site Management Agreement with Batwing Pty Ltd be varied to remove security duties from that agreement and reduce the annual remuneration accordingly and the Committee be authorised to execute an appropriate Deed of Variation to that effect."

It was passed with 49 votes for, 11 against, and six abstaining.

[13] Later that morning the committee of the body corporate met again. Three quotations were tabled by Batwing and three on behalf of the committee. Discussions failed to reach an agreement as to the figure which should be deducted from the on-site manager's remuneration.

[14]

[140544]

On 9 July 2010 the committee of the body corporate met again. Further quotations were tabled and again there was no resolution. The minutes record, "In accordance with Mr Batros' request for an independent Valuer to determine the purchase price, the BC requested the community manager to seek an appointee

from the Law Society of Queensland". This may have been a reference back to Batwing's email of 8 March 2010. The minutes of that meeting were approved at the next meeting without question by Mr Batros. However, on 10 August 2010 solicitors instructed by Mr Batros wrote to the secretary for the body corporate saying that Mr Batros had never requested an independent valuation.

[15] On 27 September 2010 the chairman of the body corporate committee wrote to the Queensland Law Society:

> "We seek the immediate appointment of an arbitrator of the Law Society to determine a simple issue between the Body Corporate of Liberty and our On-Site Manager, Batwing Resorts Pty Ltd.
>
> Under our current On-Site Management Agreement, the provision of 24 hr Security service is provided by Batwing Resorts Pty Ltd and forms part of his annual remuneration package. Both parties recently agreed that Security would become the direct responsibility of the Body Corporate and a Motion to that effect was duly passed by Lot Owners at a recent EGM.
>
> It was further resolved that, if and when agreement could not be reached on the appropriate reduction in remuneration, we would request an Arbitrator from your Society to be appointed to determine a fair price. We propose that both parties make written submissions on price within 14 days so your nominee can determine the fair price reduction.
>
> …"

The letter was marked, "C.C. Batwing Resorts Pty Ltd".

[16] A response was received from the Law Society dated 7 October 2010:

> "Thank you for your correspondence dated 27 September and received in this office on 1 October 2010.
>
> You have requested that, in accordance with the terms of an agreement between the parties, the President of the Queensland Law Society appoint an arbitrator to assist with the resolution of a dispute between the parties.
>
> You will appreciate that the agreement is between the parties, that the President is not a party to the agreement and is not contractually bound by its terms. In an attempt to assist the parties to resolve their dispute and in accordance with the parties contractual agreement the President will, however, take steps to make the requested appointment on the following basis:
>
> 1. all parties consent to the appointment,
> 2. …
>
> …
>
> To confirm that both parties agree to the appointment being made on the above basis, please have them sign on the attached copy of this letter and return with payment of the administration fee together with a copy of the Agreement by Friday 22 October 2010 for the appointment to proceed."

[17] The letter makes provision at its foot as follows:

> "I confirm I agree to the President appointing an arbitrator in accordance with the above terms and conditions and subject to the reservation of rights regarding the payment of a high fee."

[18] There is provision for the chairman of the body corporate and for the director of Batwing to sign. The letter is marked as "c.c. the director Batwing Resorts Pty Ltd".

[19] Both the chairman of the body corporate and the director of Batwing signed a copy of this letter and returned it to the Law Society.

[20] An arbitrator was appointed by the President of the Law Society and on 8 November 2010 wrote to the parties:

> "I have been appointed as Arbitrator in relation to a dispute arising out of the [OMA] by the President of the Queensland Law Society.

[140545]

> I have been provided with a copy of the [OMA] and a series of Deeds of Variation to that Agreement. I note that clause 12 of the agreement is the operative dispute resolution clause and that I am to conduct the arbitration in accordance with the laws of Queensland."

[21] The body corporate made submissions to the arbitrator. Then, on 20 December 2010, Batwing sent a letter to the arbitrator saying:

> "Batwing Resorts Pty Ltd is withdrawing from mediation on the Security Services being returned to Liberty Committee. As in accordance with Batwing's contract, I am not in default and therefore Batwing does not have to proceed with arbitration.
>
> Batwing's intention at the time, although not contractually obliged, was to agree to arbitration to mutually agree on a reduction in salary, and hand back security.
>
> The current relationship between the Chairperson and myself is somewhat strained, and therefore whatever the result from arbitration would not be agreed to by the Chairperson. …"

[22] The arbitrator was asked to stand advised that, "Batwing Resorts Pty Ltd, at this point in time no longer has any intention to remove its obligation to provide the security services from the Agreement, irrespective of the consideration for the transaction." It appears that by this stage the parties were in further dispute about other matters dealt with by QCAT.

[23] The mediator took the view that he had entered onto the arbitration and it was not possible for one party to unilaterally attempt to bring the process to an end. On 22 February 2011 solicitors acting for Batwing sent a letter dated 18 February 2011 to the arbitrator saying that: 1) the committee for the body corporate for Liberty did not have the requisite authority to commence the arbitration proceedings (s 312 of the BCCMA); 2) there was no default so as to enliven the dispute resolution clause (cl 12) of the OMA which referred to an arbitration; 3) cl 12 of the OMA did not comply with s 229(2) and s 318 of the BCCMA, and 4) even if cl 12 of the OMA did apply, the prerequisite notices and mediations prescribed by it had not been undertaken.

[24] The arbitrator was not deterred and curiously enough, without any explanation as to the inconsistency in approach, also on 22 February 2011, Batwing provided written submissions in support of the merits of the position it took in the dispute, to be considered by the arbitrator in deciding the point referred to him for arbitration. The committee responded to Batwing's substantive submissions and then Batwing, on 3 March 2011, responded to the substance of the committee's response.

[25] The arbitrator wrote to both parties saying he would consider questions of jurisdiction and asking for any additional material. Mr Batros then replied:

> "I do not wish to present additional material.
>
> The Committee has not requested additional duties for security that would increase the labour content in the current contract, so therefore please proceed on the basis of my schedule of works.
>
> Please proceed to determine a 'fair market value' for security services for Liberty based on security's current schedule of works.
>
> …
>
> Please proceed to determine a 'fair market value'."

[26] In his award the arbitrator made reference to the dispute about his jurisdiction and recorded that the parties appeared before him at preliminary conferences and "agreed they wished me to determine the issue between them".

[27] The arbitrator's decision was in favour of the body corporate.

[28] Batwing advances similar arguments before me as were advanced in the letter dated 18 February 2011.

Written Agreement to Arbitrate

[29] Pursuant to ss 3 and 4 of the *Commercial Arbitration Act* there must be a written agreement to arbitrate for the Act to apply.

[30]

It is plain that cl 12.10 of the OMA was never relied upon by either the applicant or the respondent as the agreement for arbitration which was sought from the Queensland Law Society. There are no facts before me which show that the factual prerequisites to an arbitration pursuant to cl 12.10 of the OMA had occurred. I think it is plain that the OMA cannot be relied upon as a written agreement to arbitrate.

[31] Equally plain is that by the emails and letters dated 8 March 2010 (Batwing to body corporate); 27 September 2010 (to Law Society, copied to Batwing), and 7 October 2010 (to body corporate, copied to Batwing, and signed by both Batwing and body corporate), there was a written agreement between the parties to arbitrate.

Body Corporate Not Authorised to Arbitrate

[32] Section 312 of the BCCMA provides that a body corporate "may start a proceeding only if the proceeding is authorised by special resolution of the body corporate".

[33] This matter originally came before me in the applications list on 4 March 2012. It was adjourned to the civil list after some argument. That argument revealed the respondent's position that there had not been a special resolution in terms of s 312 of the BCCMA. In *ex tempore* reasons given that day, I expressed the view that I would not see it as improper for the applicant to pass a resolution ratifying the referral of the matter to arbitration, even at that stage. The matter came back before me on 24 August 2012. On 3 August 2012 the general meeting of the body corporate had resolved:

> "THAT the Body Corporate is and was authorised to enter into an agreement with Batwing Resorts Pty Ltd to have the Queensland Law Society appoint an arbitrator and sign all necessary documents to give effect to the appointment of the arbitrator, and to pay any fee for the appointment of the arbitrator for the purpose of having determined by the arbitrator the amount of remuneration to be deducted from the OSM Agreement in exchange for the relinquishment of the security obligations to the Body Corporate."

The voting was 99 for, 10 against, and four abstentions.

[34] Batwing accepted that this was sufficient and effective ratification of the initiation of the arbitration by the body corporate. It was assumed by both parties that an arbitration was a "proceeding" within the meaning of s 312 of the BCCMA.

Arbitration Ineffective to Determine Parties' Dispute

[35] An application under s 33 of the *Commercial Arbitration Act* is not one where it is appropriate for the Court to examine the merits of the decision by the arbitrator. A Court may refuse to enforce an award if it is subject to appeal, or if the arbitrator has misconducted himself or herself.[1] No doubt it would be a proper reason to refuse leave to enforce an award if it could be shown that the arbitrator's decision was void.[2]

[36] I find that leave to enforce the arbitration award should be refused because the arbitration was ineffective to resolve the dispute between the applicant and the respondent. This conclusion is based on the provisions of chapter 6 of the BCCMA. The dispute between the body corporate and Batwing was a dispute as defined by s 227(1)(d) of the BCCMA. Section 229 goes on to provide exclusive remedies for disputes which may "be resolved under this chapter by a dispute resolution process". It seems to me that the matter is a "complex dispute", at least within the meaning of s 149B of the BCCMA because it is a dispute about a contractual matter concerning the engagement of Batwing as a caretaking service contractor for a community title scheme. The dispute as to the amount to be paid to Batwing under the OMA, after deletion of the security services from the scope of works in that contract, is within the definition of "contractual matter" in Schedule 6 to the BCCMA, concerning, as it does, Batwing's rights under the terms of the OMA and the body corporate's duties thereunder. Section 229(2) provides exclusive remedies for the resolution of complex disputes. They do not include arbitration by a private arbitrator. While the wording of the section is peculiar, it has been interpreted as meaning that the only manner in which a dispute caught by the section can be resolved is by the prescribed means.[3]

[37]

[140547]

The fact that the result of the arbitration does not, by law, resolve the dispute between the applicant and the respondent is in my opinion a good reason for refusing to enforce the award of the arbitrator. The applicant did not rely upon any argument based on waiver or estoppel, probably because of s 318 of the BCCMA which provides, "A person can not waive, or limit the exercise of, rights under this Act or contract out of the provisions of this Act."

[38] The applicant argued that the parties were not in dispute at the time of the reference to the arbitrator. The dispute between them had settled: the terms of the settlement being to exclude security services from the scope of works under the OMA at a price to be fixed, with an agreed mechanism (arbitration) to fix that price.[4] In my view, having regard to the facts of this matter, that is not a correct legal interpretation of what has occurred. The parties were in dispute at all material times.

[39] My formal order will therefore be to dismiss the originating application brought by the applicant and to declare that the award of Mr Ross Williams of 19 May 2011 has no effect on the rights and obligations of the applicant and respondent. I cannot see any necessity for the cross-application to have been brought and I dismiss it also.

[40] This may seem an unsatisfactory result having regard to Batwing's clear participation in the arbitration after having initially been the party who suggested the process. Further, having regard to the fact that Batwing raised the very point which has succeeded before me before the arbitration commenced and then, by implication at least, resiled from it. No doubt this approach by Batwing has contributed to delay and expense for both parties and further soured relations between parties who must work together until the OMA expires. The result is however, one compelled by law. In this regard I note that the body corporate seems to have acted for itself, including throughout the duration of the arbitration. The law relating to community title schemes is technical and, as this case illustrates, it is unwise for parties to proceed in disputes of this kind without legal advice, relying merely upon their notions of the justness of their cause.

[41] I will hear the parties as to costs.

Footnotes

1 *Cockatoo Dockyard* v *Commonwealth of Australia (No 3)* (1994) 35 NSWLR 689, 695-696.

2 *Mark Blake Builders Pty Ltd* v *Davis [DM-AMP] Anor*, BC 9403294, p 4 of 8.

3 *James* v *Body Corporate Aarons Community Title Scheme 11476* [2002] QSC 386, confirmed on appeal at [2004] 1 Qd R 386, 390, followed in *Henderson and Anor* v *Body Corporate for Merrimac Heights CTS 19563* [2011] QSC 336, [112].

4 cf *Booker Industries Pty Ltd* v *Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600, 606.

SDW PROJECTS PTY LTD v MODI & ORS

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(2012) LQCS ¶90-182; Court citation: [2012] QSC 400

Supreme Court of Queensland

12 December 2012

Conveyancing — Community schemes — Off-the-plan contracts — Statutory obligations — PAMDA warning requirements — BCCM Form 14 information sheet — Letter directing buyer's attention to the contractual documents — Correct document order — Negligence of the developer's solicitor — Subsequent solicitors — Termination of the off-the-plan contracts by buyers — Property Agents and Motor Dealers Act 2000, s 365(2A)(c)(ii), 366B — Body Corporate and Community Management Act 1997 (Qld).

The applicant, SDW Projects Pty Ltd, was a developer who undertook a residential development in 2006. This particular application was brought by the applicant as a result of its professional negligence proceedings against the first respondent, Mr Modi, in which the first respondent alleged that the second respondent, Ms Clements, ought to be joined. Subsequently the second respondent was joined. Both respondents denied that they had been

[140548]

negligent, submitting that their correspondence enclosing the disclosure statements and contracts complied in all respects with s 365(2A)(c) of the *Property Agents and Motor Dealers Act 2000* (Qld) (PAMDA) (Note — this is now s 368(2A)(c)). The applicant, in this proceeding, sought a declaration that the correspondence sent by both the first and second respondent did not meet PAMDA requirements.

Initially the applicant instructed "Gold Coast City Solicitors" of which the first respondent was the principal. The first respondent sent 12 contracts to prospective purchasers with a covering letter which noted that the "Contract of Sale and Disclosure Statement" were enclosed. No reference was made which drew the buyer's attention to the PAMD Form 30c warning statement or BCCM Form 14 information sheet or to the order in which these documents were provided.

In fact, the warning statement, the information sheet and the contract were all contained in a booklet, as a composite document. However, the letters referred specifically to the contract of sale, rather than the booklet as a whole: [38]–[39].

The applicant later retained the second respondent to prepare and send off-the-plan contracts to two subsequent buyers. Likewise, the second respondent sent two contracts enclosed with letters which referred to the contract of sale and disclosure statement only. Her correspondence did not mention or draw the buyer's attention to the PAMDA Form 30c warning statement or the BCCM Form 14 information sheet.

The buyers who had received those contracts subsequently elected to terminate those contracts with notice.

Held: for the applicant developer

1. The correspondence sent by both the first and second respondent to the buyers did not comply with s 365(2A)(c)(ii) in that it did not direct the attention of the buyers to the PAMD Form 30c warning statement or the BCCM Form 14 information sheet.

2. The buyer must receive the disclosure statement, PAMDA Form 30c warning statement, BCCM Form 14 information sheet and contract in the correct order. The PAMDA Form 30c warning statement and BCCM Form 14 information sheet must be attached to the contract: [35].

3. The seller must direct the attention of the buyer to the PAMDA 30c warning statement and BCCM Form 14 information sheet and the contract: [35].

4. In this case the buyer's attention was directed by the first and second respondent to the contract but not the PAMDA Form 30c warning statement or the BCCM Form 14 information sheet: [38].

5. The fact that the letters were sent to a solicitor does not assist the respondents. There was no reason to think that a solicitor would understand a reference to a contract of sale to refer to something other than a contract of sale: [40].

[Headnote by JOANNE BENNETT]

M Stewart SC with D Pyle (instructed by Mullins Lawyers) for the applicant.

RPS Jackson (instructed by Bartley Cohen) for the first respondent.

SB Hooper (instructed by Barry & Nilsson Lawyers) for the second respondent.

D de Jersey (instructed by Thynne & Macartney) for the third respondent.

G Gibson QC with D O'Brien (instructed by Ashurst Australia) for the fourth respondent.

Before: Peter Lyons J

[140549]

Peter Lyons J:

[1] The issue in these proceedings is whether the provisions of s 365(2A)(c) of the *Property Agents and Motor Dealers Act* 2000 (Qld) (*PAMDA*) have been complied with by the sending of letters each of which enclosed a contract for the sale of a proposed unit, attached to which were a warning statement and information sheet[1] , when each letter did not, in terms, refer to the warning statement or information sheet.

Factual background

[2] In 2006, the applicant (*SDW*) undertook a residential development at 1 Hinterland Drive, Mudgeeraba. The development was to include 30 residential units. As is not uncommon, the proposed units were offered for sale before the development was completed.

[3] SDW retained solicitors to assist it in relation to the sale of the proposed units. Between June and October 2007, it retained the firm "Gold Coast City Solicitors", the principal of which was the first respondent, Mr Modi. From early October 2007, SDW retained the second respondent, Ms Lisa Clements, of Clements Lawyers, to provide similar assistance.

[4] On 12 occasions between 6 and 25 June 2007, Mr Modi forwarded by courier an executed contract for the sale of a proposed unit in the development and other documents to the solicitor representing each of the purchasers. The letters generally included the following:

> **"RE: SDW PROJECTS SALE TO [BUYER NAME]**
>
> **PROPERTY: UNIT [NUMBER AND ADDRESS]**
>
> We refer to the above matter and advise that we act on behalf of the vendor and note that you act on behalf of the purchaser.
>
> We now **enclose** Contract of Sale and Disclosure Statement for your attention.
>
> … "

[5] However, one letter included the words set out above, save for the phrase, "for your attention". No party relied on this difference, and I shall henceforth ignore it.

[6] Enclosed with each letter were two spiral bound books of documents. In one book, the first page was the warning statement for which provision is made in *PAMDA*. Immediately following the warning statement was the information sheet (a document identified in the *Body Corporate and Community Management Act* 1997 (Qld) (*BCCMA*)); followed by the contract. In each case, the warning statement and the contract had previously been signed by the purchaser. Each contract recorded that the buyer had received the information sheet[2] .

[7] The second book contained a disclosure statement (also a document identified in the *BCCMA*).

[8] Ms Clements acted in relation to the sales of proposed unit 8 and proposed unit 27. On about 2 October 2007 she sent a letter to the solicitors for the purchasers of proposed unit 8. Apart from a reference to the transaction, that letter included the following:

"We refer to the above matter and enclose herewith the following:

1. Executed Contract of Sale;

2. Disclosure Statement.

We further note the following:

Contract Date: 9 October 2007

Initial Deposit: $1,000.00

Balance Deposit 6 November 2007

Settlement: 14 days after the Sellers[*] Solicitors gives notice to the Buyer that the Scheme has been created at the Department of Natural Resources & Mines."

[140550]

[9] On 7 February 2008 Ms Clements sent a letter to the solicitors for the purchaser of proposed unit 27. Apart from a reference to the transaction, that letter included the following:

"We confirm that the above contract has been accepted and signed by the Seller and is dated **01/02/2008**. We now **enclose** signed Contract for your attention.

This Contract was sent to you by express post. The cooling off period commenced on your receipt of the Contract.

As the PAMD Act is not specific as to the date of receipt, and unless you immediately advise us to the contrary, we deem that the cooling off period will commence the next business day after the above date, on the basis that the policy of Australia Post with respect to express post, is next day delivery.

..."

[10] Each of these two letters included two booklets, corresponding to the booklets sent by Mr Modi. The warning statement and contract had been signed by the purchaser; and the contract contained similar provisions acknowledging receipt of the information sheet.

[11] In early 2009, the purchaser in each of these 14 transactions gave notice of the withdrawal of its offer pursuant to s 365(2A)(c)(ii) of *PAMDA*. The third respondent, Holding Redlich, was retained by SDW in February 2009 to advise and act for it in its disputes with those purchasers. Holding Redlich briefed the fourth respondent, Mr Bradley, a barrister, to advise whether the purchasers could lawfully withdraw their offers. It seems appropriate to assume for the purpose of this application that, in a number of cases, he advised that letters did not satisfy s 365(2A)(c)(ii).

History of proceedings

[12] In April 2009, SDW commenced proceedings against Mr Modi (BS 4244/09), alleging that he had been negligent by reason of his failure, in the letters previously mentioned, to comply with the requirements of s 365(2A)(c)(ii). Mr Modi alleged that Ms Clements should have identified and attempted to rectify any non-compliance with the *PAMDA* requirements, resulting in Ms Clements' being added as a defendant in those proceedings.

[13]

[140551]

SDW had also commenced proceedings against Ms Clements in respect of the two transactions previously mentioned (*BS11953/09*). In each case, SDW had alleged that Ms Clements was negligent in failing to comply with the requirements of s 365(2A)(c)(ii) of *PAMDA*.

[14] Mr Modi and Ms Clements denied that they were negligent, on the grounds that in each of these transactions, their letter and the accompanying documents sufficiently complied with those requirements.

[15] In her defence in each of these proceedings, Ms Clements has alleged that Holding Redlich was a concurrent wrongdoer because it failed to advise SDW that none of the purchasers was entitled to withdraw the offer to purchase, and because it failed to advise SDW to insist that each purchaser complete its contract of sale, and if necessary, to sue each purchaser for specific performance of its contract. It is anticipated that a similar allegation might be made against Mr Bradley by one of the other parties to this proceeding.

[16] The present application has arisen as a consequence of a consideration and a review of the two actions commenced by SDW as to whether all necessary parties had been joined.

Statutory provisions

[17] The relevant provisions of *PAMDA* are found in ch 11. It is convenient first to note its stated purposes, as follows:

> "**363 Purposes of ch 11**
>
> The purposes of this chapter are –
>
> (a) to give persons who enter into relevant contracts a cooling-off period; and
> (b) to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period; and
> (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers."

[18] Relevant definitions for that chapter include the following:

> "**364 Definitions for ch 11**
>
> In this chapter —
>
> ***attached***, in relation to a warning statement, any information sheet and a contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document.
>
> …
>
> ***cooling-off period***, for a relevant contract, means a period of 5 business days —

(a) starting on the day the buyer under the relevant contract is bound by the relevant contract or, if the buyer is bound by the relevant contract on a day other than a business day, the first business day after the day the buyer is bound by the relevant contract; and
(b) ending at 5p.m. on the fifth business day.

Example —

Assume a contract is entered into at any time on Monday and the buyer is bound by the contract. Assume also that the cooling-off period is not affected by public holidays. The cooling-off period ends at 5p.m. on Friday

disclosure statement see the *Body Corporate and Community Management Act 1997*, section 205A.

…

information sheet see the *Body Corporate and Community Management Act 1997*, section 206(5) or (6) or 213(5) or (5A).

relevant contract means a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction.

…

unit sale means a sale of a lot included in a community titles scheme, or proposed to be included in a community titles scheme, within the meaning of the *Body Corporate and Community Management Act 1997*.

warning statement means a statement in the approved form that includes the information mentioned in section 366D(1)."

[19]

[140552]

Each transaction which gives rise to the present application was a "unit sale". A contract for such a sale is affected by s 365 of *PAMDA* which includes the following:

"**365 When parties are bound under a relevant contract**

(1) The buyer and the seller under a relevant contract are bound by the relevant contract when —

(a) for a relevant contract, other than a relevant contract relating to a unit sale — the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or
(b) for a relevant contract relating to a unit sale — the buyer or the buyer's agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).

…

(2A) For a relevant contract relating to a unit sale, the ways are —

…

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and (iv) other than by electronic communication, if —

(i) the warning statement and the information sheet are attached to the relevant contract with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and

(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement, the information sheet and the relevant contract.

Example of receipt other than by electronic communication —

• post

Examples of how attention may be directed —

• by oral advice
• by including a paragraph in an accompanying letter

(3) Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the seller or the seller's agent.

…

(5) If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.

(6) In this section —

buyer's agent includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."

[20] Obligations in relation to the provision of a warning statement and an information sheet are set out in s 366B, as follows:

"**366B Warning statement if proposed relevant contract is given in another way**

(1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.

(2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.

(3) If the proposed relevant contract does not comply with subsection (2) -

(a) if the seller gave the proposed relevant contract — the seller; or
(b) if the seller's agent gave the proposed relevant contract — the seller's agent;
commits an offence.

Maximum penalty — 200 penalty units.

[140553]

(4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Note —

A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.

(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.
(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Maximum penalty — 200 penalty units."

[21] The content of a warning statement is specified in s 366D. The words used in the warning statement must be presented in substantially the same way as those words are printed on the approved form. The statement is of no effect unless signed by the buyer, before the buyer signed the proposed contract[3] .

[22] Provision is made for the cooling off period in pt 3 of ch 11. It is sufficient to note that it generally permits termination of a contract by signed notice[4] .

[23] There has been no suggestion that any of the contracts was not a relevant contract, as that expression is used in these provisions. In each case the warning statement was in the approved form, with the word, "WARNING" in bold type near the top.

Contentions of the parties

[24] The applicant, the third respondent and the fourth respondent each contended that the first respondent and the second respondent had failed to comply with s 365(2A)(c)(ii) because in each of the transactions, the solicitor then acting for the applicant had failed to direct the attention of the buyer's agent to the warning statement and information sheet in one of the booklets accompanying each letter. They relied upon the approach taken in *MNM Developments Pty Ltd* v *Gerrard*[5] ; *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd*[6] (*Hedley*); and *Collis* v *Currumbin Investments Pty Ltd*[7] . Their submissions sought to distinguish the decision in *Boylan* v *Gallagher*[8] (*Boylan*). It was submitted that this approach to s 365(2A)(c) was to be preferred, pursuant to s 14A of the *Acts Interpretation Act* 1954 (Qld) (*AIA*) because it best achieved the purpose of the provision. Reference was also made to the passage from the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc* v *Australian Broadcasting Authority*[9.] to the effect that ordinarily the legal meaning of a statutory provision will correspond to its grammatical provision.

[25] The submissions of the first and second respondents drew attention to some statements of principle in *Boylan* (discussed below). They also draw attention to the factual similarities between that case and the present case. These respondents submitted that, so far as it discussed a requirement in ch 11 pt 1 of *PAMDA* relating to directing the attention of the purchaser to particular documents, *Hedley* dealt with a provision which required a "clear statement" which had that effect; and in any event, what was said was only said *obiter*. It was also submitted that the treatment of the relevant provision in *Hedley* was inconsistent with the subsequent decision of the Court of Appeal in *Boylan*. They submitted that the letters drew attention to the warning statement, the information sheet and the relevant contract, in the circumstances. Those circumstances were that in each case the letter drew attention (either by use of the words "for your attention" or at least by implication) to the enclosures; one of those enclosures was referred to as a "Contract of Sale"; the relevant enclosure was a booklet which included the warning statement, the information sheet, and the relevant contract; in relation to each transaction, the warning statement had been signed, and the information sheet had been seen, by the relevant purchaser;

[140554]

in each transaction, the recipient of the letter was a solicitor; and in each case the warning sheet was identified in bold and capital letters, and the information sheet immediately followed it in the booklet. It was submitted that in the circumstances, the purpose of s 365 of *PAMDA* had been satisfied.

Consideration

[26] It is convenient, consistent with the applicant's submissions, to commence with a consideration of the sequence in which the operative provisions of ch 11 pt 1 of *PAMDA* take effect, and some related matters. It is sufficient to do so, by reference to provisions dealing with the sale of a proposed unit, not involving electronic communication.

[27] If a proposed contract is given to a proposed buyer for signing, then the seller must ensure that the proposed contract has attached to it a warning statement and, for a unit, an information sheet; with the warning statement appearing as the first or top page, and the information sheet appearing immediately after the warning statement[10] . The seller must direct the proposed buyer's attention to the warning statement, and the information sheet[11] . The warning statement is of no effect unless the buyer signs the warning statement; and in a case where a proposed contract is handed to the buyer, it is of no effect unless the buyer signs it before signing the proposed contract[12] . The matters referred to thus far are generally pre-contractual.

[28] The general rule which would determine when a contract becomes effective is modified by s 365 of *PAMDA*. Its effect is that the parties are not bound by the contract until the buyer receives the warning statement, the information sheet, and the contract in accordance with s 365(2A)(c)[13] . Thus it is necessary that the buyer again receive a warning statement, and an information sheet, attached to the contract; whereas s 366B required that these documents be attached to the proposed contract. On both occasions, there is a requirement to direct the attention of the (proposed) buyer to the warning statement and the information sheet[14] .

[29] The requirement to provide these documents on two occasions to a buyer, and to direct the buyer's attention to them on each occasion, emphasises the importance which the legislature attaches to these matters.

[30] The applicant's submissions pointed out that the obligation to direct attention to these documents found in s 365(2A)(c)(ii) may be satisfied by directing the attention of the buyer's agent to them; and that the statute expressly recognised that the buyer's agent might be a lawyer[15] . The obligation to direct attention to the documents applies, notwithstanding that the documents are delivered to a lawyer acting as the buyer's agent.

[31] In *MNM Developments Pty Ltd* v *Gerrard* the Court of Appeal had to consider ch 11, pt 1, of *PAMDA* as it stood prior to amendments made in 2005. Section 366 then required that a warning statement be attached to a contract as its first or top sheet; and s 367 provided that if that was not done, the buyer might terminate the contract before settlement. De Jersey CJ said:

> "[16] The context of the requirement set up by s.366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s. 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is 'to protect consumers against particular undesirable practises'. That protection extends in case like these, to give a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s.366(4)(a), s. 366(4)(b) (including the example) and s. 367(2)."

[32] Notwithstanding the changes in the provisions, in my respectful opinion his Honour's comments remain applicable to ch 11, pt 1, including to the provisions which are significant in the present case.

[33] In *Boylan,* the Court had to determine whether a provision found in s 365(2)(c) relating to directing attention to a warning statement and a relevant contract had been complied with. Save that there is no reference to an information statement, the provision is in

the same terms as s 365(2A)(c)(ii). Of s 365(2)(c), Fraser JA (with whose reasons the other members of the Court agreed) said[16] :

> "… the relevant test is that which is expressed in the statutory provision. Neither the text nor the examples require the relevant direction to refer specifically or expressly to the warning statement or the relevant contract and s 365(2)(c) also does not require the 'clear' statement which is called for by s 365(2)(a)(i) and s 365(2)(b)(i) …
>
> Although proof of compliance with the provision ordinarily would justify an inference that the buyer or the buyer's agent in fact became aware of the documents, it is not necessary for the seller to prove that fact … The focus of the provisions is upon what was said, written, or done by the seller or the seller's agent. The statutory purpose is fulfilled if the seller or to the seller's agent does what is required to be done on the part of the seller to direct the attention of the buyer or the buyer's agent to the warning statement and the relevant contract. No less is sufficient but no more is required."

[34] In the same case, Philippides J (with whose reasons Chesterman JA agreed) said[17] :

> "While the buyer's attention must be directed to both the warning statement and the relevant contract, there is nothing which requires each to be identified distinctly and specifically. Moreover, whether there has been a direction of attention to the warning statement must be informed by the circumstances of each case.

[35] In my view, in a case where the parties would otherwise be bound by a contract relating to the sale of a unit, and a copy of the contract is delivered to the buyer by some means other than electronic communication, the effect of s 365 is that the parties are not bound until the buyer receives (in a case like the present case) a copy of the contract, the warning statement and the information sheet, in a way which satisfies two conditions. One is a condition containing several elements, they being that the warning statement and the information sheet are attached to the contract; and that the warning statement must be the first or top page of the document created by the attachment, with the information sheet appearing immediately after it. Moreover, because the statutory provision uses the defined term "warning statement", the provision refers to a document with "WARNING" in bold type. The second condition is that the seller directs the attention of the buyer to the warning statement, the information sheet and the contract. In my view, both conditions must be satisfied, before the parties are bound by the contract.

[36] What has been said about the effect of s 365 thus far is not in dispute. The issue is whether the second condition is satisfied.

[37] The first respondent and the second respondent submitted that the second condition was satisfied in this case. The effect of their submission was that, since two booklets accompanied each letter, and one booklet was clearly referred to in the letter (the disclosure statement), the other reference in the letter was to the other booklet. It was submitted that a practical approach must be taken for determining whether the condition was satisfied, bearing in mind the circumstances of the case, previously mentioned.

[38] It is appropriate to describe the booklet containing the warning statement, the information sheet and the contract as a composite document. However, the difficulty for the first respondent and the second respondent in the present case is that that booklet included the contract, described on its face as a contract of sale. The same expression appeared in each letter. In my view, therefore, the letter in each case directed attention to the contract, but did not direct attention to the other two documents in that booklet. It might be observed that the argument for the first and second respondents is particularly weak in relation to Ms Clements' letter of 7 February 2008.

[39] The specific reference in the letters to the contract of sale, rather than the booklet as a whole, materially distinguishes the facts in the present case, from those considered in *Boylan*. There, the buyer's solicitor, had prepared what was referred to as a "composite document", which included the warning statement and the contract (a deed). That solicitor described the composite document as "Put and Call Option document". When the seller's solicitor returned

those documents after execution by the seller by a letter dated 12 May 2008[18] , the seller's solicitor, in the letter, described the relevant enclosure as "full executed copy of the Put and Call Option document". The adoption of the description adopted by the buyer's solicitor was considered sufficient to refer both to the deed, and the warning statement. That conclusion was reinforced no doubt by the use of the word "full". It

might also be observed that the letter from the seller's solicitor enclosing the executed documents, when wishing to refer to the contract itself, used a different description, "Put & Call Option Deed"[19] . Looked at in the context of the communications of the parties, it is in my respectful opinion, by no means surprising that the adoption by the seller's solicitor of the expression used by the buyer's solicitor to describe a bundle including both the warning statement and the contract was held to be "apt" to refer to both those documents[20] . That is not true in the present case.

[40] In my view, the fact that each of the letters at present under consideration was sent to a solicitor does not assist the first respondent and the second respondent. There is no reason to think that a solicitor would understand a reference to a contract of sale to be a reference to something other than a contract of sale. The taking of a "practical approach" does not, in my view, alter the effect of the expression used in each letter.

Conclusion

[41] I am prepared to make the declaration sought by the applicant.

Footnotes

1 The meaning of these expressions is explained below.
2 See cl 19.1.2 of each contract, and the signed Statement [DM-AMP] Acknowledgement.
3 See s 366D(3).
4 See s 368 of *PAMDA*.
5 [2005] 2 Qd R 515, especially at [16].
6 [2008] QSC 261.
7 [2009] QSC 297.
8 [2012] 1 Qd R 420.
9. (1998) 194 CLR 355 at [78].
10 See s 366B(2).
11 See s 366B(4) and (5).
12 See s 366D(3) and (4).
13 See s 365(1) and (3).
14 See s 366B(4) and (6); s 365(2A)(c)(ii).
15 See s 365(6).
16 *Boylan* at [32] – [33].
17 *Boylan* at [51].
18 See *Boylan* at [17].
19 See *Boylan* at [18].
20 See *Boylan* at [51].

MACDONALD & ANOR v CLARK & ANOR

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(2012) LQCS ¶90-183; Court citation: [2012] QSC 418

Supreme Court of Queensland

21 December 2012

Conveyancing — Community schemes — Encroachment between neighbouring lot owners — Common boundary fencing — Improvements made to the encroached area — Conciliation in the Office of the Commissioner for Body Corporate and Community Management — Dispute resolution — Order which an adjudicator can make — Body Corporate and Community Management Act 1997 (Qld), Ch 6, s 228, 276(1), 285 and Sch 5 — Property Law Act 1974 (Qld), Pt 11 Div 1.

The plaintiffs and the defendants were adjoining lot owners who shared a common boundary within their scheme. After the plaintiffs purchased their lot in 2007, they agreed with the defendants to split the cost of a replacement fence between the two lots.

After the fence was replaced, the plaintiffs undertook improvements to their lot including laying sandstone tiles and installing a shade sail structure with the permission of the body corporate. In July 2011 the defendants engaged a surveyor to check the boundaries of the lots and the surveyor confirmed that the plaintiffs' lot encroached onto the defendant's land by about 6.5 m^2.

The parties discussed a resolution to the problem. The plaintiffs wanted the defendants to convey that portion of the land to them while the defendants wanted the encroachment removed. The defendants lodged an application with the Office of the Commissioner for Body Corporate and Community Management. The plaintiffs refused to participate and later wrote to the Office of the Commissioner seeking the matter be dismissed so that the plaintiffs' claim (which had been filed in the District Court) could be heard by that court.

The Commissioner refused to dismiss the request and placed the adjudication in abeyance until such time as the District Court claim was concluded. The District Court transferred the proceeding to the Supreme Court. The plaintiffs sought relief under Pt 11 Div 1 of the *Property Law Act 1974* (dealing with encroachments).

The defendants applied for a declaration that there was no jurisdiction for the court proceedings, or alternatively sought a stay order.

Held: defendants' application dismissed.

1. An adjudicator can make an order about a matter in s 276(1) and those mentioned in Sch 5 of the *Body Corporate and Community Management Act 1997* (Qld) (BCCM Act): [41].

2. Section 285 of the BCCM Act excludes an adjudicator from resolving a question regarding title to land: [41].

3. The adjudicator did not have the power to grant the only relief which would resolve the dispute. In obiter, Martin J noted that even if the adjudicator had resolved the dispute in the plaintiff's favour, the adjudicator would not have had the power to grant them the relief which they were seeking. There would ultimately be no utility in going through the dispute resolution process: [43].

4. The legislature has specifically provided for the Supreme Court to resolve disputes about encroachments. Such disputes should be dealt with by the Supreme Court and not through the dispute resolution processes in the BCCM Act: [46].

[Headnote by JOANNE BENNETT]

R Cameron (instructed by Steindls Lawyers) for the applicants/defendants.

C Francis (instructed by Hynes Lawyers) for the respondents/plaintiffs.

Before: Martin J

[140558]

Martin J:

[1] The plaintiffs have commenced proceedings seeking relief under Part 11 Division 1 of the *Property Law Act* 1974 ("PLA") being that part of the PLA which deals with encroachments. The defendants seek a declaration that those proceeding have not, for want of jurisdiction, been properly commenced in this Court. In the alternative, the defendants seek an order staying the proceedings permanently or until such other time as determined.

Background

[2] The plaintiffs are the registered owners of Unit 16, 101 Morala Avenue, Runaway Bay. They are adjoining neighbours of the defendants, who are the registered owners of Unit 15. The properties are more properly

described as Lots 24 and 23 of the Mornington Quays Community Title Scheme CTS 23056 ("Mornington Quays") respectively.

[3] The plaintiffs purchased Lot 24 in November 2007. At that time, the two lots were separated by a brush fence apparently located on the common boundary between the lots.

[4] In April 2009, the plaintiffs and defendants shared the cost of replacing the brush fence with a wooden fence. The wooden fence was constructed along the same line as the brush fence and extended to the boardwalk at the first defendant's request.

[5] From April to June 2009, the plaintiffs undertook improvements in the vicinity of the wooden fence, including laying sandstone tiles to replace and extend the patio area and installing a shade sail structure. These improvements were carried out with the permission of the Body Corporate for Mornington Quays.

[6] In July 2011, the defendants engaged a surveyor to determine the correct boundary line between the two lots.

[7] In August 2011, the surveyor confirmed that there had been an encroachment onto the defendants' property of an area of about 6.5 square metres. The encroachment consists of, among other things, the wooden fence, the patio improvements, a shade sail and supporting post, and a split-system air-conditioner motor.

[8] Discussions occurred in an attempt to resolve the encroachment dispute. The plaintiffs want the defendants to convey the area of encroachment to them, and the defendants in turn seek the removal of the encroachment.

History of proceeding

[9] On 21 March 2012, the defendants lodged a conciliation application with the Office of the Commissioner for Body Corporate and Community Management ("Office of the Commissioner") in relation to the dispute.

[10] A conciliation session was scheduled for 23 April 2012 but the plaintiffs advised that they would not be attending. As a result, the Office of the Commissioner issued a Conciliation Certificate to the effect that "the respondent did not make a reasonable attempt to participate in conciliation".

[11] On 18 April 2012, the plaintiffs filed a claim in the District Court at Southport seeking declarations that lasting improvements were made to the area of encroachment and orders vesting the area of encroachment in the plaintiffs.

[12] On 27 April 2012, the defendants applied to the Office of the Commissioner for adjudication of the dispute.

[13] On 18 May 2012, the defendants filed a conditional notice of intention to defend together with this application.

[14] On 25 May 2012, the plaintiffs' solicitors wrote to the Office of the Commissioner seeking a certificate of dismissal in relation to the adjudication application on the basis that the matter should be dealt with by a court of competent jurisdiction, which the plaintiffs asserted was the District Court at Southport, it being the court in which the plaintiffs had filed their claim.

[15] On 26 June 2012, the Commissioner refused the dismissal request after considering the parties' submissions and placed the adjudication in abeyance until the District Court claim was concluded.

[16] The Commissioner stated:

> "Given the case history of encroachment disputes referred to, and determined by, department adjudicators I am not persuaded that any dispute involving an encroachment must automatically be outside the
>
> [140559]
>
> jurisdiction of a dispute resolution officer. I accept that a specific proceeding under, or seeking orders in accordance with, the *Property Law Act 1974* would be another case entirely.
>
> …

Consequently, on balance I am satisfied that the applicants have *prima facie* demonstrated a dispute for the purposes of the *Body Corporate and Community Management Act 1997* that is within the jurisdiction of a dispute resolution officer.

…

I [turn] my mind to the question of whether the subject matter of adjudication is part of, or closely related to, the existing District Court proceedings – for which the answer is clearly in the affirmative.

…

… it should be noted that if I dismiss this application under *section 250* then the jurisdiction of this Office to resolve the dispute is permanently relinquished and it cannot be revisited. In the knowledge that dismissal under *section 250* is irrevocable I am therefore reluctant to dismiss the application outright on what, in my view, amounts to speculation of how the Court will proceed in respect of the respondents' claim. For these same reasons I believe it is equally inappropriate to progress an adjudication application while a *potentially* related claim is under consideration in the District Court."

[17] McGinness DCJ heard this application on 3 September 2012. Her Honour was not satisfied that the plaintiffs' cause of action was within the jurisdiction of the District Court and transferred the proceeding to this Court.

Relevant legislation

[18] Chapter 6 of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCM Act") sets out a dispute resolution scheme that the defendants contend should govern the dispute exclusively.

[19] The relevant provisions are.

"**227 Meaning of *dispute***

(1) A ***dispute*** is a dispute between –

(a) the owner or occupier of a lot included in a community titles scheme and the owner or occupier of another lot included in the scheme; …

228 Chapter's purpose

(1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about –

(a) contraventions of this Act or community management statements; and
(b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and
(c) the adjustment of lot entitlement schedules; and
(d) matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents.

(2) Also, this chapter authorises the provision of education and information services aimed at promoting the avoidance of disputes.

229 Exclusivity of dispute resolution provisions

(1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.[1]

…

(3) Subject to section 229A, the only remedy for a dispute that is not a complex dispute is –

(a) the resolution of the dispute by a dispute resolution process; or
(b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.

(4) However, subsections (2) and (3) do not apply to a dispute if –

(a) an application is made to the commissioner; and
(b) the commissioner dismisses the application under part 5.

[140560]

(5) Also, subsections (2) and (3) do not limit –

(a) the powers of QCAT under the QCAT Act to –

(i) refer a question of law to the Court of Appeal; or
(ii) transfer a proceeding, or part of a proceeding, to the Court of Appeal; or

(b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act.

[20] The plaintiffs also rely on s 184 and 185 of the PLA.

"**184 Application for relief in respect of encroachments**

(1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this division in respect of any encroachment.
(2) This section applies to encroachments made either before or after the commencement of this Act.

185 Powers of court on application for relief in respect of encroachment

(1) On an application under section 184 the court may make such order as it may deem just with respect to –

(a) the payment of compensation to the adjacent owner; and
(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and
(c) the removal of the encroachment.

…"

[21] Schedule 6 of the PLA defines "court" to be the Supreme Court.

Dispute resolution scheme

[22] The principal objective of the BCCM Act is to "provide a legislative framework which accommodates the establishment, operation and management of community titles schemes."[2] One of the secondary objectives in support of the principal objective is to provide "an efficient and effective dispute resolution process."[3]

[23] The starting point for considering the scheme is s 229, which gives exclusive jurisdiction to the dispute resolution provisions in chapter 6 if the "dispute" is one that "may be resolved under this chapter by a dispute resolution process"[4] .

[24] The criteria that have to be satisfied are:

(a) the "dispute" must come within the definition of s 227;
(b) the dispute must concern an enumerated purpose in s 228; and
(c) it must be a dispute that may be resolved under chapter 6 by a dispute resolution process (s 229(1)).

Is it a "dispute"?

[25] A "dispute" is broadly defined in s 227 by reference to the parties involved. It is accepted by the plaintiffs that the parties fall within s 227(1)(a).

Is it within the chapter's purpose?

[26] Chapter 6 establishes arrangements for resolving disputes about matters contained in s 228(1).[5]

[27] The relevance of s 228 in limiting the scope of exclusive jurisdiction was the subject of argument. The plaintiffs contend that a "dispute" for the purpose of chapter 6 is confined only to those matters which concern a subject matter enumerated in s 228. The defendants submit that the plain intention of the legislature is that an adjudicator has exclusive jurisdiction to make orders for disputes under s 227. I was referred to two decisions: one in support of each proposition.

[28] In *Penberg Pty Ltd* v *Body Corporate for Market Town Community Titles Scheme 2052*,[6] Tutt DCJ considered exclusivity of jurisdiction in relation to a dispute between a lot owner and the body corporate regarding repairs to a unit.

> "[18] While s 229 could be expressed in clearer terms, it seems to me that it is the intention of the legislature to require *any* dispute between the Body Corporate and the owner of a lot included in a community title scheme under the Act to seek remedy for the dispute under Chapter 6 if the dispute may be resolved by the dispute resolution process prescribed under the Act."
>
> [140561]
>
> (original emphasis kept)

[29] In contrast, in *Body Corporate of the Lang Business* v *Green*,[7] Daubney J considered a dispute between a lot owner and body corporate regarding monies due and owing. His Honour said, in relation to s 227:[8]

> "[30] … This definition, however, does not clarify with any precision whether it covers every conceivable dispute between a body corporate and an owner or merely those within the purview contemplated by the Chapter's purpose set out in s 228. In my view, good-sense and practicability, in conjunction with a purposive approach to the legislation, dictate that the latter must be the case; it could scarcely be said, for instance, that the legislature intended for the dispute resolution processes set out in the BCCM to apply in case of a personal injuries dispute between an owner and a body corporate."

[30] The dispute in *Green* fell squarely within s 228 and Daubney J ultimately did not have to make a finding on the point.[9] However, I respectfully adopt his Honour's view. The primary purpose of the Act is the establishment, operation and management of community titles schemes. The application of the dispute resolution scheme to every single dispute between the parties listed in s 227 could hardly be said to accord with the purpose of the Act. Take, for example, a contractual dispute between two people who happen to be lot owners in the same community titles scheme for the sale of a boat. To read chapter 6 of the BCCM Act as requiring these lot owners to settle their contractual dispute in accordance with the dispute resolution procedures would be to go outside the boundaries of a piece of legislation concerning the management of body corporate affairs.

[31] Section 228 therefore establishes the parameters within which the dispute resolution scheme operates. A "dispute" within the definition of s 227 has to come within one of the four categories in s 228 before s 229 falls to be considered.

[32] The plaintiffs submit that this proceeding does not fall within the scope of s 228. The defendants point to s 167 as an example of a provision that, if contravened, would bring the dispute within the scope of s 228(1)(a):

> "**167 Nuisances**

> The **occupier of a lot** included in a community titles scheme **must not use**, or permit the use of, **the lot** or the common property in a way that –
>
> > (a) causes a nuisance or hazard; or
> > (b) **interferes unreasonably with the use or enjoyment of another lot** included in the scheme; or
> > (c) interferes unreasonably with the use or enjoyment of the common property by a person who is lawfully on the common property.
>
> (emphasis added)

[33] This section prohibits the occupier of a lot from using his or her lot in a way that interferes with the use or enjoyment of another lot. Examples of nuisance include noise, smoke and unruly behaviour[10] and creating dust and sawdust.[11]

[34] The present dispute involves the plaintiffs making improvements on land belonging to the defendants. It does not concern the use of their own lot in such a way that causes a nuisance, or otherwise interferes with the use or enjoyment of the defendants' lot. Section 167 is not relevant in these factual circumstances and this dispute therefore does not fall within s 228(1)(a) of the BCCM Act.

[35] On this basis, therefore, the dispute resolution procedures of the BCCM Act do not govern this dispute exclusively.

[36] However, even if I am incorrect on this point, this dispute is nevertheless not subject to the BCCM Act dispute resolution procedures as it is not a dispute that can be resolved by a dispute resolution process.

Can the dispute be resolved by a dispute resolution process?

[37] If ss 227 and 228 are satisfied, s 229(1) requires the dispute to be one that may be resolved under chapter 6 by a dispute resolution process.

[38] A 'dispute resolution process' is defined in schedule 6 of the BCCM Act. The defendants in this matter applied for department adjudication.

[39]

The meaning of 'may be resolved under chapter 6 by a dispute resolution process' was explained by the Court of Appeal in *James* v *Body Corporate for Aarons Community Titles Scheme 11476*,[12] where Davies JA stated:[13]

> "Section 184[14] does not speak in terms, specifically, of jurisdiction to hear and decide but **in terms of providing a remedy**. However I think **its plain intention is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes**, relevantly in s 223 and s 227, in disputes of the kind to which s 182 refers, **subject to any statutory exception or limitation**."
>
> (emphasis added)

[40] The following sections are relevant to the powers of the adjudicator.

> **270 Dismissal of applications**
>
> > (1) The adjudicator may make an order dismissing the application if –
> >
> > > (a) it appears to the adjudicator that the adjudicator does not have jurisdiction to deal with the application; or
> > > (b) the adjudicator is satisfied the dispute should be dealt with in a court or tribunal of competent jurisdiction;…

276 Orders of adjudicators

(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about –

(a) a claimed or anticipated contravention of this Act or the community management statement; or
(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
(c) a claimed or anticipated contractual matter about –

(i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
(ii) the authorisation of a person as a letting agent for a community titles scheme.

(2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
(3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
(4) An order appointing an administrator –

(a) may be the only order the adjudicator makes for an application; or
(b) may be made to assist the enforcement of another order made for the application.

(5) If the adjudicator makes a consent order, the order –

(a) may include only matters that may be dealt with under this Act; and
(b) must not include matters that are inconsistent with this Act or another Act.

285 Limitation on powers of adjudicator

The adjudicator does not have power to resolve a question about title to land."

[41] An adjudicator may make an order about a matter in s 276(1) and those mentioned in schedule 5 of the BCCM Act. The matters enumerated in s 276(1) are broad and generally correspond with those in s 228. The adjudicator also has the power to dismiss an application for want of jurisdiction, or if the adjudicator is satisfied that it should be dealt with in a court or tribunal of competent jurisdiction. Importantly, s 285 specifically excludes the adjudicator from resolving a question about title to land.

[42] The question to be answered is whether the orders the adjudicator is empowered to make will resolve the dispute. The plaintiffs seek the conveyance of the area of encroachment to them while the defendants want the encroachment removed.

[43] The answer is apparent in s 285 of the BCCM Act: the adjudicator does not have power to resolve a question about title to land.

[140563]

If the plaintiffs were to be successful and the dispute was resolved in their favour, the adjudicator would not have the power to grant them the relief they seek. There would be no utility in going through a dispute resolution process that is incapable of ultimately resolving the dispute.

[44] I was referred to *Independent Finance Group Pty Ltd* v *Mytan Pty Ltd*[15] as authority for the proposition that the plain intention of the legislature is that an adjudicator is to have exclusive jurisdiction to make orders of the kind prescribed in ss 276 and 281 for disputes under s 227. A salient question in that decision was whether the adjudicator had to resolve a question about title to land in giving effect to a resolution granting exclusive rights over common property. In separate reasons, Thomas JA and Atkinson J (with whom McMurdo P agreed) both found that the adjudicator's order did not resolve a question about title to land.[16]

Both their Honours acknowledged that, where the adjudicator has to resolve a question about title to land, the adjudicator would be prohibited from resolving the dispute.[17]

The *Property Law Act* 1974

[45] Part 11, Division 1 of the PLA provides for relief in respect of encroachments. Section 183 of the PLA provides that that division applies despite the provisions of any other Act. Section 185 gives powers to the Supreme Court to grant relief in respect of encroachments as it may deem just, including the power to order the conveyance of the subject land or the removal of the encroachment.

[46] The legislature has specifically provided for this Court to resolve disputes about encroachments. It has also specifically excluded an adjudicator under the BCCM Act from resolving a question about title to land. The legislative intent is clear. Disputes concerning encroachments are to be dealt with by this Court and not be subject to the dispute resolution processes contained in the BCCM Act.

Conclusion

[47] The application is dismissed.

Footnotes

1 'dispute resolution process' is defined in Schedule 6 of the BCCM Act.
2 *Body Corporate and Community Management* Bill 1997, Explanatory Notes, p 1.
3 Ibid.
4 s 229(1) BCCM Act.
5 s 228 BCCM Act.
6 [2007] QDC 020.
7 [2008] QSC 318.
8 Ibid, [30].
9 Ibid, [31]
10 *Peden Pty Ltd* v *Bortolazzo* [2006] 2 Qd R 574.
11 *Aussie Traveller Pty Ltd* v *Marklea Pty Ltd* [1998] 1 Qd R 1.
12 [2004] 1 Qd R 386.
13 Ibid, 390.
14 Currently s 229 BCCM Act.
15 [2003] 1 Qd R 374.
16 Ibid, 384, 397.
17 Ibid, 384, 394.

CROSS & ORS v PEEBLES

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(2013) LQCS ¶90-184; Court citation: [2013] QCA 26

Supreme Court of Queensland — Court of Appeal

Decision delivered on 26 February 2013

Conveyancing — Sale of property — Clarification of residential property agents' duty of disclosure to prospective purchasers — Statutory obligation on agents to disclose person receiving benefit and amount, value or nature of benefit in connection with a sale — Whether the person receiving benefit must be identified by name — Whether amount of benefit must be described in a precise dollar figure — Interpretation of s 138(1)(c) of the Property Agents and Motor Dealers Act 2000 — Property Agents and Motor Dealers Act 2000, s 138(1)(c).

One of the applicants was a residential property agent engaged in the business of marketing and selling residential properties in new developments in Brisbane, the Gold Coast and the Sunshine Coast. Its activities were directed towards the interstate investor market.

The applicant operated within a corporate group that included a financial services company that provided finance to prospective purchasers and a marketing company that marketed the properties via seminars.

The *modus operandi* generally adopted by the corporate group was that the marketing company would initiate contact with prospective purchasers at its information seminars. Travel and accommodation arrangements would then be made for the prospective purchasers to fly to Queensland to inspect properties, accompanied by a representative of the applicant. Finance to purchase a property would then be offered through the financial services company.

The marketing company would be paid a fee by the property developer in return for advertising the properties.

The marketing company's name was not disclosed to a prospective purchaser, nor was the fee it was to receive in connection with the sale. Instead, disclosure was made to the prospective purchaser using Form 27b (now Form 27c), which described the benefit that the "developer's consultants" were to receive in a formulaic manner (ie up to 1.5% of the purchase price with respect to each service provided by the marketing company) rather than a precise dollar fee.

It was alleged by the Office of Fair Trading that the applicant had contravened s 138(1)(c) of the *Property Agents and Motor Dealers Act 2000*. Section 138(1)(c) provides that a residential property agent must disclose the following to any prospective purchaser:

> "(c) the amount, value or nature of any benefit any person has received, receives, or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property."

The section goes on to give examples of persons who may receive a benefit (finance broker, financial adviser, financier, solicitor, seller, etc).

The issues in dispute involved the extent of the obligation to identify the "person" in s 138(1)(c) and the adequacy of the description of the benefit that person receives in connection with the sale.

The Magistrate, in finding in favour of the applicant, held that:

> • the term "developer's consultants" disclosed in Form 27b sufficiently identified the marketing company as a beneficiary because of the knowledge of the marketing company acquired by the prospective purchasers during the marketing campaign, and
> • the formulaic manner of describing the benefit to be received sufficiently stated the benefit the marketing company was to receive (even though that bore no realistic relationship to the benefit the marketing company was in fact to receive).

[140565]

On appeal, however, the District Court judge held that:

> • the description of the marketing company as the "developer's consultants" did not satisfy the requirements of s 138(1)(c) because they were not identified by *name*
> • the formulaic description of the benefit to be received by the marketing company was inaccurate and therefore insufficient.

(See *Peebles* v *Cross & Ors* [2012] QDC 44.)

Held: appeal dismissed.

Description of recipient issue

1. Disclosure of the identity of the recipient of benefits by name is not required.

Neither s 138(1)(c) nor the prescribed Form 27b stipulated that the identity of the recipient person must be disclosed by stating the name of the person. Identifying the person by the function that person performs will suffice. Indeed, examples of persons who might receive a benefit as per s 138(1)(c) all describe the person by reference to the person's status which, in turn, is referenced to the function that the person performs (eg finance broker, property valuer, solicitor).

Description of benefit received issue

2. The formulaic description of the benefit to be received by the marketing company stated in Form 27b was inaccurate.

Further, the description was not in compliance with the notes in Form 27b (the relevant text is almost identical in current Form 27c). Compliance with the notes to the form was mandatory.

The notes to Form 27b provided that the amount, value or nature of the benefit must be provided as *accurately* as is possible at the time of the disclosure. The benefit should be expressed as a dollar amount where possible. Where an exact amount or value of the benefit is not known, a reasonable estimate of the final amount or value based on the purchase price at the time of disclosure should be provided.

It was possible for an accurate calculation of the amount of the benefit to be disclosed as the purchase price of the relevant properties was known at the time the form was given to the purchasers (with the unsigned sale contract). Even if a different purchase price might have been negotiated after the form had been provided to the purchaser but before the contract had been executed by all parties, an estimate based on the purchase price at the time of disclosure should have been made.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M J Byrne QC (instructed by Peter Shields Lawyers) for the applicants.

M D Hinson SC with A C Freeman (instructed by Crown Law) for the respondent.

Before: Fraser and Gotterson JJA and Henry J

Fraser JA: I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

Gotterson JA: At all times material to these proceedings Cross Country Realty Pty Ltd ("the corporation") held a property agents and motor dealers licence (real estate agent) which had been issued pursuant to Chapter 2 Part 6 of the *Property Agents and Motor Dealers Act* 2000 ("PAMD Act") and was a residential property agent within the meaning of that Act. Each of Kellie Lee-Ann Cross and Ronald Malcolm Cross was an executive officer of the corporation as that term is defined in Schedule 2 to the PAMD Act. They were also concerned in the management of Park Trent Investments Pty Ltd ("Park Trent Investments"), Park Trent Real Estate Pty Ltd ("Park Trent Real Estate") and Easy Plan Financial Services Pty Ltd ("Easy Plan"). Those three corporate entities together with the corporation operated within a corporate group described as the "Park Trent Group".

[3]

[140566]

By a complaint made on 24 August 2004, an officer of the Office of Fair Trading, alleged against the corporation some 38 counts of failing to disclose to a prospective purchaser of residential property the amount of a benefit that a person then expected to receive in connection with the sale of the property to the purchaser, in contravention of s 138(1)(c) of the PAMD Act. For almost all of the counts, the recipient of the benefit was identified as being Park Trent Investments or Park Trent Real Estate.

[4] By separate complaints made the same day against Kellie Cross and Ronald Cross, the same officer alleged some 38 counts of failing to ensure that the corporation complied with s 138(1)(c), thereby committing offences pursuant to s 591(2) of the PAMD Act. That section provides that if a corporation commits an offence against a provision of that Act, each of the executive officers of the corporation commits an offence of failing to ensure that the corporation complies with the provision.

[5] The complaints were heard in the Magistrates Court at Southport over seven days in August 2010. At the conclusion of the prosecution case, a no case submission was advanced on behalf of the corporation and the Crosses. The submission was based upon the interpretation and application of two provisions within s 138(1)(c) applicable to all counts, which are elaborated later in these reasons. After consideration of argument on the submission, the learned Magistrate upheld it and on 4 March 2011 made formal orders dismissing each complaint and ordering the complainant to pay the defendants' costs.

[6] The complainant appealed against these orders to a judge of the District Court of Southport pursuant to s 222 of the *Justices Act* 1886. The appeals were heard on 20 February 2012. On 27 March 2012, the learned District Court judge ordered that the appeals be allowed and set aside the orders under appeal. He remitted

the charged offences to the Magistrates Court at Southport with a direction that the Magistrate proceed according to law, and further ordered that the defendants pay the complainant's costs of the appeal on the standard basis unless agreed.

[7] On 23 April 2012 the defendants filed applications in this Court pursuant to s 118 of the *District Court of Queensland Act* 1967 for leave to appeal against the orders made on 27 March. In these reasons it is convenient to refer to the defendants as "the applicants" and to the complainant as "the respondent". In the event that leave is granted, each applicant seeks orders that the appeal be allowed, that the judgment appealed be set aside, and that the respondent pay the costs of this appeal and of the District Court appeal.

The corporation's business activities

[8] As its licence authorised it to do, the corporation at the relevant time engaged in the business of marketing and selling, as agent, residential properties in new developments in Brisbane, the Gold Coast and the Sunshine Coast. Its activities were directed towards the interstate investor market. Park Trent Investments and Easy Plan participated in these activities, the former by marketing properties via seminars and the latter by providing finance to prospective purchasers.

[9] The *modus operandi* generally adopted was that Park Trent Investments would initiate contact with prospective purchasers at its information seminars. Once interest as a prospective purchaser was expressed by an individual, that company would make travel and accommodation arrangements for the individual to travel to Queensland to inspect a property or properties. Upon arrival in Queensland, the individual would be met by a representative of the corporation, taken on an inspection tour of properties and offered finance through Easy Plan.

[10] The corporation and Park Trent Investments would customarily enter into an agreement or agreements with the property developer for a particular development before actively marketing the development. Typically, the agreements would stipulate the fees that the corporation and Park Trent Investments would be paid for effecting a sale of a property within the development. The fees were denominated as a fixed amount per sale to be divided between those two corporate entities in accordance with a formula referenced to the sale price of the property.

Section 138 PAMD Act

[11] Chapter 5 of the PAMD Act (ss 128-164) concerns real estate agents. Part 2

thereof (ss 131-157) contains conduct provisions. Section 138 constitutes Division 3 of Part 2. Division 3 is headed "Disclosure of Interest" and s 138 itself has the heading "Disclosure to prospective buyer".

[12] Of the 38 counts, some are based upon conduct which occurred between 19 March 2002 and 23 April 2002 and the others upon conduct which occurred between 24 April 2002 and 12 June 2003. Section 138(1)(b) was amended, effective from 24 April 2002, to substitute the word "benefit" for the expression "consideration, whether monetary or otherwise" and for the word "consideration" in that provision. Section 138(1)(c), which is central to these applications, was not amended at that point.

[13] Subject to those amendments to s 138(1)(b), the enacted s 138 was in the following terms during the whole of the period relevant to all of the 38 counts:

> "**138 Disclosures to prospective buyer**
>
> (1) A residential property agent for the sale of residential property must disclose the following to any prospective buyer of the property —
>
> (a) any relationship, and the nature of the relationship (whether personal or commercial), the agent has with anyone to whom the agent refers the buyer for professional services associated with the sale;
>
> *Examples of relationships for paragraph (a) —*
>
> 1. A family relationship.

2. A business relationship, other than a casual business relationship.
3. A fiduciary relationship.
4. A relationship in which 1 person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of the other.

(b) whether the agent derives or expects to derive any benefit from a person to whom the agent has referred the buyer and, if so, the amount or value of the benefit;
(c) the amount, value or nature of any benefit any person has received, receives, or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property.

Examples for paragraph (c) of persons who may receive a benefit —

- seller
- finance broker
- financial adviser
- financier
- property valuer
- solicitor
- residential property agent.

Maximum penalty — 200 penalty units.
(2) The disclosure is effective for subsection (1) only if it is —

(a) given to the prospective buyer in the approved form; and
(b) acknowledged by the prospective buyer in writing on the approved form; and
(c) given and acknowledged before a contract for the sale of the residential property is entered into.

(3) Also, for subsection (1)(c), disclosure in compliance with the approved form is sufficient.
(4) In this section —

"benefit" means monetary or other benefit.

"residential property agent" means —

(a) a real estate agent; or
(b) a real estate salesperson acting for the real estate agent; or
(c) a person acting as a real estate agent in contravention of section 160; or
(d) a person acting as a real estate salesperson in contravention of section 161.

[14] The form approved by the chief executive pursuant to s 598 of the PAMD Act for the disclosure required by s 138(1) is Form 27b. It provides for disclosure of s 138(1)(a) and (b) matters in Section 3.1 and for disclosure of s 138(1)(c) matters in Section 3.2.

[15]

[140568]

The sufficiency of the disclosure given by the corporation in Section 3.2 of the Form 27b to the prospective buyer named in each of the 38 counts is in issue in these applications. How that issue arises in fact may be outlined by reference to the circumstances of the transaction on which any one of the counts is based. It is convenient to select the Weir transaction for which relevant documents have been included in the record of proceedings in this Court and to which the Court was taken in the course of argument.

The Weir transaction

[16] Mr and Mrs Weir entered into a contract of sale dated 23 December 2002[1] to purchase proposed Lot 16, a two-storey townhouse, in proposed Community Titles Scheme "Lakeside on Varsity" at Christine Avenue, Varsity Lakes. The purchase price was $264,000. The purchase was financed by a loan made by Adelaide Bank Ltd and brokered by Easy Plan. Settlement occurred on 14 February 2003. The contract of sale identified the vendor as Narson Pty Ltd ("Narson") and the corporation as its agent for sale.

[17] A number of significant events had occurred prior to the date of contract. The first in time is that on 16 October 2002, Park Trent Investments and Narson entered into an Administration Agreement in a form which had been prepared within the Park Trent Group and forwarded to Narson that day.[2] By its terms, Narson, as the Vendor, agreed to pay Park Trent Investments, as Marketer, in accordance with Annexure "A" of that agreement. Annexure "A" which was located within the terms of contract, consisted of the following:

"**ADMINISTRATION/MARKETING EXPENSES**

The administration fee is the sum agreed upon by both the Marketer & Vendor. The administration fee of $20000.00 plus GST shall be paid by the Vendor to the Marketer on settlement of each contract.

$20,000.00 plus GST to be paid on settlement of each contract.
The REIQ Commission will be payable to Cross Country Realty on settlement and is part of the total fee charged.

The fee shall be agreed up upon by use of irrevocable authority or (sic) each sale."[3]

Under the terms of the agreement, Narson agreed to sign an irrevocable authority for payment of the administration fee prior to the contract of sale concerned being released to its solicitor by Park Trent Investments.[4] The parties also agreed that the terms of the agreement were confidential and that its details were not to be released to any person or entity.[5]

[18] The second event occurred after the Weirs had expressed interest in purchasing Lot 16 during a vendor-sponsored trip to the Gold Coast from Melbourne on 10 and 11 December 2002. Bill Myers of the Park Trent Group had shown them Lot 16, mentioned a price of $264,000 and taken them to Easy Plan's office.[6] Then he took them to the office of a solicitor. There, they were given a completed Form 27b[7] which was signed on behalf of the corporation by Mr Myers and dated 11 December 2002. The Weirs signed an acknowledgement of receipt of it on that date. They were also given an undated contract of sale for Lot 16 stating the purchase price to be $264,000 which was attached to a PAMD Act Form 30,[8] and, as well, a Deposit Power application form which also stated the purchase price to be $264,000.[9] They signed the contract and left it with the solicitor. In due course they received that document in the mail which, in the interim, had been signed by the vendor, dated 23 December 2002, and stamped.[10]

[19] Section 3.2 located on page 2 of the prescribed form was headed "Benefits other than by referral". It contained a direction to the person making disclosure which required them to disclose in that section, "… the amount, value or nature of any benefit TO YOUR KNOWLEDGE, (other than those already disclosed by you in section 3.1) which any person has received, receives, or expects to receive in connection with the sale, …" This section further directed the person to Notes on page 3 of the form "For guidance on completing table and meaning of benefit". Below this direction was a box in which disclosure was to be made. The box made provision for two columns, the one on the left-hand side being headed "Person/Entity", and the one on the right "Amount ($), value (%) or

[140569]

nature of benefit". Finally, this section contained the notation that if there was insufficient space in the box, then an additional sheet was to be used.

[20] In the case of the form given to the Weirs, the box in section 3.2 contained in handwriting the words "Refer annexure "A"". This Annexure "A" was on a separate page of the form. It was comprised of the following:

"Selling Agent	1.	Commission of 5% of the first $18,000, and 2.5% of the balance of purchase price.
	2.	The agent has a business relationship with Easy Plan Financial Services. Kellie Cross as Queensland Manager of Cross Country Realty is a director of Easy Plan Financial Services but receives no financial gain. Easy Plan Financial Services offers the following Services Providing Tax Depreciation Schedules Providing the best finance to suit particular situations Financial Planning Providing insurance solutions for clients
Developers Consultants:	A fee of up to 1.5% of the purchase price with respect to each of the following services:	
	1.	Consultation and advisory services with respect to each of the following services.
	2.	Assisting with the drafting and preparation of advertising and promotional material; assisting with the design, structure and implementation of ongoing advertising and marketing programs.
	3.	Assisting with the Co-ordination and supervision of service providers with respect to sales and marketing, including advertising and public relations providers; provision of reports to the developer with respect to matters the subject of this agreement.
	4.	Consultation services with respect to project marketing the development: provision of sales information centre/s; conducting and staffing sales information centres
	5.	Liasing (sic) with real estate agents to introduce buyers to the project: undertaking promotional activities with respect to the development including; property exhibitions, database marketing and mail-outs, letter-box drops etc
	6.	Provision of and access to and use of database/s.
	7.	The payment of expenses including advertisements, printing and stationary (sic), postage and sign-writing and general expenses."[11]

[140570]

I note that the disclosure made in Section 3.1 located on page 1 of the form did not refer to any of the above benefits.

[21] On 12 December 2002 Narson signed two documents each headed "Irrevocable Authority" which it faxed to the corporation on 15 December.[12] Both related to the sale of Lot 16. In one of the documents, Narson acknowledged that, on settlement, it would pay to the corporation REIQ commission of $7,050 plus GST. That amount is equal to five per cent of $18,000 and 2.5 per cent of $246,000 ($264,000 less $18,000) plus GST. In the other document, Narson acknowledged that, on settlement, it would pay to Park Trent Real Estate an Administration Levy of $12,950 plus GST. The REIQ commission and the Administration

Levy together equal the amount of the administration fee of $20,000 plus GST which the Administration Agreement provided be paid on each sale.

[22] After settlement and on 18 February 2003, separate tax invoices for $7,755 ($7,050 plus GST) and $14,245 ($12,950 plus GST)[13] were submitted to Narson on behalf of the corporation and Park Trent Real Estate respectively. The invoices were paid by Narson on that day.

The issues for consideration

[23] Argument of the appeal before the learned District Court judge was centred upon two issues concerning the Annexure "A" to the form 27b. They were:

> (a) whether the description of each of the recipients of the respective benefits was sufficient to satisfy the requirements of s 138(1)(c); and
> (b) whether the description of what was to be received by the developer consultant was sufficient to satisfy the requirements of that section. (There appears to have been no issue that the description of the amount to be received by the selling agent, the standard REIQ commission, was sufficient.)[14]

[24] His Honour concluded on the first issue that the descriptions were insufficient in that they failed to identify the recipient selling agent and developer consultant by name.[15] On the second issue, he concluded that the formulaic description of the benefit to be received by the developer consultant, namely up to 1.5 per cent of the purchase price with respect to each of the some six listed services,[16] was inaccurate and therefore insufficient.[17] Adapted to the Weir's case, his Honour would have regarded either a "precise $ figure" or a description which incorporated the formula "$20,000 – the REIQ commission on purchase price" as a sufficient description for the disclosure required.[18]

[25] In the appeals for which leave is sought, the applicants propose to challenge his Honour's conclusions on each of these issues. It is convenient to consider the two issues separately.

Issue (i) – description of recipient

[26] It may be accepted that neither s 138(1)(c) nor the prescribed Form 27b, in terms, stipulates that the identity of the recipient person must be disclosed by stating the name of the person. The applicants rely on that feature of the section and also upon the further feature of it that the examples of persons who might receive a benefit given by the section all describe the person by reference to the person's status which, in turn, is referenced to the function that the person performs, for example, as a finance broker, a property valuer or a solicitor. These examples themselves have statutory force as part of the enacted s 138(1)(c).[19] Relying upon these matters, the applicants argue that disclosure of the identity of the recipient by name is not required.

[27] The applicants supplement their argument by reference to the interpretative provisions in s 14A(1) of the *Acts Interpretation Act* 1954 ("Interpretation Act"). They submit that the legislative objective of consumer protection enunciated in s 10 of the PAMD Act is best achieved by interpreting s 138(1)(c) as permitting the required disclosure by disclosure of the function – referenced status of the recipient rather than as compelling mere disclosure of the name of the recipient.

[28] The respondent argues that disclosure of the identity of the recipient by name is mandatory. Reliance is placed on the provision in s 36 of the Interpretation Act which ascribes to the word "person" in an Act, a meaning that includes both an individual and a corporation. Further reliance is placed on the heading "Person/Entity" in Section 3.2 of the form and the provision in s 49(2)(b) of the Interpretation

Act to the effect that if a statutorily prescribed form requires specified information to be included in it, then the form is not properly completed unless there is compliance with that requirement.

[29] In my view, the applicant's argument on this issue is to be preferred. The absence of any express requirement for disclosure of identity by name affords a sound basis for this preference. I consider that the

respondent's argument ought not be accepted for the following reasons. To interpret the word "person" in the section as meaning both an individual and a corporation has the consequence that any recipient of a benefit, be it an individual or a corporation, must be disclosed. It does not have the consequence that the recipient individual or corporation must be identified by name, to the exclusion of disclosure by way of status referenced to function. Similarly, with respect to the heading "Person/Entity", that denotation is not apt to specify that the name of the recipient person or entity must be disclosed. The heading is sufficiently general to allow for disclosure by way of status referenced to the function of the recipient.

[30] For these reasons, I respectfully disagree with the learned judge on this issue.

Issue (ii) – description of benefit

[31] Here, it may be accepted that the description in Annexure "A" of the benefit to be received by the developer's consultant was not untruthful. The description gave a range in which the fee might fall of between nothing – if no services were provided, and nine per cent of the purchase price – if all six of the services were provided. Adopting a purchase price of $264,000, that range was from $0 to $23,760. The fee in fact received by Park Trent Real Estate was $12,950 plus GST, an amount well within that range.

[32] However, the statutory requirement for disclosure of the benefit was not merely that whatever description might be given of it not be untruthful. What was required was truthful disclosure of particulars of the benefit in accordance with all applicable statutory provisions. I have already outlined both the requirement in s 138(1)(c) that the amount, value or nature of the benefit be disclosed and the relevant content of Section 3.2 in the prescribed form. Attention needs to be given also to the notes on page 3 of the form to which the party making disclosure was directed for guidance by Section 3.2. Those notes contain the following statement:

> "'Amount, value or nature' of the benefit
>
> You must provide the amount, value or nature of the benefit as *accurately* as is possible at the time of the disclosure. You should express the benefit as follows:
>
> (1) an amount ($). If you *can not* do this, then –
> (2) a value (%). If you can not do this, then –
> (3) describe the nature of the benefit. You should ONLY do this if the benefit can not be described as an amount or value.
>
> If you do not know the exact amount or value of the benefit, provide a reasonable estimate of the final amount or value, based on the purchase price at the time of disclosure."

[33] Section 49(2) of the Interpretation Act at all relevant times provided:

> "(2) If a form prescribed or approved under an Act requires —
>
> (a) the form to be completed in a specified way; or
> (b) specified information or documents to be included in, attached to or given with the form; or
> (c) the form, or information or documents included in, attached to or given with the form, to be verified in a specified way;
>
> the form is not properly completed unless the requirement is complied with."

[34] A question arose in argument whether the notes were to be regarded as a requirement that Section 3.2 be completed in a specified way for the purposes of s 49(2)(a) of the Interpretation Act or a requirement that specified information be included in Section 3.2 for the purposes of s 49(2)(b) thereof. If either, then a failure to comply with the requirement would have the statutory consequence that the form was not properly completed.

[35]

[140572]

The applicants submit that the descriptor "For guidance" indicated that compliance with the notes was not a requirement as would engage s 49(2). I do not accept that submission. Firstly, that descriptor does not imply choice on the part of the disclosing party as to whether it takes guidance from the notes or not. To the

contrary, in my view, the descriptor connotes that the party is to obtain guidance from them. Secondly, the mandatory terms in which this extract from the notes is expressed – exemplified by the words "must provide" in the first paragraph and the imperative "provide" in the second – are indicative of a requirement to comply rather than of choice.

[36] The applicants point to s 138(3) of the PAMD Act which provides that for s 138(1)(c), disclosure in compliance with the approved form is sufficient. They submit that disclosure in compliance with the form, not any notes to it, is sufficient. This submission overlooks that the notes are part of the prescribed form. They are set out on page 3 of a five page document. There is no reason for treating them as separate from the form.

[37] Linked to that submission is a proposition suggested in oral argument by the applicants that s 138(3) overrides the application of s 49(2) of the Interpretation Act to disclosure for the purposes of s 138(1)(c). That is not so. The role of s 138(3) is a limited one. It addresses the circumstance that a form that has been approved for s 138(1)(c) disclosure might fail to provide accurately or comprehensively for disclosure in accordance with the requirements of that section properly construed. The section has the effect that, in that circumstance, disclosure in accordance with the approved form is sufficient. However, for the purposes of compliance with s 138(1)(c), s 138(3) has no bearing upon what is sufficient for proper completion of the approved form. That topic is one that falls within the province of s 49(2). Neither s 138(3) nor s 49(2) encroaches upon the field of operation of the other.

[38] It is convenient at this point to note that the applicants seek support for this submission from an observation made at first instance by Cooper AJ of the Supreme Court of New South Wales in defamation proceedings, *Cross* v *Queensland Newspapers Pty Ltd*,[20] in which the Weir and many other like transactions were considered. Referring to s 138(3) his Honour expressed the view[21] that that section does not mean that disclosure not in compliance with "the explanatory notes" to the Form 27b is insufficient. He concluded that the form which had been provided to the Weirs did comply with s 138.[22]

[39] For the reasons just given, I do not agree with this view. His Honour's reasons suggest that his view was reached without regard for the provisions in s 49(2) of the Interpretation Act. It also appears that the Administration Agreement was not in evidence before him. It remains to note that the judgment was set aside by the Court of Appeal of New South Wales[23] although his Honour's view on this matter is not discussed in the Court's reasons for judgment.

[40] The respondent submits that Annexure "A" was not compliant in two respects with the notes in the form for stating the amount, value or nature of the benefit to be received by the developer's consultant. First, the description of the benefit in Annexure "A", whether regarded as a description by value (as a percentage) or by nature, was not as accurate as possible at the time of disclosure, as required by the first paragraph in the extract from notes which I have set out. The respondents submit, correctly in my view, that under the Administration Agreement, the benefit to be received by the developer's consultant was an amount to be calculated by deduction from $20,000 plus GST of the REIQ commission plus GST: it was not an amount to be calculated (and, in fact, was not calculated), by reference to a fee of up to 1.5 per cent of the purchase price for any one or more of the six services listed in the Annexure "A". The description given was not accurate.

[41] Secondly, the respondent submits, also correctly in my view, that the amount of the benefit could and should have been stated at the time of disclosure. In the Weirs' case, the Form 27b was given to them contemporaneously with the unsigned contract and the Deposit Power application form both of which stated the purchase price to be $264,000. In those

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circumstances, an accurate calculation of the amount of the REIQ commission payable on that price could have been made and, further, an accurate calculation of the amount of the developer's consultant fee could also have been made by a simple deduction of the commission plus GST from the amount of $20,000 plus GST.

[42] There is no substance in the applicant's claim that the corporation was excused from stating the amount of the fee because a different purchase price might have been negotiated after the Form 27b had been

provided to the Weirs but before the contract had been executed by all parties. The second paragraph of the notes in the extract stated that if the exact amount was not known at the time of disclosure, then an estimate based on the purchase price at the time of disclosure was to be made and disclosed. This was not done notwithstanding that the purchase price at the time of disclosure was known to be $264,000.

[43] Accordingly in my view, the part of the Form 27b which required disclosure of the amount, value or nature of the benefit to be paid to the developer's consultant was not properly completed. The benefit was not effectively disclosed for the purposes of s 138(1)(c). On this issue I am in respectful agreement with the learned judge.

[44] For the Weir transaction, effective disclosure of the fee to be received by the developer's consultant required that the amount of the fee be stated. That could have been done by either stating that it was $14,245 or that it was $12,950 plus GST. I would add that, for that transaction, I would not regard disclosure by means of the formula proposed by his Honour as complying with the requirements in the notes for completing the form. Disclosure by the formula would not have been disclosure of an amount which, at the time that the form was provided, could have been calculated accurately, or, at least, reasonably estimated.

Disposition

[45] The issues raised by these applications warrant the grant of leave to appeal.

[46] The failure of the applicants' appeal with respect to Issue (ii) has the consequence that these appeals must be dismissed. The orders and directions made on 27 March 2012 ought to be affirmed.

[47] In this court, each side has been successful on one of the two issues for decision. In these circumstances, I consider that there ought to be no order as to costs of these applications and appeals.

Orders in each application

[48]

1. Grant leave to appeal.
2. Appeal dismissed.
3. Affirm the orders and direction made on 27 March 2012 in the District Court at Southport.

Henry J: I have read the reasons of Gotterson JA. I agree with those reasons and the orders proposed.

Footnotes

1 AB618-629; Exhibit 24.
2 AB635.
3 AB637.
4 AB636, provision D(iii).
5 AB637.
6 AB242 Tr4-5 l.55-AB243 Tr4-61.36.
7 AB607-611; Exhibit 21; AB 247 Tr4-1011.18-50.
8 AB602-606; Exhibits 19, 20; AB246 Tr4-91.25 – AB247 Tr4-101.15.
9 AB612-613; Exhibit 22; AB247 Tr4-101.50 – AB248 Tr4-11.15.
10 AB250 Tr4-13, 11.38-56.
11 AB659.
12 AB638, 639.
13 AB640, 641.
14 AB714Tr1-10L50 – AB715Tr1-11L3.
15 Reasons [26].
16 Those numbered 2 to 7.

17 Reasons [35].

18 Reasons [43], [44].

19 *Acts Interpretation Act* 1954, s 14(3).

20 [2006] NSWSC 1340.

21 At [394].

22 At [635].

23 *Cross* v *Queensland Newspapers Pty Ltd* [2008] NSWCA 80; special leave to appeal was refused by the High Court of Australia on the 30 September 2008.

HAUFF & ANOR v MILLER

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(2013) LQCS ¶90-185; Court citation: [2013] QCA 48

Supreme Court of Queensland — Court of Appeal

Decision delivered on 15 March 2013

Conveyancing — Contract for sale — Remedies for breach of contract — Where the parties entered into a standard contract of sale (being the second edition of the REIQ/QLS standard form contract for the sale of residential lots under community titles schemes) for an apartment — Where the contract contained a subject to finance clause requiring the purchaser to take all reasonable steps to obtain finance approval — Where the purchaser did not take all reasonable steps — Whether the vendor could rely on contractual remedies under cl 9 of the contract in addition to common law remedies for breach of contract — Whether the subject to finance clause was exclusively for the benefit of the purchaser.

The respondent purchaser entered into a contract of sale (using the REIQ/QLS standard form contract for the sale of residential lots under community titles schemes) to buy an apartment situated in Queensland from the vendor appellants. The contract was conditional on the purchaser obtaining approval for a loan from ING Bank with cl 3 of the contract providing that:

> **"3. Finance**
>
> 3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
>
> 3.2 The Buyer must give notice to the Seller that:
>
> (1) approval has not been obtained by the Finance Date and the contract is terminated; or
> (2) the finance condition has been either satisfied or waived by the Buyer.
>
> 3.3. The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
>
> 3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver."

The purchaser did not attempt to obtain approval from ING Bank as she believed she would not be able to get approval within the stipulated time. Instead she approached an alternative financier; however the alternative financier was not able to approve the loan in time.

The purchaser purported to terminate the contract because finance was not forthcoming and requested the return of the deposit.

The vendor subsequently purported to terminate the contract as a result of the purchaser not taking "all reasonable steps to obtain approval" from ING Bank in accordance with cl 3 of the contract. The vendor asserted a right to the contractual remedies under cl 9 of the contract in addition to common law remedies for breach of contract.

Clause 9.1 of the contract provided that if the purchaser failed to comply **with any provision** of the contract, the vendor could affirm or terminate the contract which activated the vendor's remedies in cl 9.3–9.6.

The trial judge allowed the vendor the deposit but denied it recourse to the contractual remedies under cl 9, confining them to common law relief. The trial judge held that the cl 3 subject to finance clause was entirely for the purchaser's benefit and it was not intended that if the purchaser did not comply with its provisions, the cl 9 remedies would be activated. The vendor was appealing on the ground that it should have been allowed recourse to the contractual remedies.

Held: appeal allowed.

1. The trial judge erred in finding that the purchaser's breach of the obligation to take all reasonable steps to obtain finance approval pursuant to cl 3.1 **did not** amount to a breach of contract within the contemplation of cl 9.1. The trial judge found that the breach was not within the contemplation of cl 9.1 as cl 3.1 was "entirely" for the benefit of the purchaser. However, both parties had an interest in the completion of the contract. The vendor has an interest in ensuring the purchaser makes every reasonable effort to secure necessary finance to enable completion of the contract.

2. Even though the second sentence of cl 3.1 (ie "The Buyer must take all reasonable steps to obtain approval") is couched in the language of a covenant or promise, it should, however, be regarded as a "provision" of the contract for the purposes of cl 9.1.

3. Pursuant to cl 3.3, the vendor may terminate the contract if the purchaser fails to give the requisite notice. This is the vendor's only remedy where no notice is given. In the present case, the purchaser had given notice (even though it lacked the necessary foundation). The purchaser's contractual breach was her failure to take all reasonable steps to obtain finance approval. In these circumstances, the vendor was entitled to the remedies specified in cl 9.

Had a contrary interpretation of the relevant clauses been intended by the parties, they could easily have made that clear by express provision to that effect.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

J Baird SC with L Stephens (instructed by Trevor Hauff Lawyers) for the appellants.

R Murdoch QC (instructed by Robert Palethorpe Solicitor) for the respondent.

Before: Chief Justice and Holmes JA and Dalton J

Holmes JA and Dalton J:

[1] **CHIEF JUSTICE:** The respondent entered into a contract to purchase a home unit from the appellants. The contract was subject to finance. The respondent purported to terminate the contract because finance was not forthcoming. It emerged the respondent had not applied to the nominated financier. The appellants subsequently terminated the contract claiming the deposit and asserting a right to pursue damages etc under the provisions of the contract.

[2] The learned Judge allowed the appellants the deposit, but denied them recourse to their other contractual remedies, confining them to common law relief. The appellants appeal on the ground that they should have been allowed recourse to the contractual remedy.

[3] The respondent cross-appeals on the basis the Judge erred in finding that she had not taken reasonable steps to obtain finance: her right to terminate was predicated upon her having taken those steps.

Factual circumstances

[4] By the contract, which is dated 3 September 2010, the appellants agreed to sell unit five in a block at Port Douglas to the respondent for $575,000. The deposit was $10,000. The settlement date was 1 October 2010. The "finance amount" was $400,000, to be obtained from ING Bank by 10 September 2010.

[5] When the approval was not obtained, the appellants, following an approach on behalf of the respondent, agreed to extend time for the obtaining of finance until 5 pm on 17 September 2010, with time to remain of the essence.

[6] At 4.22 pm on 17 September, the solicitors for the respondent advised the solicitors for the appellants:

> "Our client has not been able to obtain finance approval. Accordingly the contract is now at an end. Please authorise the agent to refund the deposit to our client in full."

[7] On 20 September, the solicitors for the appellants pointed out to the solicitors for the respondent that they needed to be satisfied that the respondent had taken all reasonable steps to obtain finance, and the appellants' solicitors sought copies of the relevant documentation.

[8] In response, on 20 September, the solicitors for the respondent furnished communications from The Rock Building Society, on the basis that material confirmed "that finance was not going to be approved by the due date". The query arises why the respondent applied not to the contractually specified financier, ING Bank, but to The Rock. As recounted by His Honour:

> "On entering into the contract the defendant had previously negotiated a loan facility with ING Bank, obtaining pre-approval for $200,000.00. The contracts were signed on a Friday and that evening the defendant contacted her mortgage broker, Ms Fisk to seek that ING Bank 'reactive the loan'. When Ms Fisk contacted ING Bank on Monday 6 September 2010, she was informed by email from ING that 'this has been archived in our system due to no action since May 2010, we will require a brand new loan application to be submitted in order for the deal to proceed.' Ms Fisk was of the view that it would not be possible to obtain a suitable loan from ING Bank by the Finance Date in the building contract. The defendant then decided, on the advice of Ms Fisk, to seek finance from a different financier, the The Rock … There is no evidence that the plaintiffs were advised of this decision."

[9] Informed that the respondent had made no application to ING Bank referable to the instant contract, the solicitors for the appellants said this to the solicitors for the respondent, on 20 September 2010:

> "The [contract] of sale specifically provides that the lender was ING Bank not the Rock Building Society. Additionally even the Rock Building [Society] has not refused to approve the loan simply stating it could not do so in time for the 17th September 2010 although the reason for that is unstated. That time was not a critical date as firstly an extension of time could have been requested, or simply the notice of termination not be given, in which case the contract would have remained on foot until terminated by the Seller (or Buyer if finance could [not] be obtained). If the circumstances had been explained to the Seller it would have extended the time and indeed is still willing to do so. In any event if the termination notice had not been given then the contract would have remained on foot allowing ample time for finance to be obtained. It appears that it was not an issue of whether finance could be obtained but whether it could be obtained by the 17th September 2010 from the Rock Building Society, not the contract nominated party the ING Bank and the circumstances surrounding why it could not be obtained have not been explained.
>
> This documentation does not show that the Buyer acted reasonably and we therefore cannot authorise the release of the deposit."

[10] It is convenient to observe here that the appellants were not thereby electing to affirm the contract. They were effectively negotiating as to the future of the transaction. In relation to the words, "the seller … is still willing to do so" (that is, extend time if asked), it is relevant to note that no further request for an extension of time was made. In other words, the respondent was standing by her purported termination. As in *Tropical Traders Ltd* v *Goonan* (1964) 111 CLR 41, 55, the appellants had effectively held any right of termination which had accrued to them in abeyance.

[11] Then on 21 September 2010, the appellants for their part purported to terminate the contract in reliance upon the respondent's breach of an obligation under the finance provision. They advised the solicitors for the respondent in these terms:

> "Further to my earlier email, it appears from the advice supplied to me by Joanne of Rob Palethorpe solicitor (copy attached) that the Buyer at best may have applied for a loan with the Rock Building Society, but apparently made no attempt whatsoever to get a loan from the nominated Financier ING Bank as required by the finance clause. Therefore the Buyer has not complied with the contract to take all reasonable steps to obtain the loan from the nominated Financier. In fact it appears the Buyer did not even make an application to the nominated Financier.
>
> In these circumstances the Buyer has breached the contract and the Seller may under Clause 9.3 keep the deposit and interest earned, sue the Buyer for damages and resell the property.
>
> In the circumstances, The Seller lays claim to the deposit and if necessary will sue for damages."

[12] In a letter the following day, the solicitors for the appellants advised that the appellants expressly terminated the contract pursuant to cl 9.1, and asserted the appellants' entitlement to relief under cl 9.3.

[13] There was subsequent correspondence in relation to compliance with the *Property Agents and Motor Dealers Act* 2000. Prior to the trial, the respondent disavowed any reliance on that legislation, and it is not necessary to consider it further in these reasons.

[14] The appellants sought at trial: first, a declaration that the respondent was in default under the contract and the appellants had terminated the contract under cl 9.1; second, a declaration that the appellants were entitled to the remedy specified under cl 9; third, a declaration that the appellants were entitled to the deposit monies of $10,000; and fourth, a declaration that the appellants were entitled to a deposit of $3,000 which had been paid under a related contract for the purchase of the contents of the unit. (The claim was pleaded in the statement of claim by reference to clauses 3 and 9, not anticipatory breach and repudiation.)

[15] There is no need to say more about that other contract: there is no challenge to the relief granted in that regard by the Judge.

The contractual provisions

[16] The contract was in the form of the second edition of the REIQ/QLS standard form contract for the sale of residential lots under community titles schemes. The finance clause provided:

"**3. Finance**

3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
3.2 The Buyer must give notice to the Seller that:

(1) approval has not been obtained by the Finance Date and the contract is terminated; or
(2) the finance condition has been either satisfied or waived by the Buyer.

3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver."

[17] Clause 9, upon which the appellants rely for their claimed relief, provides:

"**9. Buyer's Default**

9.1 **Seller May Affirm or Terminate**

If the Buyer fails to comply with any provision of this contract, the Seller may affirm or terminate this contract.
9.2 **If Seller Affirms**

If the Seller affirms this contract under clause 9.1, it may sue the Buyer for:

(1) damages;
(2) specific performance; or
(3) damages and specific performance

9.3 **If Seller Terminates**

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

(1) resume possession of the Property;
(2) keep the Deposit and interest earned on its investment;
(3) sue the Buyer for damages;
(4) resell the Property.

9.4 **Resale**

(1) The Seller may recover from the Buyer as liquidated damages:

(a) any deficiency in price on a resale; and
(b) its expenses connected with this contract, any repossession, any failed attempt to resell, and the resale;

provided the resale settles within 2 years of termination of this contract.

(2) Any profit on a resale belongs to the Seller.

9.5 **Seller's Damages**

The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on a solicitor and own client basis.

9.6 **Interest on Late Payments**

(1) Without affecting the Seller's other rights, if any money payable by the Buyer under this contract is not paid when due, the Buyer must pay the Seller at settlement interest on that money calculated at the Default Interest Rate from the due date for payment until payment is made.
(2) The Seller may recover that interest from the Buyer as liquidated damages.
(3) Any judgment for money payable under this contract will bear interest from the date of judgment to the date of payment and the provisions of this clause 9.6 apply to calculation of that interest."

[18] The competing positions, as placed before the learned Judge, were these.

[19] The appellants asserted that the respondent breached an obligation under what I note is part of the condition subsequent cl 3.1 (*Sutter* v *Gundowda Pty Ltd* (1950) 81 CLR 418, 443) to "take all reasonable steps to obtain approval" of finance. The respondent had made no formal application to the specified financier. Accordingly, under cl 9.1, the appellants had duly terminated the contract, becoming entitled to the relief specified subsequently in that clause.

[20] The respondent's position was that applying to ING Bank, the specified financier, given the short timeframe, would have been an exercise in futility; she was entitled to give the notice terminating the contract under cl 3.2(1) and to retain the deposit.

The learned Judge's approach

[21] His Honour held that the respondent had not satisfied her obligations under cl 3.1. He said:

> "It is established law that the defendant bears the onus of establishing that she had taken all reasonable steps to obtain finance from ING Bank in order to invoke the benefit of clause 3.1 of the building contract. The difficulty for the defendant is that no evidence was called from ING Bank as to her prospects of obtaining finance by 5:00 p.m. on Friday, 17 September, 2010, the extended Finance Date. In the circumstances and particularly having regard to the fact that she made no application for finance to this financier as contemplated by clause 3.1 at all, I am not satisfied that the defendant has discharged the onus of proving that she took all reasonable steps to obtain finance approval from the nominated financier, ING Bank."

[22] His Honour then addressed the question whether the clause 9 rights consequently accrued to the appellants. He answered that question in the negative, essentially for these reasons. He held that the provision that the respondent should take all reasonable steps to obtain finance was part of a provision (the subject to finance provision) which was "entirely for (the respondent's) benefit". Especially in light of cl 3.3, it was not intended that if she did not comply with that stipulation, her failure would activate the clause 9 regime. Rather, in giving notice of termination without the backing of compliance with its underlying requirement (to take all reasonable steps), she repudiated the contract. Having accepted that repudiation, the appellants were entitled to relief, not under cl 9, but at common law.

[23] That is my attempted summary of what His Honour said, which was as follows:

> "The relief sought pursuant to clause 9 of the building contract is couched in terms of the defendant 'failing to comply with any provision of this contract.' It could be argued that in not taking all reasonable steps to obtain approval of a loan from the nominated financier by the extended finance date the defendant failed to comply with a provision of the building contract, however this provision was entirely for her benefit and clause 3.3 makes it clear that it is not intended that non-compliance in this regard is within the contemplation of clause 9. Clause 3 was for the benefit of the defendant alone and she was not in breach of the building contract in failing to obtain finance pursuant to clause 3. In repudiating the building contract by purporting to rely on clause 3 when she was not entitled to, her conduct falls outside of what is contemplated in clause 9.1. In the circumstances, the plaintiffs clearly have remedies at common law, but the remedies specified in clause 9 of the building contract are not open to them."

[24] In the result, the Judge declined to make the first two declarations sought. He made these declarations:

> "(1) the plaintiffs are entitled to the deposit of $10,000.00 held by the Agent pursuant to Clause 2.4(1)(c) and 2.4(2) of the Terms of Contract in the Contract of Sale of Real Property made the 3rd September 2010 between the plaintiffs as Seller and the defendant as Buyer of the property described as Unit 5, at 14A-16 Andrews Close Port Douglas and being Lot 5 on SP168547; and
> (2) the defendant is in default of the Contract of Sale of Chattels and the plaintiffs are entitled to and have properly terminated the Contract for the sale of Chattels and are entitled to the deposit of $3000.00 pursuant to Clause 3 of the Contract for the Sale of Chattels.

[25] He ordered that the deposit monies, which had been paid into court, be paid out, with interest, to the appellants. He ordered the respondent to pay the appellants' costs to be assessed on the indemnity basis.

[26] It remains to set out the deposit provision:

> "**2.4 Entitlement to Deposit and Interest**
>
> (1) The party entitled to receive the Deposit is:
>
> (a) if this contract settles, the Seller;
> (b) if this contract is terminated without default by the Buyer, the Buyer; and
> (c) if this contract is terminated owing to the Buyer's default, the Seller.
>
> (2) The interest on the Deposit must be paid to the person who is entitled to the Deposit.
> (3) If this contract is terminated, the Buyer has no further claim once it receives the Deposit and interest (if any), unless the termination is due to the Seller's default, misrepresentation or breach of warranty.
> (4) The Deposit is invested at the risk of the party who is ultimately entitled to it."

Analysis

Steps taken by respondent to obtain finance

[27] A mortgage broker, Ms Fisk, dealt with the issue of obtaining finance on behalf of the respondent. She had regard to what she believed to be "turn around time" for various financial providers, and reached the view that an approach to The Rock would more likely be successful within time. There is however evidence to suggest that she was also influenced by The Rock's "competitive interest rate".

[28] The evidence before the Judge did not establish that an application to ING Bank would have been futile. That lender had a file of background information on the respondent's financial position. Presumably updating it would not have taken an inordinate time, and it may have been that if apprised of the need for a swift determination, ING Bank could and would have obliged. One simply does not know, because no evidence from ING Bank was presented.

[29] The Judge was right to emphasise that the respondent made no application for finance to ING Bank (as distinct from what could be regarded as a preliminary inquiry on 6 September 2010). The respondent did not instigate the process required of her. The Judge's conclusion that the respondent did not establish that she had taken all reasonable steps to obtain finance approval was amply justified.

Consequences

[30] Taking a literal approach, the respondent therefore failed to comply with a provision of the contract, being the second part of cl 3.1, justifying termination under cl 9.1 and activation of the appellants' rights under cll 9.3, 9.4, 9.5, and 9.6. The question arises however, whether breach of the obligation resting upon the respondent to take all reasonable steps to obtain finance approval amounted to a breach of contract within the contemplation of cl 9.1.

[31] The learned Judge considered it was not, because the provision in cl 3.1 was "entirely" for the benefit of the respondent. I respectfully disagree with that characterisation. Regarding the obligation to take reasonable steps only as a condition regulating the purchaser's right to terminate were finance not obtained, would ignore the interest of both purchaser and vendor in the completion of the contract. See, in similar vein, *Meehan* v *Jones* (1982) 149 CLR 571, 588, 592 per Mason J and *Perri* v *Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 565 per Brennan J (as their Honours "were" in 1982). A vendor has an interest in ensuring the purchaser makes every reasonable effort to secure necessary finance to ensure completion of the contract.

[32] The question remains whether the second sentence at cl 3.1, which is couched in the language of covenant or promise, should however not be regarded as a "provision" of the contract within the meaning of cl 9.1.

[33] The way the obligation to take all reasonable steps is couched and presented suggests it may have a dual operation, both as a contractual promise on the part of the purchaser (separately expressed in its own self-contained sentence), and as the pre-condition for the exercise of the right to terminate should finance approval not be granted (that sentence immediately following the "subject to finance" clause).

[34] The parties have not said that the right to terminate only arises if the purchaser has taken all reasonable steps and approval is not given, and that it is entirely up to the purchaser whether or not the purchaser takes those steps.

[35] Under this form of cl 3.1, the purchaser is apparently subject to an unequivocal contractual obligation to take "all reasonable steps to obtain approval".

[36] The Judge's other reason for his contrary conclusion was that "clause 3.3 makes it clear that it is not intended that non-compliance (with clause 3.1) is within the contemplation of clause 9".

[37] Clause 3.3 accords the vendor a right to terminate, and no more, where the purchaser has given no notice under cl 3.2, whether of termination, waiver of the condition, or satisfaction of the condition. The vendor may then terminate "for the buyer's failure to give notice" (cl 3.3). That was not this factual situation, of course, where notice was in fact given, although lacking the necessary foundation.

[38] This reason advanced by the Judge does not address the question whether the second part of cl 3.1 should be regarded as, in effect, a stand-alone promise on the part of the

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respondent – in addition to its role as the foundation of the respondent's right to terminate if finance should not be approved.

[39] Clause 3.3 "codifies" the vendor's right to terminate in the event the purchaser gives no notice at all under cl 3.2, that is, whether finance is or is not approved, or if not approved, where the purchaser has waived the right to terminate. In any of those cases, if the vendor chooses to terminate, that is the vendor's only right. The vendor may of course not terminate, but hold the purchaser to the obligation to complete. If the purchaser breaches that obligation, the vendor will have a range of rights.

[40] Take the case where the purchaser has failed to take reasonable steps to secure finance, does not gain the approval, and fails to give notice of termination (or otherwise) under cl 3.2. The vendor could then terminate for the purchaser's failure to give notice (cl 3.3). That would then be the vendor's only remedy for the purchaser's "failure to give notice" (cl 3.3).

[41] But as in that case where the purchaser's failure to discharge its contractual obligation to give notice under cl 3.2 has been preceded by another separate contractual breach, that is breach of the obligation under cl 3.1, to take all reasonable steps to obtain finance approval, there is no reason why the vendor could not terminate, not for the failure to give notice, but for breach of the separate obligation to take reasonable steps, giving rise to the application of cl 9. That is what happened in this case on 21 September 2010.

[42] A purchaser's failure to give notice under cl 3.2 is a non-compliance with a provision of the contract, to use the terms of cl 9.1, but it is cl 3.3 which makes particular provision specifically regulating and limiting the vendor's rights upon termination for that particular breach.

[43] Other instances of non-compliance, such as non-compliance with the obligation to take reasonable steps to obtain finance approval, not being the subject of special provision in the conditions (by contrast with cl 3.3), therefore fall within the general ambit of cl 9.

[44] I see no sufficient reason to depart in this regard from the literal thrust of cll 3 and 9. (The issue appears not to have been canvassed previously at appellate level.) That the respondent was obliged to take all reasonable steps to obtain approval for the requisite finance was a "provision of the contract" (cl 9.1), in fact one of considerable potential importance to both vendor and purchaser, and there is no indication that it should not be regarded as falling within the purview of cl 9. Had the contrary position been intended by the parties, they could easily have made that clear by express provision to that effect.

Conclusion

[45] I would make the following orders:

1. that the appeal be allowed;
2. that the cross-appeal be dismissed;
3. that the judgment given on 19 July 2012 be varied by the addition of the following declaration:

> (3) that on 22 September 2010 the appellants duly terminated the said contract under cl 9.1, because of the respondent's failure to comply with cl 3.1, and that the appellants are consequently entitled, at their election and as applicable, to the remedies specified in cll 9.3, 9.4, 9.5 and 9.6.

4. that the respondent pay the appellants' costs of and incidental to the appeal and the cross-appeal. The basis on which they should be assessed is reserved, pending written submissions, to be furnished forthwith.

Holmes JA: I have had the advantage of reading the reasons of the Chief Justice and of Dalton J, and agree with them. The orders should be those proposed by the Chief Justice.

Dalton J: I agree with the orders proposed by the Chief Justice.

[48] The relevant clauses of the contract – cll 3 and 9 – are set out in the Chief Justice's judgment.

[49] The contract allowed only seven days for the purchaser to attempt to obtain finance from the financier, defined as ING Bank. The

[140582]

purchaser had previously negotiated a loan facility with ING Bank for an investment which did not go ahead. It appears that she and her finance broker, Ms Fisk, therefore anticipated that only a short time would be needed for ING Bank to reactivate that previously approved loan.

[50] The contract was made on 3 September 2010, a Friday. The purchaser contacted her finance broker that day and on Monday 6 September 2010 the broker made an email enquiry of ING Bank as to how she should go about reactivating the previously approved finance. The broker was told that, because of the time which had passed since the previous application, the bank would require a new loan application to be submitted. No attempt was made to deal further with ING Bank. The broker apparently thought that an alternative financier would be more likely to grant finance within the limited time available. Unfortunately that decision seems to have been taken in ignorance of the fact that the contract required the purchaser to take all reasonable steps to obtain approval from ING Bank by 10 September 2010.

[51] The primary judge was clearly right in holding that all reasonable steps were not taken to obtain finance approval from ING Bank. Nothing but a preliminary enquiry was made. No formal application was submitted and there was no attempt by the vendor to persuade ING Bank to reconsider reactivating the previous loan or grant a speedy approval to a new loan on the basis of their previous dealings.

[52] In my view, the last sentence of cl 3.1 of the contract operated to impose an independent contractual obligation on the purchaser. It would be better if that sentence were contained in an independent clause of the contract.[2] Nonetheless, that sentence is in my view, a "provision of [the] contract" within the meaning of cl 9.1 of the contract. It was breached. That entitled the vendor to terminate the contract and rely upon his rights under cl 9.1 of the contract.

[53] The first sentence of cl 3.1 is for the benefit of the purchaser – *Zieme* v *Gregory*[3] – and cll 3.2, 3.3 and 3.4 regulate the purchaser's rights to waive it. The second sentence in cl 3.1 is not wholly for the benefit of the purchaser, but also substantially for the benefit of the vendor – *Zieme* v *Gregory*, p 223. The provisions at cll 3.2, 3.3 and 3.4 do not regulate the purchaser's obligation to take reasonable steps to obtain finance approval contained in the second sentence of cl 3.1. Further, if the purchaser does not take reasonable steps to obtain finance approval, and is thus in breach of the second sentence in cl 3.1 (as this purchaser was), the purchaser will have no right to give a notice pursuant to cl 3.2(1) of the contract – *Zieme* v *Gregory*, p 223. The primary judge was wrong to think that cll 3.2, 3.3 and 3.4 limited the vendor's rights under cl 9.1 in circumstances where the purchaser was in breach of her obligation to take all reasonable steps to obtain finance approval.

Footnotes

2 I note that cll 2.6(1), 2.6(13), 4.2, 5.6(2) and 7.8 of the contract all contain more than one provision.

3 [1963] VR 214, 222.

MICHAEL MCEVOY & ANOR v THE BODY CORPORATE FOR NO 9 PORT DOUGLAS ROAD

(2013) LQCS ¶90-186; Court citation: [2013] QCA 168

Supreme Court of Queensland — Court of Appeal

Decision delivered on 24 June 2013

Conveyancing — Where developer contracted to sell a lot which included an exclusive use area of common property — Where by a number of errors spanning 10 years the exclusive use area was not identified on any plan or part of a new community management statement — Where one of the subsequent purchasers of the lot applied to an adjudicator for an order that the body corporate register a new community management statement containing the by-law relevant to the use of the area — Where the body corporate appealed the adjudicator's decision but without having passed a special resolution to authorise undertaking that appeal beforehand — Whether the QCAT member was correct in finding that the exclusive use area was not identified — Whether the applicants' delay in seeking the relief was relevant to any exercise of the discretion.

The applicants, (Mr and Mrs McEvoy) sought the court's leave to appeal a decision made under s 276 of the *Body Corporate and Community Management Act 1997* (BCCM Act). After purchasing Lot 16 in August 2010, the applicants discovered that the sun deck area which they thought was theirs by way of exclusive use was not recorded on the community management statement as had been intended by the developer in 1999.

Subsequently, the body corporate did not agree to recording a new community management statement. However an adjudicator determined it was just and equitable to make an order requiring the body corporate to record a new community management statement which allocated exclusive use of the sun deck to Lot 16. The body corporate then appealed to the Queensland Civil and Administrative Tribunal (QCAT). The applicants subsequently argued before the Supreme Court that:

- the body corporate lacked the authority to commence the QCAT appeal and could not cure it by ratifying the proceeding after it had been completed
- the QCAT member should have dealt with the lack of authority but failed to do so
- the original owner had conferred exclusive use on the owner of Lot 16 during the owner control period
- the body corporate had resolved in 1999 to record a new community management statement granting Lot 16 the exclusive use of the sun deck
- the adjudicator could make the order granting Lot 16 its exclusive use of the sun deck under the doctrine of rectification.

Held: applicants' leave to appeal refused.

1. The body corporate cured its lack of authority by proper ratification even after the matter had been determined.

2. Just because the member failed to deal with the lack of authority issue did not make his order invalid.

3. No by-law contained in the original community management statement authorised the original owner to confer the exclusive use of the sun deck.

4. The body corporate had not validly resolved to grant the exclusive use to Lot 16.

5. A clear and concise plan of the sun deck area had not been provided sufficient to ground the adjudicator's order.

6. The member was correct in taking the decade of delay into account as part of the consideration of a just and equitable outcome.

[Headnote by JOANNE BENNETT]

[140584]

L Stephens (instructed by Alexander Law) for the applicants.

C Ryall (instructed by Robert P Palethorpe Lawyers) for the respondent.

Before: Margaret McMurdo P, Holmes JA and Douglas J

Margaret Mcmurdo P: This application for leave to appeal should be refused for the reasons given by Holmes JA and the additional reasons given by Douglas J. I agree with the orders proposed by Holmes JA.

Holmes JA: The applicants seek leave to appeal a decision of the Queensland Civil and Administrative Tribunal (QCAT) which set aside an adjudicator's orders, made under s 276 of the *Body Corporate Community Management Act* 1997. Those orders required the respondent to register a new Community Management Statement stating the applicants' entitlement to exclusive use of an area of common property in a Port Douglas unit complex.

[3] Section 150 of the *Queensland Civil and Administrative Tribunal Act 2009* permits a party to an appeal to QCAT to appeal to the Court of Appeal only on a question of law and with this Court's leave. This court has generally considered the question of leave by reference to whether there is a substantial injustice to be corrected.[1]

[4] The first of the applicants' proposed appeal grounds was described as a "preliminary point": that the appeal to QCAT against the adjudicator's decision was not authorised by the body corporate. The remaining grounds concerned whether exclusive use had been conferred on the applicants' predecessor in title (a company controlled by them) by the actions of the original owner or by a resolution of a general meeting of the body corporate; whether the QCAT member had erroneously had regard to the absence of a plan showing the area of exclusive use; and whether the adjudicator could properly order the filing of the new community management statement.

Background to the exclusive use dispute

[5] In May 1998, Famestock Pty Ltd, the applicants' company, bought Lot 16 from Blue Raven Pty Ltd, the developer of the unit complex; the latter company was controlled by a Mr Loane. The property purchased was described as:

> "Lot 16 in BUP 106455 together with an exclusive use of adjacent roof area [and] of car park no. as indicated on the plan in Annexure 'C' hereto".

[6] The *Body Corporate and Community Management Act* 1997, as it stood in 1998, contemplated (as it does now) that land in a community title scheme would be identified in a community management statement to be recorded under the *Land Title Act* 1994. The original community management statement for the unit complex had been executed in April 1998; it made no reference to any right of exclusive use of the kind which the contract purported to confer on Famestock Pty Ltd.

[7] In September of the same year, Mr Loane wrote to the body corporate manager on behalf of Blue Raven Pty Ltd, advising that

> "Exclusive Use is hereby granted to Famestock Pty Ltd [the proprietor of Lot 16] for the sun-deck and common area outside and attached to this unit".

According to the letter, a copy of the plan highlighting the area to be made exclusive was enclosed, but it does not seem to have been produced to the adjudicator or QCAT. The manager was asked to note the body corporate records accordingly, but instead advised in response that an "exclusive use area allocation" could only be granted at a general meeting of the body corporate.

[8] On 12 January 1999, an annual general meeting of the unit owners was held. An amended voting paper was circulated in advance of the meeting; it included a motion that By-law 42 (which dealt with letting rights for the complex) be deleted and a new community management statement lodged noting the deletion. It contained no reference, however, to any grant of exclusive use. The complex held 18 units. The minutes of the annual general meeting record that Mr Loane, whose company retained three of the units, was present and held proxies in respect of four other units. Four other unit owners were present at the meeting. Ten votes were cast in favour of

(and none against) a special resolution in these terms:

> "RESOLVED that by-law 42 as per the attached be deleted, and that the owner of Lot 16 be granted exclusive use for himself and his licensees of the sun deck and common area outside and attached to his unit, as identified as attached, and a new Community Management Statement be lodged with the Department of Natural Resources noting the deletion."

It may be seen that the resolution as passed was significantly different from that notified on the voting paper. No document which was attached to the minutes and which identified the exclusive use area has come to light.

[9] A week after the meeting, a request was submitted to the registrar of titles to record a new community management statement. The request noted that changes had been made to schedule C (which contained the

by-laws) and that By-law 42 had been deleted. The amended community management statement forwarded for registration contained By-law 43, which read:

> "EXCLUSIVE USE — LOT 16
>
> The proprietor for the time being shall be entitled to the exclusive use for himself and his licensees of the sun-deck and common area outside and attached to his unit, as identified on the attached plan marked 'C'."

The evidence before the adjudicator and QCAT included a floor plan which had been marked "Plan C". That plan shows the third level of the unit complex, including Unit 16, with openings onto an external area marked "Terrace" and an adjoining rectangular area which, it may reasonably be assumed, is common property. None of those areas has any further marking which would identify it as the subject of exclusive use.

[10] The request to have the new community management statement recorded met with a requisition. It noted, among other things, that in respect of By-law 43 the exclusive use description had to be shown in a schedule, and that the exclusive use plan marked "C" did not comply with the registrar's requirements. It does not seem that the requisition was ever satisfied.

[11] At some point in the succeeding years, the ownership of the unit passed from Famestock Pty Ltd to the applicants. In August 2010, the applicants applied for adjudication of their claim to exclusive use of what they described as "about 200 sq metres of rooftop" adjoining unit 16. They asserted that they had only recently discovered that the community management statement with the by-law relating to exclusive use had not been recorded. Shortly after, apparently on advice from the Commissioner for Body Corporate and Community Management, the applicants made a formal request to the body corporate to register the new community management statement in accordance with the motion passed in January 1999. The request was not complied with, and the matter proceeded to adjudication under chapter 6 of the *Body Corporate and Community Management Act.*

The adjudicator's powers

[12] Section 276(1) of the *Body Corporate and Community Management Act* 1997 sets out the circumstances of dispute in which an adjudicator may make a "just and equitable" order:

> "**276 Orders of adjudicators**
>
> (1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about —
>
> (a) a claimed or anticipated contravention of this Act or the community management statement; or
> (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
> (c) a claimed or anticipated contractual matter about —
>
> (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
> (ii) the authorisation of a person as a letting agent for a community titles scheme."

[140586]

Subsection (3) permits the adjudicator to make any of the orders listed in sch 5 to the Act; that list includes:

> "1 An order requiring the body corporate to lodge a request to record a new community management statement consistent with the statement for which the body corporate gave its consent.
> 2 An order requiring the body corporate to lodge a request to record a new community management statement, regardless of whether the body corporate consents to the recording."

The adjudicator's decision

[13] The adjudicator recorded the history of events as given by the applicants: Famestock's purchase of the unit, the exclusive use condition, the resolution to record a new community management statement and the failure of the body corporate manager to meet the registrar's requisition. In support of their application was a statutory declaration from Mr Loane, who confirmed that his company had agreed to transfer exclusive use of the area to Famestock Pty Ltd. Mr Loane also confirmed that the general meeting vote in relation to the owner of Lot 16's entitlement to exclusive use had occurred and that the motion as recorded had passed.

[14] The owners of seven units in the complex also provided submissions. One who had been present at the January 1999 general meeting disputed the resolution as recorded in the minutes. A number of the submissions made the point that unit owners who had purchased over the following decade had done so in reliance on the original community management statement, believing that the roof area was common property.

[15] The adjudicator, noting the discrepancy between the wording of the resolution on the voting paper and the resolution actually passed, said that he was not satisfied that the body corporate had resolved to grant exclusive use of the common property. However, he accepted that the intention of the original owner had been to grant Famestock exclusive use over the common property, but as the result of errors, a new community management statement had not been registered. He referred to a decision, *Burrell* v *Body Corporate for Boulevard North,*[2] in which McGill DCJ observed that rectification might be available to correct a by-law. In *Burrell,* the developer, at a stage at which it was still the only lot owner, had executed a community management statement at a general meeting. Its intention was to give a particular unit two car parks, but it had inadvertently allocated one of the car parks to a non-existent unit. His Honour remarked that it might be 'just and equitable' to grant rectification of the current by-laws; but he decided on other grounds to set aside the decision of the adjudicator.

[16] Taking McGill DCJ's observation in conjunction with the power in sch 5 to order the recording of a new community management statement, the adjudicator concluded that it was

> "just and equitable… to make an order requiring the body corporate to register a new Community Management Statement stating that the proprietor of lot 16 is entitled to exclusive use of the sun deck and common property area adjacent to lot 16. This will also involve the attachment of a plan clearly identifying the area of common property to which lot 16 is entitled to exclusive use."

The appeal to QCAT

[17] Section 289(2) of the *Body Corporate and Community Management Act* permits a person aggrieved by an adjudicator's order to appeal on a question of law to QCAT. The aggrieved person in this case, by virtue of s 289(d)(ii), was the body corporate. Section 312 of the Act permits the body corporate to start a proceeding only if it is authorised by a special resolution by the body corporate. However, it was the committee for the body corporate which resolved to appeal against the adjudicator's decision, the appeal then being brought in the body corporate's name.

[18] Section 100(1) of the Act makes a decision of the committee a decision of the body corporate, except, by virtue of s 100(2), where the decision is one on a restricted issue under the relevant regulation module. As the respondent conceded here, the decision to appeal was one on a restricted issue within the meaning of s 42 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008; which meant, under

[140587]

s 100 (2), that the committee's decision to appeal was not the body corporate's decision.

[19] In their submissions to QCAT, the applicants asserted that the body corporate had not complied with s 312 by obtaining a special resolution. On that basis (as well as of other submissions seeking to support the decision of the adjudicator), they argued that the appeal should be dismissed. The QCAT member did not deal with that contention, and indeed made no reference at all to it in his reasons for decision.

[20] Instead, the QCAT member began his reasons with a review of the history of the matter. Importantly, he noted, there had been no challenge to the adjudicator's conclusion that, given the wording of the voting paper, he could not be satisfied that the body corporate had resolved to grant exclusive use of the common property; a finding which the tribunal member described as "central to the case… [made]… in this appeal". He observed that there was no material before either the adjudicator or himself which showed that the parties to the contract (the developer and Famestock) or the parties to the appeal (Mr and Mrs McEvoy and, at least in name, the body corporate) had ever agreed on the proportions or boundaries of the area of common property in respect of which exclusive use was contemplated. Of the amended By-law 43 and the plan lodged for recording by the registrar of titles, the member noted

> "[23] The proposed by-law does not describe the size of the area to be exclusively used, and the faxed photocopy had no helpful markings. The respondents stated to the Commissioner, in their letter dated 5 November 2010, that,
>
> > 'the area marked 'C' is the 200sq metres adjoining Lot 16. I am not sure it is correctly 'marked' but…. this area is the 'most probable' area as it is the only area on the plan marked 'C'…'
>
> [24] That statement reveals two problems for the respondents. First, no marking 'C is evident on the attached plan, and second, the respondents were — as at 5 November 2010 — unsure of the actual location of the area over which they asked for exclusive use."

(The last sentence was the subject of an appeal ground. The member's reference to "the respondents" is, of course, a reference to the applicants here.)

[21] The member referred to *Pukallus* v *Cameron*,[3] in which debate had arisen as to whether a particular area was within the boundaries of the land described in a contract of sale. Wilson and Brennan JJ adverted to the need, before rectification of the contract could be ordered, for precision in the identification of the area which the parties were said to have intended to include. In the present case, the member observed, there had been no evidence identifying the precise boundaries of the area over which the applicants were to have exclusive use. The parties to the contract had not agreed on any specific place or area, and the body corporate was not found to have agreed to do anything.

[22] In addition to the problem of uncertainty, the member noted, there was an unexplained delay by the applicants in their application for adjudication. Some unit owners had bought their units believing that the area was common property. In the absence of explanation for what the member described as a "decade of delay", the order should not be upheld. Accordingly, he set aside the adjudicator's order and dismissed the applicants' application.

The lack of authority for the QCAT appeal

[23] The draft ground of appeal relevant to the "preliminary point" was that the QCAT member "[e]rred in law in entertaining the appeal which was not authorised by the Body Corporate". As already noted, the respondent conceded that the decision to appeal to QCAT had not been made by it. However, as evidence of its adoption of the proceedings, the respondent pointed to the fact that it had taken steps to oppose the application to this court, a decision which it could make by committee resolution.[4] That may well be so; but since any such committee resolution is not in evidence, and there is no other material on the point, it is impossible to say how and when any such steps were taken. The applicants contended that the decision to resist the application must be beyond the committee's spending limits so as to require it to be put to a general meeting; but there was no evidence to support that argument either.

[24]

[140588]

Secondly, the respondent adduced affidavit evidence to show that at an extraordinary general meeting on 19 November 2012 (some four and a half months after the QCAT decision was given), the body corporate voted to ratify the decision of the committee to bring the appeal from the adjudicator's decision. The applicants, however, contended that in the absence of evidence that the unit proprietors knew of the material circumstances when they voted, this court would not be satisfied that there was in fact ratification. They

relied on a decision of the Full Court in *Victorian Professional Group Management Pty Ltd* v *The Proprietors "Surfers Aquarius" Building Units Plan No 3881.*[5]

[25] That case turned on its own facts. A management agreement for a set of units was found to be invalid because its execution was authorised by an invalidly convened general meeting of the body corporate. It was argued that the agreement should be regarded as having been ratified for two reasons: the minutes of the invalid meeting had been confirmed at a later general meeting, and the body corporate's budgets, which included provision for payment of the management fee, had been approved at general meetings. Not surprisingly, the court held that in the absence of any evidence that the proprietors were aware of any dispute as to the validity of the management agreement, those acts were not sufficient for ratification.

[26] In the present case, in contrast, the resolution was in clear terms: it was that the body corporate ratify the actions of the committee in instigating, on behalf of the body corporate, an appeal of the adjudicator's orders for the dispute, which the resolution identified by number and by reference to the fact that it concerned the grant of exclusive use. The reference to ratification was explicit and the act requiring ratification was clearly identified; the proprietors could not have been in any doubt as to what they were being asked to vote for.

[27] As to the implications of the QCAT appeal's having been commenced without authority, the applicants referred the court to its decision in *Sattel* v *The Proprietors — Be-Bees Tropical Apartments Building Units, Plan No 71593.*[6] In that case, the body corporate had proceeded with an appeal to this court without obtaining the special resolution necessary under the legislation as it stood at that time. It was suggested for the appellant there that the appeal be adjourned so that a special resolution ratifying its commencement could be obtained. The court declined to grant the adjournment, saying:

> "It appears to us that, where a party having no right to do so purports to begin an appeal in this Court, on the deficiency being brought to the Court's attention the appeal would ordinarily be dismissed or struck out. The circumstances of the present case, so far as they appear from the record, do not suggest that this is a case where justice requires that any other course be followed."[7]

As a statement of practice for Court of Appeal proceedings, this is entirely unremarkable, but it does not assist very much in determining the status of the QCAT proceedings in the present case, or what approach this court should take to orders made below where the issue was live and remained unaddressed.

[28] The fact that proceedings have been commenced without authority does not render them a nullity. As much was recognised by the House of Lords in *Russian Commercial and Industrial Bank* v *Comptoir D 'Escompte de Mulhouse.*[8] In that case it was held that defendants wishing to dispute the authority of the manager of a branch of an expropriated Russian bank ought to have moved to have the bank's name struck out as plaintiff; it was not open for them to raise the issue by way of defence to the action. By implication, the court was prepared to countenance the action's proceeding to judgment with the question of the plaintiff's authority to bring it unresolved. As Ferris J, sitting in the Chancery Division in *Re Oriental Gas Co Ltd*[9] , remarked of the decision,

> "The court is thus prepared to contemplate the anomalous result that an action may be tried on its merits in a case where there was no authority to commence proceedings in the name of the plaintiff."

He went on to observe:

> "If the decision is in favour of the plaintiff this may cause no real problem, because
>
> [140589]
>
> those who have authority to give instructions on behalf of the plaintiff will be likely to adopt the favourable decision."[10]

[29] In the Australian context, in *Doulaveras* v *Daher*[11] the New South Wales Court of Appeal similarly held that a challenge to (in that case, a tutor's) authority to bring proceedings could not be raised in defence pleadings; instead, the court might, on a proper application or of its own motion, litigate the question of authority and take steps to bring any abuse of process entailed in unauthorised proceedings to an end.[12]

[30] It is well established that the commencement of proceedings without proper authority may be cured by subsequent ratification. In *Danish Mercantile Co Ld* v *Beaumont*,[13] an action was commenced in the name of a company without necessary approval by a general meeting or by the board of directors, but the action was adopted some months later by the liquidator appointed on the company's winding up. Subsequently, the defendants applied by motion to strike out the name of the company as a plaintiff. Jenkins LJ observed that the practice of the court in cases where there was dispute as to the authority for use of a company's name as a plaintiff was to adjourn any motion to strike out the company's name with a view to the holding of a meeting to determine whether the company adopted the bringing of the action. It was, Jenkins LJ said:

> "…open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action."[14]

Similarly, in *Alexander Ward & Co Ltd* v *Samyang Navigation Co Ltd*[15] and *Presentaciones Musicales SA* v *Secunda*[16] it was held that proceedings taken without authority could be subsequently ratified; in the latter case, ratification was effective notwithstanding the expiration of the limitation period.

[31] In *Ox Operations Pty Ltd* v *Land Mark Property Developments (Vic) Pty Ltd (in liq)*,[17] Finkelstein J discussed and applied the English line of authority as to ratification of proceedings, as well as noting the practice, where an action had been brought without a company's authority, of permitting the company to convene a necessary meeting to consider whether it would adopt the action.[18] In *Victoria Teachers Credit Union Ltd* v *KPMG*[19] the Victorian Court of Appeal similarly recognised the principle that a client could, by subsequent ratification, validate the commencement of an action without authority, the ratification relating back "so as to be deemed equivalent to an antecedent authority."[20]

[32] The disinclination to characterise improperly constituted proceedings as a nullity is consistent with the approach of the High Court in *Berowra Holdings Pty Ltd* v *Gordon*.[21] Of particular significance to the QCAT proceedings here is the distinction the court made between an order made by an inferior court without a power which was a nullity and

> "an order… made within power but improperly, in which case, until set aside by a superior court, the order had to be obeyed."[22]

The order here was of the latter kind.

[33] The question of whether the bringing of a proceeding can be ratified after its conclusion is not, however, one on which I have been able to find any contemporary and direct authority; probably because a defendant seeking to take any point at that stage would generally be regarded as disentitled through delay, while a successful plaintiff is hardly likely to advance it. The peculiar feature of this case is the fact that the point was squarely raised by the applicants in the tribunal, but not dealt with.

[34] Nineteenth century English cases contemplated that an individual named as plaintiff could take the benefit of an unauthorised but successful action, providing he also bore its expenses: see *Hall* v *Laver*[23] and *Burge* v *Brutton.*[24] On the other hand, in *Bird* v *Brown*[25] it was held

> "that… ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies."[26]

The ratification in the present case would not meet those criteria, taken literally; in November 2012 the body corporate could not have

[140590]

commenced an appeal against the adjudicator's order, because QCAT had already ruled.

[35] *Bird* v *Brown* has been read down considerably, however. It was distinguished by Dillon LJ (with whom Nolan LJ agreed) and doubted by Roch LJ in *Presentaciones Musicales SA* v *Secunda*, in which the named plaintiff was held able to ratify a writ the issue of which he had not authorised, notwithstanding the expiration

of the limitation period. Dillon LJ identified the ratio of *Bird* v *Brown*, and other cases which followed it, as that ratification could not apply if it had the effect of extending a time fixed by statute or by agreement for doing an act.

[36] The decision in *Trident General Insurance Co. Ltd* v *McNiece Bros Pty Ltd*[27] suggests that the *Bird* v *Brown* approach is similarly unlikely to hold much sway in this country. In that case it was held that an agent's actions in taking out a policy of indemnity insurance could be the subject of ratification after the loss had occurred, on the basis that ratification was equivalent to original authority. However, the contended-for ratification, by commencement of an action seven years after the making of the policy and five years after the time for giving notice to the insurers of the event giving rise to the loss, was held not to have occurred within a reasonable period.

[37] The question of whether a concluded legal process could be ratified was raised in *Alexander Ward & Co Ltd* v *Samyang Navigation Co Ltd*. Two individuals acting in the name of, but without the authority of the former company (which at the time had no directors), obtained a warrant of arrestment of a ship which was duly executed on it in a Scottish shipyard, the effect being to give Scottish courts jurisdiction to try the proceeding which ensued between the company and the ship's owner. The company went into liquidation and the liquidator ratified the taking of proceedings. The ship's owner argued, among other points, that when ratification occurred the arrestment, the basis of jurisdiction, was spent and could not be revived. The court held, however, that the arrestment was properly to be regarded as a step in the action, validated by the liquidator's ratification of the proceedings. The question of what the situation would have been, had the arrestment been regarded as an entirely independent and completed process, was thus not resolved.

[38] In *Davison* v *Vickery's Motors Ltd (In liq)*,[28] Isaacs J emphasised that a principal's ratification was not an adoption of the agent's act but of the relationship of agency which had been assumed by the latter. If the agency relationship had been adopted, the further question was whether the law would regard the adoption as relating back to the beginning of the transaction.[29] The purpose of the fiction by which the principal's ratification was allowed to operate as if antecedent authority had been given was "to prevent a mischief or to remedy an inconvenience that might result from the general rule of law"; but such a fiction could not be allowed to work an injury on a third party.[30]

[39] The "fiction" described by Isaacs J was accepted as "a well settled rule of common law" by the High Court in *Federal Commissioner of Taxation* v *Sara Lee Household & Body Care (Australia) Pty Ltd*:[31]

> "where a principal ratifies the earlier act of a person acting as agent without authority, the ratification relates back to the date of the unauthorised act, and the principal is bound as if the agent had had authority at the earlier time."[32]

[40] In my view (although the point need not finally be resolved in order to determine whether leave should be granted), accepting the principle that the effect of ratification is to clothe the agent with authority for the purposes of the unauthorised act, the body corporate was able retrospectively to give the committee authority to mount the QCAT appeal. That conclusion would be in keeping with the notion that ratification is designed to "remedy an inconvenience"; it seems clear enough that the body corporate wished to appeal, and that its failure to do so was the product of simple oversight as to the level of authorisation required. The applicants would not be deprived of any right by that result.

[41] There can be no doubt that the failure of the member of QCAT to deal with the submission put to him about the committee's lack of authority to bring the appeal was an error of law, but neither the proceeding nor his

order were rendered invalid by that want of authority. Whether the error warrants the grant of leave to appeal requires consideration of whether substantial injustice has been caused by it; which in turn involves considering the practical consequences of the failure.

[42] Had the tribunal member addressed the question of authority, it would have been open to him, and, in view of the object in the *Queensland Civil and Administrative Tribunal Act* of dealing with matters in an

"accessible, fair, just, economical, informal and quick"[33] way, would have been an appropriate exercise of power, to adjourn the hearing of the appeal to allow the necessary vote of the body corporate and general meeting to be taken. If the appeal on this ground were now to be heard and decided in favour of the applicants, the resulting orders would be the setting aside of the tribunal decision and the remitting of the matter for re-hearing, in circumstances where the committee's decision to bring the appeal to that tribunal had been ratified after the event. Even if that ratification were not regarded as effective, it would be difficult to argue that the body corporate should not be permitted to ratify the institution of what would then be pending proceedings. Given the ultimate unlikelihood of any different result purely on the basis of lack of authority for the tribunal appeal, I would not regard the applicants as having established a substantial injustice warranting a grant of leave to appeal on this ground.

The original owner's role

[43] The applicants' next proposed ground of appeal was that the tribunal member had

> "[e]rred in law in holding that 'exclusive use' could not be conferred upon a proprietor of a lot in a Community Title Scheme by the original owner during the "original owner control period" as defined by the *Body Corporate and Community Management Act* 1997 (Qld) notwithstanding until more than 50% of the lots in the Community Title Scheme are no longer in the ownership of the original owner there is no requirement to convene a first general meeting or elect a Committee to grant exclusive use."

The tribunal member did not in fact make any express finding that exclusive use could not be conferred by the original owner, although he did note that neither party had suggested any inaccuracy in the body corporate manager's advice to Mr Loane that the exclusive use had to be granted at a general meeting of the body corporate. But, in any case, having regard to the statutory requirements for a grant of exclusive use of common property, I do not think there is anything in the point.

[44] The *Body Corporate and Community Management Act* 1997, as it stood in 1998 when Famestock contracted to buy lot 16, contained no definition of "original owner control period", although "original owner" was defined to mean each person who, before the scheme's establishment, was the registered owner of a lot which then became scheme land. Section 133(1) was in the same terms as s 170 in the Act in its present form; it identified an "exclusive by-law" as a by-law attaching to a lot which gave the occupier exclusive use of common property or a body corporate asset.

[45] Section 134(1)[34] required the common property or body corporate asset to which an exclusive use by-law applied to be specifically identified in the by-law itself or allocated either by the original owner or the original owner's agent authorised under the by-law to make the allocation; or (in an instance not applicable here) two or more lot owners under a reallocation agreement. Section 134(2) and (3) required the written consent of the lot owner before an exclusive use by-law could attach to his lot, that consent to be given before either the passing of the resolution for recording of a new community management statement incorporating the by-law or the allocation of the common property to which the by-law applied, as the case might be.

[46] It is plain that exclusive use could not be conferred on Famestock without the creation of a by-law. The *Body Corporate and Community Management Act* did not in 1998, and does not now, contemplate the conferring of a right of exclusive use attached to a lot except by means of an exclusive use by-law. The only role which the developer might have played was in allocating the common property if a by-law had authorised it to do so. There was no such by-law.

[140592]

The January 1999 exclusive use resolution

[47] The applicants' next proposed appeal grounds turned around the exclusive use resolution passed at the January 1999 general meeting. They were, that the QCAT member had erred in: not finding the body corporate had intended to and had, in fact, granted exclusive use by its vote; taking into account that the new community management statement had not been registered when non-registration did not affect the grant of exclusive use; and overlooking the fact that the applicants had relied on the adjudicator's "factual finding…

that a grant of exclusive use had been made". The last seems inaccurate; as the member observed, the adjudicator was not satisfied that the body corporate had resolved to grant exclusive use in the common property. In any event, I do not think any of these grounds have any prospect of success.

[48] Section 55(2) of the *Body Corporate and Community Management Act* 1997 required at the relevant time that assent to the recording of a new community management statement must be given in the form of a resolution without dissent. The requirements for voting papers and passage of resolutions were contained in regulations. The original community management statement was not in evidence in this case, so it is not known whether it identified the regulation model applying to the scheme. If it did, it would, presumably, have identified the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997. If it did not, the *Body Corporate and Community Management (Standard Module) Regulation* 1997 would have applied. Both regulations required that a voting paper for a general meeting state each motion to be considered at a general meeting so as to enable any voter to cast a written vote.[35] A general meeting could pass a resolution only if it were stated in a voting paper accompanying the notice.[36] That plainly did not occur in this case. The adjudicator was correct in his finding that there had been no valid resolution as to exclusive use.

The absence of a plan identifying the exclusive use area

[49] The next ground relied on was that the QCAT member erred in having regard to the asserted absence of a plan of the area of exclusive use when the body corporate had submitted the plan marked "C" to the registrar of titles. That, I think, misapprehends the member's reasoning: he accepted that there existed a plan with the letter "C" on it; the difficulty he identified was that the applicants, writing to the Commissioner Body Corporate and Community Management, had referred to "[t]he area marked 'C'" on the plan as the "most probable" area to be the subject of the exclusive use grant. That, as the member observed, raised two problems: that there was no area marked "C" on the plan (as opposed to the plan as a whole being marked "C") and that it suggested that the applicants were uncertain of the actual area the subject of their claim for exclusive use.

[50] The plan marked "C" did show an area adjoining lot 16 which was presumably common property, but it contained no marking which would indicate what part of that area was to be the subject of exclusive use. Whatever plan might have been attached to the contract of sale was no longer available. The QCAT member was correct in concluding that there did not exist any clear and contemporary identification of the proposed exclusive use area which could have been the subject of the adjudicator's order.

Rectification and delay

[51] The applicants' remaining proposed appeal grounds were that the member had erred in holding that they could not obtain an order requiring the body corporate to file a new community management statement recording the grant of exclusive use and in holding that they were disentitled from relief on discretionary grounds. In that regard, it was said that *Pukallus* v *Cameron* and *Burrell* v *Body Corporate for Boulevard North* both supported the case for rectification; that the member should not have considered that there was a limitation arising from the case law on the orders the adjudicator could make; and that the adjudicator's statutory power to resolve the dispute was not fettered by rules relating to rectification.

[52] As to the last, I doubt that the adjudicator did have the statutory power to resolve the dispute in the way he did. The

relevant powers to make an order that is "just and equitable" under s 276 arise when there is a dispute about "a claimed or anticipated contravention of [the Act or] the community management statement" or about "the exercise of rights or powers, or the performance of duties, under [the Act or] the community management statement". No contravention of the Act, or exercise of rights or powers or performance of duties under it, was identified as being the subject of dispute; and the recorded community management statement did not confer any right of exclusive use about which the parties could be in dispute.

[53] However, the basis on which the adjudicator purported to act was not explored either before him or in the QCAT proceedings, so it is probably more to the point to say that the QCAT member was entirely correct

in saying that there was no relevant agreement between the applicants and the body corporate and there was nothing to identify precisely what the area the subject of the exclusive use was supposed to have been. That state of affairs, as the statements of Wilson and Brennan JJ in *Pukallus* make plain, did not lend itself to rectification.

[54] The adjudicator himself referred to the doctrine of rectification as a guide to whether he should exercise his perceived power. But even if one considers the matter entirely independently of any principle attaching to rectification, it could hardly be just and equitable to make orders compelling the body corporate to confer on the applicants an exclusive use as to which there was no valid resolution, on the strength of the developer's promise, made to a different entity, to confer a right to use property not now capable of identification. There was no error in the member's approach.

[55] On the question of discretionary grounds, it was put that because there had been no assessment of the credibility of the lot owners' evidence of prejudice (in relation to their having purchased without knowledge of the exclusive use area) there was no evidence on which the member could hold that the applicants were disentitled from relief on discretionary grounds. The member noted that for it to be just and equitable to make the order effectively giving exclusive use to the owner of lot 16, "an explanation had to be given for a decade of delay"; and there had been none. The evidence included a letter of 7 May 2001 which the chairman of the body corporate sent to the applicants, informing them that the community management statement had not been registered. The application for adjudication was made in August 2010. As the member observed, there was no explanation for that delay. That feature was entirely relevant to consideration of what was just and equitable.

Conclusions

[56] I do not consider that any of the proposed grounds of appeal, other than that as to the lack of authority for the commencement of the QCAT appeal, could succeed. For the reasons already given, I do not consider that the member's error in failing to deal with the lack of authority point is such as to have caused substantial injustice warranting a grant of leave to appeal. I would refuse the application for leave to appeal.

[57] So far as the question of costs is concerned, there was, up to the point of the body corporate's ratification of the committee's decision to bring the QCAT appeal, a live question about the body corporate's intentions in that regard; had that ratification not occurred, the applicants would have been in a different position in arguing that a substantial injustice had occurred. I would order that the applicants pay the respondent's costs of the application incurred after 19 November 2012 (when it may be assumed that the applicants, as members of the body corporate, became aware of the ratification) on the standard basis.

Douglas J: I agree with the reasons of Holmes JA which I have had the significant advantage of reading in draft form. I merely wish to add a few words about the question whether the bringing of a proceeding can be ratified after its conclusion.

[59] Cases such as *Bird* v *Brown*[37] and *Alexander Ward & Co Ltd* v *Samyang Navigation Co Ltd*[38] are discussed in *Bowstead & Reynolds on Agency*[39] as relevant to the rule formulated in that work that "ratification is not effective where to permit it would unfairly prejudice a third party, and, in particular -

[140594]

> (1) where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third party."

[60] That conclusion is consistent with the reference to third parties' rights by Isaacs J in *Davison* v *Vickery's Motors Ltd (In liq)*.[40]

[61] In summarising the effect of their Article 19(1) on the limits of ratification, the learned authors of *Bowstead & Reynolds on Agency* say:[41]

> "But the workability of a rule that void acts cannot be ratified has already been doubted, and it may be better simply to proceed on the basis that certain acts are by their context required to be valid and effective when done, lest a time limit be extended or the party affected be in a state of uncertainty.

> Such a rule would require discrimination between situations. Thus although the unauthorised issue of a writ can apparently be ratified, an assignment probably cannot after action on the right assigned has been commenced by the purported assignee, nor a demand for payment or delivery, a notice of abandonment in marine insurance, a notice of dishonour of a negotiable instrument or a notice to quit. *It may be possible to say that a ratification will be given retrospective effect unless there are cogent reasons why to give it such effect would contravene the purpose of any time element involved or otherwise be unfair to the third party."*[42]

[62] Here the situation is analogous to the unauthorised issuing of a writ. The failure to authorise the appeal appears to have been a simple oversight. There is no evidence, for example, that it reflected a division of opinion on the body corporate during the period of six weeks allowed for an appeal by s 290 of the *Body Corporate and Community Management Act* 1997 (Qld). That time limit may, in any case, be extended by order of the Queensland Civil and Administrative Tribunal, a course which would have been likely to occur in a case of this nature had the appeal been ratified before it was heard.[43] Giving effect to the ratification in such a case does not obviously contravene the purpose of the time limit established for the bringing of the appeal, that there be finality to litigation. Accordingly, there is no reason to refuse to give effect to the ratification. There is no evidence of any unfairness to a third party involved and no deprivation of any accrued right held by the applicants as Holmes JA has pointed out.[44]

[63] Accordingly, I agree with the proposed orders including the order as to costs.

Footnotes

1 See, for example, *Chapman* v *State of Queensland* [2012] QCA 134 at [32] and [35]; *Underwood* v *Queensland Department of Communities (State of Queensland)* [2012] QCA 158 at [54] and [68].

2 [2010] QDC 352.

3 (1982) 180 CLR 447.

4 Defending a proceeding is not a restricted issue under s 42 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 2008 (Qld).

5 [1991] 1 Qd R 487.

6 [2001] 2 Qd R 331.

7 At 334.

8 [1925] AC 112.

9 [1999] BCC 237.

10 At 250.

11 (2009) 253 ALR 627.

12 At 655.

13 [1951] 1 All ER 925.

14 At 687.

15 [1975] 1 WLR 673.

16 [1994] Ch. 271.

17 (2007) FCA 1221.

18 At [2].

19 [2000] VSCA 23.

20 At 23.

21 (2006) 225 CLR 364.

22 At 370.

23 1 Hare, 572.

24 2 Hare, 373.

25 4 Ex. 787.

26 At [799].

27 (1987) 8 NSWLR 270.

28 (1925) 37 CLR 1.

29 At 21.

30 At 19.

31 (2000) 201 CLR 520.

32 At 533.

33 Section 3(b).

34 The equivalent of s 171 of the Act in its present form.

35 *Body Corporate and Community Management (Standard Module) Regulation* s 42(3)(c); *Body Corporate and Community Management (Accommodation Module)* Regulation s 40(3)(c).

36 *Body Corporate and Community Management (Standard Module) Regulation* s 52(5); *Body Corporate and Community Management (Accommodation Module) Regulation* s 50(5).

37 (1850) 4 Ex 786; 154 ER 1433.

38 [1975] 1 WLR 673.

39 19th ed (2010) at §2-089, Article 19(1).

40 (1925) 37 CLR 1; [1925] HCA 47, 19-20, discussed by Holmes JA at [38] above. See also *Halsbury's Laws of Australia* at [15-140] and *Restatement of the Law of Agency, Third* (2006) at §4.05.

41 See above fn 39 at 97.

42 Footnotes omitted, emphasis added.

43 See s 61(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

44 See at [40] above.

MERIDIEN AB PTY LTD & ANOR v JACKSON & ORS

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(2013) LQCS ¶90-187; Court citation: [2013] QCA 121

Supreme Court of Queensland — Court of Appeal

Decision delivered on 21 May 2013

Conveyancing — Sale of a proposed lot — Where s 27 (in its unamended form) of the Land Sales Act 1984 allows a purchaser to avoid a contract for the sale of land if the vendor has not given it a registrable instrument of transfer within three and a half years — Where the primary judge held that purchasers were able to avoid sale contract even though they had refused to settle (and the vendors were therefore unable to provide the transfer) — Whether the primary judge was correct in applying a literal construction to the section — Whether, on the proper construction of s 27 (in its unamended form), a purchaser who wrongfully refuses to attend settlement and receive a registrable instrument of transfer obtains a right to avoid the contract — Land Sales Act 1984: s 27.

In January 2008, the respondent purchasers entered into a sale contract with the vendor appellants to buy an apartment in a proposed resort development in Queensland. Upon the registration of the subdivision plan and the community management statement, the vendors appointed 28 February 2011 as the settlement date. Settlement did not proceed as just prior to the settlement date, the purchasers gave notice that they were exercising their right to terminate the contract because the vendors' alleged misleading and deceptive conduct induced them to enter into the contract.

The vendors commenced proceedings in June 2011 seeking specific performance of the contract, payment of the balance purchase price and damages for breach of contract. The prescribed period for the vendors to provide the purchasers with the transfer under s 27 of the *Land Sales Act 1984* expired before judgment in the specific performance proceeding was given. The purchasers then argued that they were entitled to avoid the contract under s 27 (as it existed at the relevant time).

Section 27 provides that a purchaser of a proposed lot may avoid a contract for sale if the vendor fails to provide a registrable instrument of transfer within three and a half years of the contract date (the section was amended in February 2012 to clarify that a purchaser can only avoid the contract if the failure to give the transfer is not due to the purchaser's default). The vendors countered that to allow the purchasers to avoid the contract would be unfair, given that the purchasers had deliberately delayed settlement in order to avoid the contract.

The primary judge dismissed the vendors' claim and declared that the purchasers had validly terminated the contract and were entitled to the $450,000 deposit. The primary judge held that, as the language of (the unamended) s 27 was "clear and unambiguous", the court was required to give the section its ordinary and grammatical meaning even if that would have resulted in the purchasers being able to take advantage of their own wrong in not attending settlement. The vendors were appealing against those orders in these proceedings. The vendors argued that the amendment to s 27 in 2012 was made out of an abundance of caution and that the meaning of the s 27 was unchanged by the amendment.

Held: for the vendors. Appeal allowed.

1. The primary judge was incorrect in concluding that the language of (the unamended) s 27 was "clear and unambiguous". The provision was not intended to be read literally as such a construction fails to have regard to the conveyancing context of s 27 and is plainly not in accordance with the legislative intent "to facilitate property development in Queensland". Section 27 concerns the conduct of the parties to a contract for the sale and purchase of a "proposed lot". As such, it necessarily contemplates that, unless the contract makes provision to the contrary, a registrable instrument of transfer will not be provided by the vendor to the purchaser except in return for the balance purchase price. Such obligations on the part of the vendor and purchaser are concurrent and mutually dependent.

[140597]

It would follow that it is unlikely that s 27(1) was intended to operate so as to permit a purchaser who refuses to settle in breach of its contractual obligations and who frustrates the vendor's attempts to settle in compliance with its contractual obligations to escape from the contract and avoid liability.

2. Further, a statute should not be construed so as to enable a person to benefit from his/her own wrong or infringe common law rights (on the authority of *Pyneboard Pty Ltd* v *Trade Practices Commission* (1983) 152 CLR 328).

3. The construction urged by the purchasers was arguably consistent with the consumer protection aims of the legislation (ie to prevent vendors from delaying indefinitely). However, it was inconsistent with the object of the legislation "to facilitate property development in Queensland".

[Headnote by the CCH CONVEYANCING LAW EDITORS]

JC Bell QC with J O'Regan (instructed by Hopgood Ganim) for the appellants (vendors).

PJ Roney SC (instructed by Macrossan & Amiet Solicitors) for the respondents (purchasers).

Before: Margaret McMurdo P, Muir JA and Atkinson J

Margaret McMurdo P: I agree with Muir JA's reasons for allowing this appeal and with his Honour's proposed orders.

Muir JA: **Introduction** The purchasers entered into a contract of sale dated 2 January 2008 with the vendors for the purchase of an apartment in a proposed resort development at Airlie Beach. The first and second purchasers are the purchasers named in the contract. The vendors are the vendors. The third to fifth purchasers are guarantors of the obligations of the first and second purchasers. The contract provided that at settlement:

1. the purchasers pay the balance purchase price to the vendors (cl 11.4); and
2. the vendors, in exchange for payment, deliver to the purchasers unstamped transfer documents capable of immediate registration after stamping (cl 11.5).

[3] In a letter dated 4 February 2011, the solicitors for the vendors wrote to the solicitors for the first and second purchasers giving notice that:

1. the vendors appointed 28 February 2011 as the settlement date pursuant to cl 11 of the contract;
2. the conditions precedent in cl 5.2 of the contract had been satisfied and, in particular, the sub-division plan and the community management statement (CMS) had been registered; and
3. the Boathouse Community Title Scheme 42224 had been established.

[4] The letter stated the preparedness of the vendors' solicitors to forward transfer documents and settlement figures to the solicitors for the first and second purchasers on their undertaking to use the transfer documents for stamping purposes only prior to settlement. They requested that the undertaking be provided "urgently by return". In a letter dated 15 February 2011, sent by facsimile to the vendors' solicitors, the purchasers' solicitors provided the requested undertaking.

[5] In a letter dated 18 February 2011 to the vendors' solicitors, the solicitors for the first and second purchasers gave notice that the first and second purchasers exercised their right to terminate the contract on the basis of the vendors' alleged "misleading and deceptive conduct leading to their entry into the contract of sale". Also on that day, the solicitors for the vendors, by facsimile, advised the first and second purchasers' solicitors that their clients "although ready, willing and able to settle" would not have their solicitors "attend at settlement to tender in the circumstances". They stated that for their clients to tender at any time on the settlement date would be futile. Neither the vendors nor the first and second purchasers attempted to tender on the settlement date or at any time thereafter.

[6] The vendors commenced these proceedings on 30 June 2011 seeking specific performance of the contract, payment of the balance purchase price and damages for breach of contract.

[7]

[140598]

The period of three and a half years (the period relevant to the operation of s 27 of the *Land Sales Act* 1984 (the Act)) ended on 2 July 2011.

[8] On 25 November 2011, solicitors for the first and second purchasers advised the vendors that their "clients elect[ed] to avoid the contract in accordance with and pursuant to the provisions of section 27 of the [Act]".

[9] On 5 March 2012, the purchasers applied for summary judgment in the proceeding. On 14 September 2012, the primary judge dismissed the vendors' claim, declared that the first and second purchasers had validly terminated the contract and were entitled to the $450,000 deposit paid under the contract together with interest. The receivers and managers of the vendors were ordered to pay the purchasers' costs of and incidental to the proceeding on the standard basis. The vendors appeal against those orders.

[10] The vendors identified the issues for determination on the appeal as:

1. whether, on the proper construction of s 27 of the Act, a purchaser who wrongfully refuses to attend settlement and receive a registrable instrument of transfer obtains a right to avoid the contract; and
2. whether the purchasers, by their conduct, waived any right to avoid the contract or are estopped from relying on any such right.

[11] At relevant times, s 27 of the Act provided:

"**27 Purchaser's rights if not given a registrable instrument of transfer within a certain period**

(1) This section applies if —

(a) a purchaser entered upon the purchase of a proposed lot under an instrument relating to the sale of the proposed lot (the ***instrument***); and
(b) the vendor has not given the purchaser a registrable instrument of transfer for the lot within 3½ years after the day the instrument was made.

(2) The purchaser may avoid the instrument by written notice given to the vendor before the vendor gives the purchaser the registrable instrument of transfer for the proposed lot."

[12] Section 27(1)(b) was amended in February 2012 by the insertion of the words "other than as a result of the purchaser's default" after "the instrument was made".

The vendors' contentions

[13] The vendors argued, in effect, that the amendment to s 27(1)(b) was made out of an abundance of caution and that the meaning of the subsection was unchanged by it. It was contended that subsection (1)(b) was ambiguous in meaning. In that regard, it was asked, rhetorically:

"Can a purchaser be said to have been 'not given' the instrument when that purchaser has refused to be given it? Is there a constructive 'giving' for the purposes of s 27(2) in these circumstances?"

[14] The argument was expanded as follows. On the proper construction of s 27(1), a purchaser does not obtain a right to avoid a contract in circumstances where: the vendor was ready, willing and able to provide a registrable instrument of transfer in return for payment of the purchase price on settlement; the vendor, as it was entitled to do, called for settlement within the prescribed period; and the buyer failed to settle. This "construction" was said to be supported by the following six matters:

1. It is consistent with the language of s 27 in that the words "the vendor has not given" refer only to the vendor's conduct. They are not apt to encompass the situation described in the previous paragraph.
2. It does not detract from the consumer protection purpose of s 27, and it is consistent with the mischief that s 27 was designed to address: preventing vendors from delaying indefinitely before providing a buyer with registrable title.
3. The primary judge's construction provides a disincentive for developers to sell lots "off the plan" as it makes them vulnerable to purchasers who deliberately delay settlement in order to enable them to avoid contracts under s 27. Such a construction conflicts with the object of the legislation stated in s 2(a) of the Act "to facilitate property development in Queensland".

[140599]

4. The primary judge's construction allows a purchaser to benefit from its own breach of contract. A defaulting purchaser would escape all liability, including liability for damages for breach of contract, if the vendor decided to seek specific performance instead of immediately terminating the contract for breach and the prescribed period expired before judgment in the specific performance proceeding, thereby allowing the purchaser to avoid the contract.
5. The primary judge's construction gives rise to a substantial risk of a purchaser deliberately delaying settlement to engineer a situation in which it could avoid the contract under s 27.
6. The primary judge's construction, in practical terms, would remove the vendor's option of obtaining specific performance. In the absence of a clear contrary intention, legislation is presumed not to alter common law or equitable rights.

The purchasers' contentions

[15] Counsel for the purchasers argued that s 27 was one of the Act's consumer protection provisions and that three and a half years had been selected by the legislature as a period "sufficient to accommodate all of the contingencies which might arise either in the process of development, or indeed to accommodate any

contingencies or uncertainties such as the commencement and resolution of proceedings … relating to the non-completion of contracts".

[16] It was also argued that the legislation contemplated that a vendor, wishing to protect itself against a defaulting purchaser delaying settlement until such time as it could give a notice under s 27(2), would provide the registrable title and rely on a caveat preventing dealings between the purchaser and third parties to protect its position. The argument is unattractive and unworldly. It is highly improbable that a defaulting purchaser would accept a stamped registrable transfer from the vendor and hold it on the vendor's behalf. If the vendor registered the transfer in favour of the purchaser, it would be unlikely, at least on the purchasers' construction of s 27, that a transfer would have been "given" to the purchaser by the vendor for the purposes of s 27. Moreover, any secured creditor of the vendor is unlikely to be enthusiastic about relinquishing its security without payment of the moneys secured or the provision of substitute security.

Relevant principles of statutory construction

[17] General principles of statutory construction relevant for present purposes may be extracted, conveniently, from the joint judgment in *Alcan (NT) Alumina Pty Ltd* v *Commissioner of Territory Revenue (Northern Territory)*:[1]

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." (Citations omitted)

[18] After referring to the above passage, French CJ and Hayne J in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS* v *Cross & Ors*[2] said:

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc* v *Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
>
> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text
>
> [140600]
>
> and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added). And as the plurality went on to say in *Project Blue Sky*:
>
> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

[19] The primary judge referred to the following passage from the reasons of Heydon J in *Momcilovic* v *The Queen*:[3]

"[441] Pursuant to the principle of legality, the common law of statutory interpretation **requires a court to bear in mind an assumption about the need for clarity if certain results are to be achieved, and then to search, not for the intention of the legislature, but for the meaning of the language it used, interpreted in the context of that language**. The context lies partly in the rest of the statute (which calls for interpretation of its language), partly in the pre-existing state of the law, partly in the mischief being dealt with and partly in the state of the surrounding law in which the statute is to operate. **The search for 'intention' is only a search for the intention revealed by the meaning of the language. It is not a search for something outside its meaning and anterior to it which may be used to control it**. The same is true of another anthropomorphic reference to something which is also described as a mental state but in this field is not — 'purpose'. And it is also true of the search for 'policy'.

[442] Thus in *Project Blue Sky* v *Australian Broadcasting Authority* McHugh, Gummow, Kirby and Hayne JJ said of the common law rules of statutory interpretation:

> [69] **The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute**. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW)* v *Agalianos* Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, **the process of construction must always begin by examining the context of the provision that is being construed.**

What their Honours meant by 'purpose' is what Dixon CJ meant by 'purpose'. What he meant by 'purpose' may be inferred from his earlier analysis of a statutory discretion:

> it is incumbent upon the public authority in whom the discretion is vested … to decide … bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred … But **courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument.**

The subject matter of an enactment, and its scope, like its purpose, can only be gauged from its language. And light is cast on what 'policy' means by the statement of Mason and Wilson JJ that a court could decline to adopt a literal interpretation where this did not conform to the legislative intent, meaning 'the legislative intent as ascertained from the provisions of the statute, including

the policy which may be discerned from those provisions'." (Citations omitted, primary judge's emphasis)

[20] The vendors placed particular reliance on the principle of statutory interpretation that courts will resist an interpretation that will permit a person to take advantage of his or her own wrong.[4] In this regard, reference was made by the vendors to *Holden* v *Nuttall*[5] and *Thompson* v *Groote Eylandt Mining Co Ltd*.[6] In *Nuttall*, Herring CJ was required to consider whether an order for recovery of possession of premises by a landlord from a tenant who went into possession on a sublease shortly before the original lease was due to expire would cause the tenant "hardship". His Honour observed:[7]

> "In the circumstances of this case, moreover, I think it may properly be said that the hardship the [tenant] will suffer is self-inflicted and that it is his own conduct that has caused any hardship he may suffer. He has chosen to make use of the [*National Security (Landlord and Tenant) Regulations*] for his own protection regardless of the injury he has done the [landlord] thereby…
>
> The [*National Security (Landlord and Tenant) Regulations*] were not made to enable injustice to be perpetrated in this way. And the word 'hardship' should if necessary be limited as a matter of construction so as to avoid attributing to the regulation-maker the intention of bringing about an

injustice or allowing a man to benefit from his own wrong. It is certainly most undesirable that people should be encouraged to make use of the regulations for the purpose of acquiring benefits for themselves at the expense of the legitimate rights of others."

[21] In *Thompson*, the Court considered legislation which provided that employers were liable to pay their workers compensation for workplace injuries. The definition of "worker" relevantly included an employee who was a "PAYE taxpayer". That term was defined as a worker in respect of whom the employer "makes deductions" from the worker's pay under the PAYE provisions of the tax legislation. The respondent was legally obliged to make PAYE deductions from the appellant's pay but failed to do so. The appellant was injured at work and the respondent denied liability to pay compensation on the basis that the appellant was not a "worker" as the respondent had not made the PAYE deductions it was required to make. Mildren J, with whom Thomas J agreed and Martin CJ expressed general agreement, said:[8]

"In *Tickle Industries Pty Ltd* v *Hann* (1974) 130 CLR 321 at 331, Barwick CJ said:

'It is … a sound rule of statutory construction that a meaning of the language employed by the legislature which would produce an unjust or capricious result is to be avoided. Unless the statutory language is intractable, an intention to produce by its legislation an unjust or capricious result should not be attributed to the legislature.'

There is another rule of construction which I think is also of great significance in this case, and that is the rule expressed in the maxim nullus commodum capere potest de injuria sua propria: no man can take advantage of his own wrong. This is a very ancient rule and it applies equally to the construction of statutes as it does to contracts."

[22] In *Davenport* v *The Queen*,[9] which was cited in *Thompson*, it was said:[10]

"In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, *however clear and strong*, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe* v *Bancks*; *Roberts* v *Davey* (1833) 4 B & Ad 664; 110 ER 606, and other cases in the notes to *Dumpor's Case* 4 Co Rep 1196; 76 ER 1110 …

It is however contended that this rule of construction is inapplicable when the legislature has imposed the condition. But in many cases the language of statutes, *even where public interests are affected, has been similarly modified*. Thus, where the statute

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provided that if the purchaser at an auction refused to pay the auction duty, his bidding 'should be null and void to all intents and purposes', it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Coltman J said: 'It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view': *Malins* v *Freeman* (1838) 4 Bing (NC) 395; 132 ER 839.

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, *but the intention to exclude it should be clearly established*." (Emphasis added)

[23] The central issue for determination in *Davenport* was whether a proviso of forfeiture in s 8 of the *Agricultural Reserves Act* 1863 imported into the terms of a lease by the statute made the term of the lease void or voidable only upon a breach of the relevant condition. Section 8 relevantly provided:[11]

"If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required … the right and interest of such selector to the land selected shall cease and determine, and the amount of the purchase-money, less by one-fourth part, shall be refunded to him…"

[24] The principles discussed in *Davenport* were applied in New Zealand in *Burrows* v *Molyneux Gold-Dredging Co Ltd*[12] and *Bank of New Zealand & Ewing* v *Scandinavian Water-Race Co (No 2)*.[13] Those or related principles have been applied frequently in the United Kingdom.[14]

[25] In *Woodcock* v *South Western Electricity Board*,[15] the word "occupier" in a provision in the *Electric Lighting (Clauses) Act* 1899 requiring electricity authorities "upon being required to do so by the owner or occupier of any premises [to] give and continue to give a supply of energy for those premises",[16] was held not to include reference to persons whose original entry on the premises was unlawful.

[26] In *R* v *Registrar General*, *ex parte Smith*,[17] Staughton LJ, referring to the proposition that "statutory duties which are in terms absolute may nevertheless be subject to implied limitations based upon principles of public policy accepted by the courts at the time when the Act is passed",[18] said:[19]

> "In the case of statutory duties the rule is, in my opinion, based upon interpretation of the meaning intended by Parliament. It is not a rule imposed ab extra as in the case of contracts. That is apparent from the passage of the judgment of Donaldson L.J. which I have just quoted. To hold otherwise would come perilously close to infringing constitutional doctrine of major importance. Our courts have no power to dispense with the laws enacted by Parliament or (as it is now called) to disapply them, subject to the law of the European Community. So the rule is that we must interpret Acts of Parliament as not requiring performance of duties, even when they are in terms absolute, if to do so would enable someone to benefit from his own serious crime."

[27] Widgery LJ observed in *Buswell* v *Goodwin*[20] that:

> "The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse …"

Consideration of the construction question

[28] Although it may be accepted that the principal purpose of s 27 is consumer protection, it does not follow that the object in s 2(a) ("to facilitate property development in Queensland") or the principles of construction relied on by the vendors have no room for application. The purchasers' argument that the legislature had set a three and a half year period to cover all contingencies is not particularly persuasive. Any disputes between a vendor and a purchaser in relation to the purchaser's obligation to complete under the contract are likely to arise after completion of construction of the apartments (or completion of the subdivision as the case may be), near the time of registration of the relevant plan and thus close to the contractual settlement date. As litigation, particularly if there are appeals, could well take substantially in excess of 12 months,

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there is no compelling reason to conclude that the limitation period was intended to be sufficient to enable the merits of any dispute to be fully litigated.

[29] Moreover, if a dispute as to a purchaser's obligation to complete arises within the limitation period, when the vendor is ready, willing and able to comply with the statutory requirements, it is surely far from obvious that the legislature contemplated that a defaulting purchaser be permitted to take advantage of its own wrongdoing.

[30] The primary judge held the language of s 27 to be "clear and unambiguous".[21] I respectfully disagree. The provision was not intended to be read literally. It does not contemplate that the vendor "give" the purchaser a registrable instrument of transfer in the sense of providing it gratuitously. Nor does it contemplate that the transfer be provided irrespective of the performance by the purchaser of its contractual obligations. Section 27 concerns the conduct of the parties to a contract for the sale and purchase of a "proposed lot".[22] As such, it, necessarily, contemplates that, unless the contract makes provision to the contrary, a registrable instrument of transfer will not be provided by the vendor to the purchaser except in return for the balance purchase price. Such obligations on the part of the vendor and purchaser are concurrent and mutually dependent.[23]

[31] It tends to follow from the foregoing that it is unlikely that s 27(1) was intended to operate so as to permit a purchaser which refuses to settle in breach of its contractual obligations and which frustrates the vendor's attempts to settle in compliance with its contractual obligations, to escape from the contract and avoid liability. That proposition, I think, emerges sufficiently from the text and context of s 27(1) not to require the support of principles of statutory construction. But if such support is needed, it may be found in the principles against construing a statute so as to enable a person to benefit from his or her own wrong or to infringe common law rights.[24] In *Hongkong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd*,[25] Diplock LJ spoke of "the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong".

[32] In my view it is implicit in subsections (1) and (2) of s 27 that the "purchaser" referred to is one which, at the time of giving notice under s 27(2), was not wrongfully failing or refusing to perform those of its obligations under the contract which were concurrent with and dependent upon the obligations of the vendor to provide it with a registrable instrument of transfer. The section does not contemplate the conferring of a right of avoidance on a purchaser which would have been provided with a registrable instrument of transfer on settlement under the contract were it not for its own contractual default.

[33] Section 14A of the *Acts Interpretation Act* 1954 (Qld) requires that, in interpreting a provision, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[34] Neither s 14A nor the purposive approach to construction, however, authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statute.[26] The court's role is one of construction not legislation.[27] Here, the construction urged by the purchasers is arguably consistent with the consumer protection aims of the legislation. However, it is inconsistent with the object of the legislation "to facilitate property development in Queensland".[28]

[35] The limits within which the courts must operate in straining the language of a statute in order to ensure that the legislative purpose is not thwarted were explored in the reasons of McHugh J in *Newcastle City Council* v *GIO General Ltd*,[29] where, after referring to a statement by Brennan CJ and himself in *IW* v *City of Perth*,[30] his Honour said:[31]

> "Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in
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> treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In *Jones* v *Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect." (Citations omitted)

[36] Lord Diplock's statement of principle had earlier been adopted and applied by McHugh JA in *Kingston* v *Keprose Pty Ltd*,[32] in which his Honour said:

> "Where the text of the legislative provision which embodies the proposition is grammatically capable of only one meaning and neither the context, the purpose of the provision nor the general purpose of the Act throws any real doubt on that meaning, the grammatical meaning must be taken as representing Parliament's intention as to the meaning of the law. A court cannot depart from the grammatical meaning of a provision because that meaning produces anomalies or injustices where no real doubt as to the intention of Parliament arises: *Cooper Brookes (Wollongong) Pty Ltd* v *Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305, 320 and *Stock* v *Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 234-235, 237, 238; [1978] 1 All ER 948 at 951, 954, 955. If the grammatical meaning does give rise to

an injustice or anomaly, however, a real doubt will usually arise as to whether Parliament intended the grammatical meaning to prevail: cf *Cooper Brookes* (at 320). As Cardozo J said in *Re Rouss* 116 NE 782 at 785 (1917): 'Consequences cannot alter statutes, but may help to fix their meaning.' A resulting anomaly or injustice is not itself, however, a ground for departing from the grammatical meaning. Equally the natural and ordinary grammatical meaning of the provision is not decisive. The courts no longer follow statements to the effect of that of Higgins J in *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 162, that 'when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable': see *Cooper Brookes* (at 319-320).

Ascertaining the ordinary grammatical meaning of a legislative provision is only the first step in the process of statutory construction. If the consequences of the literal or grammatical construction raise a real doubt as to Parliament's intent, the court is justified in refusing to give the words their literal or grammatical construction: *R* v *City of London Court Judge and Payne* [1892] 1 QB 273 at 290, 301; *R* v *Wimbledon Justices*; *Ex parte Derwent* [1953] 1 QB 380 at 384; *Re Lockwood* [1958] Ch 231 at 238; *R* v *Oakes* [1959] 2 QB 350 at 354, 355; *Luke* v *Inland Revenue Commissioners* [1963] AC 557 at 577; *Adler* v *George* [1964] 2 QB 7 at 9-10; *Wiltshire* v *Barrett* [1966] 1 QB 312 at 332-333; *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1971] AC 850 at 879; *University College, Oxford (Master and Fellows)* v *Durdy* [1982] Ch 413 at 419; *Director of Public Prosecutions* v *Hester* [1973] AC 296 at 323 and *Cooper Brookes (Wollongong) Pty Ltd* v *Federal Commissioner of Taxation* (at 311, 320-321). Fifty years ago in *Sutherland Publishing Co Ltd* v *Caxton Publishing Co Ltd* [1938] Ch 174 at 201, MacKinnon LJ said that when 'the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a *strained interpretation* upon some words which have been inadvertently used' (my emphasis).

However, it is not only when words have been inadvertently used that a court is empowered to give a legislative provision a strained construction. A strained construction may be justified because words have been omitted: *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* (at

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880-882); or because by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved: *Jones* v *Wrotham Park Settled Estates* [1980] AC 74 at 105; or because the statute proceeds on a mistaken assumption: *R* v *Draper* (1870) 1 VR(L) 118; or because the purpose of the provision indicates that Parliament did not intend the grammatical meaning to apply: *Adler* v *George* (at 10); *Wiltshire* v *Barrett* (at 332-333); *R* v *Oakes* (at 354-355); or because words must be omitted to avoid absurdity; *Re Lockwood* (at 238). As many of the cases show, the purpose of the legislation may require a meaning to be placed on the words of a particular provision which, standing alone, they cannot reasonably bear. In *Adler* v *George*, the Divisional Court held that the words 'in the vicinity of any prohibited place' meant 'in or in the vicinity of any prohibited place'. In *Wiltshire* v *Barrett* the Court of Appeal held that the words 'may arrest …a person committing an offence' meant 'may arrest??a person committing or apparently committing an offence'. In *Kammins* the House of Lords held that the words, 'No application …shall be entertained unless …' meant that some applications could be entertained although the unless clause was not satisfied. But as Mason and Wilson JJ pointed out in *Cooper Brookes (Wollongong) Pty Ltd* v *Federal Commissioner of Taxation* (at 321), the propriety of departing from the literal rule does not depend upon labels. It:

> '…extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.'

In *Jones* v *Director of Public Prosecutions* [1962] AC 635, Lord Reid said (at 662) that you may not attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. His Lordship expressed the view that if the words 'are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go'. The often quoted remarks of Lord Simonds in *Magor and St Mellons Rural District Council* v *Newport Corporation* [1952] AC 189 at 191 are to the same effect. But if these remarks were ever a correct exposition of the cases, they

> no longer express the modern law of statutory construction. In *Jones* v *Wrotham Park Settled Estates*, Lord Diplock said (at 105) that if the application of the literal or grammatical meaning would lead to results which would defeat the purpose of a statute the court may read words into the legislation. But his Lordship said that words could only be read into a statute if three conditions were fulfilled. First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect."

[37] The above passage was referred to with approval by Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ in *Bropho* v *Western Australia*.[33]

[38] Spigelman CJ, in *R* v *Young*, after referring to *Kingston* v *Keprose Pty Ltd*, *Bropho* v *Western Australia* and other authorities, said:[34]

> "As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based."

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Spigelman CJ elaborated on the above observations as follows:[35]

> "Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed: *McAlister* v *The Queen* (1990) 169 CLR 324 at 330; *R* v *Di Maria* (1996) 67 SASR 466 at 472-474. If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.
>
> The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court 'supplying omitted words' should be understood as a means of expressing the court's conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted. In all cases, what the court has done is to construe the words actually used in their total context."

[40] In my view the construction advanced in paragraphs [30]–[32] above construes the critical words in s 27 in their conveyancing context. The construction is not the literal one but, as was explained earlier, a literal construction fails to have regard to the conveyancing context of s 27 and is plainly not in accordance with the legislative intent. Once that is understood there is no difficulty in construing s 27 as I have done, particularly as this accommodates the principles of construction discussed earlier. This construction does not give the words of s 27 a meaning that they cannot reasonably bear. It conventionally reads down or limits the improbably broad scope of the words of s 27, if read literally, and gives effect to the principles against construing statutes to permit a person taking advantage of his own wrong and interfering with vested property interests and common law rights.[36]

[41] The primary judge derived support for his construction from the Explanatory Notes to the *Sustainable Planning and Other Legislation Amendment Bill* 2011 which relevantly provided:

> "The amendment is proposed to apply to existing contracts entered into before the commencement of the amendment. It is proposed to apply to such existing contracts regardless of whether the sunset period has elapsed. It will not apply to those contracts where the sunset period has elapsed, the

vendor has not given a registrable instrument of transfer within the sunset period and the purchaser has given written notice to the vendor in accordance with section 27(2).

This will mean those purchasers who have defaulted under existing contracts, which have not settled on the date required by the contract (and still within the sunset period), cannot terminate the contract once the sunset period has expired. In other words, retrospective operation would mean that *'defaulting' purchasers* with existing contracts to which the *Land Sales Act 1984* applies, *would no longer be able to take advantage of the ambiguity*.

There are cases where sellers have commenced litigation to seek specific performance of the purchaser's obligation to settle. This is also in full knowledge that the existing interpretation of section 27 leaving the purchaser the right to terminate. It is also understood some purchasers are fully aware of the existing interpretation and have expectations of their existing statutory right.

…

Applying the proposed amendment to all existing contracts, regardless of court proceedings, will mean vendors can continue with their existing court proceedings or instigate proceedings,

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without being concerned with purchasers terminating the contracts due to *the ambiguity of section 27*.

It is understood there are vendors with existing contracts for proposed lots with a cumulative value in the hundreds of millions of dollars. If purchasers choose not to settle in light of *the existing interpretation* of section 27, vendors are left with two options without the amendment. They are, to take the risk of seeking a court order for specific performance and hope it will be granted within the sunset period or, to terminate the contract because of the purchaser's default. It is understood the risk is higher in seeking a court order as the settlement dates are usually very near to the end of the sunset period. It is understood vendors are deciding to choose termination of contracts as they know they can, under the contracts, keep the paid deposits.

If a defaulting purchaser terminates a contract under *the existing interpretation* of section 27, the vendor must return the deposit to the purchaser. This approach leaves the vendor in the position of no return on its investment and also facing new marketing and selling costs for the now completed but unsold lot. It is for these reasons that retrospective application is considered justified." (Emphasis added)

[42] Particular reliance was placed by the primary judge on the passage emphasised in bold type above. I am not confident, however, that the Explanatory Notes support the conclusion that it may be inferred from the amending legislation that the parliament indicated a view of the construction of s 27 consistent with that of the primary judge's. The words in italics demonstrate an understanding on the part of the Attorney-General, Minister for Local Government and Special Minister of State ("the Minister") that s 27 was ambiguous and that there was an interpretation, not necessarily the correct interpretation, which permitted a defaulting purchaser to take advantage of the section. There is no indication of a purpose to interfere with the vested rights of parties to contracts to which the proposed amendment of s 27 was not to apply.

[43] In his Second Reading Speech on the *Sustainable Planning and Other Legislation Amendment Bill* 2011, the Minister observed:[37]

"I am also moving an amendment to the bill to clarify the meaning of section 27 of the Land Sales Act. Section 27 sets out circumstances in which a buyer of a proposed lot may validly terminate the contract for that lot. It requires the seller of a proposed community title scheme lot to give a buyer of that proposed lot a registrar's transfer form to convey its title within 3½ years. If this does not occur within that 3½ year period the buyer may terminate the contract. The policy intention underpinning section 27 is that the seller must provide the buyer with a finished product within a reasonable development period so that the buyer is not faced with uncertainty as to the date of the completion of the proposed lot. However, if a buyer has not settled in accordance with the contract — that is, paid the purchase price in exchange for the title — *it could be argued that a current reading of section 27 permits a buyer to still terminate the contract once the 3½ year period, or extended 5½ year period,*

expires. This clearly is not the policy objective intended by section 27. The overall policy objective of the act is to promote consumer protection for the buyer by compelling the seller to complete a relevant development on the proposed lot within a reasonable period.

At the same time, a further objective of the act is to facilitate property development and protect a seller by creating contractual certainty. The proposed amendment resettles the balance between these two objectives by clarifying that the buyer may only terminate a contract under section 27 if they are not in default under the contract or if they have not failed to settle in accordance with the contract. This will provide contractual certainty for both parties while at the same time preserve the rights to terminate if the seller does not give a registerable instrument of transfer within that 3½ years. In addition, the proposed amendment will apply to all existing contracts from midnight on the day the amendment is introduced into

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this House — that is today. Therefore, if you have already exercised your right or taken legal action it will not apply. If you have not sought to exercise any right then the new law will apply." (Emphasis added)

[44] It will be seen from the above that the Minister admitted only to the existence of an argument that s 27, as originally worded, permitted a defaulting purchaser to terminate. The Minister noted that this was "clearly … not the policy objective intended by s 27". His statement that the amendment will have the effect of "clarifying" that a buyer may only rely on s 27(2) if the buyer is not in default or has not failed to settle in accordance with the contract is inconsistent with the view that the section, if unamended, would have different consequences.

[45] In construing s 27 in its unamended form, regard may be had to the amending legislation. In *Deputy Federal Commissioner of Taxes (SA)* v *Elder's Trustee and Executor Co Ltd*,[38] Dixon, Evatt and McTiernan JJ said in a passage, which has often been repeated:

"'An Act of Parliament does not alter the law by merely betraying an erroneous opinion of it' (*Maxwell*, *Interpretation of Statutes*, 6th ed. (1920), p. 544, and, per Lord *Atkinson*, *Ormond Investment Co.* v. *Betts*). 'Where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute' (per Lord *Atkinson*). In *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, Lord *Sterndale* said: 'I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.'" (Citations omitted)

[46] Dixon J, in *Grain Elevators Board (Vic)* v *Dunmunkle Corporation*,[39] said:

"It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the [later] provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile."

[47] That passage was referred to by Dawson J in *Hunter Resources Ltd* v *Melville*,[40] where his Honour said:

"In *Grain Elevators Board (Vict.)* v. *Dunmunkle Corporation* Dixon J. expressed the view that an amending Act might be taken into account in the interpretation of the prior legislation, at least to avoid a result that would render the amending legislation unnecessary or futile." (Citations omitted)

[48] However, in determining the proper construction of earlier legislation, regard must be had to the possibility that the amendments were made out of an abundance of caution in order to remove doubt.[41] In *Interlego AG & Anor* v *Croner Trading Pty Ltd*,[42] Gummow J relevantly said:

"There is a line of authority that an amendment may be taken into account in determining the scope of the prior legislation, at least to avoid a result which would render the amendment unnecessary, or futile or deficient: see especially *Grain Elevators Board (Vic)* v *Dunmunkle Corporation* (1946) 73 CLR

70 at 85-86; *Hunter Resources Ltd* v *Melville* (1988) 164 CLR 234 at 254-255. But in doing so caution should be exercised: see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988), §3.26. It is, after all, a curious way of revealing parliamentary intention at the time of passing the earlier provision. As was observed by Viscount Haldane LC in *Re Samuel* [1913] AC 514 at 526:

> 'It is not a conclusive argument as to the construction of an earlier Act to say that unless it be construed in a particular way a later enactment would be surplusage. The later Act may have been designed, ex abundante cautela, to remove possible doubts.'

See also *Commissioner of Taxation (Cth)* v *Verzyden* (1988) 88 ATC 4,205 at 4,210; *Downey* v *Trans Waste Pty Ltd* (1991) 172 CLR 167 at 177."

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Section 37 of the *Sustainable Planning and Other Legislation Amendment Act* 2012 provides:

> "**'37 Transitional provision for Sustainable Planning and Other Legislation Amendment Act 2012**
>
> '(1) Section 27 as amended by the *Sustainable Planning and Other Legislation Amendment Act 2012*, section 22B applies to an instrument relating to the sale of a proposed lot if —
>
> (a) the instrument is in force, and settlement has not been effected, immediately before commencement; or
> (b) the instrument is made on or after commencement.
>
> '(2) Subsection (1)(a) applies —
>
> (a) regardless of whether the sunset period ended or ends before, on or after commencement; and
> (b) even if an action for specific performance of the purchaser's obligations under the instrument has been started by the vendor, but not completed, before commencement.
>
> '(3) Subsections (1)(a) and (2) apply despite the *Acts Interpretation Act 1954*, section 20.
>
> '(4) In this section —
>
> ***commencement*** means the commencement of the *Sustainable Planning and Other Legislation Amendment Act 2012*, section 22B.
>
> ***sunset period*** means the 3½ year period mentioned in section 27(1)(b) or, if that period is extended by a regulation made under section 28, the extended period.'."

[50] The amendment removes ambiguity and provides certainty in respect of instruments to which it relates. It does not apply to instruments which are not in force prior to its commencement or deal expressly or implicitly with the rights and obligations of the parties to such instruments. I do not detect in it any intention to declare or interfere with any rights or obligations in respect of instruments to which it does not apply.

Conclusion

[51] Having regard to the conclusions reached above, it is unnecessary to determine the merits of the vendors' waiver and estoppel arguments. I will content myself with these observations. As for the alleged estoppel, there did not appear to be any representation by the purchasers on which the vendors relied to their detriment. As for waiver, or election, it does not appear that the purchasers elected between inconsistent rights.[43] As the primary judge's orders were based on an erroneous construction of s 27(2) of the Act, they must be set aside. There are plainly triable issues which cannot be resolved by this Court and I would therefore order that:

1. The appeal be allowed.
2. Paragraphs 2, 3 and 4 of the orders made on 14 September 2012 be set aside.
3. The application filed by the purchasers on 5 March 2012 be dismissed.
4. The purchasers pay the vendors' costs of the application and of this appeal.

Atkinson J: I agree with the reasons of Muir JA and the orders he proposes.

Footnotes

1 (2009) 239 CLR 27 at [47].

2 (2012) 87 ALJR 131 at 138 [24]–[25].

3 (2011) 245 CLR 1 at 175–176.

4 Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Chatswood, 2011 at [2.41]; Bennion, *Statutory Interpretation*, 2nd ed, Butterworths, London, 1992 at 795–797.

5 [1945] VLR 171.

6 (2003) 173 FLR 72.

7 *Holden* v *Nuttall* [1945] VLR 171 at 178.

8 *Thompson* v *Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72 at 80.

9 (1877) 3 App Cas 115.

10 *Thompson* v *Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72 at 80–81.

11 *Davenport* v *The Queen* (1877) 3 App Cas 115 at 121.

12 [1936] NZLR 211.

13 (1906) 26 NZLR 1351.

14 Bennion, *Statutory Interpretation*, 5th ed, LexisNexis Butterworths, London, 2007 at 1141.

15 [1975] 2 All ER 545.

16 [1975] 2 All ER 545 at 546.

17 [1991] 2 QB 393.

18 *R* v *Secretary of State for the Home Department*, *ex parte Puttick* [1981] QB 767 at 773.

19 *R* v *Registrar General*, *ex parte Smith* [1991] 2 QB 393 at 402.

20 [1971] 1 WLR 92 at 96.

21 *Meridien AB Pty Ltd & Anor* v *Jackson (as Trustee for the Jackson Family Trust) & Ors* [2012] QSC 260 at [31].

22 In Section 6 of the Act, "***proposed lot*** means that which will become a registered lot upon — (a) registration of a plan; or (b) registration of a plan and recording of a community management statement for a community titles scheme under the *Body Corporate and Community Management Act 1997*".

23 See e.g. *Foran* v *Wight* (1989) 168 CLR 385 at 396.

24 *Pyneboard Pty Ltd* v *Trade Practices Commission* (1983) 152 CLR 328 at 341.

25 [1962] 2 QB 26 at 66. See also *F.C. Shepherd & Co Ltd* v *Jerrom* [1987] 1 QB 301 at 325.

26 *Saraswati* v *The Queen* (1991) 172 CLR 1 at 21.

27 *Newcastle City Council* v *GIO General Ltd* (1997) 191 CLR 85 at 109.

28 *Land Sales Act* 1984 (Qld), s 2(a).

29 (1997) 191 CLR 85 at 113.

30 (1997) 191 CLR 1 at 12.

31 (1997) 191 CLR 85 at 113.

32 (1987) 11 NSWLR 404 at 421–423.

33 (1990) 171 CLR 1 at 20.

34 (1999) 46 NSWLR 681 at 687.

35 (1999) 46 NSWLR 681 at 687–688.

36 *Wade* v *NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *Pyneboard Pty Ltd* v *Trade Practices Commission* (1983) 152 CLR 328.

37 Record of Proceedings, Wednesday 15 February 2012 at 149–150.

38 (1937) 57 CLR 610 at 625–626.

39 (1946) 73 CLR 70 at 86.

40 (1988) 164 CLR 234 at 254–255.

41 *Allina Pty Ltd* v *Federal Commissioner of Taxation* (1991) 28 FCR 203 at 212; Pearce & Geddes, *Statutory Interpretation in Australia*, 7th ed, LexisNexis Butterworths, Chatswood, 2011 at 99; *Hepples* v *Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539–540; *Interlego AG & Anor* v *Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382.

42 (1992) 39 FCR 348 at 382.

43 C.f. *Sargent* v *ASL Developments Ltd* (1974) 131 CLR 634.

MODI & CLEMENTS v SDW PROJECTS PTY LTD & ORS

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(2013) LQCS ¶90-188; Court citation: [2013] QCA 221

Supreme Court of Queensland — Court of Appeal

Decision delivered on 9 August 2013

Conveyancing — Contract for sale of residential property — Off-the-plan contracts — Whether letter sent to buyers' solicitors returning executed contract with warning statement and information sheet directed attention to the warning statement and information sheet as required by then s 365(2A)(c)(ii) of the Property Agents and Motor Dealers Act — Whether reference in the letter to the "Contract of Sale" could be regarded as encompassing the warning statement and information sheet — Whether the context in which the letter was received or the form of the documents obviated the need to make specific reference to the warning statement and information sheet — Property Agents and Motor Dealers Act 2000, s 365(2A)(c)(ii) (since repealed).

The first respondent was a developer of a set of units situated in Queensland. The appellants were solicitors retained in 2007 to assist in conveying the proposed units.

The solicitors prepared a number of booklets which contained as their first page the PAMD Form 30c warning statement, followed by the BCCM Form 14 information sheet and the contract. Each booklet was spiral bound with a clear plastic sheet as its cover. The warning statement and contract had previously been signed by the buyer and the contract recorded that the buyer had received the information sheet.

When returning the executed contracts to the buyer's representatives, a letter was sent with each booklet which stated (*inter alia*), "We now **enclose** Contract of Sale and Disclosure Statement for your attention …". The letter did not specifically draw the buyers' attention to the warning statement or information sheet. Consequently in January 2009, the buyers sought to withdraw their offers to purchase on the ground that they were not bound by the contracts because the letter did not comply with the requirements of then s 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act 2000*.

The developer successfully sued the solicitors for negligence and breach of their retainer agreements (see *SDW Projects Pty Ltd* v *Modi & Ors* (2012) LQCS ¶90-182). The solicitors appealed against that decision.

On appeal the solicitors argued that the primary judge erred in concluding that the expression "Contract of Sale" in the letter referred only to the contract itself, rather than to the documents in the booklet as a whole. They argued that the booklet could colloquially be described as the "Contract of Sale". The solicitors also argued that if the contents of the letter taken in isolation were not sufficient, the primary judge, on the authority of *Boylan* v *Gallagher* (2011) Q ConvR ¶54-766; [2011] QCA 240, should have considered the surrounding circumstances including what was actually enclosed with the letter.

Held: appeals dismissed.

1. Section 365 required that the buyer's attention be directed to each of the three documents, ie the contract, the warning statement and the information sheet. The solicitors did not provide a compelling argument as to why a buyer's representative, on receiving a letter which said it enclosed the "Contract of Sale", without more, would regard the expression as encompassing the other two documents.

This finding is reinforced by the fact that "information sheet", "relevant contract" and "warning statement" are all separately defined in s 364 of the Property Agents and Motor Dealers Act.

2. The context in which the letter was received did not make a difference to the outcome of the appeal. While *Boylan v Gallagher* is authority for the proposition that it is not essential that there be express reference in the letter to the documents sent, a reference to the booklet as a whole, without more, did not direct attention to the individual documents contained in it.

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The context in which the letter was received may have advanced the solicitors' case if, for example, there had been a mutual adoption of particular terminology by the parties that covered all three documents. However, no such common form of expression existed here. Instead, what the letter did was to direct the reader's attention to the delivery of only one of the documents, ie the sale contract.

3. The fact that the form of the documents (ie a booklet with a clear plastic sheet cover) might have made their content more readily ascertained did not obviate the need to draw attention to each individual document. Even though the warning statement might have been physically obvious to the buyers' representatives as it was the first sheet, the information sheet would not have been obvious.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R J Anderson (instructed by Barry Nilsson Lawyers) for the appellant/second respondent, Clements.

D Clothier QC with R Jackson (instructed by Bartley Cohen) for the appellant/second respondent, Modi.

D Kelly QC with D Pyle (instructed by Mullins Lawyers) for the first respondent.

D de Jersey (instructed by Thynne and McCartney) for the third respondent.

G Gibson QC with D O'Brien (instructed by Ashurst Australia) for the fourth respondent.

Before: Holmes and Gotterson JJA and Boddice J.

Holmes JA: The first respondent was the developer of a set of units at Mudgeeraba. It retained, in turn, the appellants, Mr Modi and Ms Clements, both of whom are solicitors, to assist it in conveying the proposed units. Subsequently, it commenced separate actions against the appellants alleging a negligent failure to comply with the requirements of s 365(2A)(c)(ii) of the *Property Agents and Motor Dealers Act* 2000 (*PAMDA*). By an interlocutory application, the first respondent sought determination of whether letters which the appellants sent to buyers' solicitors, returning executed contracts with warning statements and information sheets, directed the attention of the buyer in each case to the warning statement and information sheet, as s 365(2A)(c)(ii), *inter alia*, required. The primary judge declared that the letters did not do so. The appeals are against that judgment.

[2] The third and fourth respondents are, respectively, a firm of solicitors and a barrister who gave advice to the first respondent to the effect that the letters did not meet the *PAMDA* requirements. They were joined as parties in the determination of the question as to whether the letters met the requirements of the *PAMDA* provision.

The legislation

[3] Section 365 appears in chapter 11 of *PAMDA*, which is concerned with residential property sales. Section 363 sets out the purposes of the chapter, and at the relevant time (June–October 2007) was as follows:

> "The purposes of this chapter are—
>
> > (a) to give persons who enter into relevant contracts a cooling-off period; and
> > (b) to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period; and
> > (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers."

[4] At the time of the transactions here, the scheme of chapter 11 parts 1 and 2 was, firstly, to impose certain requirements for provision of documents when a contract was furnished for the buyer's signature and, secondly, to make the contract's binding effect, once signed, contingent on provision again of such documents in the way prescribed. Part 3 of the

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chapter provided for a five-day cooling-off period,[1] which started when the contract became binding and during which the buyer remained entitled to give notice of termination of the contract. The documents to be provided under parts 1 and 2 included, apart from the contract itself, a warning statement which by virtue of s 366D of the Act was required to include information, *inter alia*, about the cooling off period to which the contract was subject, and, where the contract was for the sale of a unit, an information sheet in a form approved under s 320 of the *Body Corporate and Community Management Act* 1997, explaining the obligations attendant on membership of a body corporate.

[5] The issue in the present case arose at the second, post-execution stage, which was then governed by s 365 of *PAMDA*. The section is set out below, with, for convenience, the sub-section applicable in this case emphasised in bold print:

> "**365 When parties are bound under a relevant contract**
>
> > (1) The buyer and the seller under a relevant contract are bound by the relevant contract when—
> >
> > > (a) for a relevant contract, other than a relevant contract relating to a unit sale — the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or

(b) for a relevant contract relating to a unit sale — the buyer or the buyer's agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).

…

(2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are —

(a) by fax, but only if the documents mentioned in subparagraphs (i), (ii), (iii) and (iv) are sent in the following order—

(i) a single cover page that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract;
(ii) the warning statement;
(iii) the relevant contract;
(iv) any other documents; and

(b) by electronic communication other than fax, if the electronic communication contains —

(i) a message that includes a clear statement directing the attention of the buyer or the buyer's agent to the warning statement and the relevant contract; and
(ii) a single document, consisting only of the warning statement and the relevant contract, that is protected against unauthorised change, with the warning statement appearing as the first or top page of the document; and

Example of electronic communication—

• email

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—

(i) the warning statement is attached to the relevant contract and appears as the first or top page; and
(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract.

Example of receipt other than by electronic communication—

• post

Examples of how attention may be directed—

• by oral advice
• by including a paragraph in an accompanying letter

(2A) For a relevant contract relating to a unit sale, the ways are—

…

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and **(iv) other**

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than by electronic communication, if—

(i) the warning statement and the information sheet are attached to the relevant contract with the warning statement

appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and
(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement, the information sheet and the relevant contract.

Example of receipt other than by electronic communication—

• post

Examples of how attention may be directed—

• by oral advice
• by including a paragraph in an accompanying letter

…

(6) In this section—

buyer's agent includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."

[6] Sections 366, 366A and 366B of the Act as it stood at the relevant time were relevant to the first of the stages, pre-execution, described above. Section 366 was concerned with the situation where the proposed contract was faxed for signature, s 366A where it was sent by another means of electronic communication, and s 366B where it was sent otherwise than by electronic communication. The last section provided:

"**366B Warning statement if proposed relevant contract is given in another way**

(1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.
(2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.
(3) If the proposed relevant contract does not comply with subsection (2)—

(a) if the seller gave the proposed relevant contract — the seller; or
(b) if the seller's agent gave the proposed relevant contract — the seller's agent;

commits an offence.

Maximum penalty — 200 penalty units.

(4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Note—

A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.

(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.

(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement."

[7] Section 364 provided a definition of "attached":

"***attached***, in relation to a warning statement, any information sheet and a

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contract, means attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document.

Examples of ways a warning statement and any information sheet may be attached to a contract—

- binding
- stapling"

In the same section "relevant contract" was defined as meaning

"a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction."

The facts

[8] Mr Modi was retained between June and October 2007 and on 12 occasions provided contracts (each a relevant contract as defined by s 364 of *PAMDA*) and associated documents to the solicitors for the buyers. On 11 occasions, he sent two sets of documents by courier to the solicitors for the buyers; in the twelfth case, the two sets of documents were hand-delivered. Each set of documents was spiral bound, with a clear plastic sheet as its cover. One of the two sets of documents delivered in each case contained as its first page, visible through the clear plastic cover, the *PAMDA* warning statement, followed by the information sheet and the contract. The warning statement and contract had previously been signed by the buyer, and the contract recorded that the buyer had received the information sheet. The other set of documents delivered on each occasion concerned disclosure under the *Body Corporate and Community Management Act* 1997, the *Land Sales Act* 1984 and the *Corporations Act* 2001 (Cth).

[9] The letters accompanying the two sets of documents in each case were headed with reference to the buyer's name and the property the subject of the sale, and contained the following:

"We refer to the above matter and advise that we act on behalf of the vendor and note that you act on behalf of the purchasers.

We now **enclose** Contract of Sale and Disclosure Statement for your attention…"

One letter did not contain the words "for your attention", but his Honour observed that no party had relied on the difference, and he did not have regard to it.

[10] Ms Clements, on the pleadings, was retained in October 2007 in place of Mr Modi to carry out the functions he had performed in relation to a further two contracts and to review the twelve contracts of sale for which he had previously been responsible. She adopted the same practice as he did of providing the warning statement, information sheet and contract in a spiral-bound volume, although it is not known whether the volume had a clear cover sheet. Again, the warning statement and contract had previously been signed by the buyers and receipt of the information sheet had been acknowledged.

[11] Ms Clements's covering letters were slightly different. One said that it enclosed "Executed Contract of Sale" and the "disclosure statement". The other merely said "We now **enclose** signed Contract for your attention". That was because in that instance only one spiral-bound volume, containing the warning statement, information sheet and contract, was delivered. In relation to that bound volume, there was also this difference: the first sheet in the bundle was, rather than a warning statement, a "Statement and Acknowledgement" that the buyer's attention had been directed to accompanying documents which included the warning statement, information sheet and contract. That statement and acknowledgment had previously been forwarded for the purposes of s 366B to the buyer, who had executed and returned it.

[12] In January 2009, the buyers under the 14 contracts sought to withdraw their offers to purchase on the ground that they were not bound by the contracts because of non-compliance with s 365(2A)(c)(ii). The result was that the first respondent sued each of the appellants for negligence and breach of the retainer agreements. The appellants pleaded that the letters they had sent with the documents met the provision's requirements and that any loss was caused by the third respondent, which had advised that the buyers were entitled to terminate. (The fourth respondent had also provided advice to that effect.) The first

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respondent then brought its application for declarations that the letters did not comply with s 365(2A)(c)(ii).

The judgment

[13] The primary judge noted the sequence of requirements under chapter 11. Similar requirements to those in s 365(2A)(c)(ii) existed before the contract was entered, under s 366B: the seller had to provide the warning statement and information sheet with the contract in the designated order and to direct the prospective buyer's attention to both. The fact that the requirements existed in both those contexts underscored the importance which the legislature attached to them. The section provided that the obligation to direct attention to the documents could be satisfied by directing the attention of the buyer's agent to them, and in s 365(6) it was recognised that that agent might be a lawyer. It was clear that the obligation was unaffected by the fact that the documents were to be delivered to a lawyer rather than a lay person.

[14] The learned primary judge set out comments made by de Jersey CJ in *MNM Developments Pty Ltd* v *Gerrard*[2] as to the purpose of the technical requirements in the chapter, of ensuring consumer protection for purchasers of residential property; which might, in some cases, give a purchaser a right to terminate "even for quite technical contraventions" and regardless of any disadvantage suffered. His Honour observed that those comments remained applicable to the chapter.

[15] The primary judge distinguished on its facts the case of *Boylan* v *Gallagher*[3] which dealt with a similar question, under an earlier version of s 365(2)(c)(ii), of whether the attention of the buyer had been directed to the contract and warning statement. However, he took note of statements in *Boylan* to the effect that the section did not require the relevant direction to refer expressly to the warning statement or contract (there being no requirement for an information sheet in *Boylan*, which did not concern a unit sale); that it was unnecessary for the seller to prove that the buyer or his agent had, in fact, become aware of the documents; and that whether attention had been sufficiently directed to them would depend on the circumstances of each case. However, in the case before him, the letters referred to the "Contract of Sale"; and the contract for the sale of each property, as it appeared in the bound volume, bore that title. The letters, in his Honour's view, thus directed attention to the contract, but not to the other documents in the bound volume. It did not assist that each of the letters was sent to a solicitor; there was no reason to think that a solicitor would take the reference to a contract of sale as meaning anything other than that. Consequently, he made the declarations the subject of this appeal.

The chapter 11 cases

[16] In *MNM Developments Pty Ltd* v *Gerrard*, the focus was on the requirement in s 366 that the warning statement be attached to the contract "as its first or top sheet". The facts of the case were that the agent for the seller sent the buyer a single sheet fax which comprised a covering letter, a disclosure statement, a warning statement and the contract in that order. The court held that the warning statement was not attached as the first or top sheet of the contract. The Chief Justice remarked that the legislature had intended that a buyer on receiving a contract would first see the warning statement, a result which would be achieved if physical attachment were required. He made this observation about construction of the provision:

> "The context of the requirement set up by s. 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s. 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is 'to protect consumers against particular undesirable practices'. That protection extends, in cases like these, to giving a purchaser

> a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage."[4]

(Those were the comments which the primary judge regarded as remaining generally applicable to Ch 11 Pt 1.)

[17] In *Boylan* v *Gallagher*, the seller had become entitled to exercise a "put option",

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pursuant to which the buyer was required to purchase the land under a contract in the form annexed to the relevant deed. The buyer executed the deed and the warning statement, which was stapled to the front of the deed, and her solicitor sent it to the seller's solicitors under cover of a letter, which said that it enclosed "Put and Call Option document in duplicate signed by client". The seller executed the deed and his solicitors returned it with the warning statement in the same form in which they had been received, with a covering letter to the buyer's solicitor. The letter advised that "[the buyer's] full executed copy of the Put and Call Option document" was enclosed.

[18] Fraser JA, delivering the leading judgment, agreed with the buyer's submission that compliance with the provision was important because it identified the commencement of the cooling-off period, which was at the heart of the legislative scheme for buyers' protection. However, the provision contained no prescription as to how the direction was to occur. Neither the text nor the examples required express reference to the warning statement or the contract; the direction could be by conduct. His Honour continued:

> "The focus of the provision is upon what was said, written, or done by the seller or the seller's agent. The statutory purpose is fulfilled if the seller or the seller's agent does what is required to be done on the part of the seller to direct the attention of the buyer or the buyer's agent to the warning statement and the relevant contract. No less is sufficient but no more is required."[5]

[19] It was not necessary for the seller to prove that the buyer had, in fact, taken note of the direction; and what the parties or their solicitors thought was conveyed by the communication was irrelevant. The circumstances of the case were different from those in *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd*[6] (which involved a failure to direct attention to the relevant documents). His Honour regarded it as significant in the construction of s 365(2)(c)(i) that, unlike s 365(2)(a)(i) and s 365(2)(b)(i), it did not require a "clear statement" directing attention to the warning statement and contract.

[20] Fraser JA rejected a submission that the reference in the buyer's solicitor's letter to the enclosure as the "Put and Call Option document" only comprehended the deed; rather, that was the description which the solicitor had given the warning statement and deed as a single composite document on providing them to the seller's solicitors. By using the same expression as the buyer's solicitor together with the latter's reference and the same name of the matter in the body of the letter, the seller's solicitors had directed the buyer's lawyer back to his own file and his letter with its collective reference to the documents as the "Put and Call Option document".

[21] Other relevant circumstances were that there were only a few days between the parties' letters, so it was unlikely that the buyer's solicitor had forgotten what was enclosed with his letter. The fact that the words "warning statement" appeared in large and obvious form on the first page of the composite document reinforced the conclusion that the seller's solicitors' statement that they were enclosing the executed copy of the "Put and Call Option document" referred both to the warning statement and the relevant contract. The seller's letter had, it was concluded, directed the attention of the buyer's solicitor to the warning statement and the relevant contract, as s 365(2)(c)(ii) of the Act required.

[22] *Hedley Commercial Property Services*, referred to by Fraser JA, was a single judge decision which concerned a number of aspects of chapter 11 of *PAMDA*. Of relevance to the present case was a question as to whether the requirements of s 365(2)(b)(i) were satisfied by, firstly, an email which referred to sending a counterpart copy of the relevant contract (a call & put option deed) and, secondly, a follow-up letter which said that it enclosed the call & put option deed signed by the vendor and its counterpart copy signed by the buyer. Fryberg J in that case held that neither satisfied the requirements of the subsection, because the buyer's attention was not directed to the warning statement, although it was, in fact, attached as the top

sheet of the contract. Fryberg J pointed out that the requirement of the Act was “not that the buyer be aware of the

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warning statement; it is that the seller direct attention to it”.[7]

The contentions on appeal

[23] The appellants made these points. The primary judge had erred in concluding that the expression “Contract of Sale” in the letters referred only to the contract itself, rather than to the documents in the bound volume as a whole. That group of documents could colloquially be described as the “Contract of Sale”. The question should have been whether there had been a sufficient direction to the relevant documents, not whether some particular form of words should have been used.

[24] If the content of the letter taken in isolation were not sufficient, the learned primary judge should have considered the surrounding circumstances, including what was actually enclosed with the letters. The reasoning in *Boylan* v *Gallagher* entailed what was described as a realistic approach to the direction requirement in s 365(2A)(c)(ii), of having regard to all the relevant circumstances in deciding whether the requirement was met. The primary judge, in contrast, had not done so and had taken too narrow a view of s 365(2A)(c)(ii).

[25] In other contexts, the statutory requirements were more specific than those in s 365(2A)(c)(ii). Section 365(2)(b)(i) and s 365(2A)(b)(i) required, where the documents were sent by electronic communication other than fax, a message that included “a clear statement” directing attention to the warning statement and contract. Under s 366B(6), where the contract was given to the proposed buyer in a way other than by handing it to him or his agent, included with it had to be a statement directing attention to the warning statement and, if applicable, the information sheet and any disclosure statement. There was no such prescription in s 365(2A)(c)(ii). It followed that the requirement was intended to be less onerous and more flexible where documents were physically delivered; the form of the documents themselves was part of the circumstances which could be taken into account in determining whether adequate direction had been given.

[26] In this case, the warning statement, under clear plastic, was the first page of the relevant set of documents, so that it was obvious that the volume consisted of more than the contract itself. The letters and accompanying documents were returned soon after they had been executed by the buyers; within a week or so. They were documents which the recipients must have been expecting, and the reference parts of the covering letters made it clear that they were being returned as part of the relevant property transaction in each case. The second bound volume, described as the “disclosure statement”, contained on its front page (again under clear plastic) a list of the documents contained on it and was evidently a compilation.

[27] Section 365(2A)(c)(ii) specifically allowed for the direction to be given to the buyer’s agent which, by definition in s 365(6), included a lawyer. Here the recipients were solicitors retained to act in the purchase whose professional obligation was to appreciate the legal significance of the documents and to examine them. That, too, was a relevant circumstance in considering whether the direction of attention to the documents was adequate.

[28] A solicitor receiving the letter which said that it enclosed “Contract of Sale and disclosure statement” together with two bound volumes would regard it as identifying the two distinct volumes, one as the contract and the other as the disclosure statement. It was not necessary that each of the warning statement, information statement and contract be separately listed. The form of the bound documents was designed to comply with s 366B(2), which required the attachment to the contract of the warning statement and the information sheet so that the warning statement appeared as “its” (the contract’s) first page; the requirement being, effectively, to treat those documents as part of the contract. Similarly, s 365(2A)(c)(ii) required the warning statement, information sheet and contract to be attached in that order, so as to appear as a single document. If attention was directed to the volume, which, by statute, was required to appear as a single document, attention was necessarily directed to every part of it. That was to be drawn from *Boylan* v *Gallagher*.

[29] The learned primary judge should not have distinguished *Boylan* v *Gallagher*, which was factually on all fours with this case. Fraser

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JA had rejected the respondent buyer's submission that the reference in her solicitor's letter to the enclosure as the "Put and Call Option document" only referred to the deed, saying that since the warning statement and deed, as a composite document, were enclosed with the letter, it was clear that it referred to both. That was a conclusion that where it was apparent that the composite document consisted of more than just the contract, any reference at all to the documents was to the composite document. It did not depend on any mutual use of language, because this was the first of the letters between the parties. The fact that the seller's solicitors had adopted the description used by the buyers' solicitors was thus not necessary to the conclusion in that case.

[30] Counsel for Ms Clements made some additional submissions. He criticised the primary judge's reliance on the Chief Justice's comments in *MNM Developments*, arguing that they over-stated the purpose of the Act. The preamble to the Act, in speaking of protection against undesirable practices, was paraphrasing s 10, which related to the promotion of residential property rather than the regulation of contracts. In any event, s 363 expressly set out a more limited purpose: to give parties a cooling-off period; to require contracts to include consumer protection information including a statement about the cooling-off period; and to ensure the independence of lawyers acting for buyers. None of that suggested an approach to s 365(2A) which would result in a narrow reading of the words in the manner adopted by the primary judge. The court should take the view that because s 366B created penalties, the obligations imposed under it were more stringent than those under s 365(2A) which had no such consequence.

[31] The fact that the first document in the second of the bundles forwarded by his client was a "Statement and Acknowledgment", rather than a warning statement, reinforced rather than defeated the argument. That document referred specifically to the warning statement, information sheet and contract, a circumstance relevant in assessing the question whether the letter directed attention to the warning statement, information sheet and contract.

Discussion

[32] One must not lose sight of the particular issue framed by the parties at first instance. It did not entail some consideration at large of whether attention was drawn to the documents but the specific question of whether the letters sent with the documents drew attention to the information sheet and warning statement. The surrounding circumstances to which the appellants attach importance in their arguments were no more than the context in which "what was said, written, or done"[8] by their solicitors fell to be considered.

[33] In this case, the focus, given what was pleaded and what was at issue, was necessarily on what was written: the contents of the letters said to direct attention to the documents and whether they performed that function. That entailed a consideration of the effect of drawing attention to the "Contract of Sale". The provision required that the buyer's attention be directed to each of the three documents, the contract, the warning statement and the information sheet. No compelling argument has been advanced as to why a solicitor on receiving a letter which said that it enclosed the "Contract of Sale", without more, would regard the expression as encompassing the other documents. (It may be noted that in *PAMDA* itself "information sheet", "relevant contract" and "warning statement" are all separately defined in s 364.) The question, then, is whether the context in which the letters were received made a difference.

[34] It may be accepted, as was pointed out in *Boylan* v *Gallagher*, that it is not essential that there be express reference to the documents sent. In a particular case there may be something about the circumstances — such as the mutual adoption of particular terminology — to obviate the need to make a specific reference to the relevant documents. But contrary to the appellants' submission, Fraser JA did not conclude in *Boylan* that a reference to the bound volume as a whole, without more, directed attention to the individual documents contained in it. His statement that the reference to the "Put and Call Option document" in the buyer's solicitor's letter comprehended both the warning statement and the deed was made in response to the buyer's contention that her

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solicitor's letter referred to only one document, even though he, as the sender of it, enclosed both documents. That conclusion had nothing to do with whether the reference made at that stage directed

attention to both documents from the perspective of someone receiving it, and was only relevant to whether, by the time the documents were returned to the buyer's solicitor, there was, indeed, a mutually adopted expression covering both documents.

[35] In *Boylan*, the reference in the seller's letter was not to the relevant contract (the deed) but to the "Put and Call Option document": the expression which the buyer had used for the composite document consisting of the warning statement and deed. It was clear that what was being returned was what was sent. No such common form of expression exists here. Instead, what the letters did in this case was to direct the reader's attention to the delivery of only one of the documents, the contract. The primary judge was correct in distinguishing *Boylan*.

[36] The argument for Ms Clements that s 365(2A) should be read more liberally than m s 366B because the latter has penal consequences seems to me an unorthodox approach to statutory construction. Section 365, as a protective provision, ought to be given a wide scope,[9] while if there is real doubt as to the meaning of s 366B, it should be resolved construing it in favour of the vendor liable to penalty.[10] Generally, reference to the slightly different language of other sections (requiring a "statement" or a "clear statement") is of limited assistance; one is still left with the question of whether the buyers' attention was directed to the relevant documents. With respect, I would adopt Fryberg J's observation that the Act requires not merely that the buyer be aware of the relevant documents, but that the seller act to make him aware, by directing attention to them. Whether the seller has directed the buyer's attention to the documents cannot be determined by the likelihood of the latter's solicitor examining the material himself.

[37] That the form of the documents might make their content more readily ascertained did not obviate the need to draw attention to them. In *Boylan*, the warning statement, the only item additional to the contract, was obvious at the top of the document. Here the warning statement might have been physically obvious, but the information sheet was not. The fact that the warning statement, information sheet and contract had, by virtue of the s 364 definition, to be attached so as to appear as a single document, does not assist. As the examples to that section demonstrate, that could be achieved simply by stapling them together. That attachment did not render them in fact or legally a single document, and it did not follow that a recipient who saw from the letter that the contract was enclosed and through a clear cover sheet that the warning sheet was in the bundle was thus made aware that the information sheet was with them.

[38] The reference in *MNM Developments* to one of the objects of the Act as protecting consumers against particular undesirable practices may, as Ms Clements' counsel submitted, have overlooked the context of that particular object, which related to the promotion of residential property. But it was, nonetheless, accurate to say, as the Chief Justice did in that case, that chapter 11 contained a separate set of requirements directed to ensuring consumer protection for purchasers of residential property. As the primary judge also pointed out, the repeated obligation to direct the buyer's attention to the documents reinforces the importance attached by the legislature to the requirement. The learned judge did not err in his assessment of the significance of compliance with the requirements; nor did he do other than give the provision its ordinary meaning.

[39] The fact that the second of the bundles sent by Ms Clements contained the "Statement and Acknowledgement" as its first document alters little. If the document were, indeed, the first in the bundle, it would appear that s 365(2A)(c)(i) was not complied with, since the warning statement did not appear as the first page. No reason was given for returning the "Statement and Acknowledgement" to the buyer; it was relevant, under s 366B, only to the earlier, pre-execution stage of the contracting process. It was not a document which required any further consideration or action by the buyer, who had already signed it. Its appearance (if it were visible) was not apt to do anything other

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than increase confusion about what the vendor was sending.

[40] No convincing reason has been advanced as to why "Contract of Sale" in the letters should be regarded as embracing the warning sheet and the information sheet. There was nothing in the surrounding circumstances which would alter the meaning of that expression and no practice adopted by the parties

in this case which would lead to a different view. As the primary judge noted,[11] the taking of a "practical approach" did not change the effect of the expression used.

[41] No error has been identified in the reasoning of the learned primary judge. I would dismiss both appeals with costs.

Gotterson JA: I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.

Boddice J: I have read the reasons for judgment of Holmes JA. I agree with those reasons and the proposed orders.

Footnotes

1 Defined in s 364.
2 [2005] 2 Qd R 515.
3 [2012] 1 Qd R 420.
4 At 519.
5 At 430.
6 [2008] QSC 261.
7 At [88].
8 *Boylan* v *Gallagher* [2012] 1 Qd R 420 at 430.
9 See, for example, *Day & Dent Constructions Pty Ltd (in liq)* v *North Australian Properties Pty Ltd* (1982) 150 CLR 85 per Mason J at 108.
10 *Beckwith* v *The Queen* (1976) 135 CLR 569 at 576.
11 *SDW Projects Pty Ltd* v *Modi & Ors* [2012] QSC 400 at [40].

THE PROPRIETORS CATHEDRAL VILLAGE BUILDING UNITS PLAN NO 106957 & ORS v CATHEDRAL PLACE COMMUNITY BODY CORPORATE & ORS

(2013) LQCS ¶90-189; Court citation: [2013] QCA 264

Supreme Court of Queensland — Court of Appeal

Decision delivered on 17 September 2013

Conveyancing — Strata titles — Mixed use developments — Community property by-laws — Where a special car parking by-law was made to fulfil the developer's contractual obligations to purchasers of lots in a body corporate scheme — Whether community body corporate validly revoked by-law by a comprehensive resolution 10 years after it was made — Whether by-law was a "restricted community property by-law" for the purposes of s 206A of the Mixed Use Development Act 1993 necessitating a resolution without dissent to revoke it — Mixed Use Development Act 1993, s 206A.

The Cathedral Village was a mixed use development which comprised residential and commercial units referable to a number of different bodies corporate. The first appellant body corporate scheme ("Cathedral Village BC") contained commercial units. It also operated a commercial car park in the development. The area of the car park was principally the common property of four body corporates, including Cathedral Village BC which had six car spaces there as part of its common property.

The first respondent ("Cathedral Place CBC") was a community body corporate and owned common property associated with the whole development. It was responsible for, and was able to, make by-laws in relation to the ongoing management of the car park.

No allocation of car parks was made to the owners of units in the Cathedral Village BC scheme but representations were made by the developer to purchasers of those units when the development was created that the body corporate would have the benefit of at least 55 car parks in the area of the car park. The car parks were to be procured by the developer either by obtaining an exclusive use easement or by some other mechanism.

In order to fulfil this obligation, the developer caused Cathedral Place CBC (the developer still owned all lots in Cathedral Place CBC at this stage) to pass new by-law 28 which reserved a portion of the car park's common property (which was not part of the Cathedral Village BC scheme) for the lot owners in that scheme.

Ten years later in 2010, in an attempt to cause the operation of the car park to cease, Cathedral Place CBC revoked by-law 28 by a comprehensive resolution (Cathedral Village BC voted against the resolution).

Cathedral Village BC commenced proceedings before the primary judge seeking an injunction to restrain implementation of the resolution and a declaration against its validity (see *The Proprietors Cathedral Village Building Units Plan No. 106957 & Ors* v *Cathedral Place Community Body Corporate & Ors* (2012) LQCS ¶90-180). Cathedral Village BC asserted that by-law 28 was a "restricted community property by-law" for the purposes of s 206A of the *Mixed Use Development Act 1993* as it restricted the use of part of the community property. This type of by-law can only be made by a resolution without dissent and can only be revoked by a resolution without dissent. Cathedral Village BC argued that the by-law was not properly revoked because there was no resolution without dissent.

The grant of a statutory right of user pursuant to s 180 of the *Property Law Act 1974* was sought in the alternative.

Cathedral Village BC was appealing against the primary judge's decision that a resolution without dissent was not necessary to revoke the by-law and that the circumstances of the case did not warrant the imposition of a statutory right of user.

Held: for the respondents — appeal dismissed.

1. Cathedral Village BC was unable to provide any evidence that by-law 28 was notified as requiring a resolution without dissent or that the resolution to adopt it was passed as a resolution without dissent (even though the resolution was passed with no votes against it). As by-law 28 was not made by a resolution without dissent, it could not have been a "restricted community property by-law". A resolution without dissent was therefore not necessary to revoke the by-law and the 2010 comprehensive resolution was effective to revoke it.

2. While a statutory right of user could be imposed over a car park, at an evidentiary level, the lot owners of Cathedral Village BC failed to prove that it was reasonably necessary in the interests of effective use of the lots in the Cathedral Village building units plan to impose a statutory right of user over as extensive an area as that requested.

[Headnote by the CCH Conveyancing Law Editors]

R Perry SC (instructed by Herbet Geer) for the appellants.

B O'Donnell QC with M Gynther (instructed by Gadens Lawyers) for the respondents.

Before: Holmes and Gotterson JJA and P Lyons J

Holmes and Gotterson JJA and P Lyons J:

1. Appeal dismissed.

2. Subject to any submissions on costs made in writing within seven days of today, the appellants pay the respondents' costs of and incidental to the appeal.

Holmes and Gotterson JJA and P Lyons J:

[1] **THE COURT**: The Cathedral Place development project was undertaken by Cathedral Place Developments Pty Ltd ("CPD"), a subsidiary of Devine Limited, over a number of years, beginning in 1998. The project was developed through a mixed use scheme[1] in which a prominent city site in Brisbane bounded by Wickham, Gipps, Ann and Gotha Streets was developed for commercial and residential uses.

[2] By the community plan for the site,[2] four community development lots ("CDL 1, 2, 3 and 15") and one community property lot ("CPL 4") were created. By virtue of the registration of the community plan and the operation of s 15(1) of the *Mixed Use Development Act* 1993 ("MUD Act"), a community body corporate, Cathedral Place Community Body Corporate ("Cathedral Place CBC"), was also created.

[3] CPL 4, with which this litigation is concerned, was thereupon transferred automatically to Cathedral Place CBC. Initially, the company CPD was the owner of each of the community development lots. By virtue of its ownership of them all, initially it was the sole member of Cathedral Place CBC.[3]

[4] As owner of it, Cathedral Place CBC became responsible for, and was able to make by-laws in relation to, the on-going management of CPL 4.[4] The lot occupies an area within the development, approximately at street level, and is accessible from Gotha Street. At all material times, it has been used as a car park.

[5] The principal frontage of CDL 2 is along Wickham Street. It was horizontally subdivided between the ground floor and the first floor into two community strata lots ("CSL 1 and 2").[5] CSL 2 was further subdivided by Building Units Plan 106957[6] into common property and individual lots. Registration of this building units plan also created a new body corporate, The Proprietors "Cathedral Village" Building Units Plan No 106957 ("Cathedral Village BC"). The individual lots were sold. They are used for a range of retail and other commercial purposes.

[6] CSL 1 and CDL 1, 3 and 15 were also subdivided by registration of separate building units plans. Each plan was referrable to a separate residential precinct within the overall development. Each created by registration its own body corporate, common property, and lots which were sold. Through this process CPD ceased to have an interest in the real property comprised in the project.

[7] Each of the bodies corporate created by registration of a building units plan became a member of Cathedral Place CBC in place of CPD. Thus, in respect of membership of the owner of CPL 4, whereas CPD had initially

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been the sole member of Cathedral Place CBC, once the subdivisions had been implemented, the members of that body corporate had become the respective bodies corporate created upon registration of the building units plans; and CPD had ceased to be a member of it.[7]

[8] CPL 4 is part of a car park floor, B1. The car park on this floor is comprised of CPL 4 and other areas, each one of which is common property for a building units plan, and some of which are contiguous with CPL 4. The common property for the Cathedral Village building units plan is itself used for four car parks on this level. There is a lower level car park floor, B2, where it has common property which is used for two additional car parks.

[9] An arrangement of easements affords access for CPL 4 to and from Gotha Street via a boom gate entry. This entry point provides access to an area on the floor which is comprised of part of CPL 4 and common property for three of the building units plans, including the Cathedral Village building units plan. The other two are the Oxford and Cambridge building units plan and the Notre Dame building units plan. This area is separated from the other car parking areas on the floor partly by a fence and partly by bollards and chains. The other areas have their own boom gate entry point.

[10] Two of the easements are of some relevance to these proceedings. They are registered Easements R and S. Both are within the separate car park area and are given over part of the common property of the

“Notre Dame” building units plan. The dominant tenement for each is CPL 4. The easements are granted for the purpose in clause 3 of the Schedule to the registered instrument. The purpose of each easement is stated in clause 3 to be “of a right of way”.

The current dispute

[11] Ownership of a lot in the Cathedral Village building units plan does not confer on the owner a right to use any of the car parks. However, as those lots were marketed by the developer, representations were made to purchasers that they would have unallocated car spaces available to them on the car parking floors in a number proportionate to the area of the commercial units purchased. Moreover, in contractual documents entered into between CPD and purchasers of the lots, the company agreed to procure the benefit of at least 55 car parks to Cathedral Village BC “by either exclusive use easement or other mechanism at the Seller’s discretion”.[8]

[12] The mechanism which CPD chose for its intended purpose for fulfilling its contractual obligation was to cause Cathedral Place CBC to make a by-law in November 2000. This by-law, By-Law 28, was additional to some 27 by-laws that had already been adopted by the body corporate. It conferred an entitlement on “the Proprietors ‘Cathedral Village’ 106959 and any person authorised by them” to use CPL 4. The text of this by-law and the circumstances in which it was made are detailed later in these reasons.

[13] At an extraordinary general meeting of Cathedral Place CBC held in June 2001, it was resolved that up to $65,000 be expended by it for the installation of a boom gate and ticket dispenser. This resolution facilitated the installation of the boom gate entry point to which reference has been made. From about July 2000, Cathedral Place CBC and Cathedral Village BC acted as if they had, about that time, agreed that the latter would reimburse to the former the cost of the installation of those facilities, manage and maintain the car park at its own cost and risk, and receive the income from parking tickets issued to users.

[14] The immediate source of the current dispute is that on 28 June 2010, a comprehensive resolution (“2010 resolution”) was passed at an extraordinary general meeting of Cathedral Place CBC which purported to “delete” By-Law 28. By this date, of course, CPD had ceased to be a member of the body corporate. Each of the six body corporate members of Cathedral Place CBC was represented at the meeting. Five of them voted in favour of it. The representative for Cathedral Village BC voted against it.[9]

[15] There is no issue that this resolution was made in compliance with the provisions in the MUD Act for making community property by-laws by comprehensive resolution. Subject to compliance with other provisions relating to amendment and repeal of certain types of by-laws referred to later the resolution will have

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had the legal effect of rescinding the entitlement conferred by By-Law 28 on the proprietors of lots in the Cathedral Village building units plan and those authorised by them to use CPL 4. Those owners are aggrieved by the potential loss of convenient car parking facilities which they, their employees, clients and customers and suppliers, have enjoyed under the by-law since this commercial precinct in the development was ready for occupation.

The proceedings

[16] On 19 August 2010, proceedings with respect to the 2010 resolution were commenced in the Supreme Court by Cathedral Village BC in its capacity as a member of Cathedral Place CBC. During the course of the proceedings, all owners of lots in the Cathedral Village building units plan joined as plaintiffs. The defendants were Cathedral Place CBC and the two other body corporate members of Cathedral Place CBC whose common property is within the separate area of the car park which includes CPL 4. The relief sought by the plaintiffs consisted of an injunction to restrain implementation of the resolution and a declaration against its validity. The plaintiffs, other than Cathedral Village BC, also sought grant of a statutory right of user of CPL 4 pursuant to the provisions of s 180 of the *Property Law Act* 1974 (“PL Act”), in the alternative.

[17] The plaintiffs’ attack on the validity of the 2010 resolution was centred upon the operation of certain provisions in Division 1 of Part 10 of the MUD Act which are concerned with community property by-

laws. Separate arguments that registration of By-Law 28 had created an indefeasible registered interest in favour of Cathedral Village BC in CPL 4 and, alternatively, that Cathedral Village BC had acquired an irrevocable proprietary interest in CPL 4 on equitable principles, were also advanced to impugn the validity or effectiveness of the resolution.

[18] The proceedings were tried during 2012. Reasons for judgment were delivered on 5 October that year. After further submissions on the form of orders and costs had been made, the learned trial judge made orders on 26 October 2012. All of the plaintiffs' claims were dismissed with costs. The court also made a series of declarations as had been sought by the defendants by way of counterclaim, the import of which is to affirm that By-Law 28 has been validly revoked.

The appeal

[19] On 14 November 2012, the plaintiffs filed a notice of appeal by which they have appealed against the orders and declarations. The respondent defendants filed a notice of contention on 3 December 2012. In summary, it advances a number of additional grounds for denying By-Law 28 the continuing efficacy that the appellant plaintiffs seek to attribute to it.

[20] Whilst the stated grounds of appeal and the written submissions canvass the range of issues considered at trial, at the hearing counsel for the appellants addressed two categories of them only, namely, those relating to the characterisation of By-Law 28 for the purposes of the common property by-laws provisions in the MUD Act of which mention has been made, and that relating to the s 180 issue.

[21] It is appropriate at this point to detail By-Law 28 itself and the circumstances in which it was made.

By-Law 28

[22] By-Law 28 was made at a meeting of Cathedral Place CBC held on 29 November 2000. The evidence tendered at trial did not establish that a notice of meeting had been given for it. The minutes of the meeting[10] record that it was held at the office of Stewart Silver King & Burns (Brisbane) Pty Ltd at 10.30 am. Mr Bill Ritchie who signed the minutes as chairman, was present. He was an employee of CPD. He was also representative of each of the body corporate members of Cathedral Place CBC, including Cathedral Village BC. It was in his representative capacity he attended the meeting. Thus he was the only individual who participated in it.

[23] The business transacted at the meeting is recorded in the minutes as follows:

> "1. **Minutes**
>
> **Resolved** that the meeting of the Extraordinary General Meeting held on 20th March 2000 be confirmed as a true and correct record of the proceedings of that meeting.
>
> [140626]
>
> 2. **Amendment to By-laws – Adopt New By-law 28**
>
> **Resolved by Comprehensive Resolution** that the Body Corporate adopt a new by-law number 28 as set out below and that the Body Corporate's Solicitors be authorized to take all steps required to bring the by-law into effect.
>
> '**28. Restricted Community By-law**
>
> (a) **Application of By-Law**
>
> This By-law applies to the Visitor Carpark designated on the plan attached to this By-law ("Visitor Carpark"). Part of the Visitor Carpark is Community Common Property and part of the Visitor Carpark is Common Property for the subsidiary body corporate known as "Notre Dame". The by-law applies to the portion on the Visitor Carpark that is on Community Common Property.

The by-law is intended to apply to that portion of the Visitor Carpark that is Common Property for Notre Dame on registration of an easement from the proprietors Notre Dame BUP 106911 granting the benefit of that area to the Community Body Corporate for carparking purposes.
(b) **Persons Entitled to Use**

The persons entitled to use the Visitor Carpark are the Proprietors "Cathedral Village" 106957 and any person authorized by them, all of whom are individually and collectively referred to as "Authorised Persons".
(c) **Conditions of Use**

The Proprietors Cathedral Village BUP 106957 must ensure that the Visitor Carpark is used:-

(i) only for purposes ancillary to the Mixed Use Development of Cathedral Place;
(ii) in a manner that complies with the by-laws form (sic) time to time for the Cathedral Place Community Body Corporate.

(d) **Maintenance**

The Proprietors "Cathedral Village" BUP 106957 must maintain the Visitor Carpark in a state similar to the other carparking areas on the common property for the Cathedral Place Community Body Corporate."[11]

[24] This minute records that the resolution to adopt By-Law 28 was passed as a comprehensive resolution. In evidence, Mr Ritchie confirmed that it was passed as a comprehensive resolution.[12]

[25] On 11 December 2000, the solicitors for Cathedral Place CBC submitted the by-law for ministerial approval advising that the body corporate had "by comprehensive resolution made:

"1. Community Property By-Laws pursuant to Section 206 of the Mixed Use Development Act 1993."[13]

[26] The ministerial approval sought was that under s 206(2) of the MUD Act which provides that a community property by-law does not have effect until the Minister approves it and notification of the approval is published in the Gazette. The Minister duly approved By-Law 28 on 17 January 2001. The approval, in the following terms, was published in the Gazette on 8 March 2001:

"Approval of Amendments of Planning Schemes

3. The Minister approved on 17 January 2001, the Community Property by-law made by the Cathedral Place Community Body Corporate for the Cathedral Place Mixed Use Development Scheme under Section 206 of the said Act."[14]

[27] The registrar of titles was notified of the approval by the Minister.[15] It is common ground that details of By-Law 28 were recorded on the community plan and noted on the title of Cathedral Place CBC to CPL 4 in the register on 1 September 2003.[16] However, the recording on the register of the by-law, whether characterised as made under s 206 or s 206A, would not have conferred indefeasibility on the entitlement thereby granted to the grantee. As the learned trial judge observed,[17] s 184 of the *Land Title Act* 1994 confers indefeasibility on the registered proprietor of an interest in a lot. The entitlement to use ostensibly granted by the by-law was not a proprietary interest in land; nor was it registered on the title as such.

[28]

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By-Law 28 refers to a plan attached to it which designates a "Visitor Carpark" area. It may be assumed for present purposes, as it was for the purposes of argument of the appeal, that the plan referred to in the

minute, is the plan, a copy of which appears at p 1235 of the Appeal Record. On that plan, the designated area is hatched. It is the same area as is described at paragraph 9 of these reasons, as being the separate car park on level B1 which comprises part of CPL 4 and common property of three of the other bodies corporate. It is identified as "Visitor Carpark" on the plan.

[29] From paragraph (a) thereof, it appears that By-Law 28 was intended to apply to parts only of the Visitor Car park area, namely that part of CPL 4 as was within it and the common property for the Notre Dame building units plan. In the case of the latter, the by-law was to apply to it only upon the registration of an easement from the proprietors of the Notre Dame building units plan granting the benefit of that area to Cathedral Place CBC for car parking purposes.

[30] Had such an easement been registered, this litigation might have put in issue the lawfulness of the by-law in so far as it purported to apply to the common property of the Notre Dame building units plan. However, there is no evidentiary basis from which a finding could have been made that such an easement had ever been registered. Easements R and S, considered singularly, or together, do not answer that requirement. They apply to part only of the common property. Moreover, they are not expressed to be for "car parking purposes".

[31] Terminology used in By-Law 28 and the language in which the by-law is cast give rise to several interpretative issues. First, the expression "The Proprietors "Cathedral Village" 106957" is apt to describe collectively the lot owners in the Cathedral Village building units plan. Notwithstanding, the context in which it is used in the by-law in imposing conditions of use and a maintenance obligation suggests that the intended beneficiary of the by-law was the single corporate entity, Cathedral Village BC. Furthermore, despite that the entitlement conferred by the by-law is not expressed to be an exclusive one, it is open to inference from the conditions of use and the maintenance obligation that the by-law was intended to confer such an entitlement over the area to which it was to apply on the intended beneficiary and those authorised by it or them. However, having regard to the conclusions we have reached on the characterisation of By-Law 28, it is not necessary to resolve either of these two issues.

The characterisation of By-Law 28 grounds

[32] At all times material to these proceedings, s 206 in Division 1 of Part 10 of the MUD Act has authorised a community body corporate to make by-laws, for the "control, management, administration, use or enjoyment of the community property". It might do so by a comprehensive resolution: s 206(1). A comprehensive resolution is defined in s 3 of that Act to mean a resolution:

> "(a) that is passed at a properly convened meeting of the body corporate; and
> (b) for which the members that vote in favour have not less than 75% of the voting entitlements recorded in its body corporate roll."

[33] Section 206A of the MUD Act relates to a particular type of by-law that might be made by a body corporate under s 206. It is a by-law that "restrict(s) the use of any part of the community property" in any one of some eight ways which are set out in s 206A(1). This type of by-law is called a restricted community property by-law. Such a by-law may only be made by resolution without dissent: s 206A(2). A resolution without dissent is defined in s 3 to mean a resolution:

> "(a) that is passed at a properly convened meeting of the body corporate or committee; and
> (b) against which no vote is cast."

[34] By virtue of s 172(9) of the MUD Act, Part 2 of Schedule 2 to the *Building Units and Group Titles Act* 1980 ("BUGT Act") applies to meetings of a community body corporate (other than its first annual general meeting), and to voting at such meetings. Section 1(2A)(d) of Schedule 2 requires that notice of a general meeting be served and that it set forth the business of the meeting and, in respect of each

motion to be considered, specify whether it requires "a resolution, special resolution, resolution without dissent or unanimous resolution". Significantly, s 14 thereof has at all relevant times provided:

> "A unanimous resolution, resolution without dissent or special resolution of a body corporate may not be amended or revoked except by a subsequent unanimous resolution, resolution without dissent or special resolution, as the case may be."

[35] It is quite clear that s 14 is to be read distributively. Thus, a resolution without dissent may be amended or revoked by a resolution without dissent only. The expression "resolution without dissent" is defined by s 7 of the BUGT Act in materially the same terms as the definition given for it by s 3 of the MUD Act.

[36] The issue of characterisation of By-Law 28 arises in this way. If (as the appellants contend) it was made as a restricted community property by-law under s 206A, then it need have been made by a resolution without dissent. As such, it could be revoked only by a resolution without dissent: s 14. It will be recalled that the 2010 resolution was passed as a comprehensive resolution. Although, on the evidence, it appears that the resolution to adopt By-Law 28 was neither proposed, nor passed, as a resolution without dissent, the appellants contend that it was, or was also, a resolution without dissent as defined in s 3. That follows, they submit, because no vote was cast against it. If By-Law 28 was validly made as a restricted community property by-law, then the 2010 resolution will have failed to revoke it.

[37] However, if (as the respondents contend) By-Law 28 was made under s 206 but not as a restricted community property by-law under s 206A, then the 2010 resolution will have been effective to revoke it. Part 2 of Schedule 2 does not contain any impediment to the revocation by a comprehensive resolution of a community property by-law made by comprehensive resolution.

[38] It is therefore necessary to decide how By-Law 28 is to be characterised. In that regard, particular attention needs to be paid to whether or not it was made by a resolution without dissent for the purposes of s 206A and s 14.

[39] It is critical to the appellants' contention that By-Law 28 is a restrictive community property by-law that it have been made by resolution without dissent as required by s 206A(2). We turn first to consider that matter. In our view, the conclusion reached on it is determinative of the issue whether the by-law was validly revoked or not.

[40] There is a substantial body of direct evidence that the motion to adopt By-Law 28 was passed as a comprehensive resolution. As noted, the minutes record that and Mr Ritchie's evidence corroborates it. Whether it was also passed as a resolution without dissent will depend upon the meaning that that expression has in s 206A(2).

[41] Section 3 of the MUD Act contains the definitions for "comprehensive resolution" and "resolution without dissent" to which reference has been made, and also a definition for the term "unanimous resolution". Part 2 of Schedule 2 requires any notice of a general meeting of a body corporate to set forth whether a motion to be carried requires a resolution, special resolution, a resolution without dissent or a unanimous resolution.[18] The motion may not be submitted at the general meeting unless notice of it has been given in accordance with the section.[19] Entitlement to vote may vary according to whether a motion is one that requires a unanimous resolution or not.[20] These provisions, together with the provisions in the MUD Act which require a specific type of resolution to carry a motion on specified topics - of which ss 206(1) and 206A(2) are examples, forcefully indicate that each of the definitions of a type of resolution in s 3 is intended to be read as applying only to a resolution that is duly notified and passed as a resolution of that type by the meeting. That is to say, for example, a resolution will be a resolution without dissent only if it is notified as requiring a resolution without dissent and is passed as such.

[42] Moreover, this interpretation would preclude the circumstance that the same resolution might be classified as a unanimous resolution, a resolution without dissent and also a comprehensive resolution. Given the extent to which both Acts distinguish between different

types of resolutions, it is most unlikely that the possibility of that circumstance would have been intended.

[43] These features of Part 2 of Schedule 2 also indicate that when s 14 speaks of a type of resolution being capable of amendment or revocation by a resolution of that type only, it intends to refer to a resolution which has been notified and passed as such. Thus, whilst s 14 provides that a resolution that has been notified

and passed as a resolution without dissent may be amended or revoked by a resolution without dissent only, that stricture does not apply to a resolution which is notified and passed as a comprehensive resolution even though it might have been passed at a meeting with no vote against it.

[44] The appellants have not identified any evidence which proves that By-Law 28 was notified as requiring a resolution without dissent or that the resolution to adopt it was passed as a resolution without dissent. To the contrary, the evidence indicates that the resolution to adopt it was passed as a comprehensive resolution. In these circumstances, this Court cannot conclude that the resolution to adopt By-Law 28 was effective to adopt it as a restricted community property by-law under s 206A nor can it conclude that a resolution without dissent was required by s 14 to revoke it. By-Law 28 was validly made as a community property by-law by a comprehensive resolution. The 2010 resolution was therefore effective to revoke it. The learned trial judge so concluded.[21] His Honour's conclusion is correct, in our view.

[45] A number of other arguments were advanced by the parties with respect to characterisation of the by-law. They focused upon whether or not it answered the statutory description of a s 206A restricted community property by-law. Although the fate of this issue does not depend upon success on the respondents' part on any of them, it is appropriate that they be noted and addressed briefly.

[46] At the time that By-Law 28 was made, s 206A(1) provided:

> "**206A.(1)** The community body corporate may make by-laws under section 206 that restrict the use of any part of the community property (**"restricted community property"**) to —
>
> (a) a member of the community body corporate; or
> (b) a body corporate created by the registration of a building units or group titles plan; or
> (c) a proprietor of a lot created by the registration of a building units or group titles plan; or
> (d) a precinct body corporate; or
> (e) a member of a precinct body corporate; or
> (f) a proprietor of a lot created in a staged use precinct by the registration of a building units or group titles plan; or
> (g) a lessee or occupier of a lot within the site; or
> (h) someone else while the person is engaged in construction works in the site or in a future development area or subsequent stage."

[47] For the respondents, it was submitted that in a number of respects, By-Law 28 was not a by-law of a type that might be made under s 206A. First, it was argued that By-Law 28 was not restrictive of the use of common property to any category of persons listed in the section. The respondents relied on the absence from the by-law of any express conferment of an exclusive right of user, submitting that the heading to the by-law, "Restricted Community By-Law" did not, of itself, cloak the grant with a restriction against use by others.[22] However, as is noted at paragraph 31 of these reasons, other features of the by-law are capable of grounding an inference that the grant of an exclusive right of user was intended. This argument would avail the respondents only if that inference were not drawn.

[48] Secondly, in so far as the by-law purported to confer on persons authorised by the Proprietors "Cathedral Village" 106957 an entitlement to use the Visitor Car park, it would have conferred an entitlement on persons who did not fall within any of the eight categories listed in s 206A(1). It is accurate to say that none of those categories would accommodate as potentially broad a class of persons as those authorised by the Proprietors. There is merit in

the respondents' submission that on this account, By-Law 28 could not have qualified as a restricted community property by-law.

[49] Thirdly, the respondents argued that it was improbable that the by-law was intended to give exclusive use to Cathedral Village BC since that would mean that individual lot owners in the Cathedral Village building units plan would have to secure authorisation from their own body corporate before being able to use the car park. This argument is unpersuasive. It was open to the lot owners as members of the body corporate to ensure the adoption by it of suitable arrangements for the use by them of the car park.

[50] The learned trial judge considered each of these arguments to be valid.[23] He observed that had he held that By-Law 28 was made under s 206A, he would have held it to be invalid as a restricted community property by-law on account of these arguments.[24] For these reasons given in the preceding three paragraphs, we agree with his Honour's conclusions with respect to the second of them but have reservations with respect to the first and third of them.

Section 180 ground

[51] In their further amended statement of claim, the plaintiffs, other than Cathedral Village BC, pleaded that "it is reasonably necessary in the interests of the effective use of the carpark" that they or the registered owners of the commercial lots from time to time should have "a statutory right of user in respect of the carpark in perpetuity, subject only to termination by (Cathedral Place CBC) pursuant to a resolution without dissent."[25] On the footing of that allegation, those plaintiffs sought to invoke the jurisdiction conferred on the Supreme Court by s 180 of the PL Act to impose a statutory right of user in those terms.

[52] The plaintiffs supported their claim to the right with evidence in the form of a draft By-Law 30.[26] Additional affidavit evidence indicated that were the statutory right granted, then Cathedral Place CBC would adopt the by-law. Its purpose would be to regulate the operation, control and maintenance of the Visitors Car Park. The area designated as the Visitors Car park on the plan in Annexure A to this draft by-law equates to the whole of the hatched area on the plan attached to By-Law 28 (referred to in paragraph 28 of these reasons) reduced by some nine car parks at the western end of it which would be made available for trade vehicles and a loading zone.

[53] Section 180 provides as follows:

> "(1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (***the dominant land***) that such land, or the owner for the time being of such land, should in respect of any other land (***the servient land***) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
> (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—
>
> > (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
> > (b) on 1 or more occasions; or
> > (c) until a date certain; or
> > (d) in perpetuity or for some fixed period;
>
> as may be specified in the order.
> (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—
>
> > (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
> > (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
> > (c) either—
> >
> > > (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the

owner's refusal is in all the circumstances unreasonable; or
(ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation."

[54] It may be seen at once that the appellants' reference in their pleading to effective use of the car park was misplaced. The appropriate reference for the application of s 180 in this context, is effective use of the appellants' respective lots in Cathedral Village. The appellants' submissions on appeal adopted that reference.

[55] It is common ground that the principles summarised in *Lang Parade Pty Ltd* v *Peluso*[27] and restated by the learned trial judge[28] guide the determination of whether it is reasonably necessary in the interests of the effective use in any reasonable manner of the dominant land that it, or its owner from time to time, should have a statutory right of user in respect of the servient land. It is unnecessary to restate those principles here.

[56] His Honour accepted a number of submissions made by the respondents to the effect that reasonable necessity in terms of s 180(1) had not been established and that, in any event, the discretion conferred by the section ought not be exercised. He summarised those submissions and made observations with respect to the application of the provision as follows:

"[62] It is not a remedy apt to be applied to enforce the creation of a car park for the holders of units in a particular part of a development such as this over the community property of another body corporate in the same development for what appears to be a claim to permit the unit holders to park permanently. The defendants made a number of submissions which appear to me to be insuperable, namely:

(a) the section is not designed to assist in creating a licence or lease over land for exclusive car parking rights;
(b) the evidence does not establish that it is reasonably necessary for the effective use of the units that such a right be imposed over the car park, rather only some of the unit holders gave evidence that it was highly desirable for the businesses they ran from their units to have convenient car parking;
(c) as to that factual issue the defendants argued that the evidence of the existence of delivery bays on the property and a proposal by Cathedral Place CBC to pass a new by-law permitting deliveries within the car park to the units in Cathedral Village and creating additional delivery bays as well as the evidence of the availability of other commercial car parks nearby made the issue one not of reasonable necessity but simply convenience of the unit holders;
(d) no evidence established that it was consistent with the public interest[29] to use the car park in the manner proposed, as opposed to the interests of the individual unit owners;
(e) the development approval required the area to be used for patrons of the retail/commercial area and visitors of residents only, not for use by proprietors of units exclusively;
(f) no evidence was led to show that there had been an unreasonable refusal by Cathedral Place CBC to agree to accept the imposition of such an obligation pursuant to s 180(3)(c), having regard to the wish of that body to maintain access to the car park for other unit holders in it, the other bodies corporate and visitors;
(g) the imposition of the obligation would be inconsistent with the legislation governing the community property of Cathedral Place CBC and the common property of the other defendants by which those bodies corporate are obliged to manage their common or community property for the benefit of their members, rather than surrendering its control to the members of Cathedral Village.

[63] It also seemed to me to be inappropriate to use this remedy in this situation where the legislature has already created a complex statutory scheme for the regulation of bodies

> corporate. Decisions dealing with car parking are are (sic) intended to be made pursuant to those relevant statutes and the
>
> [140632]
>
> bodies corporate have been empowered to deal with community property in precisely regulated circumstances. For these reasons it would be quite inappropriate to use the remedy provided by s 180 in favour of those plaintiffs."

[57] We agree that it was correct for his Honour to refuse relief under this section. Some only, and well short of a majority, of the lot owners testified. The evidence of a number of them was somewhat diminished in cross-examination. However, at the highest, there was sufficient evidence to find in respect of two lot-owners[30] that concerning the uses with which they are associated, there is need for the provision of some parking in close proximity to their respective lots. At an evidentiary level, the plaintiffs concerned did fail to prove that it was reasonably necessary in the interests of effective use of the lots in the Cathedral Village building units plan, to impose a statutory right of user over as extensive an area as the Visitors Car park area in Annexure A to the draft by-law. The evidentiary failure on this account was sufficient in itself to justify refusal of the relief sought.

[58] However, we would not accept in totality all of the submissions made on behalf of the respondents listed by his Honour in paragraphs 62 of his reasons. We make the following observations in respect of those which we would accept in part or reject.

[59] The learned trial judge accepted a submission made on behalf of the respondents to the effect that the development approval required the area over which the appellants sought the imposition of a statutory right of user, to be available for use by patrons of the retail/commercial area and visitors and residents only; and not for use exclusively by proprietors of units.[31] That finding was relied upon by the respondents in the appeal. For the appellants it was submitted that inconsistency with the planning approval was not the subject of evidence; and that the effect of the finding was questionable. It was submitted by them that the right which they sought was consistent with condition 37 of the development approval[32] , with reliance being placed upon a letter from the Brisbane City Council dated 1 July 2010.[33]

[60] The draft By-Law 30 demonstrates an intention to comply with the requirements of the development approval. It also makes clear that part of the area in respect of which the relief was sought was to be made available to visitors. However, under it, another part of the same area is to be "allocated" for the benefit of the occupiers of lots, including lots in the Cathedral Village building units plan.[34] The evidence led in support of the application under s 180 demonstrated an intent, in a number of cases, that those who conducted businesses in Cathedral Village would have exclusive use of at least some of the car parks.

[61] Condition 37 of the development approval[35] required that this area not be used as a public car park for purposes other than ancillary to the approved development and that notices be displayed stating that the public parking area "is for patrons of the retail/commercial area and visitors of residents only". It was not submitted on the appeal that condition 37 was ineffective or that the public parking area to which it refers was not the area in respect of which relief was sought under s 180.

[62] The language of condition 37 is not without its difficulties. However, it appears to be drawn on the basis that the designated area would be used as a public car park and to require that area to be used only for purposes ancillary to the development the subject of the development approval. It then specifies how the area was to be so used by requiring notices limiting the use of the car park to patrons of the retail/commercial area and visitors of residents only.

[63] Non-compliance with condition 37 would have risked contravention initially of s 3.5.28 of the *Integrated Planning Act* 1997 and later of s 245 of the *Sustainable Planning Act* 2009.[36] Thus, to the extent that the draft By-Law 30 would permit the exclusive use of some of the parking by the occupants of lots in the Cathedral Village building units plan, we would accept the submission of the respondents and uphold the finding of the learned trial judge.

[64] It need be said that the reliance by the appellants on the letter of the Brisbane City Council dated 1 July 2010 is misplaced. The effect of a condition of a development approval

[140633]

is a matter to be determined by a court and not by an officer of a local government. In any event, the letter indicates that the exclusive use by owners or tenants of those commercial lots is inconsistent with the condition.

[65] Next the respondents' submission that s 180 is not designed to assist in creating a licence or lease over land for exclusive car parking rights cannot be accepted. The section is a remedial statutory provision intended to confer on a court a discretion by which a right might be granted to enable the effective use of land in a reasonable manner. Conditions which must be established to enliven the discretion and the circumstances of which the court must be satisfied before exercising it are expressly identified in the section. Sub-section (2) indicates that the right which might be granted is not limited to interests in land or rights in relation to land according to the doctrines and principles of the general law. There does not appear to be anything within the section which would justify the conclusion that the imposition of an exclusive right to use land for car parking is beyond its intended scope.

[66] The respondents' additional submission that the imposition of a statutory right of user would be inconsistent with the scheme of regulation found in the BUGT Act does not withstand scrutiny. That Act is intended to enable the subdivision of land in such a way that owners of lots thereby created would have rights in common in respect of some of the land. It was necessary for that Act to include provisions about the regulation and alteration of such rights. That circumstance does not, however, lead to a conclusion that relief under s 180 is not available over land subdivided under the BUGT Act. Indeed, it is not difficult to conceive (particularly in a group title development) of a situation where the effective use of one lot in a reasonable manner would necessitate some right over another lot in the development. Moreover, since relief under s 180 is available in respect of land in which the applicant has no interest, the provision has a potential scope for operation in circumstances which might not be capable of being adequately catered for by rights created under the BUGT Act. These considerations militate against a conclusion that such relief is not available in respect of common property.

[67] It might also be observed that the conclusion of the learned trial judge about the availability of such relief in respect of land which has been subdivided under the BUGT Act would seem to be applicable only in respect of that part of the car park as is within CPL 4. Whilst they do own lots in the Cathedral Village units plan, the appellants concerned have no relationship with the Oxford and Cambridge or Notre Dame building units plans which might be capable of being regulated under the BUGT Act. It is therefore difficult to infer that the BUGT Act was intended to prevent relief being granted to them over common property of a building unit development in which they have no interest.

[68] It is also of some significance that at the time when s 180 was enacted, there were already in force in Queensland two other Acts providing for the creation, and regulation of the use, of common property.[37] Neither of those statutes was referred to in s 180 as exceptions from its purview.

Other issues

[69] Two other issues warrant brief mention. One arises in the appellant's case; the other from the notice of contention.

[70] In the alternative to a right under By-Law 28, the appellants claim to have an equitable interest in the car park relying on the doctrine of proprietary estoppel. This claim was rejected by the learned trial judge.[38] His Honour was not satisfied that expenditure of money on the car park by Cathedral Village BC was made on the understanding, express or implied, that it or the other appellants would thereby acquire a proprietary interest in the car park. He also considered it relevant that, as he found, the money which that entity had expended on the car park had been recouped by it from the parking fees. The appellants have not shown that his Honour erred in making either of these findings with respect to fact.

[71] In so far as the appellants have, in this context, sought to rely on contractual promises made by the developer, CPD, they are unavailing because:

(a) they were not made to Cathedral Village BC, the only appellant entity to have expended money on the car park;

[140634]

(b) the promisor was the developer and not Cathedral Place CBC or any other respondent; and

(c) the promise was not that the buyer of a lot would acquire a proprietary interest in the car park.

The claim to an equitable interest or interests in the car park was rightly rejected.

[72] The respondents also sought to impugn By-Law 28 as a fraud on the power of Cathedral Pace CBC to make a by-law. It was argued that the power had been exercised for the sole purpose of fulfilling CPD's contractual obligations to purchasers of lots in Cathedral Village and that, on that account, it was exercised improperly. This argument had been advanced at trial. The learned trial judge considered it[39] but declined to determine whether the licence which, in his view, By-Law 28 had created in favour of Cathedral Village, had been created by a fraudulent exercise of power. His Honour considered that it was unnecessary for him to make the determination given that he had already determined that By-Law 28 had been validly revoked.

[73] For similar reasons, we consider it unnecessary to decide that issue in this appeal. It is unnecessary for the respondents to rely on the argument to sustain the judgment at first instance in their favour.

Disposition

[74] For these reasons, we conclude that this appeal fails and that the appropriate order is that it be dismissed.

Orders

[75] We would propose the following orders:

1. Appeal dismissed.
2. Subject to any submissions on costs made in writing within seven days of today, the appellants pay the respondents' costs of and incidental to the appeal.

Footnotes

1 Duly approved by the Minister for Local Government and Planning and by the Brisbane City Council.

2 AB1043 Mixed Community Plan 106902 registered on 28 October 1998.

3 MUD Act ss 24(1); 167(1).

4 MUD Act s 15(4).

5 By MSP 106904 registered on 29 October 1998.

6 The Cathedral Village building units plan registered on 9 March 1999.

7 MUD Act ss 24(4); 167(2).

8 AB 1470; Typical sale of contract clause 46.

9 AB 1753.

10 AB 1233-4.

11 AB 1233-4.

12 AB 177 Tr3-6 LL23-28.

13 AB 829.

14 AB 834.

15 See ss 206A(10), (11). Why this notification was given is not illuminated by the evidence. Quite possibly it occurred administratively because of the words, "Restricted Community By-Law" at the heading of By-Law 28, notwithstanding that it was approved as a community property by-law.

16 AB 1044.

17 Reasons [17].

18 Section 1(4)(d).
19 Section 1(7).
20 Section 2(6).
21 Reasons [44].
22 Contrast By-law 25 (AB 1194) which authorises Cathedral Place CBC to allocate the exclusive use of car parking spaces and which that body corporate exercised in respect of other areas (AB 1208-1223).
23 Reasons [28]-[31], [34], [35].
24 Reasons [37].
25 AB 2584.
26 Exhibit 25 AB 2115-2128 tendered at AB 373.
27 [2006] 1 Qd R 42 at [23].
28 Reasons [61].
29 See s 180(3)(a).
30 Mr Warren and Mr Rabone.
31 Reasons [62](e).
32 Approved on or about 24 September 1998 AB 1863-1902.
33 Exhibit 1 document B54 AB 926-7; also AB 34-36, Tr1-34-1-36.
34 Exhibit 25 clause 30.6 and the definitions therein.
35 AB 1898.
36 This Act replaced the *Integrated Planning Act* 1997.
37 *Building Units Title Act 1965 and Group Titles Act* 1973.
38 Reasons [59].
39 Reasons [45]-[55].

FAMESTOCK PTY LTD v THE BODY CORPORATE FOR NO 9 PORT DOUGLAS ROAD COMMUNITY TITLE SCHEME 24368

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(2013) LQCS ¶90-190; Court citation: [2013] QCA 354

Supreme Court of Queensland — Court of Appeal

Decision delivered on 29 November 2013

Community schemes — Caretaking and letting agreement — Where the parties entered into a caretaking and letting agreement for the appellant to manage a unit complex — Where appellant allowed its real estate licence to lapse and was thus in breach of the letting agreement — Whether the implied duty to cooperate compelled the respondent to assist the appellant in seeking a new licence — Whether the duty to cooperate was a continuing obligation — Whether body corporate was responsible for the ultra vires act of its committee — Body Corporate and Community Management Act 1997, s 92.

The appellant caretaker entered into a caretaking and letting agreement with the respondent body corporate in respect of a unit complex situated in Queensland. The caretaker held a restricted real estate licence as letting agent for the body corporate. The licence lapsed as a result of the caretaker not renewing it; however, the caretaker continued to act as a letting agent and was thus acting unlawfully and contrary to the provisions of the agreement. The body corporate was of the opinion that the agreement was no longer valid as a result of the breaches.

The caretaker applied to the Office of Fair Trading to renew the restricted real estate licence so as to continue as letting agent. However, the body corporate refused to provide a supporting letter to confirm that the agreement remained on foot. The body corporate committee subsequently issued a termination notice without general meeting authority to do so. The caretaker asserted that this amounted to a repudiation of the agreement by the body corporate and resulted in the caretaker losing commissions.

[140636]

The issues to be decided on appeal included whether:

- the body corporate had breached the implied duty to cooperate to do what was necessary on its part to enable the caretaker to have the benefit of the contract. The caretaker asserted that the body corporate had a duty to assist it with its licence renewal application
- the requirement to cooperate was a continuing obligation or was limited to the outset of the contract
- unauthorised conduct of the body corporate committee (repudiating the agreement) should be treated as behaviour of the body corporate.

Held: for the respondent body corporate. Appeal dismissed.

1. Even though the court "will readily imply a term in any contract that the parties shall co-operate to ensure the performance of their bargain", a party is not required to "abandon looking after its own interests in relation to the contract at least in the sense of not pursuing, if such a remedy is available, the right to terminate the contract for failure on the part of the other party to comply with its obligations under it" as per Rolfe J in *National Power Australia LLC* v *Energy Australia* [1998] NSWSC 466.

There was no breach by the body corporate for failing to assist the caretaker with its application for licence renewal. The Office of Fair Trading needed "unfettered documentary evidence" of the body corporate's approval of the agreement. Given the body corporate's attitude to the caretaker's breaches of the agreement, such an approval was not forthcoming nor should it have been required to provide it.

2. While the body corporate would have been required to cooperate to ensure the caretaker secured a licence at the commencement of the agreement in order to give business efficacy to the contract, there was no positive obligation on the body corporate to cooperate with the caretaker's attempts to procure the licence in circumstances where the caretaker had allowed the licence to lapse and had been operating unlawfully and in breach of the agreement.

3. Section 92 of the *Body Corporate and Community Management Act 1997* made it clear that the committee had no actual or implied authority to determine the agreement. However, the conduct of the committee could not be treated as conduct of the body corporate in circumstances where there had been no attempt at delegation by the body corporate. The consequences of the committee's unauthorised behaviour should not be sheeted home to the body corporate so as to make it liable for damages for the caretaker's lost commissions.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

D L Savage QC, with L Stephens (instructed by Alexander Law) for the appellant.

C L Francis (instructed by Hynes Legal) for the respondent.

Before: Chief Justice, Fraser JA and Douglas J.

Chief Justice: I have had the advantage of reading the reasons for judgment of Douglas J. I agree with the orders proposed by his Honour, and with his reasons.

Fraser JA: I have had the advantage of reading the reasons for judgment of Douglas J. I agree with those reasons and with the orders proposed by his Honour.

Douglas J: There are three issues raised by this appeal and cross-appeal. They stem from an agreement between the appellant and the respondent where the appellant had been the manager and caretaker for the unit development associated with the respondent body corporate. That relationship came to an end in disputed circumstances.

[4] The issues are:

> 1. Whether there had been a breach by the respondent of its implied duty to cooperate in doing what was necessary on its part to enable the appellant to have the benefit of the agreement;
>
> [140637]
>
> 2. Whether the respondent was liable in damages for commissions lost by the appellant and the loss of value of its business when it stopped acting as the respondent's agent;
> 3. Whether unauthorised conduct of the respondent's committee should be treated as behaviour of the respondent repudiating the agreement with the appellant.

[5] The bulk of the appellant's claim was dismissed by the learned trial judge on the basis that the respondent had not breached any implied duty to cooperate in assisting the appellant to obtain a new licence to act as a real estate agent. The appellant had allowed the licence it held when it first acted as a letting agent for unit holders in the respondent to lapse. His Honour found, clearly correctly in my view, that the implied duty to cooperate did not require the respondent to assist the appellant to obtain a new licence where it had itself previously breached clauses of its caretaking and management agreement requiring it to obtain licences needed to enable it to conduct the business of letting units in accordance with the relevant statutes and subordinate legislation.[1]

[6] Nor did his Honour accept that the appellant had proved the claimed loss of commissions in the amount of $270,349.

[7] Those two aspects of his Honour's decision were challenged by the appellant. For reasons I shall develop it is my view that the appeal should fail.

[8] The third issue was raised by the argument on the respondent's cross-appeal that actions of the committee of a body corporate which were not authorised should not be attributed to the body corporate so as to amount to evidence that it had repudiated a contract. The cross-appeal by the respondent against his Honour's conclusion that it was liable to the appellant for lost management fees totalling $37,632.53 arising from its committee's unauthorised act should succeed.

The facts

[9] The management agreement between the parties was entered into in February 1998 and included the following clauses:

> "8.1.5 The Manager shall obtain all permits, consents or licences required by any local or other lawful authority to enable the Manager to conduct on the Parcel the business of letting the Units or provide any other services as may be mentioned in this Agreement.
> 8.1.6 The Manager shall conduct such business in accordance with all statutes, regulations, by-laws or ordinances in any way relating to such business …
> …
> 10. This Agreement may be terminated by the Body Corporate by notice in writing to the Manager in any of the following events:
>
> > …
> > 10.1.2 If the Manager shall fail or neglect to carry out the duties of the Manager pursuant to this Agreement and such failure or neglect shall continue for a further period of fourteen (14) days after notice in writing shall have been given to the Manager specifying the duty which the Manager has failed or neglected to carry out and calling upon the Manager to perform such duty.

10.1.3 If the Manager shall be guilty of gross misconduct or gross negligence in the performance of the duties of the Manager hereunder."

[10] The facts surrounding the dispute that developed between the parties were helpfully and uncontroversially summarised by his Honour as follows:[2]

> "[20] At or soon after the commencement of the agreement the plaintiff and Mrs McEvoy acquired restricted real estate agent licences from the licensing authority, which at that stage was the Auctioneers and Agents Committee (AAC). This was a requirement, under s 18 of the *Auctioneers and Agents Act* 1971 (Qld), of acting as a real estate agent, the definition of which includes a letting agent.
> [21] The licences, apparently only current for a year, expired on 9 June 1999, no renewal applications having been made. The plaintiff continued to act as a letting agent
>
> [140638]
>
> and was thus acting unlawfully and contrary to cl 8.1.5 and cl 8.1.6 of the letting agreement.
> [22] Charges of acting as an unlicensed real estate agent were laid against the plaintiff and Mrs McEvoy and they were found guilty and fined on 18 June 2001 in the Mossman Magistrates Court. Between being charged and dealt with, the plaintiff and Mrs McEvoy lodged new licence applications, on 21 May 2001.
> [23] Subsequently, on 27 June 2001, the AAC requested the plaintiff provide evidence of the body corporate approval to conduct the letting business. This request was required to assess the applications under the *Property Agents and Motor Dealers Act* 2000 (Qld) ('PAMDA'), which was to come into effect on 1 July 2001.
> [24] The defendant's manager, Mr Dan Moy, faxed a signed copy of the agreement to the Licensing Section (PAMDA) of the Office of Fair Trading, which was previously the AAC, on 3 August [2001].
> [25] On 6 August 2001, Mr Ross Hurst, now deceased, the then chairman of the defendant, allegedly telephoned the Office of Fair Trading and spoke to Ms Gwen Pusztay, an officer of the Licensing Section. Ms Pusztay's file note of 16 August 2001 recorded that:
>
> > 'I received a telephone call from the chairman of the body corporate on 6/8/01, advising that the body corporate considers that the above agreement is not now current or valid in consideration of the fact that the above clauses were breached, and ~~was~~ is in the process of taking further legal advice. I asked him to provide something to me in writing in relation to the matter, however I have not yet received anything.'
>
> The breached clauses there referred to were cl 8.1.5 and cl 8.1.6, which relate to obtaining licences and conducting the business in accordance with all statutes and regulations.
> [26] A further file note made 20 August [2001] records:
>
> > 'Mr Hurst (body corporate chairman) telephoned today (20/8/01), and advised that there will be a body corporate meeting tomorrow night which will consider legal advice obtained. The advice was that Famestock Pty Ltd had breached the agreement by not ensuring it remained licensed, and therefore the agreement was no longer valid.
> >
> > The meeting will (he said) vote not to approve Famestock Pty Ltd as the letting agent.
> >
> > He will advise me in writing after the meeting.'
>
> [27] On 31 August 2001, Ms Pusztay made an internal request for legal advice as to whether the agreement was at an end. The advice was received on 26 September 2001, the recommendation being that:
>
> > '… the applications received from Famestock Pty Ltd and McEvoy for restricted letting agent's licences not be decided until such time as there is clarity as to (a) whether the agreement granting letting approval has been terminated, and (b) whether any other form of letting approval has been given by the body corporate.

> Should Famestock Pty Ltd and McEvoy require their application to be determined, the Office of Fair Trading should decide the matter according to the provisions of the Act. As such, and in the absence of any advice from the body corporate that the agreement has been terminated, it appears that the licences should be granted. If the agreement is later terminated, and if no other letting approval is given by the body corporate, action could be taken to revoke the licences.'

[28] On 4 October 2001, Ms Pusztay made a handwritten note that she had:

> 'Asked Mr Hurst (B/C) to advise in writing that they have applied to the BCCM adjudicator for a ruling re the agreement. Also asked him to advise outcome.'

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[29] Mr Moy provided such confirmation on 5 October 2001.

[30] In a letter dated 8 October 2001, sent by facsimile the following day, Ms Pusztay, signing on behalf of the Office of Fair Trading, informed the chairman of the defendant that:

> 'It is understood that the caretaking and letting agreement dated 12 February 1998 between the body corporate and Famestock Pty Ltd is the subject of Body Corporate and Community Management adjudication as to its validity. That being the case, the Chief Executive would be unable to be satisfied that this agreement constitutes the required body corporate approval.
>
> If the body corporate wishes to give approval to Famestock Pty Ltd to carry on the letting business at No 9 Port Douglas Road, in order for the licences to be considered by the Chief Executive, it would need to provide unfettered documentary evidence of that approval.'

[31] On 19 October the defendant served two default notices on the plaintiff pursuant to c1 10.1.5. The first notice alleged a breach of cl 8.1.5 on the basis that the plaintiff did not hold a letting agent's licence. The second notice alleged a breach of special condition 2 of the agreement. The notices, in accordance with cl 10.1.5 required the plaintiff to remedy the breaches within 14 days.

[32] On 26 October 2001, the plaintiff gave notice to the owners of all units for which it acted as letting agent that it would cease letting their units from that day.

[33] Mr McEvoy, acting on behalf of the plaintiff, gave notice to Mr Hurst on 14 December 2001 that the plaintiff would cease acting as the letting agent for the unit holders.

[34] Between 21 and 28 December 2001 the owners of seven units, namely units four, five, seven, 10, 13, 14 and 17, gave notice to the plaintiff withdrawing its authority to let their units. The notices from each of the unit owners used language which in some paragraphs was strikingly similar. The irresistible inference is that there had been some sharing of common written information between them or with them by someone such as Mr Hurst. The writers called to give evidence refused to accept that they acted in concert however it is at least likely they were acting with knowledge of their mutual intentions. The plaintiff submits their evidence on this aspect lacked candour and that there was obviously some sharing of written information. However even if, as seems likely, those witnesses were knowingly acting with mutual intent there is nothing wrong with that. Clause 8.2 of the Letting Agreement expressly acknowledged the owners of lots were free to elect to use another letting agent. That is, they had the right to withdraw their authority to let, regardless of whether they did so with knowledge others were doing likewise or in similar terms as others.

[35] In addition, it seems the owners wanted to withdraw their authority for a number of reasons. They had concerns about the manner in which the advertising account was being run, the fact that the plaintiff was falling behind on its payments to TransMetro and the frequency of errors in their accounts. Apparently some owners also thought that it would be preferable to have a steady income from a permanent tenant. The other obvious reason why some owners withdrew their authority was that they had discovered that the plaintiff had been operating without a licence for some two years.

[36] Despite the withdrawals of authority, it appears that the plaintiff let out some units in January 2002, in particular units four, five, 10 and 13, and, it is alleged, retained the entirety of the proceeds from those rentals. In January 2002, the proprietors of units 10 and 14 discovered this, prompting the proprietor of unit 10 to make a complaint to the Office of Fair Trading.
[37] The defendant then purported to terminate the management agreement by various notices of termination dated 7 February 2002. That date precedes the committee meeting at which it was formally resolved to terminate, which was on 11

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February 2002. This is explained by the fact that votes were actually submitted in writing prior to the meeting. The five members had all voted on or before 7 February.
[38] In total there were eight notices of termination. Each purported to terminate pursuant to a different ground. Three related to the failure to obtain the licence. One related to reg 84(e) of the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997, another to c1 10.1.3 and the other on the basis that it was a fundamental breach of c1 8.1.5.
[39] There were also two notices of termination relating to an alleged failure to maintain and or audit trust account records as required by law. These termination notices were made pursuant to reg 84(c) and c1 10.1.3.
[40] Another notice terminated on the basis that the alleged breach of special condition 2 represented a fundamental breach of the contract. The remaining two notices were issued pursuant to c1 10.1.2 for the failure to remedy the breaches as contained in the October 2001 default notices.
[41] I have already found the committee of the defendant was not entitled to terminate the plaintiff's caretaking and letting agreement, that being a matter requiring the authority of a general meeting of the defendant.
[42] On 23 January 2002, Ms Pusztay made a handwritten file note recording:

> 'If B/C approval is provided, we will be looking for A/R up to time they stopped letting + possible police investigation, refer Gwen before proceeding.'

[43] Another handwritten note dated 12 February 2002 states:

> 'Rang Chair of B/C - Ross Hurst … Famestock was apparently served with 10 termination notices on 8.2.02.
>
> Will send copies to this office.
>
> Would seem agreement is at an end and licence applications should be refused.
>
> However, await notices and then determine.'

[44] The Office of Fair Trading received the notices of termination on 22 February 2002.
[45] A few days later, on 25 February 2002 the application for licences made by the plaintiff and Mrs McEvoy were refused. The applications were refused on the basis that the eligibility requirements, namely the requirement that Mrs McEvoy have body corporate approval to carry on a business of letting lots in the building complex and for the plaintiffs application that the corporation had body corporate approval and that a director of the corporation was a restricted letting agent were not met under s 35(1) of the *Property Agents and Motor Dealers Act* 2000. The plaintiff was informed of this decision in a letter dated 7 March 2002.
[46] The plaintiff applied to an adjudicator for an order that the termination of the agreement was void. Ultimately, that application was dismissed on 29 May 2001 under s 201 of the *Body Corporate and Community Management Act* 1997 (Qld) on the basis that it should be dealt with in a court of competent jurisdiction.
[47] At an Extraordinary General Meeting of the defendant held on 22 August 2002 the McEvoys and associated entities exercised their lot entitlements to pass a series of resolutions, including for the removal of the current committee and chairperson.
[48] With Mr McEvoy as chairman of the committee, the plaintiff entered into new caretaking and letting agreements with the defendant in May 2003.

[49] The plaintiff did not resume letting the units but instead sold the letting and management rights to a third party in November 2004. The plaintiff claims that the letting pool at that time comprised nine units."

Implied duty to cooperate

[11] The appellant's argument that the respondent failed to perform its implied duty to cooperate to do what was necessary on its part to enable the appellant to have the benefit of the contract[3] focussed on the failure of the respondent through its then chairman, Mr Hurst, to inform the Office of Fair Trading in late 2001 that the agreement between the appellant

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and the respondent was still in existence. His Honour's conclusion on that factual issue was as follows:[4]

"[64] The evidence suggests there was communication occurring between Mr McEvoy and Mr Hurst about a potential letter to the Office of Fair Trading in October but not in the terms pleaded.
[65] In cross-examination the following exchange occurred:

'MR RYALL: Now - excuse me. Mr McEvoy, you had discussions with Mr Hurst during October about trying to reach some agreement? -- Yes.

And the idea of those discussions was that some accommodation be made between the body corporate and Famestock to allow Famestock to continue as caretaker and letting agent until it could sell its business to someone else?-- That's correct.

At 19 October or so of 2001, Mr Hurst indicated to you that he was prepared to send a letter to the Office of Fair Trading, I think it was at that stage, to say that the agreement was on foot. Do you remember that?-- It was a - yes, I do.

And that was followed by a letter, which I'll show you now and see if you recall? -- Yes.

Yes. So, that's a letter to you from Mr Hurst on-----?-- Yes.

And he signed it as the chairperson of the body corporate?-- Yes, he did.

And he says there that he thought there was an agreement reached on Friday the 19th of October between you and he?-- Yes.

That wasn't right, though, was it; you had a different proposal to put?-- There were discrepancies, yes.'

[66] The letter there referred to, of 26 October 2001 demonstrates that during the week prior there had obviously been discussions between Mr McEvoy and Mr Hurst working towards the plaintiff selling its management rights in an orderly manner. The letter explained an interim arrangement was agreed but later reneged on by Mr McEvoy:

'I am in receipt of your facsimile of 23 October. The contents of that letter are not acceptable to the Body Corporate committee.

The agreement which I believed I had reached with you and which you confirmed to me as late as in our telephone conversation of Friday, 19 October was as follows.

…
3. The Body Corporate would advise the Office of Fair Trading that although it regarded you as being in breech [sic] of the letting agreement it was prepared not to take any action for a period of three (3) months.
4. As a consequence of 3 the Office of Fair Trading would issue you with the appropriate licence for the limited period.
…

Your letter under reply indicates that you won't pursue this limited license [sic] and will accordingly not perform your obligations under the letting agreement.

It must be obvious to you that your response is not acceptable to the Body Corporate committee.'

[67] In the light of this evidence I would not have accepted that the request occurred as and when pleaded even if Mr McEvoy's evidence had been that such a request occurred on 22 October. At that stage any request for a letter would obviously have related to a heavily qualified communication of the kind contemplated in numbered para 3 of the above quoted letter of 26 October 2001.

[68] It is unsurprising that whether requested to or not the defendant did not provide a letter saying the agreement was still in existence in circumstances where the plaintiff had long been in breach of cl 8.1.5 and cl 8.1.6 of the letting agreement by operating unlicensed."

[12]

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The argument was that his Honour erred in those findings on the basis that he should have found that the respondent's breach was its failure to tell the Office of Fair Trading that the agreement was on foot when the implied duty to cooperate required it to say that. There was no evidence, however, as to what the attitude of the chief executive of the Office of Fair Trading would have been had the Office been told, for example, that the agreement was still on foot whether or not the parties were in dispute about it. One suspects that it may have treated such information as material to its decision but not determinative. The letter of 8 October 2001 set out at para [30] of the learned trial judge's decision referred to earlier makes it clear that the chief executive of the Office needed "unfettered documentary evidence" of the respondent's approval of the agreement. Given the body corporate's attitude to the breaches by the appellant such an approval was not forthcoming nor should it have been required to provide it.

[13] Therefore his Honour's conclusion that it was unsurprising that the respondent did not provide a letter, whether requested to or not, saying the agreement was still in existence, in the circumstances where the appellant was in breach of the agreement, is clearly correct. As Rolfe J said in the Supreme Court of New South Wales in *National Power Australia LLC* v *Energy Australia*:[5]

"The Court will readily imply a term in any contract that the parties shall co-operate to ensure the performance of their bargain. The degree of co-operation required, however, is to be determined, not by what is reasonable, but by the obligations imposed - whether expressly or impliedly - upon each party by the agreement itself. If one party is in breach of its duty to co-operate, so that performance of the contract cannot be effected, the other will be entitled to treat itself as discharged.

Similarly, if an agreement is entered into which can only take effect by the continuance of a certain existing state of circumstances, each party is under an implied obligation to do nothing of its own motion to put an end to that state of affairs, under which alone the agreement can become operative.

As I understand it, it has never been suggested that these well recognised obligations go to the extent of requiring a party to, in effect, abandon looking after its own interests in relation to the contract at least in the sense of not pursuing, if such a remedy is available, the right to terminate the contract for failure on the part of the other party to comply with its obligations under it. Nor, as I would understand it, is there any obligation on a party not to pursue any available remedies it may have under the contract by virtue of the breach of the other party. In the present case, of course, there is a positive obligation on the defendant to provide reasonable assistance."

[14] This approach also puts paid to another argument of the appellant, that the learned trial judge erroneously decided that the duty to cooperate was limited to the outset of the contract and was not a continuing obligation. What his Honour actually said was:[6]

"[78] The plaintiff submitted the implied term was 'to allow one to apply to renew or to keep one's licence during the term' and 'to keep people licensed'. The argument's premise seems to be that this was a situation where the plaintiff was seeking to renew or keep its licence. Under the duty to co-operate such a situation may have called for the defendant to do what was reasonably necessary to enable the plaintiff to have the benefit of the agreement by ensuring its existing licensed status did not lapse. But that was not the situation here. This

was not an instance of an existing licence coming up for renewal. The plaintiff had no licence to renew. The reality was that the defendant had not held a licence for over two years in breach of the letting agreement.
[79] The defendant conceded that the implied term would have required it to co-operate in the plaintiff's securing of a licence at the commencement of the agreement had it been necessary. That much may have been necessary to give business efficacy to the contract. However, there is an obvious distinction between that situation, when that which the parties had contracted for was being put in place, and the facts of this case. Here, the plaintiff was in material

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breach of the agreement in that it had been operating for over two years without a licence. It was no fault of the defendant that the licence lapsed and the plaintiff had been operating unlawfully and in breach of the agreement. The circumstances do not support an inference that there was a positive obligation on the defendant to co-operate with the plaintiff's attempts to procure a licence. Moreover, such an inference would run counter to the terms of the agreement.
[80] The very nature of the agreement meant that the parties in entering the agreement would have contemplated the plaintiff would remain licensed. The agreement does not bespeak the implication of a duty to co-operate so broad as to require the defendant to assist the plaintiff to remedy its breach and secure a licence after having operated unlicensed and in breach of the agreement for over two years."

[15] His Honour was correct in concluding that there had been no breach established by the respondent in respect of the implied duty to cooperate. Where the appellant breached the agreement by failing to renew its own licence the respondent was under no duty to tell the Office of Fair Trading that the agreement was still on foot when it was considering its own position in the matter because of the appellant's breach of the agreement which had, by then, occurred more than two years before. His Honour did not decide that the duty to cooperate was not a continuing obligation but said that it did not apply here where the appellant was itself in breach of the agreement.

Loss of commissions

[16] His Honour concluded that the appellant's claim for loss of commissions was premised on the assumption that its letting pool was diminished in December 2001 because of the respondent's alleged breach arising from its alleged failure to comply with the duty to cooperate. In the absence of such a breach no liability in damages would follow.

[17] His Honour went on to conclude that, in any event, by the time the *ultra vires* termination notice of 7 February 2002 issued, the plaintiff was no longer conducting the business of letting units as contemplated by the agreement. It had, on 26 October 2001, given notice to the owners of all units for which it acted as letting agent that it would cease letting their units from that day. It also indicated on 14 December 2001 that it would cease acting as the letting agents for the unit holders. As his Honour said:[7]

> "[110] … Its dilemma, of its own making, was that it was unlicensed and therefore could not conduct the business contemplated by the letting agreement. Its cessation of that business and any consequent loss of commission occurred earlier than the repudiation of 7 February 2002 and was not caused by it."

[18] His Honour was also unpersuaded by the evidence that the plaintiff had proved any loss of commission resulting from the defendant's repudiation.

[19] The appellant's submission was that his Honour failed to take into account that the appellant lost the chance to redeem its position with the owners of units because of its special position as the letting agent in the building and its connection with a chain whose business was the letting of similar units. That lost chance should have been reflected in a loss in the value of the business which should have been assessed by his Honour.

[20] The respondent argued that, even if there was conduct amounting to a repudiation on the part of the respondent, the appellant did not accept the repudiation and did not terminate the agreement but rather affirmed it by urgently applying to an adjudicator for an order that the agreement remained on foot. Mr Francis for the respondent submitted that an unaccepted wrongful repudiation that is not in itself a breach does not give rise to a right in damages.[8]

[21] The evidence supports his Honour's conclusion that any loss of commissions by the appellant did not result from any breach of contract by the defendant. As the respondent pointed out, the evidence from lot owners was that they were unhappy with the performance of the appellant as a manager and Mr McEvoy, a director of the appellant, conceded in cross-examination that it had not applied for a restricted letting licence after he became chairman of a new committee of the respondent at an extraordinary general meeting on 22

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August 2002 because, at least in part, it was his commercial judgment that none of the lot owners would want to use the appellant's services.[9] The evidence supported his Honour's factual findings about these issues.

[22] Further, the respondent argued that, as a matter of law, the appellant had the benefit of the management agreement up until it was given a new agreement in May 2003 and the issue of the notices of termination had not resulted in its losing its restricted licence. It had lost that by its failure to renew it.

[23] In those circumstances and, having regard to my view that the appellant has not established that his Honour's finding in respect of any breach of the implied duty to cooperate has been established, I agree with his Honour's conclusion that the claim for lost commissions was not made out.

The committee's conduct

[24] The committee's conduct that was said to establish a repudiation of the agreement by the respondent was the issuing of the termination notices on 7 February 2002.

[25] The normal rule is that a disclosed principal is not bound by its agent's act which is outside the scope of the agent's actual, implied or apparent authority unless the principal in fact authorised the agent to do the particular act or ratified it.[10] The learned trial judge concluded in this case that, although the committee of the respondent body corporate was not entitled to determine the appellant's caretaking and letting agreement, the body corporate was still liable in damages to the appellant in respect of its loss of some management fees totalling $37,632.53 on the basis that the committee's conduct evidenced a repudiation of the agreement by the respondent.

[26] His Honour had, at the outset of the trial, decided as a separate question that the committee of the respondent was not entitled to determine the appellant's caretaking and letting agreement, that being a matter requiring the authority of a general meeting.[11] That was because s 92(2) of the *Body Corporate and Community Management Act* 1997 (Qld) provided at the time of the purported termination notices that the general statement in s 92(1) that a decision of the committee is a decision of the body corporate did not apply to a decision on a "restricted issue".[12]

[27] A "restricted issue", by s 24 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (Qld), extended to decisions to change rights, privileges or obligations of the owners of lots included in a scheme. In this body corporate, community title scheme rights or privileges were conferred on the manager's lot, lot 1, including the right to use it for the purpose of caretaking. It also included the exclusive use of the office area in the lobby of the unit complex. His Honour concluded that under the by-laws those rights and privileges were clearly those of the owner of lot 1 with the result that a decision to terminate a current property management agreement must have been a decision to change rights and privileges in as much as it would remove the rights and privileges the appellant otherwise enjoyed as an owner of a lot.[13] That conclusion was not challenged at the hearing of the appeal as the first ground of the notice of cross appeal was not pursued.

[28] In deciding that the unauthorised termination notices issued by the committee on 7 February 2002 did breach the agreement, his Honour considered whether the acts of the committee beyond its power could manifest an intention that was attributable to the body corporate. In considering that issue, he referred to the reasons of Denning LJ in *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd*[14] where his Lordship said that the state of mind of the managers and directors of a company is the state of mind of a company and is treated by the law as such. The learned trial judge then went on to conclude that the committee's issuing of the termination notices had the effect of representing the company's intention not to be further bound by the agreement. He concluded that that was a repudiation on the part of the defendant, manifesting an intention that the respondent would no longer be bound by the agreement.

[29] The respondent's argument was that *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd* was a decision concerned with establishing intention on the part of the body corporate, not what intention may have been communicated to third parties by agents of it.

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There was evidence that the appellant here knew at the time of the issuing of the notices to terminate that there had not been a general meeting that had considered the question of the termination of the agreement. It would be deemed to have known that because of its status as a member of the body corporate. The appellant owned or was associated with a significant number of units in the body corporate.

[30] Mr Francis argued that the appellant, therefore, knew from the outset that the body corporate had not formed an intention not to be bound by the agreement and that the communication from the committee in the form of the notices of termination was not representative of the intentions of the respondent. It followed, in his submission, that the actions of the committee would have been seen by a reasonable person in the appellant's position therefore not to be actions on the part of the respondent that evinced an intention not to be bound by the agreement at all, but only an ineffective attempt on the part of the committee to take a step they were not authorised to undertake.

[31] He argued that the learned trial judge erred in finding that the appellant, when receiving the notices, would have inferred that the body corporate's intention was not to be bound further by the agreement so that there should not have been a finding that the acts of the committee amounted to a repudiation of the agreement on the part of the respondent.

[32] In that context, he relied also on the terms of s 92 of the *Body Corporate and Community Management Act* to which I have referred previously. The relevant subsections were:

> "92. **Power of committee to act for body corporate**
>
> (1) A decision of the committee is a decision of the body corporate.
> (2) Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee."

[33] He pointed out that the allegation by the appellant that these notices to terminate the agreement were in breach of s 92 had been made by the appellant since its pleading in August 2002 in circumstances where it was clear, because of the statute, that there was no actual or apparent authority in the committee to bind the body corporate. He referred to the decision in *Northside Developments Pty Ltd* v *Registrar General*[15] where Dawson J, when discussing Denning LJ's statement in *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd* and speaking of the organic theory used to impose liability upon companies beyond that which could be imposed by the application of the principles of agency alone, said that that theory "merely extends the scope of an agent's capacity to bind a company and there must first be authority, actual or apparent. It is only then that a person may be regarded not only as the agent of a company, but also as the company itself - an organic part of it - so that '[t]he state of mind of [the agent] is the state of mind of the company'."

[34] Here there was no actual or implied authority. That was made clear by the terms of s 92 of the Act and the Regulation, the legislature having prescribed how "decision making power is to be distributed between the body corporate in general meeting and the committee."[16] The appellant must also have known from its own position as a unit holder in the respondent that there had been no resolution of the body corporate

supporting the notices. So there was no apparent authority. Accordingly, in Mr Francis's submission, the conduct of the committee could not be treated as conduct of the respondent.

[35] At the trial the appellant referred his Honour to the decisions in *Vine* v *National Dock Labour Board*[17] and *Francis* v *Municipal Councillors of Kuala Lumpur*[18] as illustrations of the principle that a corporate entity can potentially be liable for the *ultra vires* acts of its committee. His Honour did not rely upon those decisions for the conclusion he reached but they were touched on by the appellant in the submissions. In the circumstances, it is appropriate to say something about them.

[36] In *Vine* v *National Dock Labour Board*, the respondent wrongfully delegated its power to dismiss a worker to a disciplinary committee instead of deciding the issue itself. It was that process of delegation to a committee which did

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not itself have the power to dismiss which led to the declaration that the termination of the appellant's employment was a nullity and that he was entitled to damages. That was an *ultra vires* act of the respondent itself. Here the purported termination notices were issued by the committee rather than by the body corporate which alone had the power to do that. There had been no attempt at delegation by the body corporate. It is difficult to see why the consequences of the committee's independent, unauthorised behaviour should be sheeted home to the body corporate so as to make it liable in damages.

[37] In *Francis* v *Municipal Councillors of Kuala Lumpur*, there had been a dismissal of an employee by municipal councillors who were his employers. He could, however, only be dismissed by the President of the Council. In refusing declaratory relief, the Judicial Committee of the Privy Council decided that there had been a *de facto* dismissal of the appellant by his employers, the councillors, who were therefore liable in damages. Their Lordships took the view that it would be wholly unreal to accede to the declaratory relief claimed that the appellant continued to be an employee. They distinguished the different factual situation in *Vine* v *National Dock Labour Board*. There was no analysis whether the allegedly *ultra vires* actions of the councillors should insulate them from the consequences of their own actions in purporting to dismiss the appellant or be ascribed, for example, to the President. It does not seem to have been a case where there was any analysis of the question whether the unauthorised acts of an agent should be attributed to the disclosed principal, which is the aim of the appellant here. Neither of those decisions deals with the issue in this case.

[38] Mr Savage QC for the appellant argued in reply that it was the behaviour of the respondent in refusing to perform the agreement after the purported termination by the committee that deprived the appellant of its rights under the agreement and justified his Honour's conclusion that the respondent had repudiated. That was not the case pleaded which relied only upon the sending of the termination notices and the conduct complained of in failing to perform the agreement was not shown to be conduct of the respondent rather than the committee members.

[39] For the reasons expressed earlier, therefore, I have concluded that it was incorrect to attribute the behaviour of the committee in issuing unauthorised termination notices to the respondent body corporate. It was clear that they were not actually or impliedly authorised to issue them by the statute which governed the relationship between the parties on this issue. Nor, from the factual situation known to the appellant or which should have been known to it, was there a basis for concluding that the committee possessed apparent authority to do what was done.

Conclusions and order

[40] For these reasons, it is my view that the appeal should be dismissed and the cross-appeal allowed with costs, with the effect that the judgment below should be set aside and judgment there should be entered for the defendant with costs.

Footnotes

1 See *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road Community Title Scheme* 24368 [2012] QSC 339 at [69]-[85].

2 See *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas (No 2)* [2012] QSC 339 at [20]-[49] (footnotes omitted).

3 See, eg, *Butt* v *M'Donald* (1896) 7 QLJ 68, 70-71; *Secured Income Real Estate (Australia) Ltd* v *St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607-608.

4 *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [64]-[68].

5 [1998] NSWSC 466 (Supreme Court of New South Wales, Commercial Division, 50036/1998; Rolfe J, 24 July 1998, BC9803545, unreported) at p 116. See also *ACN 096 278 483 Pty Ltd* v *Vercorp Pty Ltd* [2011] QCA 189 at [73] per Fraser JA; *Overlook* v *Foxtel* [2002] NSWSC 17 at [67] per Barrett J and *Asia Pacific Resources Pty Ltd* v *Forestry Tasmania* [1997] TASSC 1 (Supreme Court of Tasmania, No CV28/1996; Zeeman J, 15 January 1997 unreported, BC9700445) at p 29.

6 *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [78]-[80].

7 *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road (No 2)* [2012] QSC 339 at [110].

8 *Howard* v *Pickford Tool Co Ltd* [1951] 1 KB 417, 421, but see also *Cassatone Nominees Pty Ltd* v *Queenslandwide House & Building Reports Pty Ltd* [2008] QCA 102 at [20].

9 See AR43 l 40 - AR44 l 12.

10 See *Bowstead and Reynolds on Agency* (19th ed, 2010) pp 359 and 400, articles 71 and 75 at paras 8-001ff and 8-067ff; *Pianta* v *National Finance & Trustees Ltd* (1964) 180 CLR 146, 151-152, 154, 158; *Halsbury's Laws of Australia* [15-260].

11 See *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road Community Title Scheme* 24368 [2012] QSC 129.

12 *Body Corporate and Community Management Act* 1997 (Qld) Reprint 1F.

13 *Famestock Pty Ltd* v *The Body Corporate for No 9 Port Douglas Road Community Title Scheme* 24368 [2012] QSC 129 at [40].

14 [1957] 1 QB 159, 172.

15 (1990) 170 CLR 146, 201-202.

16 *Rakaia Pty Ltd* v *Body Corporate for "Inn Cairns" Community Titles Scheme 16010* [2012] QCA 306 at [42] per Gotterson JA. See also *Body Corporate for Palm Springs Residences CTS 29467* v *J Patterson Holdings Pty Ltd* [2008] QDC 300 at [46] per McGill DCJ.

17 [1957] AC 488.

18 [1962] 3 All ER 633; [1962] 1 WLR 1411.

ZHANG AND WU v SOUTH SKY INVESTMENTS PTY LTD AND ANOR

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(2012) LQCS ¶90-175; Court citation: [2011] QSC 367

Queensland Supreme Court

Decision delivered on 2 December 2011

Conveyancing — Contract for sale of an "off-the-plan" apartment — Where purchasers required the developer's plans to be modified to accommodate the existence of a private lift for access between the two levels of the purchasers' apartment — Where registered community management statement contained inaccuracies in one of the schedules on the statement regarding the number of the plan upon which the penthouse was identified — Where purchasers purported to terminate the contract and sought orders for the return of the deposit on the grounds that the contract was entered into under the common mistake of the parties that proposed by-law 50 in the community management statement (which was concerned with giving the purchasers exclusive use of the lift) was valid when in fact, it violated s 177 of the Body Corporate and Community Management Act 1997 — Whether purchasers entitled to terminate the contract pursuant to s 217 of the Act because of errors on the community management statement — Body Corporate and Community Management Act 1997: s 177, 217.

The purchasers (who were the applicants in the proceedings) were interested in purchasing an off-the-plan two-level penthouse apartment situated at the Gold Coast for $5.6 million. The respondent developer's plans depicted that the building was to contain (inter alia) two penthouses, each occupying half of level 40 and level 41. Among a number of factors which were important to the purchasers was the existence of a private lift for access between the two levels of their apartment. The developer agreed to this modification.

Information in the disclosure statement given to the purchasers ceased to be accurate as the development proceeded. The developers gave the purchasers a further statement purporting to rectify the inaccuracies. It advised that the community management statement had been amended and the exclusive use plans attached to it updated. The community management statement was registered, however, there were inaccuracies in one of the schedules on the statement regarding the number of the plan upon which the penthouse was identified.

The developers subsequently passed into receivership. The purchasers were duly notified of this fact and of the establishment of the community title scheme as well as the settlement date. The purchasers then purported to terminate the contract and sought orders for the return of the deposit on the grounds that:

> • the contract was entered into under the common mistake of the parties that proposed by-law 50 in the community management statement (which was concerned with giving the purchasers exclusive use of the lift) was valid when in fact, it violated s 177 of the *Body Corporate and Community Management Act 1997* because it purported to give exclusive use to "utility infrastructure which is common property". The by-law was also claimed to be invalid because it purported to confer the benefit of the by-law upon lots listed in the schedule on the statement that did not exist
>
> [140408]
>
> • the second disclosure statement was "inaccurate" within the meaning of s 217 of the Act, in that it had the same inaccuracies regarding the lots that did not exist. Such an inaccuracy was said to be materially prejudicial to the purchasers if compelled to settle because the inaccuracy had carried through to the recorded community management statement and the purchasers would be compelled to settle with an invalid by-law 50.

The developers countered that the Act did not prohibit granting exclusive use of the lift, that by-law 50 was not invalid and that the references to the lots that did not exist were a typographical error.

Held: for the respondents.

Mistake argument

1. The contract was not void for common mistake. The developers did not warrant the validity of proposed by-law 50. The law does not presume the validity of proposed by-laws or even their validity after the community management statement containing them is recorded in the Land Titles Register. Nothing prevented the due performance of the contract.

The existence or the validity of the by-law 50 was not a vital attribute of the consideration to be provided or the circumstances which must have subsisted for performance of the contract. The purchasers still had exclusive use of the lift as a result of the security system and access measures installed. Further, their private entries to the lift had been constructed and the main lifts did not go beyond level 40, with only the purchasers and the owners of the other penthouse having access to that level.

Section 217 argument

2. The error in the community management statement did not deprive the purchasers of the benefit of by-law 50. They would not have suffered material prejudice if compelled to complete the contract. Additionally, s 217 provides that the purchaser may terminate where (inter alia) "information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate". The inaccuracy was not contained in the disclosure statement — s 213 of the Act makes it clear that the proposed community management statement is not part of the disclosure statement. Further, the purchasers would have suffered no

material prejudice as a result of the error if compelled to complete as the error was obvious, and it was quickly and easily rectified once the developer's attention was drawn to it. Additionally, the error did not render anything in the contract void for uncertainty.

It was unnecessary to examine whether on the proper construction of the by-laws, there was in fact any real inaccuracy because the inaccuracy must be real or of substance as distinct from ephemeral or nominal: *Tillmans Butcheries Pty Ltd* v *Australian Meat Industry Employees' Union* [1979] FCA 85.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

P A Kronberg (instructed by WWS Lawyers) for the applicant.

J McKenna SC and J M Horton (instructed by Allens Arthur Robinson) for the first respondent.

R J True (solicitor) (instructed by Mallesons Stephen Jaques) for the second respondent.

Before: Fryberg J.

Fryberg J: The applicants want to get out of a contract to buy an apartment, and to get their deposit back. They seek a declaration of invalidity of the contract and an order for the payment out of court of the deposit monies. At the outset of the hearing, they abandoned an earlier claim that they had validly terminated the contract for breach. Although their written submissions raised a number of issues, they informed the court that they relied only on common mistake and s 217 of the *Body Corporate and Community Management Act 1997*.

2. The facts are not in dispute.

The negotiations

3. The applicants are husband and wife. Toward the end of 2007 they were interested in purchasing a two-level penthouse apartment at the Gold Coast for vacation purposes. Among a number of factors which were important to them was the existence of a private lift for

[140409]

access between the two levels. They inspected many apartments before deciding upon a penthouse in a development called Oracle Tower 2. It was listed for sale for $5.5 million. It had not yet been built, but the developer, South Sky, provided them with plans. These showed that the building was to contain two penthouses, each occupying half of level 40 and a substantial portion of level 41 and designated at that time as units CC and DD respectively. Living accommodation was on the lower level. Much of the upper level was occupied by building machinery, but the balance comprised a pavilion, swimming pool and spa for each unit and a raised recreation deck.

4. Access to level 40 from the ground was achieved by a bank of four lifts which also serviced lower floors. These lifts terminated at a lift lobby at level 40. Entry to each penthouse was through a door opening on to the lobby. Also opening on to the lobby was a lift which operated between level 40 and level 41 ("the penthouse lift"). On the upper level that lift opened into another lobby from which doors lead into the recreation area of each penthouse.

5. The applicants tentatively decided to purchase unit CC, but they wanted some substantial modifications made to it. They paid a preliminary deposit of $55,000 and entered into negotiations with the developer through their solicitors. In October 2007 the developer agreed to a number of modifications at their request and they agreed to pay the cost of these, $100,000 plus GST, at the date of settlement. One of the modifications affected the penthouse lift. By letter dated 24 October, the developer wrote:

> "Subject always to any necessary architectural, engineering or Authority approvals that may be required, we advise that we raise no objection to the request by the Buyers for the following on-site building variations (Works) to be undertaken, at the Buyer's cost, to Lot 24001:
>
> (a) Provision for exclusive internal life access between the media room adjacent to the lift on level 40 (Annexure 'A') to the pavilion for area marked Unit CC on level 41 (Annexure 'B')."

6. Whether by accident or design, one wall of the penthouse lift well butted up against a boundary wall of unit CC on both levels of the penthouse. The applicants through their solicitor asked the respondent to modify the plans to provide for the penetration of that wall on both levels and the insertion in the penetrations of lift entrances. This would provide them with direct access from inside unit CC to the interior of the upper level pavilion. That modification was duly made. It was an important modification to the applicants, in part it seems

because they believed that the lift provided the only means of access between the two penthouse levels. That belief was incorrect; there were also stairs.

The Disclosure Statement and the Community Management Statement

7. As might be expected, South Sky intended to establish a community title scheme under the *Body Corporate and Community Management Act 1997* for the building. Such a scheme is established when a plan of subdivision for identifying the scheme land is registered under the *Land Title Act 1994* and the Registrar records a Community Management Statement (CMS) for the scheme;[1] scheme land and the statement constitute the scheme.[2] The lots come into existence on the establishment of the scheme; until then they are proposed lots. The scheme land must consist of at least two lots.[3] Once the CMS takes effect, it is binding on lot owners[4] ; until it is recorded (under the *Land Title Act*) it has no effect.[5] A purchaser obviously has a considerable interest in knowing what is in it.

8. South Sky was not prohibited from entering into contracts of sale in respect of proposed lots before the tower was built. Before it did so, however, it was obliged to give the buyer a disclosure statement.[6] That was inevitably a very substantial document; the one which South Sky prepared for Tower 2 was, including the accompanying documents, 177 pages in length. It included a considerable amount of information and was accompanied by a number of documents as required by the Act. One of the accompanying documents was the proposed CMS.[7] If the proposed CMS had not existed[8] or the disclosure statement had not been given[9] , purchasers could terminate any contract which had not already settled.

9.

[140410]

The proposed CMS was 24 pages long (counting the attached plan). The first page was in a bar-coded form prescribed for recording under the Act in the Queensland Land Registry. The remainder comprised five schedules listed on the first page. As required by the Act, it identified the scheme land.[10] Panel 4 on p 1 provided:

> "**4. Scheme land**
>
> Description of Lot
>
> Lots # to # on SP 194241
>
> Lots # on SP 194241"

and specified the county and parish for both of the last two lines. The specific lots were not identified, I infer because it was intended to include them in an enlarged panel in the final version to be lodged in the Land Registry. Schedule A listed the lot entitlements, but only for lots 20101 to 22007. The omission of the remaining lots was of little consequence; sch B of the CMS, headed "Explanation of the development of scheme land", set out how the development would proceed. That schedule made it clear that the development was to be a staged development and that sch A listed only the 131 lots in stage 1. A complete list of all residential lots with their contributions and interests formed part of sch B, but it was made clear that those comprised in stage 2 were subject to change. The lot previously described as Lot CC was now numbered 24001; all of the lots in stage 2 were on plan 194266.

10. Because South Sky did not propose to adopt the by-laws in the schedule in the Act, sch C in the proposed CMS stated, "The by-laws in schedule 2 of the Act will not apply to the Scheme and the following by-laws will apply."[11] The proposed bylaws were then set out. Two of those bylaws are presently relevant:

> "**50. Exclusive Use Area — Lift (Penthouse Purposes)**

(a) The Occupiers of Lots mentioned in Schedule E under the heading **By-law 50 — Lift (Penthouse Purposes)** are entitled to the exclusive use of that part of the Common Property **(Penthouse Lift)** which is identified in Schedule E.
(b) The following conditions apply to such use:-

(i) the Penthouse Lift must only be used for the purpose referred to in Schedule E;
(ii) the Benefited Owners are liable to:

(A) keep the Penthouse Lift clean and tidy, in good repair and condition and properly maintained;
(B) ensure Penthouse Lift maintenance is regularly carried out;
(C) perform all the duties of the Body Corporate in respect of the Penthouse Lift including ensure that the Penthouse Lift are maintained to a standard commensurate to the standard of other facilities on the Common Property.

(iii) the relevant Owner and Occupier allowing the Body Corporate, the Committee and its properly appointed agents, access at all reasonable times to the Penthouse Lift for any proper purpose;
(iv) the Benefited Owners must contributed to all costs and expenses associated with the Penthouse Lift within 30 days of written demand from the Body Corporate. Such costs will be apportioned between the Benefited Owners based on the contribution lot entitlement of the Benefited Lots they own as a proportion of the total contribution lot entitlement of all the Benefited Lots.

(c) If an Owner or Occupier of a Lot does not carry out its responsibilities in accordance with this By-law ***50*** then the Body Corporate, and persons authorised by it, may enter upon the Penthouse Lift for the purpose of carrying out such responsibilities and the Owner will be liable for the costs incurred by the Body Corporate in that regard. Such costs must be paid on demand.

[140411]

(d) In this By Law:

(i) **Benefited Owners** means the Owners of the Lots to which this By-law ***50*** attaches;
(ii) **Benefited Lots** means the Lots to which this By-law ***50*** applies.

…

54. Special Rights — Building Levels

(a) Occupiers and Owners of Lots on each level of the Building will have the special right over that part of Common Property consisting of the foyers on their respective levels ***(Special Areas)*** so that a security and access control system can ensure that only Authorised Persons may access that level.
(b) ***Authorised Persons*** are those who are:-

(i) Occupiers of a Lot on the relevant level;
(ii) invited by an Occupier or Owner of a Lot on the relevant level to visit them;
(iii) persons maintaining Common Property;
(iv) the Caretaker; and
(v) such other persons as the Committee decides, acting reasonably.

(c) The Body Corporate must carry out its duties (including maintenance and operating duties) in respect of the Special Areas. If there is any doubt about the location or extent of the Special Areas, the determination of the Chairman of the Body Corporate (or his nominee) (acting reasonably) will be final."

11. By-law 50(b)(i) referred to sch E. That was a schedule to the CMS, not to the by-laws. It was entitled "Description of lots allocated exclusive use areas of common property". It dealt (or envisaged future dealing)

with car parks and storage and with a lift for construction and other purposes, and it also contained the following:

Lot No.	Area	Purpose
By-law 50 — Lift (Penthouse Purposes)		
Lot 24001 on SP 194266	Area L1 on plan marked "Area A"	Lift (Penthouse Purposes)
Lot 24002 on SP 194266	Area L1 on plan marked "Area A"	Lift (Penthouse Purposes)

On the attached plan, two levels were shown, level 40 and level 41. On each area L1 was the area of the penthouse lift. Lot 24002 was the second penthouse.

The contract and the further statement

12. By a contract dated 14 January 2008 South Sky sold proposed lot 24001 to the applicants for $5.6 million. The contract provided for payment of a deposit of $510,000 and I assume that this was duly paid.

13. Before it entered into the contract South Sky gave the disclosure statement to the applicants.[12] The following special conditions were included in the contract:

> "2.2 The Seller will cause, at its cost, the following alterations to be made t the layout of the Lot by settlement:
>
> (a) provide for private and exclusive entry internal lift access between the media room adjacent to the left on level 40 (refer to Annexure A) and the pavilion area marked Unit CC on level 41 (refer to Annexure B);
>
> …
> 3. Penthouse Lift Access
>
> The Buyer acknowledges that:
>
> (a) By-Law 50 of the CMS applies to the Lot ***(Lift Bylaw)***;
> (b) the Lift Bylaw gives the owner of the Lot and the owner of proposed Lot 24002 exclusive use of Area L1;
> (c) by settlement, the Seller will cause the Lift Bylaw to be amended as outlined in Annexure C; and
>
> [140412]
>
> (d) if, in accordance with Clause 25.1, the Body Corporate grants Lease to the Seller (or any person nominated by it) the Lift Bylaw will be amended to permit the lessee of the Lease to use Area L1 to gain access to and from the roof of the Scheme Buildings for the sole purpose of transporting equipment or material that is physically impossible to transport via the stairwell. To remove doubt, the lessee of the Lease is not permitted to use Area L1 as a general access way.
> 4. Rooftop Lease
>
> The Seller agrees that any Lease granted in accordance with Clause 25.1 will include a provision prohibiting the lessee of the Lease from using the leased area as a function area."

The applicants conceded that "exclusive" in cl 2.2(a) did not mean that the owners of Lot 24002 and their invitees were to be excluded from the lift.

14. Annexure C to the special conditions contained the following:

> "**50. Exclusive Use Area — Lift (Penthouse Purposes)**

(a) The Occupiers of Lots mentioned in Schedule E under the hearing **By-law 50 — Lift (Penthouse Purposes)** are entitled to the exclusive use of that part of the Common Property **(Penthouse Lift)** which is identified in Schedule E.
(b) The following conditions apply to such use:-

(i) the Penthouse Lift must only be used for the purpose referred to in Schedule E;
(ii) the Benefited Owners are liable to:

(A) keep the Penthouse Lift clean and tidy, in good repair and condition and properly maintained;
(B) ensure Penthouse Lift maintenance is regularly carried out;
(C) perform all the duties of the Body Corporate in respect of the Penthouse Lift including ensure that the Penthouse Lift are maintained to a standard commensurate to the standard of other facilities on the Common Property.

(iii) subject to 50(b)(v), the relevant Owner and Occupier allowing the Body Corporate, the Committee and its properly appointed agents, access at all reasonable times to the Penthouse Lift for any proper purpose;
(iv) the Benefited Owners must contributed to all costs and expenses associated with the Penthouse Lift within 30 days of written demand from the Body Corporate. Such costs will be apportioned between the Benefited Owners based on the contribution lot entitlement of the Benefited Lots they own as a proportion of the total contribution lot entitlement of all the Benefited Lots;
(v) if the Body Corporate, the Committee or its properly appointed agents or lessee intend to use the Penthouse Lift to move equipment or material of a significant size and nature ***(Equipment)*** the Body Corporate, the Committee or the agent shall first ensure Equipment is adequately protected to avoid damaging the Penthouse Lift. Any damage to the Penthouse Lift caused by the Equipment must be promptly made good by the Body Corporate at its cost.

(c) If an Owner or Occupier of a Lot does not carry out its responsibilities in accordance with this By-law ***50*** then the Body Corporate, and persons authorised by it, may enter upon the Penthouse Lift for the purpose of carrying out such responsibilities and the Owner will be liable for the costs incurred by the Body Corporate in that regard. Such costs must be paid on demand.
(d) In this By Law:

(i) **Benefited Owners** means the Owners of the Lots to which this By-law ***50*** attaches;

[140413]

(ii) **Benefited Lots** means the Lots to which this By-law ***50*** applies."

15. The Act envisages that information in the disclosure statement may contain errors or may cease to be accurate as a development proceeds. To deal with those situations it provides that if the contract has not settled, the seller must give the buyer a further statement rectifying the inaccuracies within 14 days or longer period agreed between the parties after becoming aware of an initial inaccuracy or after a supervening inaccuracy occurred.[13] By letter dated 7 June 2010 the solicitors for South Sky sent the solicitors for the applicants a further statement under the Act. It advised (among other things) that the (proposed) CMS had been amended and the exclusive use plans attached to it updated. A copy of the amended CMS with the updated plans was attached.

16. Page 1 of the CMS was not amended and panel 4 continued to lack specification of the lots in the development, but otherwise the amendments were substantial. Schedule A, the Schedule of Lot Entitlements, was expanded by the inclusion of stage 2 of the development, to include all 243 lots. All of the lots, including lot 24001, were stated to be on plan 194241. That was because in December 2008 South Sky decided to create the proposed lots in one stage only. Doubtless for the same reason, the content of sch

B (the explanation of the development) was entirely deleted and replaced with the words “Not applicable”. In sch C, the by-laws, by-law 49 (which had dealt with an exclusive use area for a lift for construction and other purposes) was replaced with a by-law entitled “Exclusive use area — Wine Lockers”. By-law 50 was amended as foreshadowed in the contract.[14] By-law 54 remained unaltered. Schedule E was altered to reflect the proposed wine lockers, but there was no amendment to the portion relating to the penthouse lift quoted above.[15] That was unfortunate, because the reference to SP 194266 was out of date. The two penthouses were now on plan 194241, as sch A showed.

17. Two consequences followed from the delivery of the further disclosure statement. First, the statement and all accompanying material became part of the provisions of the contract.[16] Second, the applicants acquired a right to terminate the contract by notice in writing given within 14 days if they would have been “materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or [had] become, inaccurate”.[17] They made no attempt to terminate at that time.

The CMS as recorded

18. In due course the Gold Coast City Council endorsed the CMS[18] , it was signed by South Sky as original owner[19] and on 25 August 2010 it was recorded in the Queensland Land Registry.[20] In the recorded version the “Description of Lot” in panel 4 was changed by the deletion of the last two lines quoted above[21] and their replacement with the words “See enlarged panel”. The first page was followed by two pages listing all of the lots in the tower under the heading “Enlarged panel”. The list included “Lot 24001 on SP 194241”.

19. There were also some changes in schedule E, the description of lots allocated exclusive use areas of common property. Previously the heading relating to car parks had not included a list of lots identifying the areas allocated for car parking and storage. These areas were now listed for each lot by reference to plans. The same was true of areas under the heading “Wine Locker”. Lot 24001 appeared in both cases; it was listed as being on SP 194241. Under the heading “Lift (Penthouse Purposes)”, the erroneous reference to SP 194266 remained uncorrected.

20. SP 194266 was never lodged at the Land Registry and remains in the possession of South Sky’s surveyor.

The outbreak of hostilities

21. On 1 April 2011 the solicitors for South Sky notified the applicants of the establishment of the community title scheme and nominated 6 May 2011 as the settlement date.[22] That letter disclosed to the applicants (if they did not know it already) that South Sky had passed into receivership.[23] The applicants sought counsel’s advice and on that advice obtained a copy of the CMS as recorded in the Land Registry. Shortly thereafter their solicitors identified the error in schedule E. On 21 April they wrote to the solicitors for South Sky purporting to terminate the contract. The grounds upon which they did so were expressed in the letter:

[140414]

> “It has now come to our client’s attention, after receiving Counsel’s advice that:-
>
> > (a) By-law 50 in the CMS as recorded purporting to give an exclusive use by-law in favour of our clients in respect to ‘the penthouse lift’ is not a valid by-law for two reasons:-
> >
> > > (i) that purporting to give an exclusive use by-law in respect to the penthouse lift is prohibited pursuant to s.177(1) of the *Body Corporate and Community Management Act 1997* (‘the Act’) in that it purports to give exclusive use to ‘utility infrastructure which is common property’ within the meaning of the Act; and
> > > (ii) by-law 50 as set out in the recorded CMS purports to confer the benefit of the by-law upon the Lots ‘mentioned in Schedule E’ under the heading ‘By-law 50-(Penthouse Purposes)’ as ‘Lots 24001 and 24002 on **SP 194266**’. The lots ‘mentioned’ do not exist at all and thus the by-law is invalid in not giving effect to ‘attaching to a Lot under the Scheme’ as required by s.170(1) of the Act, nor to ‘a

lot that is another community titles scheme', as required by s.170(2) of the Act, to be an 'exclusive use by-law';

(b) that the last disclosure statement dated 7 June, 2010, is 'inaccurate' within the meaning of s.217(b)(viii) of the Act, in that it has the same inaccurate reference to the 'Lots mentioned' as referred to in (a)(ii) above. Such inaccuracy will be materially prejudicial to our clients if compelled to settle, because that inaccuracy has carried through to the CMS as recorded and thus, as of today our client would be compelled to settle with an invalid by-law 50.

Accordingly, by virtue of (a)(i) above, the condition is impossible to be fulfilled, now or by the settlement date, entitling our clients to terminate.

Further, and in the alternative, the condition cannot be fulfilled because of (a)(ii) above, by the settlement date, in light of the statutory requirements to amend and record a new CMS, entitling our clients to terminate.

Further, and in the alternative, by reason of (b) above, our clients are entitled to terminate pursuant to s.217(d) of the Act."

22. The solicitors for South Sky responded on 29 April by asserting that the Act did not prohibit granting exclusive use of the lift; that by-law 50 was not invalid; and that the reference to SP 194266 was a typographical error. On the same day they lodged a request for a new CMS correcting the typographical error and the new CMS was immediately recorded. Nonetheless the applicants did not settle on the due date.

23. On 18 May the applicants applied for orders that they had validly terminated the contract and were entitled to the return of their deposit.

The applicants' submissions

24. The applicants submitted that they were entitled to terminate the contract on two bases:

"(a) That the Contract was entered into under the common mistake of the parties that the proposed bylaw 50 would be a valid exclusive use bylaw in respect of proposed Lot 24001 when in fact it was not, in accordance with s.177(1) of the BCCM Act;
(b) The last Disclosure Statement provided to the applicants dated 7 June 2010 was 'inaccurate' within the meaning of s.217 of the Act, in that it has the same inaccurate reference to the 'lots mentioned', being 'Lot 24001 and 24002 on SP 194266'."

The respondent's submissions

25. South Sky submitted that by-law 50 was a valid by-law and that even if it was not, any mistake was not a material mistake capable of supporting a decision that the contract was void. As to the argument based on s 217, upon the proper interpretation of the further (disclosure) statement, the information in it was not inaccurate, and in any event the applicants would suffer no material prejudice if required to settle.

The "Trial Arrangements" document

26. At the beginning of the trial the parties tendered a document headed "Trial Arrangements". That document provided:

"The parties approach the trial on the following agreed basis:

[140415]

1. SSI does not require the Applicants to formally prove the facts contained in:

a. paragraph 59 of the Applicant's submissions in Reply (up to and including the words *'not traverse other lots'*); and
b. paragraph 29 of the Applicant's primary submissions. These facts, however, do not displace evidence of Mr Wilkinson of the way in which the lift the subject of this proceeding actually operates.

2. The parties are approaching the question of construction of the contract and material prejudice as objective tests and as being supported only be evidence of that kind. The

Applicants' evidence of subjective matters goes only to their mistake case. The Applicants' counsel has, on this basis, withdrawn subparagraph 6(a) of his supplementary submissions.
3. On the basis outline in 2. above:

a. SSI does not object to the evidence of subjective matters deposed to by the Applicants;
b. the parties do not seek to cross-examine deponents;
c. the parties do not require their opponent's case to be put to their witnesses, the witnesses having had an opportunity, in affidavits, to respond to material aspects of the opponent's case.

4. The Applicants' Counsel will tender (without objection), a copy of the Applicants' solicitors letter of 31 May 2011 for the purposes of notifying the Court of a decision to abandon allegations as to anticipatory breach of contract earlier advanced in correspondence.[24] "

Having regard to the balance of these reasons, it is unnecessary to quote paras 29 and 59 referred to in para 1 of that document.

Mistake

27. In their outline of argument, the applicants submitted:

> "The Queensland Court of Appeal in *Australia Estates Pty Ltd* v *Cairns City Council* has authoritatively stated the principles of common mistake as set out in the English Court of Appeal decision of *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd*. Accordingly, the principles as set out in *Great Peace* or, alternatively, the rather narrow rule in *Taylor* v *Johnson* are applicable."

They did not expand upon the alternative submission, and did not refer to it orally. *Taylor* v *Johnson*[25] was a decision about unilateral mistake. It has no application to the present case. South Sky tacitly accepted the primary submission and developed its submissions accordingly.

28. I am far from persuaded that the primary submission is correct. *Australia Estates Pty Ltd* v *Cairns City Council*[26] was decided on several alternative bases and different members of the court placed different levels of emphasis upon those bases. Identification of a binding *ratio decidendi* is not easy. But this is not the case for an excursion into the fine points of Australian law relating to mistake in contract.[27] As far as this case is concerned, the parties accepted the law as stated in *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd*, in particular the following passage:

> "76 If one applies the passage from the judgment of Lord Alverstone CJ in *Hobson* v *Pattenden*, which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract. (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."[28]

They joined issue over the application of that law to the facts of this case. It is not appropriate for me to go beyond deciding that issue.

[140416]

Common assumption as to the existence of a state of affairs

29. The applicants submitted in their outlines that the parties assumed that an exclusive use licence could validly be given in respect of the penthouse lift, but it became apparent in the course of oral submissions that they were really relying upon an alleged mistake as to the validity of proposed by-law 50(a). In support of the existence of such an assumption they referred to special condition 3[29] of the contract and the letter

of 24 October 2007.[30] They gave no evidence that they or their solicitor had ever turned their minds to the efficacy of the by-law, much less that they had relied upon it in any way.

30. Special condition 3 of the contract was a term proposed by South Sky, not one sought by the applicants. Its function was to give the applicants advance notice of South Sky's intention to vary the proposed by-laws set out in the disclosure statement as it stood at the date of the contract by adding the underlined words. That was why it was phrased as an acknowledgement on the part of the applicants, not conferral of rights upon them. There was no variation proposed to by-law 50(a). The inclusion of the special condition in the contract is neutral in relation to the question whether the applicants or their solicitor relied upon a mistaken view of the validity of proposed by-law 50(a). Neither they nor their solicitor swore to any such reliance in their affidavits.

31. Nor can any such reliance be inferred from South Sky's letter of 24 October 2007. That letter does not refer to the by-laws, but only to internal lift access between the floors. I do not doubt that that was of some importance to the applicants, but it was not the subject of the alleged mistake. There is no evidence that the applicants were even aware of the proposed by-laws at the time of that letter.

32. However South Sky did not rely on this point. It submitted that the by-law was valid. In the alternative it submitted that notwithstanding any invalidity of by-law 50(a), the contract could still be performed in accordance with its terms; and in any event, invalidity of the by-law made no material difference to the applicants' position.

Impossibility of performance

33. The applicants submitted that invalidity of the by-law under s 177 of the Act rendered performance of special condition 3 impossible. That submission depended upon the further submission that special condition 3 should be read as if it meant or implied:

> "The parties enter into Special Condition 3 of the Contract on the basis of the proposed bylaw 50 as set out in Special Condition 3 can be validly effected as an exclusive use bylaw within the meaning of the *Body Corporate and Community Management Act 1997*."

With respect to counsel, that submission misconceived the purpose and effect of special condition 3. That condition stood simply as an acknowledgement by the applicants. It is impossible to imply the term for which the applicants contend.

34. The acknowledgement stands and has its force. South Sky did not warrant the validity of the proposed by-law. The law does not presume the validity of proposed by-laws or even their validity after the CMS containing them is recorded in the Land Titles Register[31] . Nothing prevents the due performance of the contract.

Vital attribute

35. The applicants submitted that in analysing this element of the test it was appropriate to have regard to what was written by Diplock LJ in *Hong Kong Fur Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd*. I quote part of the relevant passage:

> "The test whether an event has this effect or not [discharging a party from further performance of his undertakings] has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration or performing those undertakings?"[32]

In *Great Peace* the Court of Appeal wrote that in deciding whether an alleged mistake was fundamental in all the circumstances, that test could be of assistance.

36.

[140417]

In the present case, the validity or invalidity of the by-law makes no difference to the applicants' position. They still have the exclusive use of the lift. Their position is protected by the security system on the lifts and by the provisions of by-law 54. Their private entries to the lift have been constructed. The main lifts do not go beyond level 40 and only the applicants and the owners of the other penthouse have access to that level. Only they have the electronic keys necessary to operate the penthouse lift. The existence or the validity of the by-law was not a vital attribute of the consideration to be provided or the circumstances which must subsist for performance of the contract.

37. It is unnecessary to consider whether by-law 50 is valid. South Sky's alternative submissions are correct. The contract was not void for common mistake.

Section 217

38. After some uncertainty, the applicants relied upon the following parts of s 217:

> "**217 Terminating contract for inaccuracy of statement**
>
> The buyer may terminate the contract if—
>
> (a) it has not already been settled; and
> (b) at least 1 of the following applies—
>
> …
>
> (viii) information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate; and
> (c) because of a difference or inaccuracy under paragraph (b), the buyer would be materially prejudiced if compelled to complete the contract; and
> (d) the termination is effected by written notice given to the seller by the buyer not later than the latest of the following—
>
> (i) 3 days before the buyer is otherwise required to complete the contract".

They abandoned their original reliance on s 217(b)(i), doubtless because the CMS recorded for the scheme on its establishment was relevantly the same as the one most recently advised to them.

39. When the applicants purported to terminate the contract on 21 April 2011, it had not been settled. Settlement was due on 6 May 2011. Paragraphs (a) and (d) were therefore satisfied.

40. For the purposes of this submission, the applicants relied upon the error in sch E to the CMS, where, it will be recalled, the number of the plan upon which the penthouse was identified for the purposes of by-law 50 was incorrectly stated.[33] They submitted that the error was an inaccuracy which deprived them of the benefit of the by-law, and that they would suffer material prejudice if compelled to complete the contract.

41. That submission fails for at least two reasons: the inaccuracy was not contained in the disclosure statement; and it would cause no material prejudice to the applicants if they were compelled to settle. It is unnecessary to examine whether on the proper construction of the by-laws, there was in fact any real inaccuracy.[34]

42. "Disclosure statement" in s 217 is relevantly defined as a statement complying with s 213(2)–(4). Those subsections, among other things, specify what must be included in the statement and require that it be *accompanied* by the proposed CMS. Section 213 makes it plain that the proposed CMS is not part of the disclosure statement. Even if the incorrect plan number amounted to the disclosure of inaccurate information (a matter which is by no means clear), it was not information disclosed in the disclosure statement.

43. Moreover, for the reasons set out above[35] , the applicants would suffer no material prejudice as a result of it if compelled to complete. The error was obvious; it was quickly and easily rectified once South Sky's attention was drawn to it; and it did not render anything in the contract void for uncertainty.

Orders

44. The application is dismissed. I shall hear the parties as to consequential orders and costs.

[140418]

Footnotes

1 Section 24.
2 Section 10(1).
3 Section 10(2).
4 Section 59.
5 Section 52.
6 Section 213(1).
7 Section 213(2)(e)(i).
8 Section 212A(3).
9 Section 213(6).
10 Section 10.
11 Section 66(1)(e)
12 As the applicants acknowledged in cl 16 of the terms of contract.
13 Section 214.
14 Paragraph [13].
15 Paragraph [10].
16 Section 215.
17 Section 214(4).
18 Section 60.
19 Section 53.
20 *Land Title Act 1994*, s 115L.
21 Paragraph [8].
22 Under cl 5.1(a) of the contract.
23 Receivers were appointed on 16 December 2010.
24 The letter referred to in para 4 became ex 2.
25 [1983] HCA 5; (1983) 151 CLR 422.
26 [2005] QCA 328.
27 Described in a note on *Australia Estates* as "old, arcane, uncertain in application, complex and controversial": N Seddon, "Contract: Mistake Mistake", (2006) 80 ALJ 95.
28 [2002] EWCA Civ 1407; [2003] QB 679 at p 703.
29 Paragraph [12].
30 Paragraph [4].
31 *Land Title Act 1994*, s 115L(2)(b).
32 [1961] EWCA Civ 7; [1962] 2 QB 26.
33 Paragraph [11].
34 The inaccuracy must be real or of substance as distinct from ephemeral or nominal: *Tillmans Butcheries Pty Ltd* v *Australian Meat Industry Employees' Union* [1979] FCA 85; (1979) 42 FLR 331 at p 348, cited with approval in *Mirvac Queensland Pty Ltd* v *Wilson* [2010] QCA 322 at [24].
35 Paragraph [36].

GOUGH & ANOR v SOUTH SKY INVESTMENTS PTY LTD

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(2012) LQCS ¶90-176; Court citation: [2011] QSC 361

Queensland Supreme Court

Decision delivered on 2 December 2011

Conveyancing — Where plaintiffs contracted to purchase apartments "off the plan" in a development described as The Oracle — Where disclosure statement made provision for an on-site manager to conduct a letting business and provide services associated with the letting of apartments — Where letting agent eventually selected focused on short-term stays and provided certain hotel-like services to guests — Where plaintiffs claimed that the development was no longer a residential development but was a hotel/ resort — Whether development had ceased to be a residential development — Whether seller had repudiated contracts — Where certain purchasers also claimed that the disclosure statements had become inaccurate and that any such inaccuracy would cause them material prejudice if compelled to complete — Where some of the purchasers sought to avoid the contracts under s 214 of the Body Corporate and Community Management Act 1997 — Whether disclosure statements became inaccurate — Whether inaccuracy in the name of the development would cause material prejudice to the purchasers if compelled to complete the contracts — Body Corporate and Community Management Act 1997: s 214.

The plaintiff purchasers contracted to purchase apartments "off the plan" in a development described as The Oracle, situated on the Gold Coast. The development consisted of two high rise apartment towers and other low rise buildings containing retail, restaurant and commercial premises. The initial marketing of the development focused on its unparalleled status as a high-quality, luxury, residential development, perfect for the discerning retiree who desired long term residency.

The purchasers were given disclosure statements explaining that the development's residential component would be subdivided to create a community titles scheme and that it was proposed to appoint a caretaker who could carry on a business of letting lots in the scheme and who would occupy identified parts of the common property.

Prior to settlement, the purchasers received communications that announced that the letting rights had been acquired by Peppers Retreats, Resorts and Hotels and that The Oracle would be branded Peppers Broadbeach. Peppers focused on short-term and holiday letting and providing certain hotel-like services to guests. Peppers marketed the development as the "ultimate all encompassing hotel experience" being "a great hotel opposite the beach". Peppers was also permitted to place large neon Peppers' signage on the top of both towers as well as in and around the residential tower. A licence was granted and an application made to the local council for the establishment of an in-house restaurant and bar for the hotel guests to access.

The purchasers claimed that the final disclosure statement was inaccurate because it described the lots to be purchased as lots in a residential tower, whereas the apartments became part of a hotel/resort. It was thus asserted that the defendant developers had

[140420]

repudiated the contracts. Some of the purchasers claimed that they would be materially prejudiced if compelled to complete the contract pursuant to s 214(4) of the *Body Corporate and Community Management Act 1997* and were thus entitled to terminate their contracts due to the extent by which the disclosure statement, as amended, had become inaccurate.

Held: for the defendant developer.

1. The purchasers submitted that they contracted to buy a residential apartment in The Oracle, as identified on the location plan contained in the contract of sale. They argued that the developers had changed the underlying nature of the bargain by altering the development from a residential tower to a hotel/resort and by permitting the residential tower to be known and rebranded as *Peppers Broadbeach*.

However in providing for the lot to be in a residential tower, the contract did not additionally provide to the effect that the residential tower was to be of a particular kind (for example, occupied predominantly by owner-residents or for long-term residential purposes). Additionally, the Caretaking and Letting Agreement that was an annexure to the Disclosure Statement did not indicate that the letting business was confined to long-term tenancies — it gave for example, the entity conducting the letting business, authority to have and staff a tour desk.

2. The purchasers submitted that they were discharged from completing the contracts because the developers evinced an intention not to provide at settlement the subject of the contract, and instead, intended to provide a particular lot in a development which had become a Peppers hotel/resort.

However, the lots proffered by the developers in performance of the contracts were in a residential tower. The fact that the developers provided guests with certain "hotel-style services" did not mean that the tower had ceased to be a "residential tower". The fact that some of the occupants were there for a short term did not mean that the tower was not a residential tower. In its contractual context, a residential tower did not mean simply a tower for owners who are residents or long-term tenants.

3. The building did not have all of the features that would be expected of a typical, large, luxury hotel. The apartments were different from those in a hotel due to their physical size, the apartments being completely self contained and the duration of the average stay usually being longer than at a hotel. If the description "hotel" did not adequately describe its features, then it would be adequately described as consisting of self-contained apartments with access to many of the services that a hotel would offer.

The property through Peppers' on-site signage, on-site presence and extensive advertising of Peppers Broadbeach meant that the apartment tower had effectively been branded as Peppers Broadbeach. This branding went beyond the letting agent promoting its business (as the Caretaking and Letting Agreement envisaged it could) to a branding of the apartment tower. Further, at the time the various purchasers contracted to purchase their apartments, the development as a whole, and the residential tower that was promoted to them in particular, were branded as The Oracle. However, buyers who read the disclosure statement carefully or who reflected on the fact that their standard contract did not prevent them from letting their apartment for short-term or holiday letting, would have appreciated that the occupants of the tower would not only be owner-occupants or long-term tenants.

4. The form of alleged repudiation is conduct which "evinces an unwillingness or an inability to render substantial performance of the contract" (*Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* [2007] HCA 61). The purchasers' submission on repudiation was that the apartments purportedly offered in performance of the contract, were in a hotel/resort branded Peppers Broadbeach as opposed to a residential tower branded as The Oracle. As noted above, the tower was a residential tower whether described as a hotel, resort, hotel/resort or some other term. The purchasers' case on repudiation therefore turned upon

[140421]

whether the developers' failure to provide an apartment in a tower branded The Oracle as per the sale contract, and instead proffering an apartment in a tower with a different name, indicated an intention "not to provide at settlement the subject matter of the contract" because the relevant units were "substantially different from that contracted for".

The name of the tower was not pleaded or argued to be an essential term of the contract. The subject matter of the contract was a proposed lot in a residential tower. The failure to provide the relevant apartment in a tower branded as The Oracle did not indicate an intention not to provide at settlement, the subject matter of the contract. The unwillingness or inability to perform the term that provided for the tower itself to be known as The Oracle would not convey to a reasonable person, in the situation of the purchasers, renunciation either of the contract as a whole or of a fundamental obligation under it. As such there was no repudiation of the contract by the developers.

Additionally, the purchasers had not proven any departure from promised contractual performance in respect of the appointment of a letting agent in accordance with the Caretaking and Letting Agreement. There was no reduction in the value of the relevant apartments in consequence of the appointment of Peppers, its operation of the apartment tower and the branding of the towers as Peppers Broadbeach.

5. In order for the purchasers to have been entitled to terminate the contracts, any inaccuracy in the disclosure statements must have been "real or of substance as distinct from ephemeral or nominal" such as to impact on the bargain as per *Mirvac Queensland Pty Ltd* v *Wilson* [2010] QCA 322.

6. The matters noted in the disclosure statement which the purchasers claimed to have been inaccurate included:

- that the apartment purportedly offered was not an apartment in a residential tower in *The Oracle* but rather an apartment in a hotel/resort branded "Peppers Broadbeach". However, the disclosure statement described the lot as being in a residential tower which was not inaccurate. Further, the apartment was in a residential tower in The Oracle being the name of the development as a whole. Whilst it was true that the development had been rebranded as "Peppers Broadbeach", the change in the name of the tower itself was not alleged to have cause the purchasers material prejudice.
- the change in the focus of the letting business to short-stay tenants. This was claimed by the purchasers to have likely diminished the residential amenity of persons who resided in apartments that they owned or who resided there as long-term residents, compared to a letting business that did not have that focus. However, any such adverse effect would not have been because of an inaccuracy in the information disclosed in the disclosure statement but would be a result of a particular letting agent choosing to focus upon short-stay letting, as it was entitled to do under the Caretaking and Letting Agreement.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R G Bain QC and C C Heyworth-Smith (instructed by Johnsons Lawyers) for the plaintiffs/purchasers.

S L Doyle SC and D G Clothier (instructed by Allens Arthur Robinson) for the defendant developers.

Before: Applegarth J.

Applegarth J:

1. These eight proceedings, which were heard together, relate to "off the plan" contracts to purchase proposed lots in Tower One of a development described as *The Oracle* at Broadbeach on the Gold Coast. The development was undertaken by the defendant ("SSI"), and consists of two high rise apartment towers and other low rise buildings that contain retail, restaurant and commercial premises.

2.

[140422]

SSI was incorporated in 2001 for the purpose of carrying out the development. The apartments in Tower One were released for sale in 2005. The construction of the development commenced in about October 2007. The construction of Tower One was completed in October 2010.

3. The plaintiffs in each proceeding, with the exception of the plaintiffs in proceeding 12179/10 (Mr Gough and Ms Groves), entered into contracts in late 2005 or early 2006 ("the original contracts") with SSI. In June 2006 SSI obtained approval under s 29 of the *Land Sales Act* 1984 to extend from three and a half years to five and a half years the period of time in which it was required to provide a registrable instrument of transfer. As a result, the plaintiffs who had entered into the original contracts entered into new contracts in the second half of 2006. Mr Gough and Ms Groves entered into their contract with SSI on 17 October 2006.

4. At various times the plaintiffs were given disclosure statements. In general terms, the disclosure statements explained that the development's residential component to be known as *The Oracle* would be subdivided to create a community titles scheme, and that it was proposed to appoint a caretaker who could provide letting services for the owners of lots in the scheme, could carry on a business of letting lots in the scheme and would occupy identified parts of the common property.

5. Each plaintiff gave evidence of the type of development that they expected to be created, and about their intentions in relation to the particular apartment that they contracted to purchase. The personal circumstances of the various plaintiffs differed, as did their intentions in relation to their particular apartment. Some intended to occupy the apartment they agreed to buy. For example, Mr and Mrs Wicks intended to retire to the apartment they agreed to buy once Mr Wicks retired from his career as an airline pilot and they returned to Australia from their home in Hong Kong. Others hoped to on-sell the apartment before the date for settlement in order to make a profit. For example, Ms Ryan, a teacher's aide, who had limited assets, intended to on-sell proposed Lot 902 in order to be able to settle her contract contemporaneously with the contract she hoped to enter with another buyer. Her limited financial resources did not enable her to settle the contract otherwise, and she hoped to make a profit by on-selling the proposed lot. Other buyers intended to find a long-term tenant. For example, Mr Walsh and his business partner, Mr Hutchins, intended to find a long-term tenant for the apartment they contracted to buy, and Mr Hutchins thought that eventually he might live in the apartment with his family.

6. In general terms, the plaintiffs in each proceeding gave evidence that they expected to purchase an apartment in a residential tower known as *The Oracle*, and that the tower was to be an iconic, luxurious, up-market residence, providing a sense of community and a high level of amenity to its residents. These features were to give it an "exclusivity" or a quality that distinguished it from other high rise apartment buildings on the Gold Coast. The advertisements, sales brochures, sales agents' representations or other sources of information that gave rise to the expectations of individual buyers are not the subject of detailed or precise evidence. That is because this is not a case that relies on express or implied representations that were made by representatives of SSI or others in marketing *The Oracle* as the basis of the claim that has been brought by each plaintiff. Instead, it is a contract case.

7. Each plaintiff relies on the terms of a written contract. They also rely upon disclosure statements, and annexures to them, which are said to form part of the provisions of the contract by virtue of s 215 of the *Body Corporate and Community Management Act* 1997 (Qld) ("the *BCCM Act*" or "the Act"). On this basis, SSI is alleged to have promised that:

> (a) the relevant lot would be, and would be sold to the buyer as, an apartment in a residential tower in *The Oracle*; and
> (b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statement.

8. In about July or August 2010 the plaintiffs received communications that announced that the letting rights had been acquired by Peppers Retreats, Resorts and Hotels. Material sent by

Peppers on 12 August 2010 included a brochure that advised, among other things, that *Peppers Broadbeach* would be the "ultimate all encompassing hotel experience" and that *Peppers Broadbeach* would be "a great hotel opposite the beach".

9. The plaintiffs claim that the disclosure statement made under the Act, as amended by further statements, would not be accurate if now given as a disclosure statement because of numerous matters. In very general terms, the allegations are that each plaintiff contracted to purchase an apartment in a residential tower known as *The Oracle*, and the disclosure statements described the lot to be purchased as a lot in such a

residential tower, whereas the apartment in question is one in a hotel/resort branded *Peppers Broadbeach*. Certain plaintiffs claim that they would be materially prejudiced, as that expression is used in s 214(4)(b) and s 217(c) of the Act, if compelled to complete the contract by reason of the extent to which the disclosure statement, as amended, has become inaccurate because of a number of matters. The plaintiffs in three of the proceedings (Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan) purported to cancel their respective contracts pursuant to rights given to them under the Act within the time allowed by the Act. In all of the proceedings the plaintiffs claim that SSI evinced an intention not to be bound by the terms of the contract (and thereby repudiated the contract) in that:

> (a) SSI no longer intended to provide at settlement an apartment in a residential tower in *The Oracle* but rather an apartment in a hotel/resort to be known as *Peppers Broadbeach* with the features, attributes, uses and consequences alleged by them in their pleadings; and
> (b) any authorisation of a person as letting agent would not be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statements.

10. The plaintiffs seek declarations either that they were entitled to treat the contract as discharged and that the contract has been discharged, or that they validly cancelled the contract pursuant to s 214 or s 217 of the Act.

11. SSI denies that the plaintiffs in each proceeding were entitled to terminate the contract. By counterclaim in each proceeding it seeks specific performance of the contract, interest on the purchase price since the date for completion and damages.

12. At the risk of excessively simplifying the numerous allegations of repudiation, inaccuracy in disclosure statements and material prejudice that appear in the statements of claim in the proceedings, the essential complaint of each plaintiff is in two parts. First, they contracted to purchase an apartment in a residential tower, whereas on settlement they were proffered a lot in a development that had become a hotel or resort. The second is that *The Oracle* has been re-branded *Peppers Broadbeach*.

The statutory context

13. The evidence concerning the original disclosure statement given pursuant to s 213 of the *BCCM Act* and the further disclosure statements given from time to time, their alleged inaccuracy, and the prejudice that the plaintiffs say they would suffer if compelled to complete the contract make it appropriate to summarise the relevant provisions of the Act[1] concerning disclosure statements about a proposed lot. Section 213(1) of the Act provides that before a contract is entered into by a seller for the sale of a proposed lot, the seller must give the buyer a disclosure statement. A proposed lot is a lot that is intended to come into existence as a lot included in a community title scheme when the scheme is established or changed. Section 213(2) prescribes what the disclosure statement must state, include and be accompanied by. The disclosure statement must be "substantially complete".

14. Section 214 relates to the variation of a disclosure statement by a further statement. It applies if the contract has not been settled and:

> "(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or
> (b) the disclosure statement would not be accurate if now given as a disclosure statement."

If s 214 applies, then the seller must, within 14 days (or a longer period agreed between the buyer and seller) after the section starts to

[140424]

apply, give the buyer a further statement rectifying the inaccuracies in the disclosure statement. Section 214(4) provides:

> "The buyer may cancel the contract if—
>
> (a) it has not already been settled; and
> (b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and

(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."

The provisions of s 214 continue to apply after the further statement is given, on the basis that the disclosure statement is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date.[2]

15. Section 215(1) provides that the disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract. Section 216 states that the buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy.

16. Section 217 provides that the buyer may cancel the contract if:

(a) it has not already been settled; and
(b) at least one of the matters stated in sub-paragraph (b) applies; and
(c) because of the difference or inaccuracy under paragraph (b), the buyer would be materially prejudiced if compelled to complete the contract; and
(d) the cancellation is effected by written notice given to the seller by the buyer not later than the latest of the following—

(i) 3 days before the buyer is otherwise required to complete the contract;
(ii) 14 days after the buyer is given notice that the scheme is established or changed;
(iii) another day agreed between the buyer and the seller.

The relevant sub-paragraph of s 217(b) in this matter is:

"(iv) information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate".

17. If the buyer cancels a contract under the provisions of the Act in relation to proposed lots, then the seller must repay to the buyer any amount paid to the seller (including the seller's agent) towards the purchase of the lot the subject of the contract.[3]

18. The entitlement to cancel under s 214 arises in the context of a case in which a further statement is provided.[4] The entitlement to cancel under s 217 may arise where the disclosure statement is inaccurate and no further statement is provided. The entitlement to cancel under s 217 arises if, because of an inaccuracy in the information disclosed in the disclosure statement, as rectified by any further statement, the buyer would be "materially prejudiced" if compelled to complete the contract. The entitlement to cancel under s 214(4) arises if, among other things, the buyer would be "materially prejudiced" if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. The meaning of "materially prejudiced" in this context was discussed by Margaret Wilson J in *Wilson* v *Mirvac Queensland Pty Ltd*.[5] The Court of Appeal considered the concept of "material prejudice" in *Mirvac Queensland Pty Ltd* v *Wilson*[6] and approved the analysis and conclusions reached by her Honour. Her Honour had said that the following matters are clear:

"(a) The focus is on ***the*** buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?
(b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away …, material prejudice must be assessed in the light of the buyer's circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.

[140425]

(c) There must be a causal relationship between the inaccuracy and the prejudice.
(d) There must be proportionality between the inaccuracy and the prejudice.
(e) Because this is consumer protection legislation, it should be construed beneficially."[7]

Justice Jones (with whom McMurdo P and Fraser JA agreed) stated that, in the context of s 214 (and also s 217), the question of prejudice depends upon the information which has come to the buyer's actual knowledge and whether the information on an objective basis is inaccurate. The prejudice for the purpose of the section flowing from the inaccuracy arises from some detriment or disadvantage to the buyer.[8] A person would be "materially prejudiced" if disadvantaged "substantially" or "to an important extent".[9] Justice Jones cited *Vennard* v *Delorain Pty Ltd as Trustee for the Delorain Trust*[10] which suggested, in a similar context, that the phrase "materially prejudiced" meant "disadvantaged in a way which is substantial or of much consequence."[11] The concept that the buyer would be "materially prejudiced" requires a consideration of "the personal circumstances of the buyer in what is otherwise a determination to be made objectively."[12] Justice Jones concluded that material prejudice for the purpose of s 214 (and s 217):

> "has to be assessed in the context of the buyer's personal circumstances being required to complete the contract on its changed terms. The evaluation of whether any disadvantage or detriment reaches the level of material prejudice such as to warrant cancellation of the contract, must be objectively determined in accordance with community standards."[13]

The President, who agreed with these reasons, made reference to the apparently harsh result to the seller in the circumstances of that case, but stated that such a result was consistent with the scheme of the Act and its objects, which relevantly included the secondary object of providing "an appropriate level of consumer protection for … intending buyers of lots included in community title schemes".[14]

The Oracle

19. SSI was incorporated in 2001 as a special purpose vehicle to undertake the development of the project known as *The Oracle*. It was associated with Niecon Developments Pty Ltd ("Niecon") and Niecon provided staff and services to manage the development. The development is on about 12,336 square metres of land located at Charles and Elizabeth Avenues, Broadbeach. It is in a tourist precinct. It comprises two residential towers, with Tower One being 51 levels containing 265 apartments and Tower Two being 41 levels containing 242 apartments. Tower One is closest to the beach. There are about 70 different apartment configurations. There are more than 200 two or three bedroom apartments. There is a much smaller number of one and two bedroom plus study apartments. In addition, there are a small number of three bedroom plus media apartments and three bedroom plus study and media apartments. There are three penthouses. Apartment living areas range from 81 square metres to over 318 square metres. The apartments contain separate kitchens. The average sale price for the apartments at the time of their release exceeded $1,200,000. Niecon and SSI's Chief Operating Officer, Mr Mark Johnson, who oversaw the development, described it in his affidavit as a "substantial 5 star development, with very high quality finishes, spectacular aspect and position and extensive luxury facilities throughout the common areas." The development also includes, in a gallery below the towers, four three-level buildings housing boutiques, retail stores, restaurants, cafes and licensed premises.

20. The apartments in Tower One were first released for sale in late 2005. Each of the plaintiffs in the separate proceedings gave evidence concerning their expectations, and not all of them descended to great detail in relation to the information that they relied upon in deciding to buy an apartment in *The Oracle*. However, the marketing of the development focused on its unparalleled status as a high-quality, residential apartment tower. For example, the first plaintiff to give oral evidence, Mr Wicks, said that he was told about *The Oracle* in late 2005 when he told sales representatives of his and his wife's plan to retire to the Gold Coast. He said that he and his

wife were attracted to *The Oracle* "by what was proposed by way of luxurious, sophisticated residential living." Another plaintiff, Ms Ryan was told by a sales representative in late 2005 that *The Oracle* was to be "an iconic residential project with permanent and long-term residents only", and that the development was designed to attract "baby boomers" looking to downsize and move from homes into a luxuriously-appointed development with quality facilities and also to attract high-end, discerning owners looking for executive standard residences. She received promotional materials about *The Oracle*, including a large, glossy

brochure with a foreword written by demographer Bernard Salt, and a DVD which focused on the "iconic sophisticated residential nature of the development designed to attract owner/occupiers". The glossy blue brochure about *The Oracle* opens with a statement by Mr Salt about the "evolving preference by Australians for a lifestyle location in a warm climate." Mr Salt observes:

> "What had been lacking was a measure of city sophistication in these places to attract and hold the interests of aging, city-based baby boomers."

The brochure emphasised the lifestyle that *The Oracle* offered. One of its first pages stated:

> "LIVE, WORK, INDULGE IN YOUR VERY OWN FULLY INTEGRATED LIFESTYLE DEVELOPMENT".

The exclusive nature of *The Oracle* was conveyed on a page headed "WORLD CLASS LIFESPACES" which stated:

> "Every one of the residences at this landmark address will indulge its owners with world class lifespaces. The Niecon vision is to create rooms that enhance your life."

One of the stated advantages of living at such a "landmark address" was membership of what was described as "YOUR VERY OWN EXCLUSIVE CLUB". This page of the brochure stated:

> "Acquiring a residence in The Oracle is equivalent to achieving membership in a supremely private club. Owners will enjoy the privilege of access to the Niecon Executive Lounge, a space where you can socialise with like minded neighbours over a quiet game of billiards or retreat to the ultimate tranquillity and privacy of the Zen garden. Entertain guests with a selection from your personal temperate wine locker, enjoy quiet space for reflection in the library, or treat your family and friends to a screening in the private cinema. Exclusive features that make The Oracle a truly individual environment for our residents."

As to its location, the brochure posed a question:

> "Could you locate a more strategic address to live, work and relax?"

21. As previously noted, Ms Ryan and each of the other plaintiffs do not rely upon these representations as the foundation for a contractual term, or for any cause of action based upon a representation such as a contravention of the *Trade Practices Act* 1974 (Cth), s 52. Instead, these representations and the expectations they generated are relevant to the personal circumstances of each plaintiff in considering the issue of prejudice.

22. The promotion of *The Oracle* prompted a strong reaction when apartments in Tower One were released for sale in late 2005. Prospective buyers were able to sign expressions of interest. Mr Johnson describes the release of Tower One as very successful and says that there was "a frenzy to purchase *The Oracle* apartments off the plan." It was the first launch of quality apartments in Broadbeach for a long time. Whilst the popularity of the development was not surprising to him, the extent to which people were keen to purchase was higher than had been anticipated and people were "practically lining up to buy the apartments." He and other Niecon staff could not keep up with the pace at which people wanted to buy the apartments. Contract administrators were appointed to process the execution and return of contracts.

23. The process was for the contracts administrator to prepare a letter to the buyer or the buyer's solicitor, under cover of which the following documents requiring execution by the buyer would be sent:

[140427]

(a) the contract and associated forms required by the Act and the *Property Agents and Motor Dealers Act* 2000 (Qld) ("PAMDA");
(b) a Contract Disclosure Statement which contained a Developer Product Disclosure Statement, and another Disclosure Statement which itself included:

(i) a single page entitled "INFORMATION ABOUT THE DEVELOPMENT";
(ii) a Disclosure Statement given under the *BCCM Act*; and
(iii) a PAMDA Form 27c.

(c) an Operator Product Disclosure Statement.

24. The original contracts were executed by the buyers. In late May 2006 SSI obtained approval under s 28 of the *Land Sales Act* 1984 to extend the period of time within which it was required to provide buyers with a registrable instrument of transfer. Following that approval, SSI began preparing and issuing new contracts to buyers. As a result, the original contracts were replaced and discharged by new contracts. The reissuing and execution of new contracts did not involve the provision of an Operator Product Disclosure Statement to the buyers. However, new Disclosure Statements in the form described in (b) above were given. From time to time further statements were sent to buyers pursuant to s 214 of the Act.

Relevant provisions of the contract

25. After the pages consisting of statutory warning statements and the like, the first page of the contract is headed:

> "Contract of Sale
>
> The Oracle"

and bears the logo for *The Oracle* below which appears the name:

> "The Oracle
>
> Central Broadbeach"

The contract includes a number of plans, including the site plan, a matrix plan showing levels/floors and a draft building format plan. Each of the relevant plans is headed "The Oracle". The contract included various definitions, including the "Scheme" (being the community titles scheme to be created under the Act by SSI and comprising the Scheme Land and the Community Management Statement). Provision was made for the payment of a deposit and for SSI, at its discretion, to accept in lieu of a deposit a Security in favour of the deposit holder. Clause 3 related to the development and its subdivision. Clause 5 provided for settlement to occur on the "Settlement Date" and this was to be 14 days after SSI's lawyers gave notice to the buyer or its lawyers that the Scheme had been established, or changed, to create the Lot. The contract provided for time to be of the essence and for default interest. In Clause 16 the buyer acknowledged having received from the seller, before it signed the contract:

(a) a Product Disclosure Statement under the *Corporations Act*; and
(b) a Disclosure Statement under the *BCCM Act*.

26. Clause 18 of the contract described the development of "the Land" as comprising:

(a) the Retail Lot; and
(b) the Scheme.

In Clause 18.2 the buyer acknowledged that the Retail Lot would be used for commercial activities and would generate noise, pedestrian and vehicle traffic and related activities incidental to the commercial activities. Clause 18.3(a) related to commercial activities in the Scheme Buildings. By clause 18.3(a) the buyer acknowledged:

> "that the Scheme may contain up to two levels in the Scheme Buildings which are used for Commercial Purposes."

The clause defined "Commercial Purposes" to mean "any lawful purpose that is non-residential."

The Disclosure Statements

27. Those buyers who entered into the original contracts were sent a disclosure statement which is referred to in the pleadings as "the original disclosure statement". Another disclosure statement was given to these buyers pursuant to s 213 of the Act before they entered into the replacement contracts. The original disclosure statement and the new disclosure statement were in materially identical terms. One of its first pages was titled "INFORMATION ABOUT THE

DEVELOPMENT". The information page purported to give "a general outline of the development being undertaken by the Seller". It stated that:

> "The Seller intends to construct a residential and retail development.
>
> Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle, will be further subdivided by a building format plan to create a community titles scheme in respect of which there will be one body corporate. The Seller has not yet decided whether the retail component of the Development will be subdivided to create a community titles scheme. The retail component may also, at the Seller's discretion, be subdivided to create land from which another residential community titles scheme will be derived."

28. The disclosure statement given pursuant to s 213 of the Act stated that details of the terms of any proposed authorisation of a person as a letting agent for the Scheme proposed to be given after the establishment of the Scheme appeared in the Caretaking and Letting Agreement in Annexure 2. Annexure 2 consisted of a number of documents including the Caretaking and Letting Agreement.

29. Clause 3 of the Caretaking and Letting Agreement made provision for the remuneration of the Caretaker. Clause 3.6 provided that no part of the remuneration paid under cl 3 would be for carrying out any letting functions, providing any letting services or operating a letting business. Clause 4 defined the duties of the Caretaker.

30. Clause 6 of that agreement related to the Letting Business. It provided:

> "6.1 The Caretaker may carry on from the Caretaker's Unit the business of:
>
> (a) letting lots in the Scheme;
> (b) all associated services commonly rendered in connection with letting lots in developments similar to that comprising the Scheme; and
> (c) any other lawful activity.
>
> 6.2 The Caretaker may provide such letting service for such owners of lots in the Scheme as require that service. However the owners are free to choose whether or not to use the letting services of the Caretaker to be provided under this Agreement.
> 6.3 If the Caretaker decides to provide the services referred to in this clause, then it will supervise the standard of tenants of all such lettings arranged by it and ensure, so far as practicable, that no nuisance is created on the Scheme Land and that the Scheme and lots in it are not brought into disrepute.
> 6.4 In so far as it is lawful, the Caretaker may erect signs reasonably necessary in or about the Scheme Land for the purpose of promoting and fostering the letting business. Such signs must be temporary and moveable.
> 6.5 The Caretaker must comply with all laws in conducting the letting business."

31. Clause 16 of the Caretaking and Letting Agreement provided for the Caretaker's Unit to be used by the Caretaker for the purpose of management of the property, conducting the letting business and any other lawful purpose.

32. Clause 20 was headed "Occupation Authority". Its various sub-clauses gave the Caretaker the authority to occupy identified parts of the Common Property on certain conditions. These areas were identified as OA1, OA2, OA3 and OA4. In each case the Caretaker was authorised to use the area in question to perform its duties under the agreement "and for any other lawful purpose". Areas OA1, OA2 and OA4 were for the exclusive occupation of the Caretaker. In the case of OA3 the caretaker was authorised to use it "for special events, functions, presentations or any other lawful use" (which together were called an Event). Clause 20.3 permitted the Caretaker to charge a fee for persons attending an Event and to retain that fee as its property. The clause went on to make provision in relation to the prior booking or reservation of OA3 by an owner. Clause 20.3(e) entitled the Caretaker to serve alcohol, other beverages and food on OA3 but only if all appropriate licences were held and laws were complied with to allow such service.

33.

[140429]

Clause 20.5 authorised the Caretaker to place signage and other items. It provided:

> "20.5 The Body Corporate gives the Caretaker the authority to place (and, where appropriate, have manned) a tour desk, brochure stands, signage, vending machines and other similar things ***(Structures)*** (for example, without limitation, marketing activities and sale of products) on any part of the Common Property on the following conditions:-
>
> (a) the Caretaker must keep any Structures in good condition and repair and to a standard commensurate with the surroundings in which they are located (namely a high quality and standard);
> (b) the Structures must not materially inhibit the flow of persons on the Common Property;
> (c) the Caretaker does not have the exclusive use of the area in which the Structures are located.
> (d) if the erection and use of a Structure causes any damage to the Common Property (except for fair wear and tear), the Caretaker must promptly make good such damage."

34. The separate document entitled "Developer Product Disclosure Statement" had the purpose of informing buyers of apartments about the opportunity to make their apartments available to the Operator for letting purposes. Buyers were not obliged to appoint the Operator to let their apartments. This Developer Product Disclosure Statement ("PDS") was required by the Australian Securities and Investments Commission ("ASIC") as a condition of a class order given by it under the *Corporations Act* in respect of "managed investment schemes". The Developer PDS gave an overview of the development and indicated that a further document called an "Operator PDS" would be issued in relation to the management rights scheme known as the "Oracle MR Scheme". Part 7 of the Developer PDS identified the benefits of participating in the Oracle MR Scheme as follows:

> "(a) all services such as cleaning/servicing of rooms are on-site, and done in a timely manner to suit Guests' arrivals and departures;
> (b) on-site reception facilities to meet and check in Guests;
> (c) telephone connection to the main reception, and through the CTS central system;
> (d) ability to utilise all guest services such as room service, restaurants, tours, etc which can all be charged to the room;
> (e) the on-site building manager can make available any specials or promotions that may exist at that time;
> (f) the on-site building manager is readily able to deal with Guests' needs;
> (g) wholesale accommodation operators requiring accommodation for on-sale to retail customers often prefer to deal with on-site building managers rather than off-site letting agents. This is because of the convenience to wholesale operators of dealing with just a few on-site building managers rather than many individual agents;
> (h) Guests wanting to let apartments in particular resorts or buildings frequently make inquiries with on-site building managers rather than approaching off-site letting agents."

35. Part 10 of the Developer PDS was headed "Returns to Participating Apartment Owners". Part 16 related to the returns that might be expected from participation in the Oracle MR Scheme. It advised that the income that a participating apartment owner receives from participation is uncertain and may vary. Ultimately, "occupancy levels and room rates will determine the gross income" from letting an apartment. This part of the document identified a number of factors that affected occupancy levels, including demand, the Australian economy, different seasons and the Operator. As to the Operator, it stated:

> "The demand for rooms may be influenced by the contacts that the Operator has in the industry and the Operator's experience in operating similar properties. An Operator that is unknown in the accommodation industry may have more difficulty attracting Guests."

36.

[140430]

The Operator PDS was to like effect. The version that was provided to Mr and Mrs Wicks was dated 16 December 2005. It identified its purpose as offering apartment owners the opportunity to make apartments available to Sky Asset Management Pty Ltd (SAM) "for short term, holiday and medium term letting

purposes." It also gave an overview of the Oracle development and the benefits of participating in the Oracle MR Scheme. Clause 9 stated that the Operator would have "certain rights over part of the common property of the CTS, for example, rights to erect signage." These rights were said to be outlined in the proposed Community Management Statement. Clause 10 addressed returns to participating apartment owners. It defined apartment revenue as income received by the Operator for occupation only of the relevant apartment less "frequent flyer commissions, fees and other money payable to travel wholesalers and booking agents". Sub-clause 10(d) provided:

> "(d) Any fees, charges or other income received by SAM or any Manager which are not Apartment Revenue will not form part of the revenue paid to Participating Apartment Owners. For example, income from food and beverages, laundry and dry cleaning income and extra room servicing is not Apartment Revenue. That income will not be included in Apartment Revenue."

37. The Operator PDS contained provisions similar to the Developer PDS in relation to returns from participation in the Oracle MR Scheme including the factors that would influence demand for rooms. Clause 22 of the Operator PDS identified the main documents relating to the Oracle MR Scheme to be an application form, the appointment (PADMA Form 20a) and the Caretaking and Letting Agreement. It sought to summarise the key terms of the appointment as including the fact that the apartment owner appointed SAM "exclusively as agent for the Apartment Owner to let the Apartment for short term, holiday and medium term lettings." It enabled SAM to engage a manager to carry out its day to day activities. The definitions in cl 24 of the document included a definition of Apartment Revenue. Apartment Revenue was said not to include money that SAM received for selling goods and services to Guests or any other person. These goods and services were defined to include, without limitation:

> "(a) food and beverages;
> (b) laundry and dry cleaning;
> (c) extra room servicing;
> (d) entertainment, pay television, video hire and in-room movies;
> (e) telephone, facsimile or other communications services;
> (f) valet parking, arranging and providing transport;
> (g) gift shop and tour sales;
> (h) foreign exchange;
> (i) recreational facilities; and
> (j) conference room use and conference, office and business services and equipment use."

38. The Operator Product Disclosure Statement concluded with advice as to what an apartment owner who wanted to make an apartment available to SAM "for short term and holiday letting" must do.

39. The proposed Letting Appointment Agreement annexed to the Operator PDS referred to the agent's duties. The services that the agent was to provide included:

> "advise and promote the Property and The Oracle generally to travel agents, tourism operators and the public as a quality Guest accommodation".

The Further Disclosure Statements

40. SSI issued further disclosure statements from time to time. Again, adopting the further disclosure statements provided to Mr and Mrs Wicks as a convenient point of reference, on 27 September 2006 SSI provided a further disclosure statement pursuant to s 214 of the Act. It advised, among other things, that a Facility Sharing Agreement allowing the owners and occupiers of lots in the proposed Oracle Tower Two to use the facilities in The Oracle Community Titles Scheme had been varied, and that the facility sharing agreement for owners and occupiers of lots in *The Oracle* to use the facility in The Oracle Tower Two had been varied. It advised of variations in relation to the Facility Sharing Agreement benefiting the retail lot. It also advised that the proposed

[140431]

Caretaking and Letting Agreement to be entered into with the body corporate for *The Oracle* had been varied. The main changes to the documents that had previously been supplied were highlighted on attached

documents. The single page further statement dated 27 September 2006 and the attached documents run to almost 200 pages.

41. A document described in the pleadings as the second s 214 further statement was provided by SSI on 16 January 2007. It related to changes to the Community Management Statement and to the Body Corporate budget and levies, which are not presently relevant. The third s 214 further statement was provided on 22 December 2008. Among other things, it annexed an amended Caretaking and Letting Agreement.

42. On 28 May 2010 SSI provided the "fourth section 214 further statement". It advised that the occupation authority plans, attached to the Caretaking and Letting Agreement, had been updated and attached a copy of them. It also advised that the Caretaking and Letting Agreement had been amended and attached a copy of the amended document. The amended document identified South Sky Assets Pty Ltd as the Caretaker. The fourth s 214 further statement also advised, among other things, that the Product Disclosure Statement for The Oracle Community Titles Scheme that had been previously distributed had been withdrawn, and a copy of the withdrawal notification was attached. The withdrawal notice dated 28 May 2010 stated that Sky Asset Management Pty Ltd (SAM) had previously proposed operating letting schemes for apartment owners and that the buyer may have received a PDS about the letting schemes. SAM advised that the Product Disclosure Statements that it had previously issued had been withdrawn and that ASIC had been notified of the withdrawal. The reason for the withdrawal was that the ASIC class order provided that where the minimum purchase price exceeded $500,000 a PDS was not required, and SAM was withdrawing the PDS because minimum purchase prices at The Oracle and The Oracle Tower Two exceeded $500,000. The statement went on to advise that despite the withdrawal of the PDS, the seller advised that it still expected that buyers and owners would be able to participate in letting schemes at The Oracle and The Oracle Tower Two, and that updated details about the new proposed letting schemes would be sent to the buyer shortly.

43. It is unnecessary to detail for present purposes minor changes made to the Caretaking and Letting Agreements by the first, third and fourth s 214 further statements. The plaintiffs rely upon the fact that the amendments to the Caretaking and Letting Agreement for *The Oracle* did not change the terms of the Letting Business described in cl 6 of that agreement. SSI relies on the fact that the Caretaking and Letting Agreements annexed to the Disclosure Statement given under s 213 of the Act and to the first, third and fourth s 214 further statements provided, among other things:

> (a) for the Caretaker to provide letting services and to operate a letting business;
> (b) for the Caretaker's unit to be used for the purposes of the management of the property and conducting the letting business (and any other lawful purpose);
> (c) that the letting business involved the letting of lots, all associated services and any other lawful activity;
> (d) that the body corporate gave the Caretaker the authority to occupy part of the common property for special events, functions and presentations or any other lawful use and that the Caretaker might serve alcohol, other beverages and food in that area if all appropriate licences were held and laws complied with to allow such service;
> (e) that the body corporate gave the Caretaker the authority to place (and, where appropriate, have manned) a tour desk, brochure stands, signage, vending machines and other similar things on any part of the common property on certain conditions.

The plaintiffs' cases in relation to the disclosure statements

44. The plaintiffs rely upon the fact that the disclosure statement and the first, second, third and fourth s 214 further statements (and related material) were expressed to relate to *The Oracle* and/or The Oracle CTS. SSI admits this. There is no contest that the disclosure statement given

[140432]

under the Act, as varied by the first, second, third and fourth s 214 further statements, formed part of the contract by virtue of s 215 of the Act. The plaintiffs plead that, in the premises, there were further terms of the contract that:

> (a) SSI would sell to the plaintiff a specified lot "in a residential tower in *The Oracle*"; and

(b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement and as described in the Developer PDS and the Operator PDS.

The plaintiffs invoke s 216 of the Act and plead that they are entitled to rely on the information in the disclosure statement, the first, second, third, fourth (and, in one case, fifth) further statements, and the respective annexures to those as if SSI had warranted their accuracy. On that basis, the plaintiffs plead that SSI warranted to them that:

(a) the relevant lot would be, and would be sold to the relevant plaintiff as, an apartment in a residential tower in *The Oracle*; and
(b) any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the disclosure statement.

45. SSI admits that it was a term of the contract that, subject to the terms and conditions of the contract, it would sell to the plaintiffs the relevant lot in Tower One of *The Oracle* development, but otherwise denies that it was a term of the contract that any authorisation of a person as letting agent would be in the terms of the Caretaking and Letting Agreement, as pleaded by the plaintiffs. The denial is based upon, among other things, the additional terms pleaded by it in its defence and the fact that any authorisation by the body corporate for a person to be the on-site letting agent was to be on the terms of the Caretaking and Letting Agreement annexed to the fourth s 214 further statement.

The appointment of Peppers

46. Peppers was established in 1984 when Peppers Guest House opened in the Hunter Valley. According to its website, the "short break market" was then in its infancy. Its website states:

> "Today you will find the Peppers collection of Retreats and Resorts in the most extraordinary places throughout Australia and New Zealand. You will find us set amongst rainforests, vineyards and cities, as stately homes, on cattle stations, mountain ranges, golf courses, beaches and tropical islands, each property boasting its own individual charm and character."

Its web page titled "Escapes and Experiences" states:

> "At Peppers, our exquisite collection of Resorts and Retreats present a plethora of specialised escapes. Our romantic escapes offer the chance to reconnect while our indulgence escapes allow you to relish in life's luxuries. For blissful pampering try one of our renowned spas or for the ultimate in serene seclusion our beach or island escapes are perfect."

The website and other promotional material from Peppers is badged under the logo:

PEPPERS

RETREATS.RESORTS.HOTELS

47. Peppers forms part of the Mantra Group of companies. Mantra operates three divisions or brands — Peppers, Mantra and Break Free — which offer hotels, resorts, retreats and self-contained accommodation on a short-term or holiday basis. Each brand is positioned in different markets.

48. In about early 2009 SSI started to give serious thought to selling the management rights at *The Oracle*. In mid-2009 meetings were held with representatives of different groups who had expressed interest, including the Mantra group of companies. Any entity which was appointed to undertake caretaking/letting/management at *The Oracle* required substantial capacity since, with more than 500 apartments, the caretaking and letting activity was a substantial enterprise. After discussions, SSI decided that Mantra's top brand, Peppers, should be appointed because it was a "premium brand and because Mantra was prepared to offer a better price for the management rights." SSI thought that the Peppers brand would bring the level of professionalism and quality to *The*

Oracle that was required. As part of the negotiations, Mantra requested that a liquor licence be obtained in the name of South Sky Assets Pty Ltd ("SSA"), and application was made by SSA with SSI's consent.

Discussions between SSI and Mantra turned to how Mantra could provide guests who stayed in *The Oracle* with services, including mini-bars.

49. A Share Sale Agreement relating to the sale of the shares in SSA, a company then in the Niecon group of companies, was entered into on 14 July 2010. All the issued shares in SSA which were owned at the time by South Sky Enterprises Pty Ltd, another Niecon company, were sold to Peppers Leisure Pty Ltd, conditional upon certain events.

50. The amount payable under the Share Sale Agreement was the subject of detailed provisions. There were to be various payments, including a "Key Payment" for each qualifying lot in excess of 150 qualifying lots during the initial period ending on 30 November 2012. The payment of the purchase price was subject to, among other things, the Tower One body corporate consenting to an application by SSA for a liquor licence in respect of the relevant part of the land in the tower that SSA could occupy and the body corporate of Tower Two consenting to a similar application in respect of relevant land in that tower. The Share Sale Agreement contemplated "Restaurant Works" as part of the "Buyer's Fitout". The works are set out in Annexure L to the Share Sale Agreement and involve the creation of a restaurant and kitchen in Lot 101 (the Caretaker's Unit) on the ground floor of Tower One. In addition to the provision for SSA to obtain a liquor licence over the areas it was entitled to occupy, the Share Sale Agreement provided for SSA to apply for a liquor licence in respect of the restaurant and bar, and areas adjoining them, the lots and the "Authorised Common Property" (being the Occupation Areas). These provisions were to facilitate the service of liquor in the planned restaurant and bar, at events, in mini-bars and by room service. They were important to Peppers in delivering the services that were necessary to achieve the standards required of one of its resorts.

51. The Share Sale Agreement addressed the issue of signage and required SSI within 14 days of the establishment of the Tower One Scheme to cause the Tower One body corporate to approve the signage referred to in Annexure I. A similar obligation arose in respect of signage on Tower Two.

52. The result of the carrying into effect of this agreement has been the establishment of large neon Peppers signage on the top of each building. Other Peppers signage appears in and around the residential tower.

53. On or about 14 September 2010, the Community Management Statement for The Oracle Community Titles Scheme was registered. On 4 October 2010 the body corporate for The Oracle CTS entered into a Caretaking and Letting Agreement with SSA. On and from 7 November 2010 Peppers Leisure Pty Ltd caused SSA to operate its on-site letting business in respect of Tower One and Tower Two in accordance with the Caretaking and Letting Agreement. Although SSA was still a Niecon company, Peppers Leisure Pty Ltd assumed control of its activities under the Share Sale Agreement. The Share Sale Agreement settled on Monday, 28 February 2011. However, before this date Peppers signage had been installed and *Peppers Broadbeach* had been launched.

54. Shortly after the Share Sale Agreement was entered into, the appointment of Peppers was announced in a letter to buyers and also in a joint press release made on or about 23 July 2010. The letter stated that:

> "The Oracle will be branded Peppers Broadbeach and will be the flagship Peppers hotel."

The joint SSI/Peppers press release was titled:

> "Peppers to launch the Gold Coast's first five star hotel in a decade".

The press release, which was approved by SSI prior to its release, made a number of references to "hotel". The news of Peppers' appointment apparently attracted attention. Mr and Mrs Wicks received a letter dated 6 August 2010 from Noble House Design which stated:

> "We were delighted to hear of the appointment of Peppers as Residential Managers to The Oracle which will be branded 'Peppers Broadbeach'".

55.

[140434]

In late July, after the joint press release had been issued, Mr Mark Johnson, the Chief Operating Officer for both Niecon and SSI, says that he formed the view that it was not correct to call the development a hotel and he issued instructions to Niecon employees to request that Mantra not describe it as a hotel.

56. By this time, and despite the fact that the Share Sale Agreement was still conditional, Mantra had been provided with information about buyers to enable it to convey information to them.

57. By 12 August 2010, Mantra had prepared an "Owners Pack" and other material for distribution to buyers. Mr Johnson learned that the material had been printed for distribution that day, when he was told that Mantra had "boxes and boxes of documents printed and that it was too late for SSI to review it because they were being sent." Mr Johnson says that he asked Mantra's representatives to hold off sending information until SSI had had a proper chance to review it. However, the packs were sent without any review or approval by SSI. The material was sent under cover of a letter dated 12 August 2010 signed by Ms Simms of the Owner Relations Department of Peppers Retreats, Resorts and Hotels. It was on letterhead styled Peppers Broadbeach and referred to the appointment of Peppers as "onsite Hotel Managers". It referred to the opportunity for holiday letting, furniture packages and other matters. It enclosed forms that would facilitate its appointment by an owner as a letting agent. It attached a brochure that described *Peppers Broadbeach* as a hotel.

58. The material was sent by Mantra to buyers before SSI had an opportunity to review its contents properly and obtain legal advice about its implications for contracts with buyers. I accept Mr Johnson's evidence that SSI did not authorise or approve references in the packs to the development as a hotel.

59. On 24 August 2010 SSI sent a pro forma letter to owners advising that *The Oracle* precinct was nearing completion and that it was estimated that completion of the residential buildings (and settlements) should occur in early to mid October. It informed owners about the opportunity to undertake an inspection and provided contact details for various inquiries, including inquiries about the holiday or permanent letting program.

60. On 30 August 2010, Ms Simms from Peppers Broadbeach sent a letter to owners which stated:

> "By now you would have received Owners Packs outlining the letting program to be operated from The Oracle and The Oracle Tower 2. As you know, South Sky Assets Pty Ltd is to be the Caretaker of each tower in line with the disclosed Caretaking and Letting Agreements. The Caretaker will be operating the holiday letting pool under the *Peppers Broadbeach* brand."

The letter went on to advise that *Peppers Broadbeach* had a guest program that was "developed to not only provide you as an owner with great 'hotel style' services and management, but offers many services not available to any other apartment owner or guest on the Gold Coast."

61. Despite requests from SSI to Mantra/Peppers' representatives not to refer to the development as a hotel in the marketing, Ms Simms sent an email to a buyer in September 2010 which again referred to the development as a hotel. Ultimately, SSI instructed its solicitors to write to Mantra demanding that they cease referring to the development as a hotel in any marketing. Mantra eventually agreed to cease referring to the development as a hotel and made amendments to its website. However, it continued to communicate with owners and others by referring to *Peppers Broadbeach* rather than *The Oracle*. For example, a letter dated 24 September 2010 from Ms Simms of Peppers Retreats, Resorts and Hotels was sent on Peppers Broadbeach letterhead and referred to Peppers holiday letting packs. It stated: "In the 4 weeks since we commenced taking bookings for Peppers Broadbeach, bookings have been incredibly strong and we have already oversold on various room nights."

62. These communications were apt to alert buyers who had contracted to purchase an apartment in Oracle Tower One that the letting agent intended to engage in the business of short-term and holiday letting. This would not have come as a surprise to a buyer who had read the various disclosure statements and other

documents that had been sent to them over the previous years. Earlier in 2010 SSI had written to buyers from time to time about the letting program. A pro forma letter dated 22 February 2010 advised owners that SSI had been "busy finalising our in-house Oracle Management and Letting Program." This letter advised that SSI could "dove-tail an ideal holiday letting program that will work with your own requirements for using your apartment". Other letters sent to buyers before the announcement of Peppers' appointment also informed buyers about a holiday letting program. For example, a letter dated 31 May 2010 to Mr and

Mrs Wicks stated that the advantage of using the in-house management team included "walk-in bookings", convenient on-site check-in and other services guests would expect from a facility of such stature.

63. In short, after the Share Sale Agreement was entered into, and prior to the date for settlement of the buyers' contracts, the fact that the letting business would be operated by Peppers was communicated to buyers. Certain correspondence continued to refer to "The Oracle and The Oracle Tower 2". SSI did not give a further disclosure statement relating to the implications of the Share Sale Agreement. However, the Share Sale Agreement related to the sale by the developer of management rights, and a disclosure statement given under the Act is not required to disclose the terms of such a sale. If, however, such an agreement alters the terms of a Caretaking and Letting Agreement which has previously been disclosed pursuant to s 213 or s 214, so that the disclosure statement has become inaccurate, then this will attract the provisions of s 214 and s 217.

64. The Share Sale Agreement, in effect, stated the terms upon which South Sky Enterprises Pty Ltd (SSE) would sell the management rights business to Mantra/Peppers. The mechanism for the sale was the sale of SSE's shares in South Sky Assets Pty Ltd (SSA) to Peppers Leisure Pty Ltd (Peppers). The agreement was conditional upon a number of matters, including entry by the body corporates of the Tower One and Tower Two schemes into Caretaking and Letting Agreements in the form that had been disclosed to buyers. It was also conditional upon:

> (a) the body corporate consenting to applications for liquor licences over areas it was entitled to occupy;
> (b) the body corporate approving the alterations required for a restaurant and bar to be constructed in Lot 101;
> (c) the body corporate approving certain signage in accordance with the Caretaking and Letting Agreements.

The signage for which the Share Sale Agreement provided included Peppers "hero signs" atop each building and signs at the lobby entrance to each building.

65. The conditions of the Share Sale Agreement were implemented over time. The hero sign on Tower Two was installed in December 2010 and the one on Tower One in March 2011. On 1 October 2010 the first meeting of the body corporate for The Oracle was held, and the South Sky interests procured resolutions to enter the Caretaking and Letting Agreement with SSA, to consent to applications by SSA for a liquor licence over the lots and certain areas of common property and for the erection of signage in accordance with a signage plan.

66. A liquor licence was granted on 8 December 2010. The licence is a Subsidiary On Premises licence relating to The Oracle, which means that alcohol can only be served whilst SSA adheres to its primary function of providing accommodation. Since the liquor licence was granted, some apartments have been excluded from it, reflecting the fact that owners who do not wish to have it apply to their apartments can choose not to do so.

67. An application was made to the Gold Coast City Council for confirmation that the proposed restaurant and bar is generally in accordance with the existing approval. The restaurant and bar are yet to be built within Lot 101, but their establishment is important to Peppers in ensuring it achieves its desired rating, and this apparently requires an in-house restaurant and bar for its guests to access. In support of the application the Mantra Group's Director of Acquisitions wrote to the Chief Executive Officer of the Gold Coast City Council on 6 April 2010 and advised that, without a restaurant and kitchen, Mantra could not brand *The Oracle* as a "Peppers Resort"

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and that a "restaurant facility and room service is something that is expected in a 4.5–5 star strata titled resort." The letter concluded:

> "Although it is hoped that the restaurant will obtain a good reputation for its quality of service, it is not intended to be advertised for the general public. It is understood that it will be of such a capacity to service in-house guests and residents.

It is critical for the resort branding for Peppers at the Oracle to have a restaurant facility. A restaurant and room service facility is ancillary to its management rights business."

68. In the months immediately preceding the date for settlement of their contracts the plaintiffs knew of the appointment of Peppers as Caretaking and Letting Agent, and they received a variety of communications from both SSI and Peppers. Initially SSI stated that: "The Oracle will be branded Peppers Broadbeach and will be the flagship Peppers hotel." This was said by SSI on or about 23 July 2010. SSI and Peppers jointly announced the same thing. Peppers continued to describe *Peppers Broadbeach* as a hotel, despite SSI's requests that it not do so.

69. On 29 November 2010, which was after the date for settlement fixed by the contracts, SSI's Group Operations Manager wrote to purchasers noting that SSI's earlier advice that "The Oracle/Peppers Broadbeach would be the flagship Peppers hotel" had caused some confusion. The letter advised:

"While the 'Peppers Broadbeach' brand features prominently, the precinct includes the same luxury residential buildings and facilities which we started constructing in 2006. The Peppers group will be offering hotel-like services for the precinct, but The Oracle/Peppers Broadbeach is not a hotel. The two towers (called The Oracle Tower 1 and The Oracle Tower 2) are not hotel buildings. The Oracle/ Peppers Broadbeach comprises two luxury residential buildings, with all the facilities and services you'd expect to find in a hotel."

70. SSI's caution after July 2010 in not wanting *The Oracle* described as a hotel is understandable. As Mr Johnson explained in his evidence, the building had not been approved by Council for use as a hotel. At least one buyer had complained following the announcement about Peppers, and Mr Johnson was concerned that some buyers would use the description of *Peppers Broadbeach* as a hotel to avoid their contracts.

71. SSI had permitted the development to be described as a hotel in the joint press release of 23 July 2010, despite knowing that the development approval did not allow the building to be described as a hotel. Shortly afterwards Mr Johnson reflected on the matter and issued a standing instruction to his staff to request that Mantra not describe the development as a hotel. Part of the concern was that the building did not have a certificate of classification for hotel use, and an associated concern was that inaccurate descriptions of the building might prejudice contracts of sale. SSI sought to review documents, such as the material sent by Peppers to owners on or about 12 August 2010, because of a requirement of its financiers not to put any of the contracts of sale under threat.

72. After the 23 July 2010 joint press release, SSI received at least one protest from a buyer of a proposed lot. A question asked of Mr Johnson during his cross-examination tended to suggest that there were protests from more than one buyer, but Mr Johnson's answer referred to a "query from a buyer". There is no evidence that there was a large number of protests, and on the evidence there may have been only one, it having been made shortly after the 23 July 2010 joint press release.

73. The plaintiffs in these proceedings did not complain to SSI prior to the date originally set for settlement about the appointment of Peppers, save for Mr Gough and Ms Groves who purported to terminate in a solicitor's letter dated 13 October 2010, some six days before the settlement date. The letter complained about the promotion of the development by Peppers as a "hotel" and an increase in letting fees over those previously estimated. Ms Ryan gave her reasons for not complaining earlier than her solicitor's letter of 4 November 2010. She was hoping to be employed by Niecon and did not want to sound like she "hated the building". One plaintiff, NOA 8338 Pty Ltd, by its

director, Mr Ford, communicated with Peppers in October 2010 about possible arrangements for leasing the apartment it had contracted to purchase. It is possible that the plaintiffs did not know the extent to which Peppers intended to brand the building as *Peppers Broadbeach*, and they were not told about the terms of the Share Sale Agreement that facilitated this by signage. They were not told about plans for a liquor licence of the kind contemplated by the Share Sale Agreement or of the plan to have a ground floor restaurant and bar so as to facilitate Peppers' plans. Still, the plaintiffs were aware after July/August 2010 of the appointment of Peppers, and of its plans to use the *Peppers Broadbeach* brand and to promote short stays and holiday lettings. The plaintiffs did not complain to SSI about these things soon after becoming aware of them, or complain about the services that they expected Peppers would supply to its guests.

Purported terminations

74. After The Oracle CTS was established, SSI's solicitors sent letters to buyers nominating settlement dates. Some of the plaintiffs negotiated short extensions of time within which to settle. The first settlements were set for 19 October 2010. In various forms, and on various dates, the plaintiffs in each of these proceedings purported to cancel the contract.

Common issues

75. The pleadings in each proceeding are in a generally similar form. In each proceeding the same essential allegation is made, namely that the plaintiff contracted to purchase an apartment in a residential tower in *The Oracle* when in fact the apartment purportedly offered in performance by SSI is an apartment in a hotel/resort branded *Peppers Broadbeach*.[15]

76. The statements of claim in each proceeding continue with allegations along the same lines. For example, it is alleged that the plaintiff contracted to purchase an apartment the resale value of which would be determined by reference to it being an apartment in a residential tower in *The Oracle* and not an apartment which is an element in a hotel/resort branded *Peppers Broadbeach*. Additional allegations along these lines are made in respect of the rental value of an apartment in a residential tower in *The Oracle* rather than an apartment in such a hotel/resort branded Peppers Broadbeach. Further allegations are made in relation to the ability to advertise and let through an off-site agent and the ability to obtain on-site caretaker and letting services in accordance with the disclosed letting agreements, which are pleaded to have been more favourable to an owner than that available through Peppers. The plaintiffs plead that the practical consequence of the apartment being in a hotel/resort branded *Peppers Broadbeach* rather than an apartment in *The Oracle* will include:

> (a) an increase in the extent and intensity of use of common areas because of the increased number of persons (hotel/resort guests and hotel/resort staff) using it;
> (b) an increase in the public access and use of the development resulting in a reduction of privacy and security;
> (c) a compromise of the plaintiffs' use and enjoyment of the apartment and common areas;
> (d) accelerated deterioration of common areas;
> (e) preventing the plaintiffs from attracting persons who do not wish to stay in a hotel/resort; and
> (f) preventing the plaintiffs from attracting persons who do not wish to stay in a premises the subject of a liquor licence.

77. By reason of the date upon which they purported to cancel, only some of the plaintiffs are able to seek to invoke the statutory right to cancel under s 214(4)(b) and s 217(b)(iv). However, each plaintiff alleges that the final disclosure statement has become inaccurate on a number of grounds. These include the fact that the disclosure statement describes the lot as a lot in a residential tower, whereas the disclosure statement if now given would state that the lot was an apartment in a hotel/resort, and also would state that the lot is in a hotel/resort branded "*Peppers Broadbeach*".

78. Reliance is placed upon the fact that the Caretaking and Letting Agreement, if given now, would have to disclose that the plaintiffs would have no practical ability to let the lot through an off-site agent or privately because:

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> (a) the development is branded as *Peppers Broadbeach* and as a hotel/resort rather than apartments available for holiday letting in the normal course;
> (b) The plaintiffs would not be able to use the name and mark *Peppers Broadbeach* in order to advertise the apartment; and
> (c) The plaintiffs would not be able to use the name and mark *The Oracle* in order to advertise the apartments.

79. Another ground of alleged inaccuracy is that the Caretaking and Letting Agreement, by cl 6, enabled the caretaker to erect temporary and moveable signs for the purpose of promoting and fostering the letting business whereas the disclosure statements if given now would disclose that the caretaker would be entitled

to affix signage to and above the scheme property, including signs erected on the exterior of Oracle Tower One and Oracle Tower Two identifying each tower as “Peppers”.

80. The plaintiffs place reliance upon the terms of the Share Sale Agreement as part of their respective cases. Particular reliance is placed upon the provision of the Share Sale Agreement in relation to a liquor licence, the restaurant and bar to be established in the caretaker’s lot and the provision for Peppers signage.

81. The various pleaded features of the tower as a result of the appointment of Peppers are alleged to have resulted in a substantial difference between acquiring an apartment in a residential tower known as *The Oracle* and an apartment in a hotel/resort branded *Peppers Broadbeach*.

82. The common issues in each proceeding may be broadly summarised as follows:

> 1. What was promised by the terms of the written contract and the disclosure statements that formed part of it by virtue of s 215 of the *BCCM Act*? In particular, did the plaintiff in each proceeding contract to purchase an apartment in a residential tower known as *The Oracle*?
> 2. Was the plaintiff offered in performance of the contract something substantially different to what the plaintiff contracted to purchase, namely an apartment in a hotel/resort branded *Peppers Broadbeach*?
> 3. If so, was the plaintiff entitled to terminate the contract because SSI evinced an intention not to be bound by the terms of the contract in that:
>
> > (a) SSI no longer intended to provide to the plaintiff at settlement an apartment in a residential tower known as *The Oracle* but rather an apartment in a hotel/resort to be known as *Peppers Broadbeach* with the features alleged in the statement of claim; and
> > (b) any authorisation of a person as letting agent would not be in the terms of the Caretaking and Letting Agreement annexed to the final disclosure statement, and as described in the Developer PDS and the Operator PDS.
>
> 4. In the alternative, were certain plaintiffs (Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan) entitled to cancel the contract pursuant to s 214 or s 217 of the Act?

83. If a plaintiff was entitled to terminate or cancel the contract, then there will be declarations to that effect and consequential orders for the delivery up of bank guarantees/deposits. If, however, the plaintiff was not so entitled, then it is accepted that SSI should obtain orders for specific performance and other relief on its counterclaim by way of damages for costs that it has incurred as a result of the plaintiff’s failure to settle. The basis for the calculation of such damages has been agreed and the parties proposed that an updated calculation be produced up to the date of judgment.

What documents comprised the contract by virtue of s 215 of the Act?

84. There is no issue on the pleadings that it was a term of the contract that, subject to its terms and conditions, SSI would sell to the plaintiff or plaintiffs in each proceeding the specified lot in Tower One of *The Oracle*. Nor is there any issue that by virtue of s 215 of the Act it was a further term of the contract that any authorisation by the body corporate for a person to be the letting agent would be on the terms of a Caretaking and Letting Agreement annexed to the disclosure statement given under the Act.

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The first issue between the parties as to the terms of the contract relates to the documents that form part of the provisions of the contract by virtue of s 215 of the Act.

85. The plaintiffs submit that by operation of s 215 of the Act the contract comprised the following documents:

> (a) The Contract of Sale;
> (b) The Disclosure Statement title page;
> (c) The Developer PDS;
> (d) The Disclosure Statement given pursuant to s 213 of the Act and the 13 documents annexed to it; and
> (e) The Operator PDS.

SSI submits that the Operator PDS is not a contractual document and has no effect under the Act. It also submits that the Developer PDS does not contain contractual warranties and the mere fact that it was provided at the same time as the BCCM Disclosure Statement does not make it "accompanying material" for the purposes of s 215 of the Act.

The Operator PDS

86. The Operator PDS was provided with the original contracts. It was not provided again to the buyers who entered the original contracts before they entered into the replacement contracts. Mr Gough and Ms Groves received an Operator PDS prior to executing contracts to purchase Lots 2905 and 2907 in October 2006.

87. The Operator PDS was issued by Sky Asset Management Pty Ltd (SAM), not SSI. It explained that it was issued by SAM to comply with the requirements of the *Corporations Act* in relation to managed investment schemes. Under a managed rights scheme class order, ASIC granted exemption from certain registration requirements subject to compliance with conditions. One of the conditions of the ASIC class order was that a Product Disclosure Statement be given to a buyer of an apartment before entry into a contract. The purpose of the Operator PDS was to provide information about the Oracle MR Scheme to enable owners to decide, once they had received it, whether or not to participate in arrangements to make their apartment available for letting.

88. The Operator PDS was provided as a separate bound document. The covering letter that was sent to the buyers who entered into an original contract identified it as a separate and distinct document from the disclosure statements which included the Developer PDS under the *Corporations Act* and the disclosure statement under the BCCM Act. Both the covering letter and the terms of the Operator PDS distinguished it from the disclosure statement given under the *BCCM Act*.

89. The contract itself did not refer to the Operator PDS, let alone give it contractual force. Clause 16 of the contract included an acknowledgment by the buyer of having received from the seller, before it signed the contract, a Product Disclosure Statement under the *Corporations Act* and a disclosure statement under the *BCCM Act*. In the case of the replacement contract this was referrable to the Developer PDS and the BCCM Disclosure Statement respectively since no new Operator PDS was provided to these buyers.

90. The contract did not incorporate the Developer PDS as a term of the contract. The Developer PDS contemplated that the operator would issue an Operator PDS. However, it did not purport to incorporate any Operator PDS. It contemplated that a detailed PDS about the Oracle MR Scheme would be issued by the Operator. The Developer PDS made no promise about what its terms would be, and stated that "no warranty can [sic] or is given by South Sky as to what conditions the Appointment will contain. Those conditions will be decided by the Operator."

91. The Operator PDS was not given any contractual force by the contract. Accordingly, the issue is whether s 215 of the Act operated so that it formed part of the contract. I have earlier summarised s 215. Section 215 provides:

> "**215 Statements and information sheet form part of contract**
>
> (1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.
> (2) The information sheet does not form part of the provisions of the contract."

92. An Operator PDS was not provided at the time the disclosure statement required by s 213 was given in relation to the replacement

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contracts. However, Mr Gough and Ms Groves received an Operator PDS at the same time as they received the BCCM Disclosure Statement.

93. The word "accompanying" in s 215 must be construed in its statutory context. Section 213 of the Act provides that the disclosure statement that the seller must give pursuant to s 213(1) must "state", "include", "be accompanied by" or "identify" certain things. For example, s 213(2)(e) provides that the disclosure statement "must be accompanied by" the proposed community management statement.

94. The reference in s 215 to "material accompanying the disclosure statement" should be interpreted to refer to material that is required to accompany the disclosure statement and material that accompanies it because, for example, it is intended to form part of the disclosure statement, not simply material that happens to be provided at the same time as the disclosure statement. It is apt to refer to documents that are incorporated by reference into the disclosure statement and that accompany it, or to documents which are annexed to it.

95. I was referred to passages in *Mirvac Queensland Pty Ltd* v *Horne*[16] which considered the provisions of s 21 and s 22 of the *Land Sales Act* 1984 (Qld), but these passages do not particularly assist in deciding the meaning of "accompanying material" in s 215(1) of the *BCCM Act*.

96. I do not accept the plaintiffs' principal submission that the statutory purpose of the Act in which s 215 is contained is served by a literal interpretation of "any material accompanying" since the language is "of the widest import". Such an interpretation would extend the operation of s 215 and give contractual force to any material, for example, a document that had nothing to do with the requirements of the Act, such as a tourist brochure, or a statutory notice required by some other legislation, which happened to be sent together with the disclosure statement required by s 213 of the Act. An interpretation that extends the operation of s 215 to everything that is sent in the same envelope as the BCCM Disclosure Statement has little to commend it. An interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[17] An interpretation which gives contractual force to documents unrelated to the requirements of the Act does not achieve the purpose of the Act, and would have apparently unintended consequences. A seller would need to avoid including in the same envelope in which the s 213 disclosure statement was sent any other document, for fear that it would be treated as "material accompanying" the disclosure statement and form part of the contract by virtue of s 215.

97. It would also be an odd and apparently unintended consequence if the parties' contractual obligations depended on whether an Operator PDS required by the *Corporations Act*, or some other document not required by the *BCCM Act*, was sent in the same or a separate envelope to the disclosure statement required by s 213.

98. It is unnecessary to consider the variety of possible circumstances in which a document may constitute "material accompanying" the disclosure statement. It is sufficient to conclude that the separate provision of the Operator PDS did not mean that it was "material accompanying" the disclosure statement given under the *BCCM Act* for the purposes of s 215. It follows that the Operator PDS did not form part of the provisions of the contract by virtue of s 215.

99. In summary, the contract did not include the Operator PDS.

The Developer PDS

100. When the original contracts were sent to the buyers they were sent under cover of a letter which separately listed what were described as:

(a) Disclosure Statements;
(b) the Contract of Sale;
(c) the Operator PDS.

The Disclosure Statements were pre-bound under a title page "Disclosure Statement" and consisted of:

(a) the Developer PDS;
(b) the Disclosure Statement given under the *BCCM Act* which consisted of a covering page, an index and:

(i) a single page titled "INFORMATION ABOUT THE DEVELOPMENT";

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(ii) a document styled Disclosure Statement (Section 213 of the *Body Corporate and Community Management Act* 1997 and Section 21 of the *Land Sales Act* 1984);
(iii) a PAMDA Form 27c and several annexures.

The Disclosure Statements were pre-bound. The Operator PDS was also sent to the buyers under the original contracts under cover of the same letter and was in a separate pre-bound form.

101. The original contracts were replaced and discharged by new contracts. The re-issuing and execution of the new contracts did not include the provision of an Operator PDS. However, it involved the sending of a new set of documents for execution by the buyers. The new contract of sale was sent along with disclosure statements in the form that I have already described, namely the Developer PDS, the disclosure statement given pursuant to s 213 of the *BCCM Act* and accompanying materials.

102. The Developer PDS was issued under the managed investment scheme provisions of the *Corporations Act*, not pursuant to any requirement of the *BCCM Act*. It explained that it was issued so as to satisfy one of the conditions of the ASIC class order. Its contents distinguished it from the disclosure statement required by the *BCCM Act*.

103. The contract did not give the Developer PDS contractual force. The document itself did not purport to be of contractual force. The fact that it was given at the same time and in the same bound document as the *BCCM Act* disclosure statement does not mean that it constituted "material accompanying" the disclosure statement for the purposes of s 215. It was in a different form to the documents which were annexed to the disclosure statement given under the *BCCM Act*. It was not required to be given by s 213 of the Act, and s 213 did not require it to accompany the *BCCM Act* disclosure statement. It was given so as to comply with the requirements of the *Corporations Act*. The disclosure statement given under the *BCCM Act* did not incorporate it by reference. It was not "material accompanying" the BCCM disclosure statement for the purposes of s 215 of the Act. The fact that, as a matter of convenience to both the buyer and seller, it was sent at the same time as a disclosure statement given under the *BCCM Act* does not mean that it formed part of the contract by virtue of s 215.

104. In summary, the Developer PDS was not incorporated by the terms of the contract, and it did not form part of the contract by virtue of s 215.

The information page

105. As previously noted, the Disclosure Statement given in compliance with s 213 of the *BCCM Act* included a single page titled "INFORMATION ABOUT THE DEVELOPMENT". The index of documents contained in that Disclosure Statement referred to it, and to other documents including numerous annexures, as being "documents contained in this Disclosure Statement". I find that the information page formed part of the BCCM Disclosure Statement in that it was physically bound up with it. If, however, it did not form part of it, like the annexures, it was "material accompanying" the Disclosure Statement since it was part of a single "pre-bound" Disclosure Statement that was given in order to comply with obligations under s 213 of the Act. Apart from being physically bound up with other parts of the Disclosure Statement, it was "material accompanying" the Disclosure Statement since it gave a general outline of the development more specifically described in the following pages of the document. Because it either formed part of the BCCM Disclosure Statement, or was "material accompanying" it within the meaning of s 215 of the Act, the information page forms part of the provisions of the contract by virtue of s 215.

The annexures included in the Disclosure Statement

106. For similar reasons, the annexures to the disclosure statement, including the Caretaking and Letting Agreement, form part of the provisions of the contract.

What did SSI promise in the contract?

107. The plaintiffs submit that in each case they contracted to buy an "off-the-plan" unit — a "proposed lot" — in a development to be known as *The Oracle*. They rely upon the terms of the contract (which was titled "Contract of Sale: The Oracle") and location plans that

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formed part of it. Each plan is headed The Oracle. They also rely upon the Disclosure Statement including the first document contained in it headed "INFORMATION ABOUT THE DEVELOPMENT". I have earlier quoted the contents of this document at paragraph [27] of these reasons. The plaintiffs place particular reliance upon the following statement:

> "Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle …".

The plaintiffs also rely upon the contents of the Disclosure Statement which refer to the proposed lot being purchased in The Oracle development as identified on the location plan contained in the contract of sale.

108. The plaintiffs submit that, whether taken individually or together, the contract of sale and these other documents (which form part of the provisions of the contract by virtue of s 215) provide that SSI "would sell to the Plaintiff the particular lot in a residential tower in The Oracle development."

109. In response, SSI notes that there are potentially two components to this allegation: firstly, that the tower was to be a residential tower; and, secondly, that the tower was to be in *The Oracle*. It relies upon the fact that there is no allegation in the pleadings that a reference to *The Oracle* had a particular meaning at the time of the contracts, so that such a meaning was somehow incorporated into them. Evidence from the plaintiffs about marketing material and conversations was not relevant to what was contractually promised about *The Oracle* because the plaintiffs did not plead that the contracts comprised anything other than certain documents referred to in the pleadings. The meaning of *The Oracle* is to be derived from the contractual documents, and the plaintiffs' various understandings of what was meant by *The Oracle* is irrelevant in determining the terms of the contract. SSI submits, and I accept, that in deciding what was contractually promised by it, I refer to the contract documents, not to some abstract concept derived from matters outside of them.

110. The plaintiffs do not plead that *The Oracle* had a particular meaning at the time the contracts were negotiated, and that this meaning is incorporated into them. The plaintiffs plead, and SSI admits, that SSI developed two high rise apartment towers on land at Broadbeach known as *The Oracle*. SSI also admits the pleaded allegation that the plaintiffs entered into an "off the plan" contract to purchase a lot in Tower 1 of the development described as *Oracle*. SSI pleaded that its development known as *The Oracle* also incorporated other buildings, retail stores, restaurants, licensed premises and commercial premises and that its development is "a substantial, five star, resort development." These pleaded contentions about the nature of the development do not alter the fact that the plaintiffs do not plead that a reference to *The Oracle* had a particular meaning at the time the contracts were made, and that such a meaning was incorporated into them. The plaintiffs do not plead that *The Oracle* had a meaning that the parties adopted in using that term in their contractual documents. For example, they do not plead that they contracted on the basis that *The Oracle* meant a residential tower that was predominantly occupied by owners or long-term tenants.

111. I accept the plaintiffs' submissions that a relevant term of the contract was that SSI promised to sell a particular lot in a residential tower in *The Oracle* development, and that by virtue of the contents of the contract and the information sheet which formed part of it, the contract provided that the residential component of the development was to be known as *The Oracle*. However, in providing for the lot to be in a residential tower known as *The Oracle*, the contract did not additionally provide to the effect that the residential tower was to be of a particular kind (for example, occupied predominantly by owner-residents or for long-term residential purposes). The reference to the "residential component" to be known as *The Oracle* must be viewed in its context, where there was a distinction between residential and retail components of the development.

112. Moreover, the Caretaking and Letting Agreement that was an annexure to the Disclosure Statement did not indicate that the

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letting business was confined to long-term tenancies. For example, it gave the entity conducting the letting business authority to have and staff a tour desk.

113. The paragraph of each plaintiff's pleading that alleges that it was a term of the contract that SSI would sell to the plaintiff a specified lot in a residential tower in *The Oracle* does not plead in terms that the residential tower itself would be known as *The Oracle*. However, this paragraph[18] refers to an earlier sub-paragraph which relevantly pleads that the residential component was to be known as *The Oracle*. The plaintiffs' cases were conducted on the basis that the documents that had contractual force provided that the residential component would be known as *The Oracle*. The plaintiffs allege that they were promised a

lot in a residential tower known as *The Oracle* which is part of a development also known as *The Oracle*. Each plaintiff's case is that SSI has changed the substratum of the bargain in two related respects. First, the development has been altered from a residential tower to a hotel (or resort). Secondly, the residential tower is not known as *The Oracle*, but has become known as (and branded as) *Peppers Broadbeach*.

114. The essential promise in the contract was to sell "the Property" on the terms of the contract. The "Property" was identified in the contract particulars as a proposed lot number on a specified level "identified on the Location Plan …". The Location Plan consists of several pages showing site plans, other plans and building format plans, each headed *The Oracle*.

115. Senior Counsel for SSI submitted that the words "*The Oracle*" on the Location Plans were simply words, and that there was no promise that the building would have that name. He submitted that the identification of what the purchaser was to get was a proposed lot on a certain level, identified on the Location Plan. There was said to be no promise that the building would have the name *The Oracle*.

116. I consider that this takes an artificially narrow view of the documents that constitute the contract, and what SSI promised to sell.

117. The purchase of a lot in a community titles scheme does not only provide ownership of the lot itself, but also of the common property of the scheme with all other owners as "tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots."[19] An owner's interest in a lot is inseparable from the owner's interest in the common property.[20]

118. The contract itself was titled "Contract of Sale: The Oracle". The Location Plans confirmed that the building was named The Oracle. The disclosure statement, and the material accompanying it which formed part of the provisions of the contract, was titled "Disclosure Statement: The Oracle". Annexures in the disclosure statement refer to The Oracle. For example, the Caretaking and Letting Agreement was styled "Caretaking and Letting Agreement: The Oracle". The information sheet which also formed part of the contract by force of s 215 stated that the residential component of the development was to be known as The Oracle.

119. The subject matter of the contract was a proposed lot in a residential tower to be known as *The Oracle*.

120. The next contentious issue concerning the terms of the contract relates to what SSI promised in relation to the letting business. As previously noted, the plaintiffs plead that SSI promised that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement, and as described in the Developer PDS and the Operator PDS. For the reasons that I have given, I accept that by reason of s 215(1) of the *BCCM Act* it was a term of the contract that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the BCCM Disclosure Statement. The Developer PDS and the Operator PDS were not part of the contract.

121. I have earlier quoted relevant provisions of the Caretaking and Letting Agreement, particularly cl 6 of that agreement which related to the letting business, and cl 20 which authorised the Caretaker to occupy certain identified parts of the common property. From time to time further statements given under s 214 of the Act made changes to certain identified Occupation Authority areas. Nothing

turns on these changes. These areas were to be used for certain identified purposes. Some of these areas include external landscaped areas which might be used for special events, functions, presentations or any other lawful use. Another change resulted in the renumbering of cl 20.5. It became cl 20.4. The parties' submissions refer to cl 20.5 and I shall do the same. No issue was raised in the pleadings about the validity of cl 20.

122. Clause 6.4 of the Caretaking and Letting Agreement authorised the Caretaker to erect signs reasonably necessary in or about the Scheme Land for the purpose of promoting and fostering the letting business. Such signs "must be temporary and moveable".

123. Clause 20.5 dealt with different subject matter, including signs. I have quoted it in paragraph [33]. It relates to various items collectively titled "Structures" that the Caretaker was given authority to place (and

where appropriate, have manned) on any part of the common property subject to certain conditions. The items were a tour desk, brochure stands, signage, vending machines and other similar things. Nothing in the terms of cl 20.5, or in its context, confines the type of signs to signs that are temporary and moveable. The limitation in cl 6.4 in that regard cannot be read into cl 20.5.

124. The essential contractual promise of SSI to each plaintiff was to sell an identified lot in a residential tower. The tower was to be known as *The Oracle*. The residential tower was to be one having the physical attributes described in the contract, and there is no dispute in these proceedings that the building, as constructed, has those physical attributes. There was no contractual promise that the residential tower be occupied predominantly, let alone exclusively, by owner-occupiers or long-term tenants.

125. The contract provided that any authorisation of a person as a letting agent would be in the terms of the Caretaking and Letting Agreement annexed to the Disclosure Statement. That agreement provided for the entity appointed by the body corporate to operate a letting business, and to use certain common property for specified purposes. The letting business was not limited to long-term tenancies. Nothing in the Caretaking and Letting Agreement provided that the letting agent could not conduct its letting business so as to attract short-term tenants and holiday-makers. The letting business involved associated services commonly rendered in connection with letting lots in similar developments and "any other lawful activity." This authorised the provision of services to guests occupying apartments, including guests staying for a short time who might require room service, a mini-bar and other "hotel-like services".

Did SSI's proffered performance amount to a repudiation?

126. The plaintiffs submit that they are discharged from completing the contract because SSI evinced an intention not to provide at settlement the subject of the contract and, instead, intended to provide a particular lot in a development which has become a Peppers hotel or resort. It submits that by altering the development from a residential tower to a hotel or resort, and by permitting its name to be changed, SSI has changed the substratum of the bargain.

127. The plaintiffs' submissions developed this point in two separate, but related, parts. The first was that SSI's proffered performance was of "a different product". The second is that the tower is not known as *The Oracle* because it has been branded as *Peppers Broadbeach*.

128. The plaintiffs point to the use by Peppers and other parties of the term "hotel" to describe the tower in which the plaintiffs contracted to purchase a lot. They also point to SSI's use of this description for some time. While relying upon the fact that the tower is still described by many as a Peppers hotel, the plaintiffs submit that, in any event, regardless of the label, the point remains that the lots are not lots in a residential tower *The Oracle* but are lots in a Peppers hotel or hotel-like resort. This submission reflects the plaintiffs' pleas that the apartments purportedly offered in performance by SSI are apartments in a hotel/resort branded *Peppers Broadbeach*. Although the plaintiffs' case relating to SSI's proffered performance and its alleged repudiation has this composite aspect, the parties' submissions separately addressed two related aspects, and I

[140445]

will do the same. The first is whether the lot is in a residential tower. The second is whether the tower is known as *The Oracle* and whether it is branded *Peppers Broadbeach*.

Is the lot proffered by SSI in a residential tower?

129. Following the appointment of Peppers and the opening of the building for guests, apartments in it were let for short term and holiday letting. There is nothing in the contracts concluded between the various plaintiffs and SSI to say that this would not be the case. There was no contractual promise that lots in the building would be occupied exclusively or predominantly by owners or long-term residents.

130. SSA (as a wholly owned Peppers subsidiary) provides guests with a variety of "hotel-style services" including room service. It has procured liquor licences to permit the installation of mini-bars and the service of alcohol. It proposes to develop Lot 101 in the tower (referred to in the contract documents as the Caretaker's unit) as a restaurant and bar. Many other residential towers on the Gold Coast have such a facility for residents and their guests.

131. The fact that SSA provides guests with certain "hotel-style services" does not mean that the tower has ceased to be a "residential tower" in the sense earlier described. The fact that some of the occupants are there for a short term does not mean that the tower is not a residential tower. The contractual promise of a lot in a residential tower relates to a tower used for residential purposes. The relevant provision distinguished the residential component from the retail component of the development. In its contractual context, a residential tower does not mean simply a tower for owners who are residents or long-term tenants.

132. Clause 20 of the Caretaking and Letting Agreement gave certain authorities to occupy parts of the common property and, among other things, to operate a tour desk. This serves to confirm that the residential tower was one that might house short-term guests and persons on holiday.

133. If, contrary to my earlier finding, the Developer PDS did form part of the contract, then my conclusion that the residential tower was one that permitted the Caretaker to provide services to holiday makers and other short-term guests would have been reinforced. The Developer PDS indicated that the on-site letting agent would conduct a business that included short-term and holiday letting, with associated hotel-style services.

134. I conclude that the lots proffered by SSI in performance of the contracts are in a residential tower.

Is the residential tower known as *The Oracle* and is it a hotel/resort branded *Peppers Broadbeach*?

135. The proceedings raise two related, but slightly different factual issues. One is whether the residential tower is known as *The Oracle*. The second is whether it is a hotel/resort branded *Peppers Broadbeach*. It is not part of the plaintiffs' pleaded cases that SSI promised to the plaintiffs that it would continue to invest in *The Oracle* brand, or ensure that there would be a certain level of signage, branding or marketing of *The Oracle*. The contractual promise was a simple one, namely that the residential tower would be known as *The Oracle* (and be part of a development also known as *The Oracle*). I shall address in turn:

> (a) Is the residential tower a hotel/resort?
> (b) Whether described as a hotel or a resort (or the amalgam in the plaintiffs' pleading, "hotel/resort"), is it branded *Peppers Broadbeach*?
> (c) Is it known as *The Oracle*?

Is the residential tower a hotel/resort?

136. Definitions of a hotel vary, and whether or not this particular building is described as a hotel is largely dependent on the perspective of the beholder. It will be recalled that SSI initially was content to join in a press release with Peppers in July 2010 that announced that Peppers was to launch the Gold Coast's "first five star hotel in a decade", but that later SSI requested Peppers not to describe the development as a hotel in its marketing material. Mr Johnson, in an affidavit first sworn on 14 May 2011, stated that he would describe the development as "an extremely high quality residential apartment complex, at which guests may expect many of the sort of services that a five star hotel would offer."

137.

[140446]

He noted that their stay will differ from a hotel in that the physical size of the rooms/space that guests occupy is substantially greater, the accommodation is completely self-contained and the duration of the average stay is usually longer than at a hotel. In this regard he observes:

> (a) the physical sizes of the apartments are much larger than a hotel, ranging from about 81 square metres to over 318 square metres, whereas hotel rooms are generally 30 to 40 square metres;
> (b) each apartment contains one, two or three bedrooms, save for the penthouses, which contain four bedrooms;
> (c) all apartments, save for one-bedroom apartments, contain multiple bathrooms;
> (d) each apartment contains a fully operational kitchen;
> (e) each apartment contains a laundry;
> (f) each apartment contains significant balcony space;
> (g) the development contains a cinema which is not something to be found in a hotel;

(h) wine lockers are provided in respect of each apartment, which would not be found in a hotel;
(i) there is a significantly larger number of car spaces provided than would be found at a hotel;
(j) there are no dedicated rooms for hotel use;
(k) there are no major back-of-house facilities, for example, kitchens and laundries;
(l) there is a mix of owner-occupiers and guests on any given floor (at the time of swearing his affidavit there were 97 apartments "signed with SSA");
(m) the apartments "signed with SSA" are randomly located throughout the towers. Accordingly, a guest who books an apartment through SSA/Peppers may be located next to an owner-resident or an owner-holiday-user or a long-term tenant or a guest who booked through an off-site letting agent;
(n) there is a body corporate responsible for all apartments and the facilities, which has effective control of the development.

Mr Johnson's reference to apartments that are "signed with SSA" should be taken to mean apartments that, in effect, are in the pool of apartments that Peppers lets.

138. I accept on the basis of this evidence that the building does not have all of the features that would be expected of a typical, large, luxury hotel. However, the description of the building in which the plaintiffs contracted to purchase an apartment as a "hotel" is not governed entirely by whether it has all of the features of a five star hotel such as ballrooms, large conference centres and the like, or the fact that it possesses certain features that most hotels lack. As Mr Johnson notes, guests may expect many of the sort of services that a five star hotel would offer. These include being met upon their arrival and the impression that they are entering a hotel. That impression depends upon, among other things, on-site signage and presentation, and off-site marketing. I shall address these issues in connection with the alleged branding of the building as *Peppers Broadbeach*. For present purposes, it is sufficient to conclude that the description "hotel" does not completely describe the type of apartment complex in question for the reasons given in Mr Johnson's affidavit. However, many individuals would describe it as a hotel, as SSI was initially content for it to be described.

139. It has the features of a resort, and the description of it as a resort would not be inaccurate. If the description "hotel" does not adequately describe its features, then it would be adequately described as consisting of self-contained apartments with access to many of the services that a hotel would offer. Incidentally, the website of the on-line travel service Expedia.com.au describes *Peppers Broadbeach* as "Broadbeach aparthotel with an outdoor pool". The following summary appears as a result of a hotel search for the city of the Gold Coast:

> **"Peppers Broadbeach**
>
> Corner Elizabeth Ave & Surf Parade Broadbeach, QLD 4218 Australia
>
> [140447]
>
> **Broadbeach aparthotel with an outdoor pool**
>
> ***Airport nearby***
>
> Situated by the sea, this aparthotel is close to Oasis Shopping Centre, Broadbeach Mall, and Kurrawa Beach. Area attractions also include Gold Coast Convention and Exhibition Centre and Pacific Fair Shopping Centre.
>
> ***Pool, fitness facility***
>
> At Peppers Broadbeach recreational amenities include an outdoor pool and a sauna. The aparthotel also features self parking and a porter/bellhop.
>
> ***DVD players/iPod docks***
>
> In addition to kitchens and balconies, guestrooms feature washers/dryers along with iPod docking stations and microwaves."

140. It is sufficient to resolve the issues in these proceedings to find that the residential tower in which the plaintiffs contracted to purchase an apartment is either a hotel or a resort. If it is not adequately described as a hotel, it certainly is a resort in which guests may expect many of the services that a luxury hotel would offer.

Is it branded *Peppers Broadbeach*?

141. I turn to the issue of whether the tower, whether described as a hotel/resort or by some other description, has been branded *Peppers Broadbeach*. Shortly before the trial I undertook a view of Oracle Tower One, Oracle Tower Two and the Oracle Boulevard precinct. This view in the company of counsel and solicitors was to enable me better to understand the evidence of witnesses and exhibits, which include photographs and signage plans. The issue of branding was also addressed by expert reports and two experts who gave oral evidence. The plaintiffs relied upon a joint report of Professor Bill Merrilees and Associate Professor/Senior Lecturer Richard Jones. Dr Jones was the principal author of the report and gave oral evidence. SSI relied upon the expert report of Dr Larry Neale, who is a senior lecturer in marketing at the Queensland University of Technology. In accordance with pre-trial directions, Dr Jones and Dr Neale met and produced a joint report that highlighted areas of agreement and disagreement between them. I found their evidence of assistance in determining the branding issue. However, that issue is not one to be determined by experts. It is a question of fact to be decided by me on the basis of all of the evidence, which is assessed with the benefit of the view that I undertook. I shall first address certain evidence which is relevant to whether the building is branded *Peppers Broadbeach* before addressing the evidence of the experts.

142. From a distance and on closer inspection, the subject building, the other tower and the precinct in general present as a well-designed development which is visually impressive, and built to a high standard. For present purposes, namely the branding issue, a striking feature is the rooftop signage. Tower One has a large illuminated Peppers sign that faces west. Tower Two has a similar sign. At ground level, the entrance to Tower One is dominated by a Peppers sign. A photograph of it is the first photograph in Exhibit 76. Its large black lettering is featured against the white background of the main entrance to the building. On a facia inside the entrance is a sign for “Oracle Tower 1” and the Oracle logo. The Oracle logo is also tiled into the footpath immediately outside the entrance. The “Oracle Tower 1” sign on the facia inside the entrance and the Oracle logos to which I have referred do not significantly detract from the impression given by the large Peppers signage at the entrance to the building.

143. There are many signs and icons throughout the general precinct that refer to The Oracle, Oracle Boulevard or a particular part of the development such as Oracle North, Oracle South, Oracle East or Oracle West. There is a portable Peppers Concierge stand outside Tower 2, which houses the main reception for Peppers guests. There is also a Peppers sign above the entrance to this reception, a Peppers mat leading into it and a Peppers sign above the reception desk. There also is a surfboard with “Peppers” on it.

144. There are Oracle logos in the paving outside the reception of each tower. Oracle logos are built into glass as a safety feature. Oracle logos also appear in corridors and rooms within the towers.

145.

[140448]

Peppers signage dominates Oracle signage on entering Tower One. The large entrance mat is marked *Peppers Broadbeach*.

146. Signage is, of course, only one component of branding. Dr Jones, in his joint report with Professor Merrilees, offers the following definition of a brand:

> “A brand is widely defined as ‘A name, term, sign, symbol, or design, or a combination of them which is intended to identify the goods or services of one seller or a group of sellers and to differentiate them from those of competitors’ (American Marketing Association). Thus, the brand is that intangible object that manifests itself through tangible communication elements that indicate, first the source or ownership of the brand, i.e. that it is different from competing products and services, and secondly, the differential value of the brand, i.e. how it is different from competing products and services.”

147. Dr Jones's report examines, in the case of the Peppers brand and the Oracle brand, three elements: the appearance of the brand, the behaviours associated with the brand and the service offered by the brand. These three elements make up what is often referred to as "the brand promise". There is no disagreement between the experts concerning these matters of definition or in relation to the concepts of brand meaning, brand signification and brand architecture, as outlined in Dr Jones's report. The experts also agree on the following points:

> "1. That Peppers is positioned as offering short-break residential accommodation at the luxury end of the market.
> 2. That both brands, The Oracle and Peppers, are positioned as luxury brands in their respective markets, and share many of the same brand promises.
> 3. Regarding the scope of the presence of the two brands on site:
>
> > a. Peppers signage is present in and on the residential buildings: (rooftop signage, main entrances). Peppers' presence is focused around the residential elements of the precinct.
> > b. Oracle signage and branding icons are also present also [sic] in and around the buildings — often built into the precinct.
>
> 4. That the Peppers brand is highly activated through marketing communications and that there is little evidence of Oracle branding outside the Oracle precinct; Peppers undertake a large and sophisticated integrated marketing campaign of promotions and cross-promotions, advertising, direct marketing, PR, social media and others, which has been focused in the last year disproportionally on Peppers Broadbeach.
> 5. Of the role of the Peppers brand, as expressed through their brand promise, for delivering high quality services. We agree that the brand promise, expressed through key touchpoints of communication, services and products, plays an important part in helping consumers evaluate the brand. We note that both brands have many similarities in their brand promises; namely luxury and high quality."

148. The evidence, including the opinions of these experts, establishes that the Peppers brand is positioned as offering short-break residential accommodation at the luxury end of the market. The Peppers brand signifies short breaks with an emphasis on luxury and is often associated with locations that offer consumers short-term "escapes". Peppers seeks to differentiate its services from other accommodation providers by promoting its "relaxing resorts" and "couples retreats".

149. Peppers has heavily promoted its brand in connection with the residential components of the development. In addition to signage and on-site services, it has promoted *Peppers Broadbeach* through a broad range of marketing material.

150. The precinct in general, and the residential towers in particular, are not so heavily promoted as *The Oracle* as to overcome the domination of the Peppers brand in respect of the residential component of the site. As to marketing, Mr Johnson's first affidavit (sworn 14 May 2011) states:

> "After the Share Sale Agreement was entered into, the Development continued to be marketed by SSI as The Oracle. There
>
> [140449]
>
> were still a number of apartments available for sale in the Development, particularly in Tower 2, that were not sold off the plan.
>
> After the appointment to SSI of the Receivers & Managers, however, there has been little active marketing of the Development. However, The Oracle sales office has continued to operate, predominantly to make available for sale the remaining apartments in the Development."

This limited marketing, compared to Peppers' on-site signage, on-site presence and extensive advertising of *Peppers Broadbeach* means that Tower One effectively has been branded as *Peppers Broadbeach*. The same applies to Tower Two. This branding (or re-branding) began with the announcement of Peppers' appointment, and was achieved by, among other things, the Peppers signage on the site and the extensive promotion of the Peppers brand.

151. This branding goes beyond the letting agent promoting *its business* (as the Caretaking and Letting Agreement envisaged it could) to a branding of the apartment tower. The existence of signs for "Oracle Tower 1" and the Oracle icon on glass and other features does not lead to the conclusion that the building is branded as *The Oracle* or not branded as *Peppers Broadbeach*. Whereas some residents, retail owners and others would take these signs and icons as indicating that the building is in the Oracle precinct, and has a connection with the brand/sub-brand Oracle Boulevard, these features do not brand the building. The Peppers signage and other features signifying the presence of Peppers do. The Peppers brand dominates the building from top to bottom. From the illuminated signs at the top of the tower to the welcoming doormat at the entrance, the dominant brand is Peppers. The building would be likely to be referred to as Peppers or Peppers Broadbeach, not only by short-term visitors who booked accommodation in it through Peppers, but by members of the general public who are in its vicinity, either on foot or in a vehicle.

152. The dominance of the Peppers brand in respect of the residential elements of the site is set to continue.

153. Brands are said to require "continual investment in their promotion and renewal" in order to achieve sustained levels of awareness. At the time the plaintiffs entered their contracts there was extensive marketing of *The Oracle*. It signified a high quality luxury precinct that included apartment towers carrying that brand. The appointment of Peppers, the dominant presence of the Peppers brand in both towers (exemplified by the illuminated signs that surmount and virtually brand them), the active promotion of *Peppers Broadbeach* and the limited promotion of *The Oracle* in connection with the residential component of the development leads to the conclusion that the tower in which the plaintiffs contracted to purchase an apartment is branded as *Peppers Broadbeach*.

154. Separate but related issues arise about the branding of the entire development. SSI submits that the whole development can be described as "The Oracle". It submits that "The Oracle is the entire development rather than any particular component part of it." There is scope for debate about whether the entire development is described as "The Oracle" or "Oracle". Accepting, however, the submission made by SSI on this point, the fact remains that particular components of the development have been branded. The retail component has been branded *Oracle Boulevard*. The residential component has been branded *Peppers Broadbeach*.

155. The branding of the residential component as *Peppers Broadbeach* may have been reinforced by the erection of hero signs atop the buildings since the date for settlement under the plaintiffs' contracts. But this simply carried into effect the branding to which the South Sky entities committed as part of the Share Sale Agreement's provisions in relation to signage, and the body corporate's resolution of 1 October 2010 that carried this into effect. The process of branding the tower as *Peppers Broadbeach* began as early as the joint media release to which SSI was a party, and it has continued. Reference in correspondence sent to buyers in 2010 to *The Oracle* does not alter the fact that Mantra/Peppers was intent on branding the building as *Peppers Broadbeach*.

156.

[140450]

Mantra/Peppers is a successful, large organisation that devoted substantial resources to marketing and otherwise branding the apartment towers as *Peppers Broadbeach*. It has succeeded in its stated intention of branding Tower One as *Peppers Broadbeach*. Its success has been achieved in part by the absence of any real attempt by SSI or anyone else to brand the residential component by a different name. However, the success of Mantra/Peppers has been in large measure the result of its own promotion of the *Peppers* and *Peppers Broadbeach* brands in connection with the residential component of the development, aided by the signage that the Share Sale Agreement contemplated.

157. I conclude that the residential tower in which the plaintiffs contracted to purchase an apartment is branded *Peppers Broadbeach*. There is no prospect that this branding will change prior to the settlement of contracts pursuant to any decree of specific performance.

The expert evidence on branding

158. I have reached the conclusion that the building is branded *Peppers Broadbeach* without reference to contentious aspects of the evidence of experts, and I would have reached the same conclusion without the benefit of their evidence.

159. Because of the branding issues raised in the pleadings, the parties sought and obtained pre-trial directions for expert reports and for the experts to confer. The experts' respective reports and their joint report addressed "The Oracle" brand and Dr Jones's report devoted a section to the signification of "The Oracle" brand in 2005 and 2006. Evidence about the branding of the building (and also the whole development) as "The Oracle" has some relevance to the issue of whether the building has become branded (or re-branded) as *Peppers Broadbeach*.

160. SSI criticised Dr Jones's view that in 2005 and 2006 *The Oracle* held a brand promise of "entirely owner occupied apartment towers" as:

> (a) being based upon unpleaded marketing material, including material that post-dated 2005–2006 which is not specifically related to the evidence of the plaintiffs about the material they received or considered; and
> (b) not taking account of "core documents" (the contract, disclosure statements and so on) with which Dr Jones was not briefed.

I accept that Dr Jones's evidence about the Oracle "brand promise" is not relevant to the contractual promise made by SSI to the plaintiffs. It is, however, relevant to the branding issues in the case. The evidence of Dr Jones (and Dr Neale) about branding issues is legitimately based on sources that include marketing material, and did not need to be limited to marketing material read by the plaintiffs. I discount the weight of Dr Jones's opinions about the Oracle brand in 2005 and 2006 to the extent that it relies on material that post-dates that period. Provision to Dr Jones of the "core documents" would have given a more complete account of material that relates to the branding of *The Oracle* to a particular section of the general public, specifically buyers. I accept SSI's submission that reference to the core documents would have shown a conflict between the content of those documents and the view that *The Oracle* brand signified exclusive owner occupied residences and the creation of an exclusive club of owners. That view was expressed by Dr Jones based on marketing and other material and without reference to the "core documents" that were sent to the plaintiffs since the latter were not briefed to him.

161. I accept SSI's point that someone who received and read the "core documents" would not have found in them a promise that *The Oracle* was to consist exclusively of owner occupied residences, given references in them to short-term and holiday letting. Accordingly, I do not rely upon Dr Jones's opinion relating to what *The Oracle* signified in 2005–2006 (or at other times) as relevant to the contractual promise made to the plaintiffs. Dr Jones's evidence is relevant to the branding of *The Oracle* to persons who received the kind of marketing materials that were considered by him and Dr Neale.

162. I shall first address the experts' evidence in relation to *The Oracle* brand, and then other matters about which they had differences of opinion. Before doing so I shall give my reasons for ruling on objections to certain parts of Dr Jones's report. SSI's

[140451]

objections were argued just before Dr Jones gave his oral evidence and the parties indicated that I might give my reasons later. I do so now.

163. The first objection, described as "an overarching objection", is that the opinions and conclusions stated in the expert reports are no more than the experts' views on what is conveyed by various communications to the mind of an ordinary person and is not something which is the proper subject of expert evidence. In deciding whether the field is one in which expert evidence can be called, two principles apply according to the learned authors of the Australian edition of *Cross on Evidence*:

> "One seeks to exclude evidence on the ground that the ordinary person is as capable of forming a correct view on the question as anyone else. The second seeks to exclude evidence which, since it is not based on an organised body of sound knowledge or experience, is insufficiently reliable."[21]

SSI's objection is on the first ground. There is no objection on the basis that there is not an organised body of knowledge or experience in relation to branding. As to the first aspect, the relevant question is:

> "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area".[22]

164. The expert evidence to which objection is taken does not relate to how an ordinary person would be likely to be influenced by a particular communication. In that regard, ordinary human nature is not the subject of proof by expert evidence.[23] The reports relate to the meaning of "branding" and the process by which branding occurs. They relate to the relationship between relevant brands, and aspects of branding which is outside ordinary knowledge and experience. Although some aspects of the reports may relate to matters in respect of which expert opinion is not essential to form a correct view, this cannot be said in respect of the reports as a whole. The experts' opinions are of substantial assistance in relation to branding issues, and I do not accept the overarching objection to them.

165. The next objection relates to parts of Dr Jones's report which relate to what the Oracle brand meant or signified between December 2005 and October 2006. The objection was on the grounds of relevance. For the reasons canvassed during the hearing of this objection, I consider that the evidence is relevant to the issues raised in the pleadings concerning the difference between a building known as *The Oracle* and one branded *Peppers Broadbeach*, and also to the issue of "material prejudice" under the *BCCM Act*. In this latter regard, although the marketing and other materials upon which individual plaintiffs' expectations were based were not pleaded, evidence was given in that regard. The evidence of Dr Jones is relevant to the issue of "material prejudice", and admissible on that basis. The issue of "material prejudice" is assessed objectively, having regard to the particular buyer's circumstances. The evidence of branding is relevant to the pleaded issues of material prejudice. Whether the claimed material prejudice was caused by an inaccuracy in a disclosure statement, or some other cause, is a separate issue that does not go to the admissibility of the evidence. The evidence is relevant to issues on the pleadings.

The Oracle brand

166. Dr Neale's report states that: "The Oracle brand signifies a high quality luxury precinct comprising apartment towers, restaurants, cafes and retail boutiques." His site visit revealed "a great deal of Oracle branding throughout" the precinct, including "on the street, street signs, retail shops and common areas". This branding included the large Oracle logos that were part of the footpath. Dr Neale also reported:

> "Outside the Oracle precinct, however, there is little evidence of Oracle's marketing and branding activities. My information search did not reveal much in the way of brand activation. Oracle have a web site, but not much else for people who are searching for the brand. There was no search marketing campaign evident, and I could find no examples of Oracle advertising."

167.

[140452]

Dr Jones distinguished between the brand "The Oracle", other signs and things containing references to "Oracle" (such as the "Oracle Tower 1" inside the main entrances to the residential towers and signs containing references to "Oracle Boulevard"). As to the brand "The Oracle", he concluded that it was positioned "as a unique residential development at the absolute top end of the apartment market." He explained his reasons for this more fully in his report and under cross-examination. He notes that there are a number of brand names associated with Oracle, and that it is necessary to define the brands and sub-brands. The development at the site is branded as "The Oracle, Central Broadbeach". This refers to the development on the relevant block which includes the two towers. "Oracle Boulevard" refers to the shopping precinct at the ground level running through the site. Dr Jones is of the opinion that, as originally launched, "The Oracle" was the core brand for the whole development and that "Oracle Boulevard" was a sub-brand referring only to the retail elements of the development. His report describes the various value propositions contained in the Oracle brand. The brand "The Oracle" is said to have significant emotional elements that make up its brand promise. These were emphasised in the description of The Oracle as a "landmark address" and "the unchallenged centre of Gold Coast sophistication". Drawing upon these elements and the appeal to exclusivity (such as the promise that "Acquiring a residence in The Oracle is equivalent to achieving membership in a supremely private club"), his report concludes that The Oracle is defined by its

residents being owners of the properties they reside in. The “hedonic value proposition” of The Oracle brand is conveyed in propositions such as: “Every one of the residences at this landmark address will indulge its owners with world class life spaces”.

168. Dr Neale does not agree with Dr Jones about the brand promise offered by The Oracle in 2005/2006. The differences in the opinions of the experts is summarised in their joint report dated 25 July 2011:

> “Dr Neale does not agree that the Oracle brand promise from 2005/2006 was that of entirely owner occupied apartments. He forms this opinion because purchasers would rely on all information received, not just brochures. For example, the Operator Product Disclosure Statement contained information about: the choice available to owners to let out their apartment, three different ways for an owner to let out their apartment, the provisions of on-site services for letting out an apartment including room service and an on-site reception desk, and apartment owners being able to use their letting pool apartments for 21 days per year. As purchasers would have had all this information before purchasing the apartment, Dr Neale contends the brand promise of Oracle in 2005/2006 was not of an owner-occupied building but rather a precinct that offered apartments that could be occupied by the owners, or occupied by long or short-term renters.
>
> Dr Neale also does not agree that the private element drives the emotional value proposition of the Oracle brand. He maintains that all purchasers would have been aware that there are in excess of 500 apartments across the two Oracle towers, and that the Oracle precinct is located in one of the busiest tourist locations in Australia.
>
> Prof Merrilees and Dr Jones maintain their view that a significant driver of the brand promise of The Oracle brand lies is [sic] in its emotional and hedonic elements. Key drivers in the emotional value proposition are those of luxury, well-being and exclusivity. Exclusivity is articulated in several ways that emphasises [sic] the private element of the brand The Oracle. As pointed out in their report, notwithstanding functional similarities between the brands: for example, the quality of the finishes, the facilities and the ability to rent apartments, the distinction between the brands lies in the emotional promise of exclusivity directed towards owner-occupiers and the creation of an exclusive club of owners. The perception of this distinction is an important value driver for the brand ‘The Oracle’. Prof Merrilees and Dr Jones maintain their opinion that exclusivity is a driving force of the brand ‘The Oracle’.”

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For the reasons given by Dr Neale, I find that any purchaser who relied on the information contained in disclosure statements would not have understood that *The Oracle* would have been entirely owner occupied apartments. Someone who received, read and relied on these documents would not have gained that impression.

170. Persons who read and relied only upon marketing material may have derived an impression of the residential component of *The Oracle* as being directed towards owner occupiers, including club-like facilities for owners. Still, it is unlikely that such persons would have understood *The Oracle* as consisting entirely of owner occupiers.

171. It is unnecessary to dwell on this aspect, since it involves an element of uncertainty about the type of persons reading marketing material, the precise material and the other information they relied upon, and the extent to which they reflected upon how a high proportion of owner-occupiers was to be achieved and what would prevent an owner from renting an apartment for short terms.

172. The differences between the expert opinions should not detract from the substantial area of agreement between them about *The Oracle* brand from time to time. They agreed about the matters that I have earlier identified, and that *The Oracle* brand (like the Peppers brand) is positioned at the luxury, premium end of the market.

The signification of the illuminated signage of Peppers mounted on the Oracle complex

173. The experts did not agree about the signification of the signage and branding on the site. After describing the illuminated signs that are mounted on the top of each tower Dr Jones's report states:

> "Such signs are important indicators of the brand as reflected in the definition of a brand … In this case the Peppers signage surmounting both towers indicates the dominant presence of the brand in both towers."

His report continues to the effect that in order to determine the signification of the illuminated signage of Peppers surmounting both towers, the illuminated signage must be seen in the context of other signage on the site. He discusses that signage in his report. On the basis of his observations he assesses that there are "two dominant brand names on the site: Peppers and Oracle Boulevard." He explains:

> "There are only two references to the brand The Oracle on insignificant signage (an evacuation sheet and roadwork sheeting). In the absence of significant signage for the brand The Oracle, references to Oracle (as in 'Oracle Tower' and 'Oracle North') have in our opinion a very weak symbolic link to the brand The Oracle. In our opinion and based on or [sic] site visits, the signs Oracle Tower 1 and Oracle North, Oracle West, Oracle South and Oracle East do not refer significantly (semiotically) to the brand The Oracle. Brands need reinforcing through visual identity systems and marketing communication. We see little evidence of the reinforcement of the brand The Oracle on site.
>
> The Peppers brand is dominant for the residential elements of the site and the Oracle Boulevard for the retail elements. This dominance reinforces the significance of the rooftop-mounted signage. Given the lack of other residential signage to indicate the presence of other brands (notably The Oracle), we conclude that Peppers is the dominant brand for the residential elements. The signification of this is that the residential elements of this site are a Peppers resort, retreat or hotel."

174. By contrast, Dr Neale's report expresses a different view of the signification of the illuminated signage of Peppers mounted on The Oracle complex. It says that, in general, rooftop signage has two main functions: direction and promotion. For visitors to the Broadbeach area, the illuminated Peppers signs atop the residential towers are said to be "primarily directional in function." The report states that "[l]ocals would also use the rooftop signs to help them navigate to the precinct, and Peppers would derive some awareness and branding benefits from their visibility." Dr Neale notes that, for Peppers, signage is only a part of their overall promotional campaign, and that Peppers undertakes a large and sophisticated integrated marketing campaign. I

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accept the proposition advanced by Dr Neale that because most Peppers customers who visit the site will already have made their booking decision, and have already committed to paying for the accommodation, the rooftop signs have a directional function for them. However, I do not consider that this proposition detracts from the essential point made by Dr Jones that the Peppers signage surmounting both towers indicates the dominant presence of the Peppers brand in both towers. I accept Dr Jones's evidence that whilst the rooftop and roof-level signage is not an indicator of 100 per cent brand ownership of the building it surmounts, it is used to reflect the dominant brand of the site.

The signification of advertising rental accommodation in the Oracle complex as Peppers accommodation

175. The experts also addressed the signification of advertising rental accommodation in the Oracle complex as Peppers accommodation. In that regard Dr Jones had regard to advertisements and internet peer review sites such as Trip Advisor, Expedia and Hotels.com. These are said to be important brand touch points for accommodation brands and important sources of advertising. He notes that the sustainability of brands relies on their reinforcement through communication. Having noted that the on-site communication of the brand "The Oracle" is poor, he notes that this increases the significance of the role of rental advertising. Dr Neale agrees that the Peppers brand is highly activated through marketing communications and that there is little evidence of Oracle branding outside the Oracle precinct. As to the significance of the advertising of rental accommodation in the complex as Peppers accommodation, he states:

> "From a consumer behaviour and branding perspective, it is in the interests of investors in the Oracle towers to have a well recognised and trusted brand, like Peppers, to offer short-term rental

accommodation. The Peppers brand is already known for luxury accommodation with high quality services, and this is the advantage of branding the short-term rentals as Peppers accommodation rather than Oracle."

Brand relationship

176. Dr Neale's report describes the current relationship between the two brands as follows:

> "From walking through the precinct, there is evidence of Oracle and Peppers branding throughout. Customers and visitors currently see the brands side-by-side in and around Tower 2. This is also the case in and around Tower 1, but the Peppers branding is less predominant than Tower 2. For the remainder of the precinct (retail boutiques, café district, streets, car parks), the conspicuous branding is mostly Oracle, while Peppers branding is sparse.
>
> Given the ubiquitous Oracle branding throughout the entire precinct, in my opinion it is reasonable to expect that some residents, retail owners and local customers think of and refer to the precinct as Oracle, whereas short-term visitors may be more likely to refer to the complex as Peppers."

177. It is correct to refer to "the ubiquitous Oracle branding throughout the entire precinct". However, I accept the distinction made by Dr Jones between references to Oracle and The Oracle, and that Oracle Boulevard is a separate brand or sub-brand that should be distinguished from The Oracle. The O-shaped icon that is used around the site has a relationship to both. However, the brand "The Oracle" is not strongly present on the residential component of the site, in part because of the dominance of the Peppers brand. I accept the conclusion of Dr Jones:

> "Signage is a visual identifier of the brand. The dominant positioning of the two Peppers illuminated signs surmounting both Tower 1 and Tower 2 on the site identify the source of the site's brand as being Peppers. Examination of on-site signage in its entirety sees this dominance compounded. Three conclusions are made. Firstly, that Peppers is the dominant brand name for the residential elements of the site. Signage is located above both main entrances and in the reception foyers. Secondly, that whilst there remains extensive use of The Oracle logo, this can be regarded as signifying The Oracle Boulevard brand (rather than its original signified [t]he brand The Oracle) referring to the shopping areas and not the
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>
> residential elements of the site. Thirdly, [t]he brand The Oracle is not significantly present on the site. The signification of this is that the residential elements of this site are a Peppers resort, retreat or hotel."

178. This conclusion requires qualification in the light of what Mr Doyle SC described as a small thing in his cross-examination of Dr Jones — the Peppers signage described at page 13 of the Jones/Merrilees report as being "above the reception clearly visible from outside" relates to the reception in Tower Two, not Tower One. Dr Jones acknowledged this in his evidence, and it was not suggested that this misdescription alters his opinion. In his report he referred to a doormat in the entrance to Tower Two "emblazoned Peppers Broadbeach", and in his oral evidence (but not in his report) he gave evidence of such a large doormat just inside the reception of Tower One. It was described by Dr Jones to have the Peppers logo woven into it and to have a "very high impact" because one "has to tread over it to go into the building." This oral evidence tends to reinforce the conclusion drawn in Dr Jones's report about the significance of signage and the fact that Peppers is the dominant brand name for the residential elements of the site.

179. Dr Jones's report and oral evidence about branding were not based simply on signage on Tower One. They related to signage elsewhere and the extent of marketing activities. His views on signage were not based on an inspection of the extent of internal signage in rooms and corridors and the like and I take this into account in assessing the weight of his opinions.

180. Dr Jones's report states, and Dr Neale does not contest, that the Peppers brand is currently the dominant brand for the residential elements of the site. The fact that, as Dr Neale says, some residents, retail owners and local customers think of and refer to the *precinct* as Oracle, does not alter the fact that Peppers

is the dominant brand for the residential elements of the site. And, as Dr Neale says in his report, short-term visitors may be more likely to refer to the precinct/complex as Peppers.

The oral evidence of the experts

181. Dr Jones made the point that the presence in the precinct of signs relating to The Oracle (such as evacuation diagrams inside services entrances and on roadworks sheeting), Oracle (such as Oracle Tower 1) and the Oracle icon (on windows, pavements and directory signs) are not linked in a significant way to the brand *The Oracle*. The icons around the site were said to have lost their function as signifiers of the brand, and had become way markers or indicators of physical areas. For example, Oracle South is used to denote the location of part of the precinct, and contributes to a brand Oracle, not the brand *The Oracle* which was promoted in 2005/2006. The signs referring to "Oracle" and to logos around the site had limited significance to the brand *The Oracle*. This was because of "very little marketing and promotion of the brand". If there had been "more robust" branding of *The Oracle* or *Oracle*, then those signs would have had gained more signification. By contrast, the promotion of the retail precinct as *Oracle Boulevard*, including its own web page, leads to the conclusion that *Oracle Boulevard* has its own brand.

182. Dr Neale, in oral evidence, accepted that the "Hero Sign" atop each tower denotes a building name. Like other equally large neon signs on other buildings, such as the Sofitel, the Peppers sign gave the building a name and this was reinforced by other Peppers signage that was the subject of signage applications. The signage for Oracle Boulevard denoted a street name and the retail and commercial precincts on lower levels.

183. Dr Neale did not see any difference between the use of "Oracle" and "The Oracle" from a consumer behaviour or branding perspective. Consumers would see "Oracle", "Oracle Tower 1", "Oracle Boulevard" and the Oracle logo around the precinct, and that would confirm that they were in the Oracle precinct. If they were looking for something more specific, like Oracle Boulevard, they would know they were in a certain part of the precinct, such as the retail or commercial sector.

184. As to the extensive Peppers signage, Dr Neale accepted that it was the dominant signage on the building and that, whilst "some locals would think it was still Oracle", most people would call the towers Peppers.

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Summary of expert evidence on the branding issue

185. Despite some differences in relation to matters such as the signification of illuminated signage, there was a level of agreement between the experts about the branding of the tower as *Peppers* or *Peppers Broadbeach*. They agree that the Peppers brand is the dominant brand for the residential component of the development. I accept this view.

Conclusion on the branding issue

186. Leaving aside the opinion evidence of the expert witnesses on the issue of branding, I conclude that, at the time the various plaintiffs contracted to purchase their apartments, the development as a whole, and the residential tower that was promoted to them in particular, were branded as *The Oracle*. Buyers who read the disclosure statements carefully, or who reflected on the fact that their standard contract did not prevent them from letting their apartment for short-term or holiday letting, would have appreciated that the occupants of the tower would not only be owner-occupants or long-term tenants. Still, in its marketing to the general public, the apartment tower was promoted as a place of residence, and an exclusive one at that. As the blue brochure said "Every one of the residences at this landmark address will indulge its owners with world class lifespaces." This kind of representation is not alleged to have contractual force. Instead, the promotion of *The Oracle* at that time is relevant to the branding of the apartment tower, and to the alleged re-branding of it after the arrival of Peppers. Prior to the advent of Peppers the apartment tower was branded as *The Oracle*. That brand signified, in the case of the apartment towers (as distinct from the retail precinct), a luxurious residence. The signage and advertising of *Peppers* and *Peppers Broadbeach* on the site, and the active promotion of *Peppers Broadbeach* by Mantra/Peppers in other ways, effectively has branded the apartment towers as a Peppers retreat, resort or hotel. The Peppers brand is positioned as offering short-break accommodation.

187. Tower One is branded as Peppers by the large neon “hero” sign that effectively names the building. The dominance of the Peppers brand is reinforced by other Peppers signage and the activation of the names Peppers and Peppers Broadbeach in a variety of forms. By contrast, the brand *The Oracle* has a diminished presence in and about the apartment tower by reason of the dominance of Peppers, and the absence of investment in and promotion of the brand *The Oracle* in connection with the occupation of the apartment tower. As a result, its impact is low.

188. Mantra presumably had good reason to negotiate the terms which it did in the Share Sale Agreement to promote its Peppers brand. As appears from its April 2010 correspondence to the Gold Coast City Council in support of the application to allow a restaurant to operate on the ground floor of Tower One, it intended to “brand” the building as Peppers, and I find that it achieved that result. By branding the building as Peppers and by its active promotion of *Peppers Broadbeach* by signage, doormats and marketing of the hotel/resort by that name, it has done more than promote the letting business of the company it acquired. It effectively has rebranded the apartment tower in which the plaintiffs contracted to buy an apartment as *Peppers Broadbeach*.

Is the tower known as *The Oracle*?

189. A finding that the tower has been branded *Peppers Broadbeach* does not necessarily determine the related issue of whether it is known as *The Oracle* since, theoretically at least, a building might be widely known by two names. However, in the circumstances of this matter the branding of the tower as *Peppers Broadbeach* means that it is not generally known as *The Oracle*. It is possible that some individuals would describe the tower, as distinct form the development as a whole, as *The Oracle*. However there was no acceptable evidence that the tower is generally known as *The Oracle*.

190. SSI submits that the plaintiffs’ expert, Dr Jones, did not express the view that Tower One is no longer known as a tower in *The Oracle*. They also note that Dr Jones also expressed the view that signs such as “Oracle Tower 1” and “Oracle Tower 2” are way marks or indicators of physical areas, and are used to identify each building, rather than signify the brand *The Oracle*. This oral evidence was directed to the issue of branding,

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but it has a relevance to the issue of whether the building is known as *The Oracle*. I accept that Dr Jones has not expressed the view that Tower One is no longer in *The Oracle*. His evidence was directed to a different issue, namely branding.

191. I also accept that the use of the Oracle name and icon throughout the precinct, including the presence of signs such as “Oracle Tower 1” and “Oracle Tower 2” as depicted in photographs that became exhibits or parts of expert reports, leads to the conclusion that the development as a whole is known as *The Oracle* or *Oracle*. Certain signs may lead some people to describe Tower One, as well as the development as a whole, as *The Oracle*. Others to whom the building was once marketed as *The Oracle* may also know it by this name. However, the effect of the branding of the building as *Peppers Broadbeach* does not support the conclusion that it is generally known as *The Oracle*. I agree with Dr Neale that most people would call the towers Peppers.

192. The development as a whole may be known as *Oracle* or *The Oracle*. However, the residential component is known as *Peppers Broadbeach*, just as its retail component is known as *Oracle Boulevard*.

193. I find that the tower itself is not known as *The Oracle*. It is known as *Peppers Broadbeach* as a result of the branding of it by that name. The finding that the tower itself is not known as *The Oracle* is made in the context of the contractual promise that the tower was to be known as *The Oracle*. That contractual promise should not be taken to refer to the name by which the building was to be known by only some individuals, who had some special knowledge, but to the name by which it was known more generally. The evidence does not support the conclusion that the tower itself is generally known as *The Oracle*.

Repudiation

194. The plaintiffs contend that SSI evinced an intention not to provide at settlement the subject matter of their contract, and instead proposed to provide an apartment in a hotel/resort to be known as *Peppers*

Broadbeach. They contend that the relevant apartments are substantially different from what they contracted for, SSI evinced an intention not to be bound by the relevant contract and thereby repudiated it.

195. The form of alleged repudiation is conduct which "evinces an unwillingness or an inability to render substantial performance of the contract".[24] It is sometimes described as conduct "which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations", and may be termed renunciation.[25] The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[26] The plaintiffs' case on repudiation does not allege the breach of a term, any breach of which justifies termination. In the joint judgment of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* their Honours stated:

> "There may be cases where a failure to perform, even if not a breach of an essential term … manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words."[27]

196. In determining whether SSI has repudiated each contract, the point of reference is the promised contractual performance, not expectations built on representations that are not pleaded or proven to have had contractual force.

197. The plaintiffs' pleaded case on repudiation in respect of SSI's proffered performance of "an apartment in a hotel to be known as *Peppers Broadbeach*" referred to a variety of "features, attributes, uses and consequences" referred to in earlier paragraphs of the pleading.[28] They also pleaded in support of their case on repudiation that any authorisation of a person as letting agent would

not be in the terms of the Caretaking and Letting Agreement annexed to the final disclosure statement.

198. The plaintiffs' submissions on repudiation did not invoke each of the pleaded "features, attributes, uses and consequences" but were of the more general kind that I have earlier identified, namely that the apartment purportedly offered in performance is in a hotel (or resort) or hotel/resort branded *Peppers Broadbeach*. Some of the specific matters that are pleaded in support of repudiation are relied upon in the plaintiffs' submissions on cancellation pursuant to the *BCCM Act*, which raise different issues compared to repudiation under the general law.

199. In relation to the plaintiffs' case on repudiation as advanced in their submissions, I have found that SSI's purported performance of each relevant contract did not meet its contractual obligations in that the tower is not known as *The Oracle* and has been branded as *Peppers Broadbeach*. In short, the departure from the promised contractual performance relates to the name of the tower.

200. The inability or unwillingness of SSI to provide an apartment in a tower known as *The Oracle* and the proffered performance by providing an apartment in a tower branded *Peppers Broadbeach* is not submitted by the plaintiffs in their submissions on repudiation to have had certain consequences in relation to "the product" being sold. The plaintiffs' case on the name aspect, as distinct from their case that the tower is a hotel, does not assert that the proffered performance is of "a different product". Their submissions headed "A different product" are to the effect that the development is a hotel or resort, rather than a residential tower. To quote the plaintiffs' written submissions:

> "Whilst the change of name is important (and addressed below), by altering the development from a residential tower to an hotel or resort, the Defendant has changed the substratum of the bargain."

201. I have declined to find that the tower is something other than a residential tower, whether described as a hotel, resort, hotel/resort or some other term. In the light of that conclusion, the plaintiffs' case on repudiation,

as argued, turns upon whether the proffered provision of an apartment in a tower that is not known as *The Oracle* and that is branded as *Peppers Broadbeach* constitutes a repudiation.

202. The issue then is whether the failure to provide an apartment in a tower that has the name provided for in the contract, and the proffering instead of an apartment in a tower with a different name, indicates an intention "not to provide at settlement the subject matter of the contract" because the relevant units are "substantially different from that contracted for" (to quote the plaintiffs' submissions). To use the similar language of the High Court in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd*, the issue is whether the different name of the tower entitles the plaintiffs "to conclude that the contract will not be performed substantially according to its requirements" or amounts to a renunciation either of the contract as a whole or of a fundamental obligation under it.

203. The relevant departure from the promised contractual performance relates to the name of the tower, not the fact that the business conducted under the name *Peppers Broadbeach* attracts short-stay guests and holiday-makers, and would be described by many as a kind of hotel or a hotel/resort. The name of the tower is not pleaded or argued to be an essential term in the sense discussed in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd*[29] . The name of the tower and the promise that it was to be known as *The Oracle* are provisions of the contract for the reasons I have earlier canvassed. The name of the tower appears on the contract, including the plans that are included in it, and on documents that form part of the contract by virtue of s 215. One of these documents, the information sheet, stated that the residential component was to be known as *The Oracle*. But these provisions are not pleaded or submitted to have been an essential term.

204. The subject matter of the contract is a proposed lot in a residential tower. The failure to provide the relevant lot in a tower known as *The Oracle* does not indicate an intention not to provide at settlement the subject matter of the contract or something substantially different from that for which the plaintiffs contracted.

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The unwillingness or inability to perform the term that provided for the tower itself to be known as *The Oracle* (as well as being part of a development described as *The Oracle*) would not convey to a reasonable person, in the situation of the plaintiffs, renunciation either of the contract as a whole or of a fundamental obligation under it.

Conclusion — alleged repudiation in relation to the name of the tower

205. The plaintiffs have not proven that the unwillingness or inability to perform the contractual provision in relation to the name of the tower constitutes a renunciation of the contract or a fundamental obligation under it so as to amount to a repudiation.

206. I have declined to find that the tower is not a residential tower, such that a description of it as a hotel/resort means that SSI "has changed the substratum of the bargain" or that the relevant apartment is substantially different from, or a "different product" from, the subject matter of the contract, namely an apartment in a residential tower. I have declined to find repudiation in relation to the name of the tower. These conclusions determine the issue of repudiation on the bases that it was argued.

207. In case it becomes relevant I will make findings in relation to certain other matters which were pleaded in relation to the issue of repudiation, but not urged in submissions.

The Caretaking and Letting Agreement

208. As noted, one element of the plaintiffs' pleaded case on repudiation is that by entering into the Share Sale Agreement SSI evinced an intention not to be bound by "the disclosure statement terms" of the contract, particularly that any authorisation as letting agent would be in terms of the Caretaking and Letting Agreement annexed to the final disclosure statement. However, the Caretaking and Letting Agreement entered into by the body corporate and SSA is in that form.

209. The Share Sale Agreement did not alter those terms. Instead, it addressed matters such as signage, obtaining the body corporate's consent to a liquor licence and the fit-out of Lot 101 as a restaurant and bar. These were aspects of a commercial negotiation for the sale of management rights by a developer to the

purchaser of those rights. The Caretaking and Letting Agreement is a different kind of agreement, namely one between a body corporate and the entity appointed by it to the role of caretaker and letting agent.

210. In any event, the Caretaking and Letting Agreement contemplated signage being authorised by cl 20, the provision of services by the letting agent, and the use of Lot 101 and certain "Occupation Areas" for certain purposes. The service of alcohol to guests, the holding of events at which alcohol is served and the use of Lot 101 as a restaurant and bar are not beyond the matters contemplated by the Caretaking and Letting Agreement. If, however, there has been an authorisation beyond the terms of the Caretaking and Letting Agreement, it does not amount to a repudiation of the contracts entered into by the plaintiffs.

Short-term and holiday letting and the provision of hotel-like services

211. The provision of short-term and holiday letting was not pleaded to be a departure from a contractual term, save perhaps insofar as it and the provision of "hotel-like services" are subsumed in the allegation that the tower was not a residential tower and was a hotel/resort. If the tower is to be described as a hotel or a hotel/resort, then this does not amount to a repudiation. The provision of hotel-like services to short-term guests and holiday makers is not inconsistent with any contractual promise. The tower is designed to be in the nature of a resort, particularly for short-term guests. If it is described as a hotel, rather than a resort or apartment tower with access to hotel-like services including room service, then there is no departure from promised contractual performance, or any departure is not repudiatory. The type of "hotel" is of a particular kind, namely self-contained apartments with access, if required, to certain hotel-like services. It does not have a ballroom or a large conference centre. The proposed restaurant and bar is a feature of similar high-rise apartment blocks on the Gold Coast that attract short-term stays and holiday makers. The provision of alcohol in such a tower, at certain events, in mini-bars and by room service, is not inconsistent with any contractual promise to the plaintiffs.

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If the conduct of the letting business, the provision of certain hotel-like services and the proposed establishment of a restaurant/bar has made the tower a hotel/resort, and if (contrary to my findings) this involves a departure from the promise that the tower would be a residential tower, then any departure does not amount to a repudiation. One reason is that the kind of residential tower contemplated by the contract was one in which residents might be on short-stays or be holiday makers who sought and received services from the letting agent of the kind in fact provided by Peppers. Expressed differently, the contract did not provide that the residential tower was to be of a character that restricted it to owner-occupiers or long-term tenants, or that it would not be in the nature of a resort at which residents received certain hotel-like services.

The consequence of the tower not being known as *The Oracle*

213. The consequences of the tower not being known as *The Oracle*, as distinct from being known as *The Oracle* and being a place at which Peppers conducted a letting business under the name *Peppers Broadbeach* and provided certain hotel-like services in doing so, is not pleaded or proven. The plaintiffs' case on repudiation was of the dual or composite kind earlier described, with the "branding" or "change of name" aspect being somewhat secondary to its "different product" aspect. The "branding" or "change of name" aspect was not explored separately as to its consequences on the subject matter of the contract or its value. The following discussion of the valuation evidence should be read in that context. Moreover, any assessment of the consequences of the tower itself not being known as *The Oracle*, while still being in a precinct or development known as *The Oracle* or *Oracle*, would need to take account of the provision in the relevant documents about the conduct of the letting business. Nothing stopped the letting agent from promoting its own brand and using signs to do so. It would also need to take account of the fact that the promise that the tower was to be known as *The Oracle* did not entail any promise about a particular level of promotion of that name, by signage or marketing, or that the tower would retain that name for a particular period after settlement.

The valuation evidence

214. The plaintiffs each plead that they contracted to purchase an apartment "the resale value of which would be determined by reference to its being an apartment in a residential tower in *The Oracle* and not an apartment which is an element in a hotel/resort branded *Peppers Broadbeach*". This was not a plea that the resale value would decline or had declined as a result of the residential towers being a hotel/resort branded *Peppers Broadbeach*. By an amendment shortly before trial to a different section of the pleading in relation to "material prejudice" in terms of ss 214(4)(b) and 217(c) of the Act, it was alleged that the apartment purportedly offered in performance by SSI:

> "… is, and was at all material times since the appointment or engagement of Peppers as aforesaid, of lesser value in consequence of such appointment or engagement, the uses to which Peppers intends to put (or is putting) apartments and other facilities and areas in the development and branding as '*Peppers Broadbeach*' as aforesaid than if [the] apartment … was an apartment in a residential tower in the '*Oracle*' without any (and all) of such appointment or engagement of Peppers, uses by Peppers and branding as '*Peppers Broadbeach*'."

215. Two valuers gave evidence at the trial: Mr Muchall for the plaintiffs and Mr Hamilton for the defendant. They also prepared a joint report to the Court. The joint report recorded the following points of agreement:

> (a) The subject property is an iconic twin high rise tower development with in excess of 500 apartments.
> (b) The apartments are finished to a high standard and the fitting and fixtures are considered to be of a high standard. They are self contained with separate bedroom, bathrooms and living areas.
> (c) The communal facilities provided in the development are extensive and present to a very high standard.
> (d) Broadbeach, where the development is located, is a suburb which caters for both tourists and permanent residents.
>
> [140461]
>
> (e) Large high rise residential developments on the Gold Coast have been previously by a mix of owner occupiers (resident or lock up) and investors (permanent and, where permitted, short term holiday let).
> (f) Purchasers of a unit in the subject development have the option to reside in the apartment, or theoretically utilise an onsite letting agent or an offsite letting agent to manage it privately.

216. Mr Hamilton in his report considered that the correct approach to the valuation of the apartments is as an apartment in a residential tower in *The Oracle*, although it should be valued with the full knowledge that Peppers is the operator. Mr Hamilton's view is that Peppers as part of the Mantra Group has the necessary expertise and resources to conduct the duties of the caretaker and on-site letting agent to a high standard, and that the commission and management fees charges are in line with comparable on-site letting agreements and that the commission fees would be regulated by market forces. The provision of hotel-like services (such as concierge, room service and 24 hour reception) did not alter the valuation approach. Mr Hamilton did not agree with the contention that the relevant apartments are of a lesser value due to the appointment of Peppers and the branding of the development. He considers that the appointment of Peppers would be favourably received by the market.

217. By comparison, Mr Muchall expressed the opinion that Peppers is seen "more as a boutique smaller scale of up-market short stay accommodation resorts". Other than the Peppers Resort at Kingscliff in New South Wales, he was not aware of any other metropolitan resorts managed by "Peppers" of the nature and scale of *Peppers Broadbeach*. As a result, Mr Muchall stated in the joint report that he was "not able to comment on the expertise or resources of Peppers to undertake the caretaking and letting duties for Peppers Broadbeach to a high standard." In addition, Mr Muchall was of the opinion that the appointment of Peppers Broadbeach provided a greater emphasis on the overall development as a hotel/resort providing short stay accommodation, and that this would not be attractive to the owner-occupier market, given the high turnover of accommodation and greater use of communal facilities and common areas. He also expressed the view that the approval of a liquor licence for the provision of mini-bars in rooms and in a restaurant/bar would place a greater focus on the development being a hotel, reducing "the prestige residential amenity".

218. In his report Mr Muchall said that potential purchasers of an apartment in such a development generally fall into one of three categories: those who intend to buy for immediate or near term permanent owner

occupation; for use as a holiday unit for themselves and their family on a casual basis; or as investment for capital appreciation or a rental return. Each had a different perspective in making a decision to purchase. Owner occupiers preferred to not live in buildings utilised for short stay accommodation. The same could be said for "part-time" owner occupiers who utilise the units for their own holiday use. With investors, the main concern was either for a short/medium term capital gain or a good rental return.

219. As to the difference in value of an apartment in a "Peppers" brand of hotel and/or resort against one in *The Oracle* as a residential complex where apartments can be let by owners if they choose, Mr Muchall's report expressed the opinion that a potential purchaser would not look as favourably on a Peppers apartment as against an Oracle apartment. His report said that he had not been asked to quantify the difference in value between the two scenarios and he considered that this was "both difficult and fraught with too many unknowns". He said that any difference would also be dependent on the type, size and nature of the accommodation and the purchaser's requirements, which will vary.

220. On a separate question, Mr Muchall's report said that there would not be any perceived difference in value between the Peppers letting business being:

(a) a Peppers luxury five star hotel (or the like); or
(b) a Peppers accommodation resort as part of which Peppers provides hotel-like services.

221. In his cross-examination Mr Muchall accepted that the building was never going to be wholly occupied by owners and long-term or

[140462]

medium-terms tenants, and that there was no exclusion of holiday letting. He accepted that if there had been an attempt to exclude owners from putting their apartment into a letting pool for holiday letting there would be a lot of people who would not be interested in buying an apartment in the building. One such category would be a purchaser who was interested in maximizing their return. Another would be purchasers who wanted to keep their options open. It would also exclude potential purchasers who wished to occupy the apartment for a few weeks themselves per year but otherwise rent it on a holiday basis. When asked whether the exclusion of those people would drive the apartment's value down Mr Muchall responded that this was not a simple question to answer. A restriction on short term accommodation would have an impact, but "on the flip side" it might make the owner-occupier or more prestigious residential areas more valuable. Ultimately, Mr Muchall acknowledged that one could not really tell what impact, if any, the appointment of Peppers had on value because of the absence of sales evidence.

222. Mr Muchall was the joint author of a valuation report produced in June 2008 in relation to *The Oracle* for first mortgage security purposes. That report addressed, among other things, the value of management rights and was based on a letting pool projection of 100 units in Tower One and 130 in Tower Two which equates to 38 per cent of the total units in Tower One and 54 per cent of the units in Tower Two, or 45 per cent of the total units in the development. The income to be derived by the manager included tour and ticket sales. The 2008 report did not suggest that the letting pool would not consist of short-term accommodation and holiday makers. It tended to indicate that it would. The report's analysis was based upon competition that was considered "to emanate from 41/2-star to 5-star resorts and hotels located throughout the Gold Coast." Calculations were made on the basis of expected occupancy rates and regard was had to occupancy rates for hotels, motels and serviced apartments. The 2008 report is consistent with an assessment of *The Oracle* as a building that would be conducted as a luxury resort attracting, among others, short-term letting and holiday makers. To the extent that Mr Muchall's 2011 report for the purpose of these proceedings and his oral evidence sought to distinguish between a "prestigious residential apartment complex" and a hotel/ resort, this is not a distinction made in the 2008 report. Further, reference to the disclosure statements given to purchasers, as distinct from material which initially marketed *The Oracle*, did not indicate that the tower would be predominantly occupied by owner-occupiers or long-term tenants. On the contrary, it indicated short-term letting and holiday-making and the provision of hotel-like services. To the extent that the questions asked of Mr Muchall for the purpose of preparing his 2011 report are based on assumptions about the extent of short-term letting, these assumptions are not reflected in contractual documents. He was briefed, and relied upon, the plaintiffs' affidavits, but was not briefed with the relevant contract and disclosure statements. Any shift from a prestigious residential apartment complex without short-term letting to one that focuses on short-term hotel/resort style accommodation relates to a supposed shift from something that buyers were not

contractually promised. The building was always going to compete in the luxury short-term accommodation market, and the Landmark White valuation report of 2008 assumes this to be the case.

223. In the joint expert report Mr Muchall said that he was not able to comment on the expertise or resources of Peppers to undertake the caretaking and letting duties of *Peppers Broadbeach* to a high standard. However, the evidence, including Mr Hamilton's evidence, is that it is able to do so.

224. Mr Hamilton rejected the proposition that the value of the apartments had gone down as a result of the appointment and presence of Peppers. He saw it as an advantage to have an experienced, well-reputed manager. In connection with the plaintiffs' pleading that the resale value of an apartment will fluctuate in line with the value of the Peppers brand and "not as an individual, independently owned residential apartment", the plaintiffs point to the following evidence given by Mr Hamilton under cross-examination:

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> "… if you looked at it on the basis that it wasn't being well managed — and it appears that it is being very well managed — and it was being managed poorly, it could have an adverse [effect] on the lifestyle elements for those people, if guests were unruly or things weren't maintained properly, but I would think that as a buyer I would take better — greater confidence having the Peppers as manager and take confidence that they would be able to control their guests' behaviour, maintain the property in a suitable way beyond its call, so I would think they would be positive things."

The plaintiffs submit that the proposition that if the apartments are well managed by Peppers then the value of lots will be affected positively, carries the corollary that if the apartments are managed poorly by Peppers their value will decrease. They submit that the apartments are "indexed" to the value of the Peppers brand and they have no control over how well or poorly Peppers will perform. These propositions are not really to the point in proving material prejudice. It may be accepted that the value of an apartment will be affected by the value of the Peppers brand and the value of the *Peppers Broadbeach* brand in particular. However, the value of the apartment would be affected by the brand and performance of any caretaker and letting agent. So too would the rental that it could command.

225. Mr Muchall did not suggest that the appointment of Peppers and the branding undertaken by it had a greater impact on value than if a different and possibly less well-known operator had been appointed and branded the resort with its name. Interestingly, the plaintiffs' submissions on valuation pointed to a recent magazine article as exemplifying the practical effect of the appointment of Peppers Broadbeach. The article claimed:

> "The number one reason to holiday at home: the Gold Coast boasts Australia's best hotel, Peppers Broadbeach."

But this and other descriptions of *Peppers Broadbeach* as a five star hotel or luxury resort tend to prove that it is being operated successfully.

226. There is no evidence that the management of the tower by Peppers and its promotion as a hotel/ resort branded *Peppers Broadbeach* has attracted undesirable elements and guests who are disorderly and adversely affect the amenity of residents. The evidence indicated that the tower has a mix of occupants with less than half the apartments being in the Peppers letting pool. This was the kind of proportion anticipated by Landmark White in its 2008 report. I take account of the practical problems that might confront the plaintiffs in proving bad behaviour by Peppers' guests or other adverse impacts that have arisen as a result of Peppers appointment. Current owners might be unlikely to give evidence of such negative matters for fear that it would reduce the value of their apartment. However, there was no evidence of these adverse impacts. Not only were the plaintiffs unable to call such evidence in their cases, the issue was not explored in the cross-examination of the defendants' witnesses, particularly Mr Johnson who is very familiar with the operation of the development. There is nothing to detract from the evidence, including Mr Hamilton's evidence, that the building appears to be very well managed. In addition, it is in Peppers' interest to control guests and maintain standards. It is contractually obliged to do so.

227. In arriving at his opinions concerning value, and the consequences of the appointment of Peppers, Mr Hamilton had regard to different sectors of the market, including investors and owner-occupiers. He did not consider that the appointment of Peppers as manager would adversely impact on the lifestyle of someone

living at the property, and it gave them the opportunity if their circumstances changed to take advantage of Peppers expertise. Mr Hamilton did not consider that a newspaper description of the property as a hotel called for a completely different valuation exercise because one was not concerned with a hotel room. Instead what was being valued was an apartment with a particular number of bedrooms. Certain hotel-like services might be available via Peppers to short stay visitors who rented the apartment.

228. The essence of the plaintiffs' submission on valuation was that the plaintiffs contracted for what were to be "first-class,

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indeed 'iconic', units, probably the best units in the Broadbeach residential unit market" and that what were tendered in performance are apartments which focus on short-term hotel/resort style accommodation identifiable as *Peppers Broadbeach*. However, the correct valuation analysis for the purpose of the deciding whether there has been a diminution in value is to value what the plaintiffs' contracted for, namely an apartment in a tower in which the apartment and other apartments in the tower might be let for short-stays and to holiday makers. The apartment contracted for was one which the owner might use as a permanent residence or let to long-term tenants, but also was available for short-term letting, as were all other apartments in the building. The apartment contracted for was one in a tower with an on-site letting agent who could conduct the business of letting and provide services to residents and their guests. Mr Hamilton had appropriate regard to this mix. In response to a question about the advertising of hotel/like services and an "increased focus on short-stay accommodation", Mr Hamilton responded that he did not think that the building had changed its focus at all, because it was always going to have a mix of end users. Mr Hamilton did not regard the provision of a restaurant and bar on the ground floor of Tower One as adversely affecting the value of an apartment in it. In fact, in his opinion it had a positive impact. High rise apartments on the Gold Coast that had been built from 1970 onwards often included a restaurant/bar on the ground floor and the presence of such a facility was relevant to how star ratings were assessed. A restaurant was regarded as a positive attribute that would lift the star rating.

229. There was some debate and submissions were made as to whether Mr Hamilton had inappropriate regard to comparable buildings at Main Beach and Surfers Paradise. The plaintiffs' submissions contend that he approached the valuation on the basis that the apartment formed part of a broader market on the Gold Coast for high rise residential towers. I do not consider that the criticism is justified. Mr Hamilton referred to a "prestige sector of the apartment market" and to a "Broadbeach Highrise Market Sector". He paid appropriate regard to other high rise residential towers, as did Mr Muchall. Both had appropriate regard to high rise apartments at Broadbeach and elsewhere on the Gold Coast. Both had regard to the tower's high quality and its locality.

230. The valuation witnesses were cross-examined about whether an apartment might have had a higher value if a greater proportion of apartments in the tower were occupied by owners and the tower was not operated by Peppers. Such a tower would have greater appeal to certain categories of investors. But its greater appeal to a certain category of buyers needs to be balanced against its reduced appeal to other categories of buyer. A tower that could not be operated as it currently is by *Peppers*, and which focused upon permanent residents, would appeal to some sectors of the market, but not to others. I do not consider that either expert was in a position to say reliably whether an apartment in such a tower would be worth more or less than its present value.

231. No contractual provision indicated that the tower was going to be occupied entirely, or even predominantly, by owner-occupiers, even if some buyers were led to believe that owner-occupiers were its target market. Mr Muchall in 2008 assumed that 38 per cent of the units in Tower One would be in the letting pool that was managed by the entity that acquired management rights. It is doubtful whether each apartment would have had a higher value if there had been a contractual provision in all of the contracts for the tower to be occupied exclusively by owner-occupiers and long-term tenants. Mr Hamilton's evidence was to the effect that such an apartment would probably have less value because of its reduced appeal to the largest part of the investor market. Mr Muchall said that such arrangements would have a negative impact upon investors who wish or might wish to let the apartment on a short-term basis, but would increase its appeal to owner-occupiers. Under cross-examination he did not say what the net effect would be.

232. The first valuation issue on the pleadings relates to the fluctuation in value of an apartment in line with the value of the Peppers brand and/or the *Peppers Broadbeach* brand. This point seems to go no where. The resale value of an apartment might fluctuate in

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line with the value of these brands and those, in turn, might be linked to the performance of Peppers and *Peppers Broadbeach* in particular. An apartment is to be valued as a "residential apartment", but as one in a residential tower that will be occupied by a variety of residents, including persons occupying an apartment for a short term or on holiday. The apartment is to be valued as an apartment in a residential tower, but knowing that the tower has a caretaker and letting agent whose letting business seeks to service consumers wanting to occupy the apartment on holidays or for a short term. There is no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager. The plaintiffs have failed to establish the material prejudice pleaded in sub-paragraphs 40(b) and (c) in the Wicks proceeding in relation to fluctuation in value.

233. As to the issue of alleged reduction in value, as pleaded in paragraph 40(m) and hinted at in paragraph 33 of the Wicks pleading, the plaintiffs have not proven their pleaded case. They have not proven that the apartment that Mr and Mrs Wicks agreed to purchase, or any other relevant apartment in these proceedings, is of lesser value in consequence of the appointment of Peppers, the conduct of Peppers and the tower's branding as *Peppers Broadbeach*. This addresses the matters earlier raised in paragraphs 33 and 34 of the Wicks pleading in relation to the "resale value" and the "rental value" of the apartment. The plaintiffs have not proven that the value of an apartment is any less than it would have been if a different operator had been appointed to conduct the letting business under a different brand, or under no brand at all. What can be said is that the apartment would be worth less if a less competent and experienced manager, who lacked the experience and competence of Peppers, had been appointed.

234. In conclusion, the plaintiffs have not proven their pleaded case in relation to an alleged reduction in the value of the relevant apartments in consequence of the appointment of Peppers, its operation of the apartment tower and the branding of the building as *Peppers Broadbeach*.

235. It follows that the plaintiffs have not proven that any departure from promised contractual performance in respect of the appointment of a letting agent in accordance with the Caretaking and Letting Agreement, and in particular the appointment of Peppers and the branding of the tower as *Peppers Broadbeach*, has had an adverse effect on the market value of any of the apartments which they contracted to purchase.

236. This issue of value, of course, is a different issue to the subjective value that a particular purchaser might place upon the consequences of the appointment of Peppers and the branding of the tower as *Peppers Broadbeach*. It is also an issue different from the effect upon the residential amenity of owner-occupiers of the appointment of Peppers, the branding of the tower as *Peppers Broadbeach* and the apparent success of *Peppers Broadbeach* in its operation. Those issues of residential amenity will be later addressed in the context of claims that rely upon the *BCCM Act*.

237. I have addressed the valuation evidence and certain pleaded issues of material prejudice at this point because the plaintiff's submissions were that "[v]aluation considerations run commonly as regards both repudiation and BCCMA Operation". To the extent that valuation considerations and the valuation evidence bear upon issues of repudiation rather than pleaded issues of material prejudice under the *BCCM Act*, I conclude that the plaintiffs have not proven that the appointment of Peppers, Peppers' operation or the branding of the tower as *Peppers Broadbeach* has had an adverse effect upon the value of apartments. There is no evidence that the branding of the towers as such has had an adverse effect upon the value of individual apartments. The evidence is that Peppers is an experienced and competent operator, and there is no evidence that the resort is not well managed by it. The evidence is to the effect that it is well managed. The plaintiffs' contracts always contemplated the appointment of a manager and letting agent. There was no contractual promise that the management rights would be given to a company that had access to the management systems and experience possessed by Mantra/Peppers. To the extent that there was an

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expectation that the management rights would be sold to such an entity, the expectation has not been disappointed. Relevantly, the appointment of Peppers has not been shown to have reduced the value of the

apartments compared to the value which they would have had if a different entity had been appointed. To the extent that valuation considerations are relevant to issues of repudiation, the plaintiffs have not proven their case.

Conclusion — repudiation

238. The plaintiffs have not established that SSI repudiated the contracts and that they were discharged from their contracts under the general law.

Purported termination under the *BCCM Act*

239. I have earlier outlined relevant sections of the *BCCM Act* and the principles that emerge from authorities in respect of them. The entitlement to terminate under the Act is invoked by Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan. These plaintiffs plead that the final disclosure statement had become inaccurate as that term is used in ss 214(4)(b) and 217(b)(iv) of the Act on certain grounds. They also pleaded that they would be "materially prejudiced", as that expression is used in the Act, if compelled to complete the contract, by reason of the extent to which the final disclosure statement has become inaccurate by reason of any or a combination of various matters. Fourteen sub-paragraphs of paragraph 40 of the Wicks pleading allege material prejudice by reason of the extent to which the final disclosure statement had become inaccurate. These sub-paragraphs also appear in the pleadings of Mr Gough and Ms Groves, and Ms Ryan, with one sub-paragraph in the Wicks proceeding being in a slightly different form since it contains specific reference to their retirement.

240. As to the issue of inaccuracy, the Court of Appeal judgment in *Mirvac Queensland Pty Ltd* v *Wilson*[30] states that the inaccuracy "must be 'real or of substance as distinct from ephemeral or nominal' such as to impact on the bargain." The inaccuracy by which the buyer would be "materially prejudiced" if compelled to complete the contract is an inaccuracy in the disclosure statement given under the Act, not an inaccuracy in some extraneous material. I will address each of the points of alleged material prejudice that were pressed by the relevant plaintiffs in final submissions under the relevant headings that appear in those submissions and which are pleaded in paragraph 40 of the Wicks pleading, paragraph 39 of the Gough and Groves pleading and paragraph 41 of the Ryan pleading.

Sub-paragraph (a): The apartment purportedly offered in performance by the defendant is not an apartment in a residential tower in *The Oracle* but rather an apartment in a hotel/resort branded "*Peppers Broadbeach*" with the features, attributes, uses and consequences pleaded in earlier paragraphs

241. The disclosure statement described the lot as being in a residential tower. This is not inaccurate. Matters extraneous to the disclosure statement (such as brochures and representations by sales staff) may have led some buyers to expect that the tower would be occupied predominantly by owner-occupiers or long-term tenants. However, the disclosure statement did not represent this to be the case. For the reasons given earlier, if the tower is described as a hotel/resort then it is still a residential tower. The final disclosure statement has not become inaccurate because some would describe the tower as a hotel/resort. A further disclosure statement which described it as a hotel might be inaccurate, at least according to some definitions of what constitutes a hotel. The relevant alleged inaccuracy relates to the fact that the lot was described as being a lot in a residential tower. This description has not become inaccurate since the tower is still a residential tower. A further disclosure statement describing it as a "hotel/resort" or by some other term was not necessary to prevent the disclosure statement from becoming inaccurate.

242. The next alleged inaccuracy relates to the fact that the final disclosure statement described the lot as being in a residential tower in *The Oracle* whereas the disclosure statement, if now given, would state that it is in a lot in a hotel/resort branded *Peppers Broadbeach*. The lot is in a residential tower in *The Oracle*, being the name of the development as a whole. Accordingly, the ground of inaccuracy pleaded in paragraph 39(b) of the Wicks pleading is not

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established. The alleged inaccuracy and the associated plea of material prejudice appear to relate to an inaccuracy because the disclosure statement, if now given, would need to state that the lot is in a hotel/resort

branded *Peppers Broadbeach*. I do not consider that the final disclosure statement has become inaccurate because it does not describe the residential tower as being in a "hotel/resort". The tower contemplated by the disclosure statement was a residential tower with in excess of 260 apartments, managed by a caretaker and letting agent and having the features of a resort. The disclosure statement had not become inaccurate in any of these respects. The fact that some persons might label the building as a hotel does not mean that the final disclosure statement becomes inaccurate. Many would label it a hotel if a different letting agent had been appointed on the basis that it would be an apartment/hotel in which short-term guests, holiday makers and others would reside and receive certain hotel-style services.

243. The remaining issue then becomes one in relation to the branding of the hotel/resort as *Peppers Broadbeach*. The disclosure statement indicated that the tower was to be known as *The Oracle*. Its branding as *Peppers Broadbeach* means that this is not the case and the disclosure statement has become inaccurate in that regard. Incidentally, sub-paragraph 39(b) of the Wicks pleading in relation to the branding issue and sub-paragraph 40(a) dealing with the related matter of material prejudice do not specifically plead that the tower itself was to be known as *The Oracle*. In any case, I will proceed on the basis that the final disclosure statement has become inaccurate in respect of the name of the tower itself. The plaintiffs do not plead that the different name in itself is a ground of material prejudice. Some of their evidence touched on this aspect. I address it below. A beneficial construction of what is meant by "materially prejudiced" should be adopted in accordance with *Mirvac Queensland Pty Ltd* v *Wilson*.[31] However, it has not been demonstrated that the relevant plaintiffs have been disadvantaged substantially or to an important extent by an inaccuracy in the name of the tower. The tower remains one in a development known as *The Oracle*.

Sub-paragraphs (b), (c) and (m): Valuation issues

244. I have addressed above the issue pleaded in sub-paragraph 40(b) of the Wicks pleading in relation to fluctuation in the resale value of the apartment. Similar considerations apply in relation to the rental value of the apartment being a matter pleaded in sub-paragraph 40(c). The same conclusions reached in relation to fluctuation in the resale value apply to fluctuations in the rental value. I have found that the diminution in value alleged in sub-paragraph 40(m) has not been proven.

Sub-paragraph (d): The fees for caretaking and letting

245. The matter pleaded in sub-paragraph 40(d) of the Wicks pleading is not pressed.

Sub-paragraph (e): The ability, in practical terms, to use an off-site agent to let the apartment and/or to let it privately

246. The plaintiffs pleaded as a ground of inaccuracy that the Caretaking and Letting Agreement enabled them to advertise and arrange for the letting of the lot through an off-site agent or privately, whereas the disclosure statement if given now would be required to disclose that they "would have no practical ability to let the lot through an off-site agent or privately" because they would not be able to use the name and marks of *Peppers Broadbeach* in order to advertise the apartment, nor would they able to use the name and mark *The Oracle*. The plaintiffs did not specifically plead that any such practical inability was the result of what is described as the "Oracle Brand Licence" addressed in clause 45 of the Share Sale Agreement and the "Trade Mark Licence" in Annexure D to that agreement. The terms and effect of these licences were not specifically pleaded. SSI complained about the late emergence of any issue in relation to the licence granted by clause 45 of the Share Sale Agreement. I allowed certain cross-examination of Mr Johnson over objection. However, the plaintiffs established few, if any, facts in relation to the licensing of the marks and the practical effect that such licensing has upon the opportunity to advertise or let an apartment through an off-site agent or privately.

247.

[140468]

An important preliminary point in terms of the accuracy or inaccuracy of the disclosure statement is the fact that the disclosure statement made no statements about intellectual property in *The Oracle*. In particular, it did not represent that SSI, the body corporate or any other entity owned the relevant trade marks and would license them to individuals.

248. Clause 45 of the Share Sale Agreement requires South Sky Enterprises Pty Ltd to procure entry into a licence. The licence is between Niecon Developments Pty Ltd as licensor and Mantra IP Pty Ltd as licensee. This clause of the Share Sale Agreement relates to the licensing of certain marks in connection with Peppers' letting business in respect of the two apartment buildings.

249. The plaintiffs did not plead or prove that they had any rights in respect of those marks before the Share Sale Agreement was entered into or that entry into the Share Sale Agreement affected those rights. The disclosure statement simply did not address entitlement to any trade marks, let alone promise that buyers would have ownership or licences to use any such trade marks. Incidentally, the *BCCM Act* does not require a disclosure statement to address such matters.

250. The plaintiffs have not produced evidence, let alone proven, that the granting of the licences referred to in the Share Sale Agreement has caused them, or is likely to cause them, any harm. In particular, they have not shown that the relevant licences mean that they have no practical opportunity to advertise or let their apartment through an off-site agent or privately. There was no evidence that the licence impacts upon the practical ability of an owner to advertise or let their apartments through an off-site agent. The only evidence given on the topic tended to indicate that there was no apparent problem. No owner of an apartment gave evidence of any difficulty in using an off-site agent or in letting their apartment privately. No off-site agent was called to say that the licence did, or would, adversely affect their ability to let an apartment in *The Oracle*. The valuers who gave evidence did not suggest any practical problem in relation to off-site letting in general or licensing of names in particular. Mr Johnson was not aware of any difficulty experienced by owners who use off-site letting agents in using the word *Oracle* or *The Oracle*.

251. In any event, the licence referred to in clause 45 of the Share Sale Agreement does not appear to preclude the relevant plaintiffs from advertising the fact that they wish to let an apartment in *The Oracle*. A registered trade mark would not prevent the use of the word *The Oracle* to describe either the development or the tower in which the apartment is located.

252. The plaintiffs sought to rely upon the decision in the *South Sky Investments Pty Ltd* v *Prins*.[32] That decision involved an application by SSI (the plaintiff in that case) for summary judgment against purchasers. The argument advanced in opposition to summary judgment by the defendants in that case was that they intended to let two apartments by their own marketing and that the effect of registration of certain trademarks would be to make them uncompetitive with the on-site agency. Their case was that they should have been told this by SSI and that they were thereby misled or deceived in contravention of s 52 of the *Trade Practices Act* 1974 (Cth). A particular allegation was that registration of certain trademarks would make it impossible for any competitor, such as the defendants, to use the word "Oracle" as part of a domain name, and that there were other effects upon search results on the internet.

253. After referring to relevant authority, McMurdo J stated:

> "If the defendants here mean to say that *any* use of the expression 'The Oracle', in the promotion of their apartments if they must purchase them, would be an infringement of these marks, if registered, they are misstating the effect of that judgment. So far as the *Trade Marks Act* is concerned, the defendants would be able to use the name of this building (Oracle) or any similar name to identify and describe the apartments being offered for rental, as long as they did not use the words *as a trade mark*, ie use them to distinguish their business services from others offering apartments in this building."[33] (italics in original)

[140469]

His Honour continued:

> "Nevertheless, on the state of the present evidence, it cannot be concluded now, in the plaintiff's favour, that the registration of the trade marks could have no substantial impact upon competitors of the on-site manager, such as the defendants if they are ordered to complete their contracts. There are two propositions in respect of trade mark infringements which are relevant at this point. The first is that although the use of a trade mark as a trade mark is often distinguished from a use which is merely descriptive of the product or service, a use might constitute an infringement, by its being used as a trade mark, although the mark also serves at the same time a descriptive function. Secondly, a

party might infringe a trade mark although not intending to use the mark as a trade mark. The path for the intended user of the relevant words, in order to avoid an infringement, might not be so clearly marked that the user would not be forced to err on the side of caution to avoid an infringing use. **Thus for the present, the claims by the defendants that they would be significantly affected in their use of the name of the building, specifically within their internet marketing, cannot be readily dismissed. Instead, all of this requires a factual inquiry at a trial**. In particular, there are necessary inquiries as to what form of internet material is necessary to effectively compete with the on-site operator and as to what use of the relevant words might be necessary to that end. There would then be questions as to whether such material, at least arguably, would constitute an infringement. Even a serious prospect of infringement might be a sufficient deterrent to the use of the subject words that it would present a substantial impediment to persons such as the defendants in competing with the on-site operator."[34] (emphasis added)

These observations were made in the context of an application for summary judgment and served to identify the importance of undertaking a factual inquiry at trial of the issues raised in that proceeding. In these proceedings the plaintiffs did not call evidence that supported the relevant pleaded allegation or the unpleaded allegation concerning the effect of the licence on their practical ability to let the lot through an off-site agent or privately. The plaintiffs in this case did not call evidence or undertake the kind of factual inquiry at trial alluded to by McMurdo J.

254. The plaintiffs submit that the issue is whether they will be materially prejudiced if compelled to complete the contracts because of the extent to which the disclosure statement has become inaccurate and, as with the *Prins* case, the disclosure statement material did not refer to an intention to apply for registration of trademarks, nor to an intention to licence them. I note that the plaintiffs in this case did not plead or particularise an inaccuracy or material prejudice in that particular respect. However, leaving aside the absence of a specific pleading in this respect, the plaintiffs' case in relation to inaccuracy and material prejudice fails because the plaintiffs did not call evidence so as to permit a factual inquiry into the issue of whether trademark licences have deprived them of the ability, in practical terms, to let the apartment privately or by using an off-site agent.

255. In summary, I am not satisfied that the disclosure statement is inaccurate in the respect alleged or that any such inaccuracy would materially prejudice the relevant plaintiffs if they were compelled to complete their contracts.

Sub-paragraphs (f), (g) and (h): Tenants who do not wish to stay in a hotel/resort

256. Mr and Mrs Wicks plead as grounds of material prejudice:

> "(f) If the Plaintiffs do not include apartment 1803 in the letting pool for *'Peppers Broadbeach'*, they will be deprived of the ability to market apartment 1803 to, or to attract to apartment 1803, tenants who do not wish to stay in an hotel/resort.
> (g) If the Plaintiffs do include apartment 1803 in the letting pool for *'Peppers Broadbeach'* they will be:
>
> (i) restricted to receiving less than 50% of the income from the apartment; and
>
> [140470]
>
> (ii) will not own a lot marketable to people who do not wish to stay in an hotel/resort.
> (h) If the Plaintiffs do not include apartment 1803 in the letting pool for *'Peppers Broadbeach'* they will nonetheless be deprived of the ability to market apartment 1803 to or to attract to apartment 1803:
>
> (i) persons who do not wish to stay in an hotel/resort; and
> (ii) persons who do not with to stay in premises the subject of a liquor licence;
>
> with diminished return from attempted letting accordingly."

257. The plaintiffs submit that the particular prejudice attaching as a result of these points is that the market sectors available to the plaintiffs if compelled to complete the contracts will reduce. In oral submissions the

plaintiffs acknowledged that there was no promise of receiving 50 per cent of the income from the apartment, and that the evidence did not support a finding that they would be restricted to receiving less than 50 per cent of the income from the apartment. Accordingly, I disregard sub-paragraph (g)(i).

258. None of the plaintiffs who rely upon an asserted entitlement to cancel pursuant to the Act originally intended to let their apartments. However, as a result of the global financial crisis, Mr Wicks changed his retirement plans, and Mr Gough and Ms Groves changed their plans to sell their home and move into the apartment. To the extent that there always was a possibility that their plans might change and they might decide to let their respective apartments for some time before either occupying them or selling them, it is appropriate to address the alleged point of material prejudice in relation to tenants who do not wish to stay in a hotel/resort. The plaintiffs submit that they will be deprived of the ability to market the units to:

> "(a) people who do not wish to stay in an apartment the subject of a liquor licence. The largest sector particularly affected would be the Islamic market, bearing in mind the populations of tourists and purchasers from the Middle East and the Islamic countries of South East Asia.
> (b) people who do not with [sic: wish] to stay in or own an apartment in an hotel/resort — persons with the same views on the point as the Plaintiffs."

There was no evidence about the extent of the sectors of the market referred to in these submissions.

259. It is unnecessary to repeat matters that have been addressed in respect of other grounds of material prejudice, particularly those in relation to the description of the tower as a hotel/resort. The present point relates to sectors of the market who do not wish to stay in a hotel/resort. The threshold point relates to an inaccuracy in the disclosure statement or the fact that the final disclosure statement has become inaccurate as that term is used in sub-paragraphs 214(4)(b) and 217(b)(iv) of the Act. I have addressed that point in a related context. In the present context, the disclosure statement did not make any statement about the expected mix of tenants or their priorities. It was consistent with owners letting their apartments to a range of persons, including persons who would occupy the apartment for a short stay or on holiday and would receive certain hotel-like services supplied by the entity appointed as Caretaker and Letting Agent. Such services might include room service, which in turn might involve the service of alcohol. The other disclosure statements, namely the Operator PDS and the Developer PDS, clearly contemplated the provision of hotel-like services.

260. The present point arises because the provision of certain hotel-like services by Peppers and the marketing of *Peppers Broadbeach* leads to the tower being described by some as a hotel/resort. There is no direct evidence about the categories of people who would not wish to stay at such a resort. I am prepared to assume that there would be some individuals who would not wish to stay there because they do not wish to stay in a hotel/resort or do not wish to stay in premises that are the subject of a liquor licence. This point needs to be taken into account, along with the fact that the conduct of Peppers and the services it supplies (including room service and a mini-bar), are presumably attractive to many people, including those who do wish to stay in a hotel/resort and who would value the convenience of

not having to go outside to purchase liquor. These might include individuals who are influenced by magazine articles and other marketing. For example, a magazine article tendered by the plaintiffs (Exhibit 105) effusively describes *Peppers Broadbeach* as Australia's best hotel, based upon feedback from guests who posted on the Trip Advisor website. The article refers to the services offered at reception and by porters. It refers to many aspects of the tower, to a day spa and to the hotel's position "without peer". These and other communications are apt to attract people who wish to stay in a hotel/resort.

261. If the appointment of Peppers means that the plaintiffs are deprived of their ability to market their apartment to persons who do not wish to stay in a hotel/resort, this needs to be counterbalanced against their ability to market the apartment to persons who do wish to stay in a hotel/resort, and a luxury one at that.

262. It should be recalled that the disclosure statement did not label the tower as a hotel/resort. The information sheet that formed part of it simply described it as the residential component of the development. Some would say that the residential component was always going to be in the nature of a resort or a hotel/resort for persons living there during short stays and on holidays. Its evolution into a tower in which a substantial number of apartments are in a letting pool of apartments to be used by holiday makers and others

wishing to stay at a hotel/resort is not a development that makes the disclosure statement inaccurate. If, however, the disclosure statement was inaccurate or has become inaccurate because of this development, then it is not a development which has been shown materially to prejudice the plaintiffs because they have been deprived of the ability to market the apartment to persons who do not wish to stay in a hotel/resort. The plaintiffs have not persuaded me that they have been prejudiced materially in the respects alleged.

Sub-paragraphs (i) and (l): Residential amenity and increased use

263. Mr and Mrs Wicks plead:

> "(i) The Plaintiffs entered into the contract with the intention of retiring to Broadbeach to live in apartment 1803 as an apartment in a residential tower in *'The Oracle'* and have no desire, and will be prejudiced if compelled to, live for the duration of their retirement in an hotel/resort with the features attributes uses and consequences referred to in paragraphs 32–37."

They and the other plaintiffs plead:

> "(l) The conduct of the development as an hotel/resort will:
>
> (i) compromise owners' enjoyment of the common property of the Scheme by reason of the use of a substantial part of that property for a restaurant and/or bar conducted for *'Peppers Broadbeach'* with associated adverse effect on the amenity of the Scheme and individual apartments.
> (ii) accelerate the deterioration of the common property of the Scheme giving rise to a consequential increase in cost to the owners of apartments by the increase in levies to fund more frequent maintenance, repair and replacement than would otherwise be the case;
> (iii) increase the damage to and destruction of common property of the Scheme due to the increased number of persons (hotel/resort guests and hotel/resort staff) using the same (especially in light of sales of liquor) giving rise to consequential increase in cost to the owners of apartments by the increase in levies to fund repair and replacement of such common property;
> (iv) increase the cost of insurance of the development with consequential increases in levies to the owners of apartments;
> (v) have an adverse effect upon the residential amenity of both the common property and individual apartments."

264. The plaintiffs do not press the points made in sub-paragraphs (j) and (k) in relation to material prejudice. It is convenient to deal with sub-paragraphs (i) and (l) together because they both involve the issue of residential amenity. Sub-paragraph (i) relates to alleged prejudice in being compelled to live during retirement in a hotel/resort with the features of *Peppers Broadbeach*. This allegation is pleaded only in the Wicks matters. I will address their personal

[140472]

circumstances later. Sub-paragraph 40(l) in the Wicks proceeding and the equivalent paragraphs in the pleadings in the Gough and Groves and Ryan proceedings raise the issue of residential amenity and it is convenient to deal with that issue, including the particular prejudice that is alleged in respect of the amenity of Mr and Mrs Wicks during their retirement. The issue of residential amenity is relevant to each of the plaintiffs both in respect of any period in which they might reside in the apartment and also in respect of the amenity of the apartment to an individual who might use their apartment as a permanent residence. At one stage Mr Gough and Ms Groves intended to use their apartment as a residence. Ms Ryan, on the other hand, contracted to purchase an apartment expecting to re-sell it. She was told by a real estate agent that *The Oracle* was to be an iconic residential project with permanent and long-term residents only, and was designed to attract "baby boomers" looking to downsize and move from homes into a luxuriously-appointed development. Accordingly, the residential amenity of the tower to such potential purchasers is relevant to Ms Ryan's circumstances. It will be necessary to consider the personal circumstances of each of the plaintiffs who assert an entitlement to cancel under the Act in determining the issue of material prejudice. Before doing so, it is necessary to identify the alleged inaccuracy in the disclosure statement and the extent to which the disclosure statement has become inaccurate.

265. The *BCCM Act* is not concerned with material prejudice in some general sense but with material prejudice to the buyer if compelled to complete the contract "given the extent to which the disclosure statement was, or has become, inaccurate"[35] , or from the fact that the buyer would be materially prejudiced if compelled to complete the contract "because of" an inaccuracy under s 217(b), in this case because information disclosed in the disclosure statement, as rectified by any further statement, is inaccurate.

266. The relevant inaccuracy that is causally linked to the material prejudice that I am presently considering is not apparent on the pleadings. I may have already dealt with some alleged inaccuracies in dealing with earlier grounds of material prejudice. Without unnecessarily repeating matters, the apartment being offered in performance is an apartment in a residential tower in the development known as *The Oracle*. The plaintiffs currently under consideration (and others) may have expected the contracted apartment to be in a particular kind of residential tower, namely one predominantly occupied by permanent and long-term residents. This expectation was not based upon the contents of the disclosure statement. The final disclosure statement has not become inaccurate as that term is used in relevant provisions of the Act because it describes the apartment as being a lot in a residential tower.

267. Sub-paragraph 39(a) of the Wicks pleading says that a disclosure statement "if given now would and must state that Lot 1803 would be an apartment in an hotel/resort." I am not persuaded that the requirements of the Act require a disclosure statement to give such a short-form description, or that the final disclosure statement has become inaccurate because it does not include such a description. As previously noted, although some would describe the tower as a hotel, that simple description is, at best, incomplete and possibly misleading. The tower has many features that a hotel does not possess and lacks features that many hotels possess. It is not occupied only by hotel guests and hotel staff. Although the current mix of occupants is not clear from the evidence, SSI submits, and the plaintiffs' submissions do not contest, that it has a mix of occupants with less than half having decided to appoint Peppers to manage their apartments.

268. The BCCM Disclosure Statement and the "material accompanying" it did not make any statement about the expected mix of occupants. Apart from the information sheet which effectively described the tower as a residential tower, it did not give a general description of it. It did not state that the tower would be occupied predominantly by permanent and long-term residents. It did not state that the services to be provided by the letting agent, the features of the building and the facilities and services enjoyed by short-term tenants and holiday makers would lead to it being described in some particular way, or not

[140473]

being described as a hotel or resort, particularly by persons occupying apartments managed by the letting agent.

269. The fact that the tower is described as a hotel or resort, and in the opinion of many has become a hotel or resort, is a matter of particular concern to someone like Mr Wicks. As an airline pilot, much of his life has been spent in hotels, and he says in his affidavit that the thought of retiring to a hotel/resort development is abhorrent. This evidence is relevant to the issue of material prejudice in the case of Mr and Mrs Wicks. It bears upon their personal circumstances and upon their residential amenity.

270. In relation to issues of residential amenity that are specifically pleaded in sub-paragraph 40(l) of the Wicks pleading and in comparable paragraphs of the pleadings in the Gough and Groves and the Ryan proceedings, it is necessary to identify the relevant inaccuracy before turning to the extent to which any such inaccuracy would cause material prejudice if the plaintiffs were required to complete their contract. No specific allegation of inaccuracy in respect of residential amenity is made in paragraph 39 of the Wicks pleading. Instead, it is apparently subsumed in the general contentions that the lot was to be in a residential tower, whereas a disclosure statement if now given would have to state that it is an apartment in a hotel/ resort branded *Peppers Broadbeach*. The starting point for an assessment of alleged inaccuracy bearing upon residential amenity is the content of the disclosure statement that was given in respect of the contract, and each further statement and any material accompanying it. This includes the Caretaking and Letting Agreement in respect of a tower which was to have more than 250 apartments. The annexures to the disclosure statement also included Facility Sharing Agreements which contemplated use of facilities in Tower One by occupants of Tower Two and owners of lots and employees in the retail component of the development. The Caretaking and Letting Agreement was consistent with the letting agent seeking to attract

short-term tenants and holiday makers. It contemplated the conduct of events in occupation areas and the use of the caretaker's lot on the ground floor of Tower One for services commonly rendered in connection with letting lots in such a development and for any lawful activity. The contract itself contemplated that two levels in the Scheme Buildings might be used for "Commercial Purposes", being any lawful purpose that was non-residential.

271. The occupation of the tower by short-term tenants and holiday makers and the provision of services to them by the letting agent was contemplated by the disclosure statement. It was more clearly indicated by the Operator PDS and the Developer PDS which the plaintiffs contend form part of the contract. Incidentally, very few of the plaintiffs read the disclosure statements in any detail. In any event, the disclosure statement given under the *BCCM Act* made no explicit statement about residential amenity. The plaintiffs plead no such statement. The disclosure statement did not indicate that the amenity of residents would not be affected by the movement of persons occupying the more than 250 apartments in the tower or the provision of services to them by the letting agent that was to be appointed to manage the tower.

272. The relevant inaccuracy in the disclosure statement is ill-defined by the plaintiffs' pleadings. Instead, the essence of their cases on inaccuracy and material prejudice relate to the appointment of Peppers, its operation of the letting business, and the provisions of the Share Sale Agreement that facilitate the conduct of that business. These and other matters are alleged to have resulted in the tower becoming a hotel/resort that attracts more people than the plaintiffs had expected. Those expectations, however, are not based on the *BCCM Act* disclosure statement. They arise because of statements made outside of it, including statements made by sales representatives. These expectations were not deflated or adjusted by reading the *BCCM Act* disclosure statement, its annexures, or the other disclosure statements provided to the plaintiffs.

273. Save in the respects that I have previously addressed, namely the name of the tower itself, I am not satisfied that the final disclosure statement is inaccurate or has become inaccurate on any of the bases pleaded and pressed by the plaintiffs.

274.

[140474]

The plaintiffs' written submissions anticipate the contention that the contract and the disclosure statements suggested that there would be a great deal of foot traffic in the premises. They submit that Peppers is a hotel/resort providing services in addition to those of a letting agent under the terms of the Caretaking and Letting Agreement annexed to the disclosure statement, and that this will involve an increase in the number of people able to access Tower One. Particular reliance is placed upon the proposed restaurant and bar on the ground floor as being open to the public and attracting members of the public to the foyer area. This is said to increase the number of people present, increase the number of inebriated people present and decrease the security of those residents wanting security. More generally, the "short-stay" nature of Peppers business is said to cause a substantial increase in both the number and turnover of short-stay tenants/ patrons, who will be distributed throughout the two towers.

275. As to the restaurant and bar pleaded in paragraph 40(l)(i), the proposed restaurant and bar is limited to the area described as Lot 101. By reason of its ownership of Lot 101, and the terms of relevant documents, the on-site letting agent (SSA) is entitled to use Lot 101 for the provision of certain services to residents and guests and other lawful activity. The use of Lot 101 as a restaurant and bar is authorised by the permission granted by the Caretaking and Letting Agreement to use it for the provision of services associated with the letting business. The letting business is one that provides services to residents and guests. It services apartments that are to be occupied by persons expecting to occupy an apartment warranting a star rating of four-and-a-half to five stars. The provision of an in-house restaurant and bar is necessary for Peppers to achieve its desired rating. The existence of a ground-floor restaurant and bar in such an apartment complex is common on the Gold Coast. In any event, the establishment of kitchen facilities would be necessary to operate room service. The plaintiffs do not allege that the proposed use of Lot 101 as a restaurant and bar would be unlawful.

276. The *BCCM Act* disclosure statement did not state that Lot 101 would be used as a restaurant and bar. However, this does not mean that the statement has become inaccurate. The use of Lot 101 as a restaurant and bar appears to be authorised by the Caretaking and Letting Agreement annexed to the disclosure

statement. The fact that a different letting agent might have put Lot 101 to a different use, for example a retail shop directed at tourists or a tour office, does not mean that the appointed letting agent is not authorised to use it as a restaurant and bar. Peppers intends to use the restaurant and bar to provide services to residents and guests. The proposed restaurant and bar is targeted at residents and guests. There is no evidence that it is targeted at members of the general public. The area of the proposed restaurant and bar is fairly small. The proposal to use Lot 101 as a restaurant and bar does not make the disclosure statement inaccurate.

277. Its establishment may increase foot traffic in the foyer area. The possibility exists that persons using the restaurant and bar will become inebriated. There is no evidence that Peppers will knowingly permit this to occur or will not address the problem if and when it occurs. There is no evidence of a present problem in relation to inebriated residents and guests returning to the premises from bars and restaurants in its vicinity. However, the possibility of this occurring must be present in a tower with more than 250 apartments situated in a tourist area with restaurants and bars. It has not been shown that the proposed in-house restaurant and bar will have any significant adverse effect on residential amenity. The use of Lot 101 for such a purpose is authorised. No inaccuracy in the disclosure statement in this regard has been proven.

278. The broader issue of residential amenity relates to the increase in the number of people present on the premises and the amount of foot traffic as a result of the focus by Peppers on short-stay tenants, compared to the situation that might have obtained if a letting agent did not have that focus. It is indisputable that a focus on short-term tenants will increase the turnover of tenants. Holiday makers coming and going from their apartments may use lifts several times a day, more than permanent and long-term residents who travel to and from their place of employment and depart the building less frequently. An increase in the number and

[140475]

turnover of short-stay tenants has the potential to affect the residential amenity of the relevant plaintiffs if and when they take up permanent residence in the building, and upon the residential amenity of potential purchasers who might seek an apartment in which to reside permanently or frequently. The extent of any reduction in residential amenity is relevant to the issue of material prejudice. The relevant complaint is the focus of the letting business operated by Peppers. Yet the plaintiffs do not point to any statement in the *BCCM Act* disclosure statement to the effect that a letting agent would not have such a focus. Accordingly, any reduction in residential amenity is not because of any inaccuracy in the information disclosed in the disclosure statement.

279. The specific matters pleaded in sub-paragraph 40(l)(ii), (iii) and (iv) of the Wicks pleading relate to the consequences of increased use of the premises on common property and increases in the cost of insurance, which the plaintiffs submit are likely to be borne by the body corporate and passed on to members of the body corporate. There is no evidence that the conduct of the letting business as a “hotel/resort” has had these consequences compared to the position that would have applied had it not focused upon short-stay tenants and not attracted the description “hotel/resort”. There is no evidence that insurance companies have reclassified the nature of the premises or increased insurance premiums because the premises have become a “hotel/resort”. The plaintiff submits that these matters may be inferred. I am prepared to infer that the conduct of the letting business as a “hotel/resort” that focuses upon short-stay tenants is likely to involve greater use of common property and accelerate the deterioration of common property compared to usage in circumstances in which the letting pool had a greater number of long-term tenants. I am not prepared to infer that insurance premiums have increased. If they have, the extent of any increase is unproven.

280. Moreover, the extent of any accelerated deterioration in common property, any increase in damage to common property and any increase in the cost of insurance must be by reference to the extent to which these are a result of the development being conducted differently to the manner described in the disclosure statement. The disclosure statement did not preclude the letting of apartments on a short-stay basis. The cost to the body corporate and members of the body corporate by any increase in levies as a result of accelerated deterioration, increased damage and increased insurance premiums is unproven. Whatever its extent, it would need to be off-set by possible improvements in rental income because apartments are able to be let to persons who wish to stay at a hotel/resort that provides facilities including the sale of liquor in mini-bars by way of room service and in the yet-to-be established restaurant/bar. Regard would also need to be had to the possible increase in the capital value of the apartment because of its potential to be let to such short-stay tenants. The provision of certain hotel-style services to short-stay tenants is likely to attract

more short-stay tenants and increase the amount for which an apartment may be rented on that basis. It may improve occupancy rates compared to the occupancy rates that would prevail if these services were not available. Any increase in occupancy rates may be a mixed blessing to some owners. It may increase the potential rental income of the apartment or maintain and improve its capital value compared to an apartment that did not offer these services and that had a lower occupancy rate. Those potential improvements, with their positive financial benefits, need to be balanced against the cost of providing such services, including increased levies. I am not persuaded that any financial consequences by way of increased levies by reason of the matters pleaded in paragraph 40(l)(ii), (iii) and (iv) exceed the financial benefits to an owner of Peppers conducting the development as a "hotel/resort".

Summary in relation to alleged inaccuracy of the final disclosure statement

281. I am not satisfied that the final disclosure statement has become inaccurate because it describes the lot as being in a residential tower. The tower remains a residential tower. I am not persuaded that a disclosure statement if given now would have to describe the apartment as a "hotel/resort". It might simply refer to it as a residential tower and not attempt to describe it as a hotel,

[140476]

apartment/hotel, self-contained apartments with access to hotel-like services, a resort or in some other way.

282. The final disclosure statement has not become inaccurate because it describes the lot as being a lot in a residential tower in *The Oracle*. It has, however, become inaccurate insofar as it said that the residential tower itself was to be known as *The Oracle*, when the residential tower has become branded *Peppers Broadbeach*. The name of the tower itself is not pleaded as an inaccuracy and the change in the name of the tower itself is not alleged to have caused the plaintiffs material prejudice. The relevant plaintiffs' pleading in relation to inaccuracy and material prejudice does not relate to the name of the tower, as such. The grounds that were pressed in final submissions relate instead to the conduct of the development as a hotel/resort branded *Peppers Broadbeach* with its focus on short-stays.

283. The conduct of the letting business so as to focus on short-stay tenants is likely to diminish the residential amenity of persons who reside in apartments that they own or who reside there as long-term residents, compared to a letting business that did not have that focus. However, any such adverse effect upon residential amenity and resultant prejudice to the plaintiffs if compelled to complete a contract would not be because of an inaccuracy in the information disclosed in the BCCM Disclosure Statement, as rectified by any further statement made under the *BCCM Act*. It would be because a particular letting agent chose to focus upon short-stay letting, as it was entitled to do under the Caretaking and Letting Agreement annexed to the BCCM Disclosure Statement.

284. Accordingly I am not satisfied that the final disclosure statement has become inaccurate in any of the pleaded respects, or that the respect in which it has become inaccurate (the name of the tower itself) is an inaccuracy which would result in a buyer being materially prejudiced if compelled to complete the contract because of that inaccuracy. In terms of s 214(4)(b), the plaintiffs have not proven that they would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. In terms of s 217(b)(iv) the plaintiffs have not proven that because of an inaccuracy in the information disclosed in the disclosure statement, as rectified by any further disclosure statement, they would be materially prejudiced if compelled to complete the contract.

285. In short, the plaintiffs have not established their pleaded case of inaccuracy, and the inaccuracy that I have found is not shown to have been causative of material prejudice.

Material prejudice — the particular circumstances of the relevant plaintiffs

286. I shall address separately the position of each of the plaintiffs who rely upon an entitlement to cancel under the *BCCM Act*.

Mr and Mrs Wicks

287. Mr Wicks is an airline pilot. He and his wife have resided in Hong Kong for 25 years, have visited the Gold Coast for 20 years and intended to retire there. On 27 January 2006 they executed a contract to

purchase “off the plan” a lot on the eighteenth floor of Oracle Tower One. Mr and Mrs Wicks planned to live in this apartment in their retirement years. After SSI obtained approval to extend the period of time in which it was required to provide the plaintiffs with a registrable instrument of transfer, they executed a second contract to replace the original. This was on 25 July 2006.

288. They received a series of disclosure documents concerning their purchase. On 23 January 2006, prior to signing their first contract, they received an original disclosure statement pursuant to s 213 of the *BCCM Act*, a Developer PDS and an Operator PDS. On 24 July 2006, they received another disclosure statement (consisting of a Developer PDS and a *BCCM Act* disclosure statement) in terms materially the same as the original one.

289. On 27 September 2006 the defendant provided a further disclosure statement pursuant to s 214 of the *BCCM Act*. A second further disclosure statement followed on 16 January 2007, and a third on 22 December 2008. This third further disclosure statement contained an amended Caretaking and Letting Agreement, as did a fourth further disclosure statement on 28 May 2010.

290.

[140477]

From February 2010 Mr and Mrs Wicks received information about the holiday letting program to be conducted.

291. On 6 August 2010, a letter was sent to Mr and Mrs Wicks by Noble House Design. It referred to the appointment of Peppers as residential manager for the Oracle, and to the branding of the Oracle as *Peppers Broadbeach*. This was the first indication to them of Peppers’ involvement with the Oracle. On 12 August 2010, *Peppers Broadbeach* sent to Mr and Mrs Wicks a bundle of documents known as an Owners Information Pack. Among these documents was a letter announcing that the Oracle had recently joined the Peppers portfolio of retreats, resorts and hotels, a brochure promoting *Peppers Broadbeach*, a furniture package brochure, and various forms.

292. The initial settlement date for the contract was 19 October 2010. On 7 October 2010, newly-appointed solicitors sought an extension of the settlement date to 19 November 2010 on behalf of Mr and Mrs Wicks. The reason given for the extension was that the Wickses resided overseas and needed more time to make arrangements for settlement. Settlement was extended by agreement to 9 November 2010 on certain terms.

293. On 18 October 2010, Mr Wicks emailed Mr Stone of SSI. He stated that their retirement plans had changed, that they were to remain in Hong Kong and that they would no longer be making use of the apartment. He stated that there seemed to be two choices — complete the purchase and immediately put the apartment up for sale or seek to come to a commercial arrangement with SSI to terminate the contract. He stated that the apartment was exceptionally well positioned in the development but that the market was depressed. Mr Wicks sought to initiate a discussion about SSI re-marketing the apartment for sale with compensation being paid by Mr and Mrs Wicks. There was no reference to any concern about Peppers having been appointed.

294. Mr and Mrs Wicks changed solicitors again and appointed their present solicitors. On 1 November 2010 their new solicitors wrote purporting to terminate the contract. This letter focused on what was said to be the conversion of the development to a Peppers hotel, the effect that this would have on their letting options and a concern about an increase in letting fees. The letter of termination was essentially in the same terms as that sent on behalf of Mr Gough and Ms Groves on 13 October and on behalf of Ms Ryan on 4 November 2010.

295. Mr and Mrs Wicks’s pleading sets out six grounds upon which the final disclosure statement is alleged to have become inaccurate, and also thirteen grounds on which they would be materially prejudiced if compelled to complete their contract. I have dealt with the matters that were pressed in this regard in final submissions. Mr and Mrs Wicks, like the other plaintiffs who gave evidence, relied upon affidavits which were read and stood as their evidence-in-chief.

296. Because of his occupation as an airline pilot, Mr Wicks has spent, and continues to spend, a lot of time staying in hotels. His affidavit says that he would never want to retire to a building that is a hotel or is run like a hotel. The essence of his complaint is that his retirement plans have been ruined by a switch from a

sophisticated, upmarket residential development called *The Oracle* to a hotel called *Peppers Broadbeach*. He says he is now being an offered an apartment in one of a chain of hotels and resorts that cater to the short-term holiday market, and in which hotel-like services such as pay-for-use car parking, convention facilities, and the service of food and alcohol are offered. I note that, contrary to his affidavit, residential visitors do not pay for car parking, and there are no convention facilities. Mrs Wicks reiterates another of her husband's concerns, namely that the security and privacy of their complex has been compromised. She expresses concern that they have lost the secure, quiet retirement which they were expecting.

297. When and precisely why their retirement plans changed is not clear from the evidence. Mr Wicks accepted that the impression that he wished to give in his affidavit was that his retirement plans were ruined because of the appointment of Peppers. However, his email of 18 October 2010 (which was not disclosed by him) indicated that their retirement plans had changed and made no reference to the fact that this was a result of

[140478]

Peppers having been appointed. Mr Wicks's oral evidence was that his retirement plans are entirely flexible and that three months planning was all that he needs to retire. The first complaint made about Peppers was when Mr and Mrs Wicks engaged their present solicitor. This was long after they received documents announcing its appointment.

298. Mr Wicks appreciated after receiving disclosure statements in early 2006 that an owner could appoint a letting agent to arrange short-term holiday and medium-term lettings, and that other prospective purchasers could do the same. He did not pay much attention to these matters because, at the time, he and his wife intended to retire to rather than let their apartment. Mr Wicks's affidavit says that on and after 12 August 2010, after receiving the Owner's Information Pack from Peppers (and subsequently from other information received) he became aware of the appointment of Peppers and of the proposal for the development to become "a short-term holiday resort/hotel", and that his retirement plans were ruined. His affidavit asserts that he contracted to buy an apartment in a complex that was to provide "a secure and private environment for the benefit principally of the owner-occupiers with exclusive use of the upmarket private facilities." This last statement, of course, relates not to the contract's actual terms but to Mr Wicks's understanding of what he contracted to buy and the grounds of material prejudice asserted in his affidavit.

299. Under cross-examination, Mr Wicks was unable to explain the absence of complaint about the appointment of Peppers shortly after he learned of its appointment in August 2010. He accepted in his oral evidence that, when he entered into the contract in 2006, what was contemplated was a letting arrangement which would permit short-term occupation of apartments that were put into the letting pool. He thought, however, that the opportunity for short-term letting would not be taken up by many owners. He "imagined" that the sort of tenants would be the sort of people who come typically from Victoria or New Zealand and spend a couple of weeks or longer at Broadbeach. This was based upon his own experience of the type of people who holiday at Broadbeach. On this basis he expected short-term letting to be "relatively minor on the scale of things." He also thought that owner-occupiers would find it very hard to justify letting for less than three or four days because cleaning and other costs would eat into the net return. As a result of these considerations, he assumed that short-term letting would be relatively minor.

300. Mrs Wicks gave oral evidence that a letter of 12 August 2010 announcing the appointment of Peppers was a "warning bell". However no complaint was made about it at the time. Her evidence was that she and her husband were "fairly insulated" from the effects of the global financial crisis, although the airline industry suffered a severe downturn and he took some unpaid leave which allowed them to travel. She was aware that the apartment would be worth less as a result of the impact of the global financial crisis, but said that was "of no material importance to us." I find it hard to accept that this is the case. In any event, the relevant issue is whether the matters relied upon by Mr and Mrs Wicks as constituting material prejudice should be accepted.

301. Under cross-examination, Mrs Wicks clarified that her objection was not to short-term letting (which she defined as anything less than a week) as such. She explained that it was not to do with the length of the stay, but the fact that "it was a hotel and it was offering hotel services." Even then, it was not the fact that hotel-like services such a concierge, valet parking and room service were a concern. Rather, she explained that it "increases the business and the number of staff and the dynamics of the building. It's a completely

different animal to a residential complex." The concerns expressed by Mrs Wicks in her oral evidence did not precisely coincide with those articulated in her affidavit and she said that she was not absolutely certain what she meant in the affidavit where it states: "There will be increased foot traffic and noise with the types of persons who will be attracted to holiday at The Oracle." She clarified that her concern was with the numbers that would be attracted, not the type of people, and her concern with foot traffic was with traffic on the eighteenth floor where there are six apartments. The concern she expressed over foot traffic was not in relation to

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people checking in and out, or people coming in and out of the foyer. Her concern was with traffic in the rooms adjacent to where the apartment was. In re-examination, Mrs Wicks was led back to her affidavit and prompted with questions about the restaurant and bar. She said in this regard that she had a concern for lack of security, lack of privacy and the ability for people to come off the street and use those services when they were not residents and not staying at the premises.

302. I place limited reliance upon the contents of the affidavits filed by Mr and Mrs Wicks. I place greater reliance upon the evidence given by them under cross-examination. They appreciated from an early stage that the building would include short-term letting. They did not give the matter much thought because of their own intentions to retire to the apartment, rather than let it, and because, based on their past experience, they expected the extent of short-term letting to be minor. I am not persuaded that the announcement of the appointment of Peppers was a matter of great concern because they expected short-term letting to be relatively minor. If the announcement of Peppers sounded any "warning bells", they were not of a kind that prompted any inquiry or complaint.

303. Ultimately, the point to emerge from the evidence given by Mr and Mrs Wicks, as tested under cross-examination, is a concern that the number of short-term tenants will be more than they expected, and Mrs Wicks's particular concern was with the movement of people on the eighteenth floor, rather than through other areas.

304. I accept that Mr Wicks genuinely does not want to live permanently in a hotel/resort, and did not expect to do so when he and his wife contracted to purchase Lot 1803 for $1.13 million. If the extent of short-term letting undertaken by Peppers in respect of the apartments that are in its pool makes the residential tower a "hotel/resort", then short-term letting to that extent was not something which the relevant disclosure statement, and other disclosure statements, either predicted or excluded. Mr Wicks may not have contemplated short-term letting to such an extent, based upon his own experience. Given his personal circumstances, including his resistance to the idea of spending his retirement in a hotel-like environment, I consider that Mr Wicks will be prejudiced in a significant way by living in a tower that is described by many as a hotel and which has a greater number of short-term guests than he expected.

305. However, any prejudice to the expectations of Mr and Mrs Wicks and their residential amenity is not because of an inaccuracy in the disclosure statement. It is because, as matters have transpired, the extent of short-term letting is greater than they expected.

306. Their residential amenity and their retirement plans have been affected by a greater number of short-term tenants and the provision by Peppers of services to those tenants, but that prejudice is not causally-related to any inaccuracy in the BCCM Disclosure Statement.

Mr Gough and Ms Groves

307. Mr Gough is a jeweller on the Gold Coast. He and his partner, Ms Groves, contracted to purchase two lots on level 29 of Tower One. Mr Gough negotiated the purchase directly with Mr Nikiforides, the developer. The apartments he was shown were too small for his residential requirements, and he sought to amalgamate three units. Eventually it was agreed that two units would be amalgamated into one, with a connection via the laundry. Mr Gough and Ms Groves intended to live in the larger lot, and to use the connecting lot either for their visitors or for renting to medium/long term tenants. The first lot that they contracted to purchase had a purchase price of $2.687 million. The second lot had a purchase price of $863,000.

308. On 23 October 2006, Mr Gough and Ms Groves executed contracts to purchase the two lots. Prior to signing those contracts they received disclosure statements, including an Operator PDS and a Developer

PDS. In January 2007, December 2008 and May 2010, Mr Gough and Ms Groves received further disclosure statements in relation to each lot.

309. It seems that Mr Gough and Ms Groves received communications about the on-site letting program that was initially proposed. Their pleading indicates that Mr Gough and Ms Groves first became aware of Peppers'

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involvement in the Oracle around July 2010 when they were shown an email sent to another purchaser. That email announced that *The Oracle* would be branded *Peppers Broadbeach*, that it would be a flagship Peppers hotel, that Peppers had entered an exclusive management agreement in relation to *The Oracle* and other matters. They received an Owners Information Pack dated 12 August 2010.

310. The settlement date for Mr Gough's and Ms Groves's lots was 19 October 2010. On 13 October their solicitors wrote to SSI's solicitors to cancel both contracts.

311. Their pleading raises essentially the same grounds of inaccuracy and material prejudice that were relied upon in the Wicks proceeding, and which I have previously addressed. In their affidavits, Mr Gough and Ms Groves particularly complain of the loss of the exclusive, "high-end" character of the Oracle development. Their affidavits say that they looked forward to mixing and forming relationships with other wealthy individuals. The Peppers brand, they say, devalues their investment and destroys the Oracle's unique, iconic status, and will result in their neighbours comprising substantial numbers of short-term tourists. Because of their jewellery business, they also have a particular concern for privacy and security, values which, they say, are compromised by the presence of, and orientation towards, tourist traffic. Under cross-examination, Mr Gough in particular did not articulate all of these concerns, and different concerns were expressed by each of them in their oral evidence.

312. Interestingly, in cross-examination Ms Groves gave evidence of having been told before entering the contract that there would be 60 per cent owner-occupiers in the building and that the remaining 40 per cent would be "long-term rental". She understood this to mean letting of between one and six months. Neither she nor Mr Gough read the disclosure statements. Mr Gough did not give evidence of having been told that there would be 60 per cent owner-occupiers and 40 per cent long-term tenants. However, I found both Ms Groves and Mr Gough to be honest witnesses and I accept that Ms Groves has a genuine recollection of being told there would be 60 per cent owner-occupiers and of the remainder being what she understood to be long-term rentals. I also accept that she believed what she was told. As she explained:

> "I have to trust what people tell me when I'm buying something, the same way somebody has to trust me when they [are] in my business."

313. I accept that because she did not read the disclosure statements, trusted in what she was told and did not think about short-term letting, she thought that the building would be an "upmarket, mostly residential apartment building", occupied to the extent of 60 per cent by owner-occupiers. She did not expect the provision of hotel-like services such as room service to short-stay guests. Her belief that the building was to consist mainly of owner-occupiers and tenants staying a month or more was a motivating factor in purchasing the apartment because she was worried about how busy it could be.

314. Mr Gough read only the part of the contracts relating to the price. He did not read the disclosure documents and gave them to his lawyers. He did not imagine that the building would only be occupied by owners and long-term tenants. He expected people to be there on short-term stays for a week or more. He understood that the letting agent business would be conducted so that it attracted both short- and medium-term stays. He expected certain hotel-like services such as reception staff to meet guests. He did not anticipate that there would be room service. Mr Gough was taken through a variety of services and his evidence was that he did not think that these would be available to short-term guests. He accepted that the concern expressed in his affidavit was that he did not want to live in an apartment building "that services the short term tourist market offering hotel type services". Under cross-examination, he clarified that his concern was not so much about the hotel-type services about which he was questioned, such as valet parking, room service, the capacity to have alcohol served at the pool and tours arranged, it was "more the amount of people that a hotel would attract on a short-term basis". His concern was with people who came for a couple of days or a day.

315.

[140481]

Mr Gough and Ms Groves listed their apartments for sale in August 2009. This was after the global financial crisis. Their original plan had been to sell their residential home and after the global financial crisis that seemed no longer to be in their financial interests. As a result they listed the apartments for sale. The listing occurred well before the announcement of the appointment of Peppers.

316. Mr Gough and Ms Groves articulated different concerns in their oral evidence, and those concerns do not coincide with the many matters mentioned in their affidavit evidence. Ms Groves's principal concern is that the building is not occupied by owner-occupiers and long-term tenants as she understood it would as a result of oral representations made to her, and she is worried about how busy it may be as a result of the presence of short-term tenants. Mr Gough's principal concern, as articulated in his oral evidence, is the number of people that would be attracted on a short-term basis. Their respective concerns are not about the name of the tower and its branding as *Peppers Broadbeach*. Their concern is not even with the fact that Peppers rather than some other operator has been appointed as the caretaker and letting agent. Rather, their concerns are: a) that Peppers' operation will attract short-term letting; and b) the amount of people that will be attracted to the building as part of the short-term tourist market.

317. Like the other plaintiffs in these proceedings, Mr Gough and Ms Groves did not complain about the appointment of Peppers when its appointment was announced.

318. I take account of the fact that Mr Gough and Ms Groves changed their plan to reside in the apartments as a result of the global financial crisis and a reassessment of their plans. I do not accept, however, that this means that their decision to cancel was based only upon financial considerations. I accept their evidence that they have a concern about the number of short-term guests in the building and about how busy it may be. They may have had these concerns at an earlier stage had they read the disclosure statements and, in the case of Ms Groves, not relied upon what she was told or at least what she understood she was told about 40 per cent of the apartments being occupied by long-term tenants.

319. Again, the entitlement to terminate under s 214 or s 217 of the *BCCM Act* does not arise simply because a buyer's expectations have been disappointed and he or she receives at settlement something substantially different from what was expected. The relevant point of reference is the BCCM Disclosure Statement, not expectations derived from extraneous sources. The Act requires material prejudice to be as a result of an inaccuracy. The inaccuracy must be the cause of the material prejudice. I am not satisfied that any prejudice to Mr Gough and Ms Groves as a result of being compelled to complete the contract is because of an accuracy in the BCCM Disclosure Statement.

Ms Ryan

320. Ms Ryan works as a teacher's aide. She thought that *The Oracle* stood apart from other developments on the Gold Coast and was well-situated to cater to a growing market of downsizing and retiring baby boomers. She never planned to live in, or to take possession of, her apartment. Rather, her intention was to on-sell it to another buyer prior to settlement. She contracted to buy a two-bedroom apartment in Oracle Tower One on 10 January 2006 for $940,000. That contract was replaced by a new contract on 18 July 2006.

321. The initial contract was entered into after she spoke to a real estate agent who told her that *The Oracle* was to be "an iconic residential project with permanent and long-term residents only". After investigating in late 2005 other projects planned for Broadbeach, and finding nothing which compared to *The Oracle*, she entered the contract. Her affidavit states:

> "I was satisfied that The Oracle would meet the requirements of a different and separate market from existing and planned developments in Broadbeach such as the Meriton, Sierra Grande, the Soffitel [sic] and Jupiters Casino. The Oracle was to be an iconic, luxury, residential development and had a unique position on the beach-side offering high quality finishes for discerning long-term residents and quality inclusions and facilities such as a Zen garden, private wine locker, gym, movie theatre and a

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teppanyaki bbq for use by owner/occupiers. I believed it would define Broadbeach long term as predominantly a city-like residential living environment with a mix of residential, hotels and commercial buildings."

322. Ms Ryan received a disclosure statement in January 2006, along with the Operator PDS and Developer PDS. She received another disclosure statement on 14 July 2006 before signing the second contract. She received further disclosure statements in September 2006, January 2007, December 2008 and May 2010. Ms Ryan gave oral evidence of probably "scanning through" the disclosure statements that she received.

323. The only means by which Ms Ryan would be able to perform the contract was by finding another purchaser and arranging contemporaneous settlements. She had no independent means of settling the contract.

324. In early 2010, and before any announcement of Peppers, Ms Ryan listed the property at a price of $1.28 million. This price was selected because it would enable her to cover the purchase price, stamp duty and agent's commission. However, the price of $1.28 million was unrealistic in the light of the global financial crisis and its impact on property prices, even though Ms Ryan had the hope that such an iconic building would not be affected as other parts of the market had been.

325. In July 2010 she was sent an email announcing that Peppers would manage *The Oracle*, which would henceforth be a flagship Peppers hotel branded *Peppers Broadbeach*. In August or September 2010 she received the Owners Information Pack including a letter and brochure promoting Peppers and *Peppers Broadbeach*, a furniture package brochure and various forms. In October 2010 she was sent the Peppers Investor Brochure promoting *Peppers Broadbeach*.

326. In her affidavit, Ms Ryan says that upon receiving the Owner's Information Pack from SSI on around 12 August 2010 she became aware that the circumstances with respect to her purchase had substantially changed from what she understood to be the case as a result of what was represented to her. Her affidavit says that she was "shocked and disappointed" to hear that Peppers/Mantra had been appointed as letting agents and that the building would be a Peppers flagship hotel. She did not complain to SSI about this. Instead, on 22 September 2010 she wrote to Mr Con Nikiforides of Niecon and explained her predicament. She explained that she did not have the funds to settle and that the matter had cost her $7,500 in bank guarantee fees. She explained that she had a mortgage of around $100,000 on her $300,000 townhouse, was in her mid-50s and earned about $550 per week as a teacher's aide. She asked to be let out of the contract and explained the difficulties that she had in meeting the required deposit of $94,000. She explained that she had brought up her children without maintenance from her former husband and saw the investment in *The Oracle* as a way of finally getting ahead by using the equity in her home as the deposit.

327. Her personal circumstances were apt to evoke sympathy. Ms Ryan's letter mentioned the severe health problems of her aged parents and the circumstances of her daughter who had recently separated from her husband and was left with the care of two small children and a $50,000 business debt. They were coming to live with Ms Ryan. Ms Ryan offered to work for Niecon in order to make up the deposit amount. A notation on the file copy of a letter of 22 September 2010 indicates that it received the standard Niecon response. Ms Ryan explained in her oral evidence that she did not complain in this letter or in others that she wrote to Mr Nikiforides in October 2010 that she was upset by the appointment of Peppers. She said that she did not know her legal rights and that she did not want to put herself in a bad light with Niecon by laying any blame on it. She did not complain about the building being turned into a hotel because she did not want to make it sound as if she hated the building, and she was offering to work for Niecon. She hoped to be let out of the contract. I accept her evidence as to her reasons for not complaining about the appointment of Peppers.

328. Ms Ryan's settlement date was 27 October 2010. This was extended by agreement to 9 November 2010. On 4 November, however, her solicitors wrote to SSI's solicitors to cancel the contract.

329.

[140483]

Ms Ryan pleads the same six grounds of inaccuracy as the other plaintiffs in these actions. She also pleads 13 grounds on which she would be materially prejudiced if required to complete the contract. Her affidavit makes the claim that the value of her apartment has been compromised by the Peppers re-branding. She

says that her apartment's value would be higher if it was part of an iconic, luxury, residential development as opposed to being part of a hotel. The appointment of Peppers is said to have negatively impacted on the prestige of her lot, which it will no longer attract the sort of wealthy baby-boomers to whom she hoped to on-sell. Instead, her prospective market is now said to be limited to investors interested in night-rate letting, which is a market already met by other Broadbeach developments.

330. A separate complaint is made in relation to letting fees, but this complaint is without merit for the reasons given in SSI's submissions at paragraph 340, and which was explored in her cross-examination.

331. In her oral evidence, Ms Ryan reiterated that she was led to believe that *The Oracle* was to be a prestigious address and that the complex itself was unique. She was persuaded that the main market for it was "retiring baby-boomers" and that this was a large market. She was taken in cross-examination, as other plaintiffs were, to the contractual documents and disclosure statements. Her evidence was that references in the Operator PDS to short-term holiday letting would have come as a surprise to her had she read them. This is because it was not what was promoted to her. However, she did not read that document or the other documents. She recalled the documents but could not recall reading them.

332. In her oral evidence, she identified her concern as short-term letting, and the fact that the letting agent is Peppers, with accommodation being offered under its name. Her complaint would have been the same had the same services been offered by an agent under some innocuous unknown name. She identified her problem with the Peppers branding as being that it "devalues the development because it's not residential and you don't get the same capital gain and … the banks won't lend as much money on [it]." She stated that "it's just not The Oracle". Her concern with the branding of Peppers was not the name as such, but that the name is linked to a chain of hotels and the building was not "long-term residential in the mainstream". Instead of providing a lifestyle for long-term residents, the appointment of Peppers placed a focus on short stays. As Ms Ryan explained: "You don't go to Peppers to retire or to live" and so "that dynamic has changed."

333. As a result of what she was told prior to entering into the contract, Ms Ryan did not expect short-stay guests. Her definition of a short stay was not precise but it included people who booked at night-rates. She did not necessarily expect people to stay there for many months but did not expect it to be a place where people could go and stay overnight. She did not expect the business to attract weekend guests. In various ways, Ms Ryan explained that she was disappointed with the prospect of *The Oracle* having short-term guests. It was not "the iconic vision that everybody had". She expected the apartment, with its facilities that included a full kitchen, to be a home in which people lived. She accepted, however, that the contract documents that she signed placed no restriction on her capacity to short-term let her apartment and she did not think that anyone else had promised such a thing. She simply assumed that purchasers would live there.

334. I found Ms Ryan's oral evidence more informative of the substance of her complaint than her affidavit. However, one sub-paragraph of her affidavit captures the prejudice she claims to have suffered as a result of the development being rebranded Peppers:

> "The Oracle was to be an iconic, unique and luxury residential complex with the intention of attracting well-off baby-boomers who wished to downsize and live out their lives in luxury and exclusive living. The Oracle with the rebranding of Peppers will no longer attract such persons or any person looking for a residential apartment to live in or to let as a residential apartment …".

The essence of her complaint is that she believed that the development was to be for owner-occupiers and permanent residents only.

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Like other plaintiffs, she complains that the letting agent conducts a business which will attract short-stay holiday makers.

335. In her oral evidence she explained that her complaint was not just that Peppers was offering certain hotel-like services, but that it was offering them "under a new name", namely *Peppers Broadbeach*. As she said in her oral evidence: "It's just not The Oracle." Part of her complaint was that the branding of the development as *Peppers Broadbeach* had a number of consequences, principally the attraction of short-term tenants, and that the Peppers branding and descriptions of it as a hotel had severely compromised her ability to sell the apartment to the market that she had identified.

336. Ms Ryan, probably more than any of the other plaintiffs, articulated the relevant prejudice occasioned to her because of a change in the name itself. The relevant prejudice arises because the residential tower is not known as *The Oracle*, but is branded as *Peppers Broadbeach*. This prejudice relates to what Ms Ryan understood the name *The Oracle* to mean as a result of what was said to her by an identified real estate agent and by unnamed Niecon sales staff before she entered the contract, namely that *The Oracle* would be an iconic residential project with permanent and long-term residents only. She believed that there was a market for on-selling an apartment in such a tower. The relevant prejudice is not to her own personal residential amenity; rather, it is that a tower branded *Peppers Broadbeach*, and not known as *The Oracle*, is not what she expected to purchase.

337. Her case, as pleaded and as put in submissions, did not focus upon an alleged inaccuracy in the name of the tower itself. Instead, it was pleaded on the wider basis that I have earlier addressed. The relevant pleaded inaccuracy is that the disclosure statement describes her lot as being a lot in a residential tower in *The Oracle*, whereas a disclosure statement if given now would state that the lot would be a lot in a hotel/resort branded *Peppers Broadbeach*. An inaccuracy in respect of the name of the tower itself was not specifically pleaded. Ms Ryan's evidence in relation to prejudice includes the fact that the lot is not in a tower known as *The Oracle*, and that the residential towers have been branded *Peppers Broadbeach*. Part of her case on prejudice relates to the name itself, and what that name meant to Ms Ryan.

338. I have earlier found that the disclosure statement stated that the residential component of the development was to be known as *The Oracle*. I have found that it has been branded *Peppers Broadbeach*. Accordingly, the disclosure statement would be inaccurate in this regard. It had become inaccurate in this regard prior to the date for settlement of Ms Ryan's contract and at the time she purported to exercise a statutory entitlement to cancel it. The statutory entitlement to cancel under s 214(4)(b) arises if the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate. Section 217(c) has a similar causal element. An inaccuracy in the information disclosed in the disclosure statement, as rectified by any further statement, is not itself sufficient. The buyer must show that "because" of the inaccuracy in the information disclosed in the disclosure statement, he or she would be materially prejudiced if compelled to complete the contract. I have earlier addressed what is meant by "materially prejudiced". The test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced? As with the other plaintiffs relying upon the statutory right to cancel, it is necessary to identify the relevant "material prejudice", and there must be a causal relationship between the inaccuracy and the prejudice.

339. In Ms Ryan's case, the substance of her complaint is not the name of the residential tower as such (that is, that the tower is no longer known as *The Oracle*). The name aspect is part of a broader case on prejudice relating to the conduct of the development, namely that the arrangements that have been put in place attract short stays with the result that the tower has become a hotel/resort. The relevant prejudice is pleaded in paragraph 41(a) of her pleading, namely that the apartment purportedly offered in performance is not an apartment in a residential tower in *The Oracle* but, rather, an apartment in a hotel/resort branded *Peppers*

Broadbeach with the features, attributes, uses and consequences referred to in paragraphs 33 to 38 of that pleading.

340. As with other plaintiffs, the claimed prejudice relates to the difference between what was expected as a result of statements not found in the disclosure statement and what is offered by way of contractual performance. However, the *BCCM Act* requires a causal relationship between the inaccuracy and the prejudice, and, as was said in *Mirvac Queensland Pty Ltd* v *Wilson*,[36] there must be "proportionality between the inaccuracy and the prejudice".

341. The relevant inaccuracy in the disclosure statement relates to the name by which the tower was to be known. This is the inaccuracy that has been established by Ms Ryan and the other plaintiffs. The disclosure statement has not been shown to have been inaccurate in the other respects pleaded by them. Having regard to the need for a causal relationship between the inaccuracy and the prejudice claimed by Ms Ryan, the disclosure statement did not say the things about the tower that she expected as a result of what was said to her. It did not say that the tower was to be occupied by permanent and long-term residents only. It did

not say that owners could not let their apartments for a short term. The Caretaking and Letting Agreement contemplated, among other things, that the letting agent might operate a tour desk.

342. Any inaccuracy in the disclosure statement with respect to the name of the residential tower (being an inaccuracy not specifically pleaded) is an inaccuracy in respect of a tower in which apartments might be let for short-term stays. The disclosure statement did not become inaccurate because the appointment of Peppers permits such conduct. The disclosure statement was not inaccurate, and did not become inaccurate, because the tower might be a "resort" for a large number of persons occupying apartments for a short time. Any inaccuracy in the disclosure statement in respect of the name of the tower needs to be seen in that context.

343. In assessing "material prejudice", regard must be had to Ms Ryan's particular circumstances. She was misled by at least one real estate agent into believing that *The Oracle* was to be for permanent and long-term residents only. Her belief in this regard was in part a function of her failure to read each of the disclosure statements. If she had done so, she would not have formed that belief. She also would have questioned that belief if she had reflected on the absence of any contractual provision in her standard contract (and presumably in standard contracts signed by other buyers) that prevented her from letting her apartment on a short-term basis. In any event, I accept that Ms Ryan had an expectation that *The Oracle* would consist of permanent and long-term residents.

344. Ms Ryan attached significance to the name *The Oracle* because of what that name conveyed to her in the light of what she had been told (even if these things were not part of any contractual promise). She intended to on-sell the apartment to persons seeking an apartment with the features that she expected *The Oracle* to have, being individuals who wished to live in the apartment on a permanent basis or let it to others on a long-term lease.

345. Having regard to those personal circumstances, I conclude that someone in those circumstances would be materially prejudiced if compelled to complete the contract and acquire an apartment in a tower branded *Peppers Broadbeach* because of the meaning and significance that was attached to the name *The Oracle* as a result of non-contractual representations. That person would also be prejudiced even if the tower was not branded *Peppers Broadbeach*, and was known as *The Oracle*, but was managed by a letting agent with a focus on short-term stays.

346. The material prejudice that arises because of the focus of Peppers on short-term stays is not because of an inaccuracy in the disclosure statement. The only relevant inaccuracy is in the name of the tower itself. The material prejudice is not because of that inaccuracy. The extent to which the disclosure statement was or became inaccurate is in respect of the name of the tower itself. The material prejudice pleaded and proven by Ms Ryan relates to the difference between what she expected (on the basis of non-contractual representations) *The Oracle* would be like, and

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what was provided for in the contract, including the disclosure statement which formed part of it and which permitted short stays.

347. The tower that was to be known as *The Oracle*, as described in the disclosure statement, did not have the features that Ms Ryan expected, but it did have the features described in that document. These included an on-site letting agent who could promote its business and focus on short stays. The name given in the disclosure statement was the name of a tower having those features, not a tower having the features which Ms Ryan understood that *The Oracle* would have. The inaccuracy in the name of the tower must be seen in that context.

348. In summary, the apartment was still in a development named *The Oracle*, even if the tower itself would not be known as *The Oracle* because of the branding being undertaken by Peppers. A disclosure statement stating that the tower would be known as *The Oracle* would have been inaccurate if given in October 2010, but only in respect of the name of the tower itself. It would not have been inaccurate in relation to the nature of the tower and the type of guests that the letting agent might seek to attract to it. It is these matters, not the name of the tower itself, that constitute the substance of Ms Ryan's disappointed expectations and the prejudice that she says she will suffer as a result if she is compelled to complete the contract.

349. Any inaccuracy in the disclosure statement is not the cause of the material prejudice that has been pleaded and proven by Ms Ryan.

Conclusion — cancellation under the *BCCM Act*

350. The plaintiffs who claimed an entitlement to cancel pursuant to the *BCCM Act* have not established such an entitlement. I have had regard to the personal circumstances of each such claimant. In general terms, however, the focus of each of those plaintiffs was on the expectation that *The Oracle* would be predominantly, if not exclusively, occupied by owner-occupants and long-term tenants. This was important to Mr and Mrs Wicks and to Mr Gough and Ms Groves because of their own residential amenity. It was important to Ms Ryan because an iconic, luxury, residential tower catering to permanent and long-term tenants was what she understood *The Oracle* to be as a result of representations that were made to her. Each of the plaintiffs' expectations were not met because the tower in which they contracted to purchase an apartment permits short-term letting and the letting agent has a focus on short-term letting.

351. The disappointed expectations of each of the plaintiffs may be described as a "material prejudice". Having regard to each plaintiff's circumstances, someone in those circumstances would be materially prejudiced if compelled to complete the contract. They would be disadvantaged in a substantial way. However, the prejudice is not because of an inaccuracy in the information disclosed in the BCCM Disclosure Statement. They are not materially prejudiced in the respects alleged, given the extent to which the disclosure statement was, or had become, inaccurate prior to the date for their contract to settle. The prejudice suffered by the plaintiffs is because the contract (including the BCCM Disclosure Statement that formed part of it) did not give protection to their expectations.

Other plaintiffs

352. The personal circumstances of the other plaintiffs are not relevant to any claim under the *BCCM Act*. The written submissions of the plaintiffs do not address the individual circumstances of the plaintiffs apart from those plaintiffs who rely upon an entitlement to cancel their contracts under the *BCCM Act*. SSI makes some general submissions about the evidence given by the plaintiffs, and then descends to some detail concerning the evidence of each of them. The general submissions are as follows. First, the evidence given by the plaintiffs in relation to their expectations in respect of their apartments is irrelevant to the construction of the contract, or any issue of whether there has been a departure from it. Indeed, this evidence tends to disprove the plaintiffs' pleaded cases because it makes clear that the plaintiffs' expectations were not based upon the "core documents", being the contract and the disclosure statements. In fact, generally the plaintiffs did not read these documents or read only a small part of them. SSI also relies upon the absence of complaint by the plaintiffs about the appointment of

[140487]

Peppers until they went to their present solicitor. Finally, the general point is made that the plaintiffs are aware that the market value of their apartments had been substantially reduced as a result of broader economic events and, understandably, none of them wished to proceed with their contracts in those circumstances. I accept these general submissions.

353. It is unnecessary to address the individual circumstances of the other plaintiffs. The circumstances of their entry into the contracts are not in dispute. It is unnecessary to canvass in these reasons the oral evidence given by each of these plaintiffs concerning their expectations and the respects in which they say they will be prejudiced by being compelled to complete their contracts. In general, I found each of the plaintiffs to be an honest and reliable witness. I did not find substantial parts of the evidence given by Mr and Mrs Parsons to be reliable. Their former solicitor's correspondence sent in late 2010 did not reflect their actual circumstances. Mrs Parsons's evidence is that in late 2010 her husband still wanted to purchase the apartment. There was no document supporting Mr Parsons's evidence that he complained about the appointment of Peppers. I conclude that the predominant reason for Mr Parsons being disappointed with the purchase and wishing to explore reasons not to complete is the valuation that he obtained on 19 October 2010. I found Mr Parsons's evidence of having no recollection of receiving certain correspondence unconvincing. Apart from the evidence of Mr and Mrs Parsons which I found to be unreliable, I found the oral evidence of the other plaintiffs in relation to their expectations to be reliable. I do not propose to address their

oral evidence in any detail. Their expectations differed in some respects, but generally were along the same lines. For example, Mr Walsh, who intended to let out the apartment that he and Mr Hutchins contracted to purchase to a long-term tenant, understood that he could rent out the apartment for a short term if he wanted to. When he entered the contract he understood that the building was directed "towards a residential market", but expected that the letting agent would be experienced, would promote its business and might conduct its business in a way that would attract short stay or holiday business. He did not expect, however, that there would be hotel-like services such as valet parking and room service, and it is these things that in his view have turned the development into a hotel-like environment. To similar effect is the evidence of Ms Ferguson, who understood that apartments in *The Oracle* could be let for short-term and holiday purposes, but thought that this would represent only a very small percentage because the development was "mainly marketed for [the] long-term, residential owner-occupier". Ms Taylor, who entered into the same contract, accepted that the decline in the market value of the apartment was part of the reason that she does not wish to complete, but did not wish to settle because she felt that she and Ms Ferguson were not now getting what they had contracted to purchase. When she entered the contract, Ms Taylor expected that there might be holiday letting but that most of the people who were purchasing an apartment were purchasing it to "either live in it or [when they were not living in it] close it up". In this regard, she expected that it would be "more of a residential building." She was aware that purchasers could use their apartments for holiday letting. Mr Hutchins likewise knew that it was possible that apartments could be let for short periods, but expected that it would be occupied primarily by long-term residents.

354. The convincing oral evidence given by a variety of plaintiffs about their expectations, and how the apartment offered to them at settlement falls short of those expectations, fails to prove that those expectations had contractual protection, and that there has been a repudiation of a contract that protected those expectations. The contractual promises are found in the contractual documents, not in the evidence of the plaintiffs about what they expected as a result of other matters, or what they imagined the building was going to be like in circumstances in which they did not read the contractual documents. As with the evidence of those plaintiffs who claimed an entitlement to cancel under the *BCCM Act*, the other plaintiffs are, in various ways and in varying degrees, disappointed because of features of the apartment tower, not to mention a decline in the value of luxury apartments on the Gold Coast because of general economic conditions.

355.

[140488]

In different ways the plaintiffs are disappointed because the apartment is not in the kind of building that they expected. They may have expected the building not to have the number of short-term stays that the appointed letting agent has achieved, and they may not have expected that short-term guests would be able to receive certain hotel-like services. However, the plaintiffs' expectations were not based on the provisions of the contract, including documents that formed part of it by virtue of the *BCCM Act*, or on the other disclosure statements that they received. Their disappointed expectations do not give them an entitlement to terminate their contracts for repudiation. Their contracts did not protect those expectations.

Conclusion

356. The plaintiffs in each proceeding have not established that they were discharged from their contract under the general law. Mr and Mrs Wicks, Mr Gough and Ms Groves, and Ms Ryan have not established that they were entitled to cancel their respective contracts under the *BCCM Act*. The plaintiffs breached their contracts by failing to settle. SSI was ready, willing and able to complete the contracts. In each proceeding it is entitled to a decree of specific performance.

357. SSI has also established an entitlement to damages. It proved an entitlement to damages which were calculated to the date of trial on an agreed basis. The final calculation will need to be updated to the date of judgment.

358. In each proceeding there will be judgment for the defendant. SSI is entitled to a decree of specific performance on its counterclaim, and also judgment on its counterclaim against the buyers and guarantors. I will hear the parties, if necessary, on the question of costs. However, there appears to be no reason as to why costs should not follow the event. I direct the defendant to submit proposed minutes of order within

seven days. I anticipate that the form of order requiring each buyer specifically to perform and carry into effect the relevant contract will be in a form similar to that ordered in comparable cases and, if required, I will hear the parties as to the date for completion and other terms of the orders.

Footnotes

1 For the purposes of this case, the plaintiffs submitted that Reprint 3D was the applicable reprint and the defendants did not contest that point. All references to the *BCCM Act* are therefore references to Reprint 3D, which was effective from 15 March 2006 to 30 June 2007.

2 *BCCM Act*, s 214(5).

3 *BCCM Act*, s 218.

4 *Lee* v *Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249 at 259 and 268, [2008] QCA 29 at [4] and [41].

5 [2010] QSC 87. See *also Latitude Developments Pty Ltd* v *Haswell* [2010] QSC 346 at [55]–[65] where P Lyons J also discussed the concept and concluded that material prejudice is not to be judged by reference to facts not known to the buyer at the time when it gives a notice of termination.

6 [2010] QCA 322.

7 [2010] QSC 87 at [32].

8 [2010] QCA 322 at [58].

9 Ibid at [59].

10 [2010] QCA 309.

11 [2010] QCA 322 at [59], citing [2010] QCA 309 at [27].

12 [2010] QCA 322 at [59].

13 Ibid.

14 Ibid at [3].

15 See for example Wicks proceeding para 32.

16 [2009] QSC 269 at [28]–[30].

17 *Acts Interpretation Act* 1954 (Qld) s 14A(1).

18 Paragraph 24(a) of the Fourth Further Amended Statement of Claim in the Wicks proceeding, there being identical allegations in each of the other pleadings.

19 *BCCM Act*, s 35.

20 *BCCM Act*, s 35(3).

21 J D Heydon, *Cross on Evidence*, 8th Aust. Ed (Chatswood: LexisNexis Butterworths, 2010) at 1010, [29050].

22 *R* v *Bonython* (1984) 38 SASR 45 at 46–47 per King CJ, cited with approval in *Osland* v *R* (1998) 197 CLR 316 at 336, [1998] HCA 75 at [53] and *HG* v *The Queen* (1999) 197 CLR 414 at 432, [1999] HCA 2 at [58].

23 *Transport Publishing Co Pty Ltd* v *Literature Board of Review* (1956) 99 CLR 111 at 118–119, [1956] HCA 73 at [13] per Dixon CJ, Kitto and Taylor JJ.

24 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 135, [2007] HCA 61 at [44].

25 Ibid.

26 Ibid.

27 Ibid at 136, [44].

28 See, for example, Wicks proceeding, paragraph 45 of the Fourth Amended Statement of Claim.

29 (2007) 233 CLR 115 at 136–7, [2007] HCA 61 at [47].

30 [2010] QCA 322 at [24], quoting *Tillmans Butcheries Pty Ltd* v *AMIEU* (1979) 42 FLR 331 at 348.

31 Ibid.

32 [2010] QSC 438.

33 Ibid at [15].

34 Ibid at [16].

35 The Act, s 214(4)(b).

36 [2010] QCA 322 at [50], endorsing what was said in *Wilson* v *Mirvac Queensland Pty Ltd* [2010] QSC 87 at [32].

GOUGH & ORS v SOUTH SKY INVESTMENTS PTY LTD

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(2012) LQCS ¶90-177; Court citation: [2012] QCA 161

Queensland Court of Appeal

Decision delivered on 15 June 2012

Community schemes — Whether the name of a building was an essential term of the contract — Whether change of name and brand was a repudiation of the contract justifying termination — Body Corporate and Community Management Act 1997, s 213, 215, 216.

This was an appeal from *Gough & Anor* v *South Sky Investments Pty Ltd* (2012) LQCS ¶90-176; [2011] QSC 361, and the factual background is set out in that case.

At trial the judge held that:

1. the appellant purchasers were not entitled to treat the contracts as discharged for repudiation
2. the breach of the terms of the contracts did not allow the appellants the right to treat the contracts as discharged for repudiation
3. the respondent developers did not proffer lots which were substantially different from those for which the appellants contracted.

The purchasers appealed, arguing that the language of the contract indicated that the name of the building was an essential term, and the change of name (and brand) from "The Oracle" to "Peppers Broadbeach" was a repudiation of the contract which justified termination: [8]ff.

Held: appeal dismissed.

Per Muir JA (with McMurdo P and Margaret Wilson J agreeing)

1. There was little in the findings of the primary judge to support the finding that there was a contractual intention that a term that Tower 1 be known as "The Oracle" or that the development be known as "The Oracle" was essential or would give rise to a right to terminate: [35].

2. The use of the name "The Oracle" in the contractual documents merely assisted in identifying the physical property to be sold and purchased: [37].

3. There was no provision in the contracts which required the use of the "The Oracle" on signage, documents, or anything else: [40].

4. There was nothing to indicate from "the general nature of the contract considered as a whole, or from some particular term or terms, that the promise [in such a term, assuming that there was one] is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise" (*Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 137): [42].

5. Even if a breach of the term (in respect of the name "The Oracle") existed, it was not one which deprived the purchaser "of a substantial part of the benefit to which he is entitled under the contract" (*Koompahtoo* at 140): [43].

6. The Information Page (bound with the Disclosure Statement and noting apartments to be known as "The Oracle") was part of the Disclosure Statement. It could not be read and understood separate from the contract or the disclosure statement. It was doubtful that the reference to "The Oracle" and the residential component could mean anything more than the seller's present intention, subject to rights which might be exercised under the contract, Caretaking and Letting Agreement or the lease, that the residential component would be known as "The Oracle": [55].

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R Bain QC with C Heyworth-Smith (instructed by Johnsons Lawyers) for the appellants.

S Doyle SC with D Clothier SC (instructed by Allens Arthur Robinson) for the respondent.

Before: Margaret McMurdo P, Muir JA and Margaret Wilson J

Margaret McMurdo P: These appeals should be dismissed with costs on the indemnity basis. The various appellants contracted with the respondent to purchase units in Tower 1 of *The Oracle* development at Broadbeach. Prior to settlement, the appellants were informed that Peppers Retreats, Resorts and Hotels had acquired the letting rights to Tower 1 which was to be known as and promoted as *Peppers Broadbeach*. They sought to be discharged from their contractual obligations claiming that the respondent had breached its obligations to them; they had contracted to purchase an apartment in a residential tower known as *The Oracle*. Senior counsel for the appellants conceded at the appeal hearing that there was one central issue in

these appeals. It was whether the trial judge, on the evidence, was right to conclude that the respondent was entitled to specific performance because it was not an essential term going to the root of the contracts that the development be known as *The Oracle*.[1] I agree with Muir JA's reasons for finding the primary judge was right to reach this conclusion.

[2] I also agree with the orders proposed by Muir JA.

Muir JA: Introduction The appellants are purchasers under six contracts entered into with the respondent for the purchase and sale of proposed lots in a community titles scheme which was to be registered in respect of tower one of a two tower development described as *The Oracle* at Broadbeach. The appellants, with the exception of the appellants in appeal 11905/11, entered into their contracts in late 2005 or early 2006. Consequent upon the respondent obtaining approval under s 29 of the *Land Sales Act* 1984 to extend the time within which it was required to provide a registrable instrument of transfer, those appellants entered into new contracts of sale and

[140491]

purchase. The appellants in appeal 11905/11 entered into their contract on 17 October 2006. That contract and the new contracts, all of which are in standard form, will be referred to collectively as "the contracts" and individually as "the contract". Promotional material provided to the appellants before they signed all versions of the contracts referred to the development as *The Oracle*. So too did various disclosure statements provided to the appellants by the respondent from time to time pursuant to s 213 of the *Body Corporate and Community Management Act* 1997 ("the Act").

[4] Before the due date for completion of the contracts, purchasers were notified that "The Oracle [would] be branded Peppers Broadbeach and [would] be the flagship Peppers hotel".[2] Peppers were appointed as caretaking and letting agents in respect of Tower 1. The appellants in appeal 11905/11 purported to terminate their contract by letter dated 13 October 2010. The other appellants purported to terminate on various dates after the respondent's solicitors sent letters nominating settlement dates.

[5] The appellants commenced proceedings claiming declarations that their respective contracts had been validly cancelled. They all relied on what the primary judge described in his reasons as:

> "…the same essential allegation…, namely that the [appellants] contracted to purchase an apartment in a residential tower in *The Oracle* when in fact the apartment purportedly offered in performance by [the respondent] is an apartment in a hotel/resort branded *Peppers Broadbeach*".[3]

[6] The primary judge found against the appellants who have appealed on grounds that:

> 1. Having found that:
>
> (a) Tower 1 is not known as *The Oracle*;
> (b) Tower 1 is known as *Peppers Broadbeach*; and
> (c) the respondent promised that Tower 1 was to be known as *The Oracle*,
>
> the trial judge erred in holding that the appellants were not entitled to treat the contracts as discharged for repudiation.
> 2. The trial judge erred in holding that the breach of the terms of the contracts that required the respondent to provide to the appellants at settlement lots in a residential tower known as *The Oracle* did not afford the appellants the right to treat the contracts as discharged for repudiation.
> 3. The trial judge erred in finding that the respondent proffered at settlement lots which were not substantially different from those for which the appellants contracted.
> 4. The trial judge erred in finding that the appellants did not plead or argue that either:
>
> (a) the terms of the contracts that the name of Tower 1 was to be *The Oracle* were essential terms, breach of which gave rise to a right to terminate the contracts; or
> (b) the terms of the contracts that the name of Tower 1 was to be *The Oracle* were indeterminate (sic) terms, the breach of which gave rise to a right to terminate the contracts.

Grounds 1, 2 and 3

The appellants' submissions

[7] The appellants relied on the following passage from the reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd*,[4] referring to observations of Jordan CJ in *Tramways Advertising Pty Ltd* v *Luna Park (NSW) Ltd*:[5]

> "What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination."

[8]

[140492]

The appellants' argument proceeded as follows. The language of the contract reveals an intention to treat the name as an essential term or as a term, a sufficiently serious breach of which would give rise to a right to terminate the contract. The contract refers to the development by that name and reiterates the name in the location plans and disclosure statements. It need not have referred to the name at all as the location and address on the plans would have identified the lot being sold equally well. The emphasis of the name reflects its centrality to the bargain.

[9] The language of the contract must be understood in the context of the relationship established by the contract and the commercial purpose it served.[6] The subject matter of the contract must be considered in the statutory context enabling entry into a contract for the purchase of freehold title of a lot in a building that does not yet exist. The subject matter of the contract is a bundle of rights described in the Act and the disclosure statement is incorporated into the contract: s 215 of the Act.

[10] The first document of the 13 documents in the Disclosure Statement was headed "*Information about the Development*" and stated that the residential component was to be "*known as The Oracle*". The s 213 Disclosure Statement (the second of the 13 documents) provided adjacent to the heading "*Lot Details*" that "*The proposed lot being purchased is lot no*. … (***Lot***) *in The Oracle development as identified on the location plan contained in the contract of sale* (***Contract***) *which accompanies this Disclosure Statement*".[7] The Location Plan is headed "*Oracle*".

[11] "*The Oracle*" is more than just an identifier; it is a brand. This bears on the commercial purpose of the contractual term. Evidence of that significance derives from the evidence of the "*branding*" experts. In this regard, the trial judge failed to properly consider and characterise the effect of the change of name or brand on the value of the lots. Whilst noting the appellants' argument that "*the apartments are 'indexed' to the value of the Peppers brand and they have no control over how well or poorly Peppers will perform*",[8] his Honour considered only the effect of that "*indexation*" in so far as the management by Peppers of Tower 1 was concerned, without extending his consideration to the Peppers brand generally. The name was an essential consideration and how the residential towers are, now, effectively named ("branded") was an essential matter, accordingly.

[12] If viewed as an intermediate term of the kind described and considered in *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd*,[9] the difference between a lot in a tower known as "*The Oracle*" and a lot in a tower known as "*Peppers Broadbeach*" is sufficiently serious to give rise to a right to terminate for repudiation. A change from "*The Oracle*" to "*Peppers Broadbeach*" denotes a change from an independently recognisable ("*branded*") apartment tower to a hotel/resort in a chain of hotel/resorts. This is a sufficiently serious change to constitute a renunciation of the contract by the respondent or a sufficiently serious breach of the term that the lot be a lot in a tower known as "*The Oracle*" to give rise to a right to terminate for repudiation.

The primary judge's relevant findings

[13] The primary judge rejected the respondent's submissions to the effect that the words "*The Oracle*" in the contractual documents did not have any promissory effect.[10] He found that "the subject matter of the contract was a proposed lot in a residential tower to be known as *The Oracle*"[11] and that Tower 1 "is not known as *The Oracle*"[12] and "is branded *Peppers Broadbeach*".[13] The primary judge accepted that although there was "Oracle branding throughout the entire precinct …Peppers is the dominant brand name for the residential elements of the site".[14] He found that Tower 1 was known generally as *Peppers Broadbeach* rather than *The Oracle*.[15]

[14] The primary judge held:[16]

> "The subject matter of the contract is a proposed lot in a residential tower. The failure to provide the relevant lot in a tower known as *The Oracle* does not indicate an intention not to provide at settlement the subject matter of the contract or something substantially different from that for which the [appellants] contracted. The unwillingness or inability to perform the term that provided for the tower itself to be
>
> [140493]
>
> known as *The Oracle* (as well as being part of a development described as *The Oracle*) would not convey to a reasonable person, in the situation of the [appellants], renunciation either of the contract as a whole or of a fundamental obligation under it.
>
> **Conclusion – alleged repudiation in relation to the name of the tower**
>
> The [appellants] have not proven that the unwillingness or inability to perform the contractual provision in relation to the name of the tower constitutes a renunciation of the contract or a fundamental obligation under it so as to amount to a repudiation.
>
> I have declined to find that the tower is not a residential tower, such that a description of it as a hotel/ resort means that [the respondent] 'has changed the substratum of the bargain' or that the relevant apartment is substantially different from, or a 'different product' from, the subject matter of the contract, namely an apartment in a residential tower. I have declined to find repudiation in relation to the name of the tower. These conclusions determine the issue of repudiation on the bases that it was argued."

The contractual documents

[15] Before considering the grounds of appeal, it is useful to identify the provisions of the contract, Disclosure Statement and other documents on which the parties' debate was centred.

[16] The contract identified the property to be purchased as:

> "Proposed Lot No… on Level… identified on the Location Plan together with the Chattels.
>
> Parking… space for …car"

The Location Plan was made up of:

> "1. Site Plan
> 2. Matrix Plan – showing levels/floors
> 3. Draft Plan SP 189370
> 4. Draft Building Format Plan (Stage 1A) – draft SP 189371
> 5. Draft Building Format Plan (Stage 1B) – draft SP 189373."

[17] The words *The Oracle* were prominently displayed on each of these plans. The first page of the contract was headed "Contract of Sale: The Oracle" and the logo for The Oracle also appeared on that page above the words "The Oracle Central Broadbeach".

[18] "Development" is defined in clause 1 of the Terms of Contract as meaning "The Oracle development to be carried out on the Scheme Land in the way outlined in the CMS".

[19] The definitions in clause 1 of the Terms of Contract of "CMS", "Land", "Scheme Land" and "Scheme Buildings" are:

"…***CMS*** means the community management statement for the Scheme recorded, or to be recorded, in accordance with the BCCM Act. A copy of the proposed CMS forms part of the Disclosure Statement.

…***Land*** means the land as described in Schedule 1. Where the context permits, it includes any land that is ultimately derived from the Land.

…***Scheme Buildings*** means the improvements to be made to Scheme Land (including the building of which the Lot will be part) as part of the Development.

…***Scheme Land*** means the land derived from the Land."

[20] Other relevant provisions of the Terms of Contract are:

"**3.1 Development of scheme land**

Subject to other provisions of this Contract, the Seller will cause a licensed builder to build the Scheme Buildings on the Land substantially in accordance with the Location Plan and the Plans and Specifications.

3.2 Changes to the development

Subject to the BCCM Act, the Seller may:

(a) change the name of the Scheme;
(b) make variations to any of the Development, Scheme Buildings and Schedule of Finishes (including the substitution of any items with those of a similar quality as decided by the Seller (acting reasonably)) but only minor variations to the Property;

[140494]

…
(e) alter the Common Property or rights in relation to the use of the Common property;
(f) change anything in the CMS (but the proportion which the interest schedule lot entitlement and contribution schedule lot entitlement for the Lot bear to the total interest schedule lot entitlement and total contribution schedule lot entitlement respectively must not be substantially varied);

…
(h) grant any exclusive use or special rights over the Common Property or a body corporate asset;

…

3.7 Marketing/Construction of development

…

(b) The Buyer acknowledges that the construction of the Development may be carried out in stages. It will not object to, make any claim or take any other action whatsoever (including issuing any proceedings for an injunction or damages) related to:-

…

24.1 Variations in Staging

It is intended that the Scheme will be developed in 2 stages. However, the number of lots in each stage and, in particular, the levels of the Scheme Buildings included in a stage, may change as decided by the Seller in its absolute discretion. This clause applies despite any staging details disclosed in the Location Plan or the CMS.

24.2 No objection

The Buyer will not object or take any other action (including delaying settlement of this Contract or terminating it) in relation to any matters referred to in clause 24.1.

…

25.1 Granting of Lease

The Body Corporate will, if requested by the Seller, grant the Lease to the Seller (or any person nominated by it). The Lease will be over part of the Common Property (which is anticipated to be the roof of the Scheme Building).

25.2 Form of Lease

In this clause 25, *Lease* means a lease substantially in the form contained in Annexure 2 of the Disclosure Statement but incorporating such changes that the Seller may require, in its absolute discretion. In particular, the area the subject of the Lease may change.

…

28.1 Progressive Development

The Buyer acknowledges that:

(a) the Scheme will form part of a large mixed use development comprising a significant number of different uses (for example, and without limitation, residential, retail and commercial uses) which will be developed progressively over time;
(b) the Seller (and persons authorised by it) intends to lodge various Development Applications over that part of the Land (and, possibly, adjoining land) that will not be contained within the Scheme."

[21] The "Developer Product Disclosure Statement", which was provided to buyers under the managed investment scheme provisions of the *Corporations Act*,[17] had on its front page the words "The Oracle Broadbeach". *The Oracle* logo was under those words and under the logo "The Oracle Central Broadbeach" was written. Paragraphs 4 and 9 of this document provided:

"**4. An overview of the Oracle development**

(a) South Sky is proposing to construct a high rise building at the Location to create a strata title development to be known as Oracle. It is intended that the building will comprise:

(i) a non residential lot (which may be subdivided to create a community titles scheme); and
(ii) lots in an accommodation community titles scheme to be known as Oracle CTS.
(iii) It is proposed that the CTS will contain between 247 and 347 residential apartments. This PDS only relates to the residential apartments.

[140495]

(b) It is proposed that the Body Corporate for the CTS will enter into a Caretaking and Letting Agreement with the Operator.
(c) Under the terms of the Caretaking and Letting Agreement the caretaker is required to maintain the common property of the CTS and is also entitled to conduct on-site letting activities, which it may do itself or through a Manager it engages. It is these on-site letting activities which, in effect, comprise the management rights scheme referred to in this PDS.
(d) The Operator will issue a further Product Disclosure Statement (called an *Operator PDS*) in regard to the management rights scheme (known as the *OracleMR Scheme*) it intends to operate and give to Apartment Owners an Appointment for Apartment Owners' consideration.

…

9. Property to be owned or occupied by the Operator to allow it to conduct the Oracle MR Scheme

The Operator will own or have the right to occupy an on-site reception/office area which will allow it to operate the Oracle MR Scheme. It may also have certain rights over part of the common property of the CTS, for example, rights to erect signage. These rights will be outlined in the proposed community management statement contained in the BCCM Disclosure statement and the Caretaking and Letting Agreement."

[22] The finding that the Developer Product Disclosure Statement "was not incorporated [into the contract] by the terms of the contract, and …did not form part of the contract by virtue of s 215" was unchallenged.

[23] The next part of the bundle of documents provided by the respondent to the appellants commences with a front sheet, headed "Disclosure Statement", similar in wording and layout to the front sheet of the Developer Product Disclosure Statement.

[24] The next page was an index which provided:

"Index of documents contained in this Disclosure Statement

1. Information About The Development
2. Body Corporate and Community Management Act Disclosure Statement
3. PAMD Form 27c

Annexure 1
4. Budgets and Related Financial Information

Annexure 2
5. Body Corporate Manager's Agreement
6. Caretaking & Letting Agreement
7. Community Management Statement
8. Building Management Statement
9. Lease of Roof
10. Facility Sharing Agreement (burdening adjoining residential scheme)
11. Facility Sharing Agreement (benefiting adjoining residential scheme)
12. Facility Sharing Agreement (benefiting adjoining retail lot)
13. Electricity Agreement"

[25] The index was followed by a one page document headed "Information about the Development". The appellants placed substantial reliance on this document, which, for convenience, I will refer to as the "Information Page". It provided, inter alia:

"• The information contained on this page is only intended to give buyers a general outline of the development being undertaken by the Seller (***Development***).
• The Seller intends to construct a residential and retail development.
• Land on which the Development will be constructed is proposed to be initially subdivided to create 2 lots (being a residential lot and a retail lot). The residential component, to be known as The Oracle, will be further subdivided by a building format plan to create a community titles scheme in respect of which there will be one body corporate. The Seller has not yet decided whether the retail component of the Development will be subdivided to create a community titles scheme. The retail component may also, at the Seller's discretion, be subdivided to create land from

[140496]

which another residential community titles scheme will be derived."

[26] After the Information Page came a document which the respondent claimed was the Disclosure Statement provided under the Act. It was headed "Disclosure Statement (s 213 of the [Act] and s 21 of the Land Sales Act 1984)". Its first page was numbered 2 and its last, a signing page, numbered 6, contained an acknowledgment that the "Buyer received this statement before entering into the Contract". This document, which also had on the top of each of its four pages, "Disclosure Statement" and "Allens Arthur Robinson", relevantly provided:

"**1. Lot Details**: The proposed lot being purchased is lot no. … (***Lot***) in The Oracle development as identified on the location plan contained in the contract of sale (***Contract***) which accompanies this Disclosure Statement."

[27] The numbered pages of the Disclosure Statement were followed by a "Selling Agent's Disclosure to Buyer" form of three pages. The next document, headed "Disclosure Statement – Annexure 1 – Budgets and Related Financial Information" was numbered 10 at the foot of the page. There then followed pages numbered 11 to 21 inclusive consisting of: a document headed "Body Corporate for The Oracle – Administrative Fund Budget"; a document headed "Body Corporate for The Oracle – Sinking Fund Budget"; a document headed "Body Corporate for The Oracle – Schedule of Lot Entitlements (Stage 1)" and a similar document for Stage 2. The next document, on page 22, was headed "Disclosure Statement"; underneath that were the further headings in bold type:

Annexure 2

Body Corporate Manager and Service Contract Engagements and Letting Agent Authorisations and Other Agreements

This Annexure contains the following:

• Body Corporate Manager's Agreement
• Caretaking & Letting Agreement
• Building Management Statement
• Community Management Statement
• Lease of Roof
• Facility Sharing Agreement (burdening adjoining residential scheme)
• Facility Sharing Agreement (benefiting adjoining residential scheme)
• Facility Sharing Agreement (benefiting adjoining retail lot)
• Electricity Agreement

Relevant contractual principles

[28] The principles relevant to the determination of whether the anticipatory breach of the contractual term found by the primary judge entitled the appellants to terminate the contracts were discussed in the following passage from the reasons of Jordan CJ in *Tramways Advertising Pty Ltd* v *Luna Park (NSW)*[18] quoted with approval by Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd*:[19]

> The nature of the promise broken is one of the most important of the matters [ie, the matters which need to be considered in considering the legal consequences flowing from a breach of contract]. If it is a condition that is broken, ie, an essential promise, the innocent party, when he becomes aware of the breach, has ordinarily the right at his option either to treat himself as discharged from the contract and to recover damages for loss of the contract, or else to keep the contract on foot and recover damages for the particular breach. If it is a warranty that is broken, ie, a non-essential promise, only the latter alternative is available to the innocent party: in that case he cannot of course obtain damages for loss of the contract."

[29] Jordan CJ then considered the test for identifying whether a term was a condition or a warranty:

> "The question whether a term in a contract is a condition or a warranty, ie, an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered

> into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge. In some cases it is expressly provided that a particular promise is essential to the contract, eg, by a stipulation that it is the basis or of the essence of the contract; but in the absence of express provision the question is one of construction for the Court, when once the terms of contract have been ascertained."

[30] A little later in their reasons, their Honours further considered the approach to be taken in determining whether a term was such that any breach of it entitled the innocent party to terminate:[20]

> "It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination."

[31] Dealing with breaches of intermediate terms, their Honours said:[21]

> "Breaches of this kind are sometimes described as 'going to the root of the contract', a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term; the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract.
>
> A judgment that a breach of a term goes to the root of a contract, being, to use the language of Buckley LJ in *Decro-Wall International SA* v *Practitioners in Marketing Ltd*, 'such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract', rests primarily upon a construction of the contract. Buckley LJ attached importance to the consequences of the breach and the fairness of holding an injured party to the contract and leaving him to his remedy in damages. These, however, are matters to be considered after construing the agreement the parties have made. A judgment as to the seriousness of the breach, and the adequacy of damages as a remedy, is made after considering the benefit to which the injured party is entitled under the contract."

Consideration

[32] In support of the findings identified in paragraphs [11] and [12] above, the primary judge observed that any assessment of the consequences of Tower 1 not being known as "*The Oracle*" would need to have regard to:

- "the provision in the relevant documents about the conduct of the letting business";
- the ability of the letting agent to promote its own brand and use its own sign on Tower 1;
- the absence of a promise to promote *The Oracle* name or even to maintain its use.[22]

[33] Elsewhere, the primary judge found that:

- the apartment contracted for was in a tower with an on-site letting agent who could conduct the business of letting and provide services to residents and their guests;[23]
- no contractual provision indicated that Tower 1 was going to be occupied predominantly by owner-occupiers;[24]
- there was no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager;[25] and
- it was not established that any apartment was of lesser value in consequence of the appointment of Peppers, the conduct of Peppers or the Tower's branding as *Peppers Broadbeach*.[26]

[34]

[140498]

As the respondent submitted, the name *The Oracle* was not pleaded to have, and was found not to have, any content or significance independent of the subject matter of the contracts. There was no suggestion in the evidence which the primary judge accepted that *The Oracle* was a name which carried with it any particular attraction for purchasers or that the failure to use it exclusively or predominantly to identify Tower 1 would result in any detriment to the appellants.

[35] There is little, if anything, in the primary judge's findings which would support the finding of a contractual intention that a term that Tower 1 and/or the development be known as *The Oracle* was essential or one which would give rise to a right of termination in the event of a sufficiently serious breach.

[36] The findings, which with respect were justified on the evidence, support the contrary conclusion. The mere fact that a development is given a name and that name is used in promotional and contractual documentation says little, if anything, about whether there is to be found in the contract an implied promise that the name will be used in respect of the completed building. Developments such as *The Oracle* are invariably given a name by the developer for the purposes of identification in marketing. If the name had commercial significance, for example signifying an association with a nationally or internationally recognised hotel or apartment or resort brand, one would expect to see provisions in contracts for the sale of apartments in the development relating to rights in respect of the retention and use of the name.

[37] The respondent argued that the reference to *The Oracle* in the contractual documents merely assisted the identification of the physical property to be sold and purchased. I accept that submission. At the time of contract, Tower 1 had not been constructed and the apartments were being marketed as apartments in Tower 1 of a development known as *The Oracle*. The Community Titles Scheme was to have the name "The Oracle Community Titles Scheme" with the relevant scheme number added. The references in the contractual documents to *The Oracle* were accurate and assisted in identifying the property, albeit peripherally, as a more precise identification was effected by the proposed lot number and by the "Location Plan" documents.

[38] It was apparent from the contractual documents, and in particular clause 3 of the Conditions of Sale, that the final form of the overall development was subject to change and that there might be significant changes even with respect to Tower 1: a possible change of name of the Community Titles Scheme was flagged.

[39] Putting aside for the moment the effect of any warranty deemed to exist by s 216 of the Act, there is little support for the conclusion that, in addition to the role played by the Oracle name in identifying the apartments to be sold and purchased, there was also a promise by the vendor that Tower 1 be known or described as *The Oracle* at the date of completion. If such a promise existed, it needed to be inferred and the inference, if it could be drawn, was far from obvious.

[40] The existence of an obvious commercial explanation for the references to *The Oracle* in the contractual documents is an impediment to the drawing of any such inference. However, there are significant indications in the contractual documents which are inconsistent with an intention that there be any such promise.

One of the most obvious of these is the absence of a promise to promote, maintain or even use the name on or in connection with, Tower 1. There is no provision in the contracts which requires the use of *The Oracle* on signage, documents or anything else. There is, however, recognition that a letting agent may be engaged[27] and that a lease of part of the common property may be granted to the respondent or its nominee. Significantly, there are no restrictions in respect of the name under which a letting agent may carry on business and, as the respondent pointed out, it was always evident that any manager of the building would be a large corporate operator. Such an entity would be likely to trade under a nationally recognised name which it would use in relation to its business conducted at Tower 1.

[41]

[140499]

The argument that the change of name from *The Oracle* to *Peppers Broadbeach* was a step too far is, in essence, no more than an assertion: an assertion which ignores the considerations just discussed. Accordingly, none of grounds 1, 2 and 3 was made out.

[42] For these reasons and for the reasons given below, I am unable to accept that the term found by the primary judge was either a condition or a warranty. There is nothing to indicate from "the general nature of the contract considered as a whole, or from some particular term or terms, that the promise [in such a term, assuming that there was one] is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise".[28]

[43] Assuming a breach of the term found to exist by the primary judge, it was not one which deprived the purchaser "of a substantial part of the benefit to which he is entitled under the contract".[29] It is of relevance in this regard that the development continued to retain and use *The Oracle* name. The primary judge found:[30]

> "There are many signs and icons throughout the general precinct that refer to The Oracle, Oracle Boulevard or a particular part of the development such as Oracle North, Oracle South, Oracle East or Oracle West…
>
> There are Oracle logos in the paving outside the reception of each tower. Oracle logos are built into glass as a safety feature. Oracle logos also appear in corridors and rooms within the towers."

The Information Page and the alleged statutory warranty

[44] I have thus far not considered the consequences of the primary judge's findings that the Information Page formed part of the Disclosure Statement or was "material accompanying" it and thus formed part of the provisions of the contract by operation of s 215 of the Act. The respondent challenged that finding in a Notice of Contention.

[45] The respondent argued that the Information Page, although bound up with the Disclosure Statement, was not part of the Disclosure Statement and did not relevantly accompany it. It was submitted also that to give literal meaning to the provisions of s 215(1) of the Act would lead to absurdity. For example, if documents which did not relate to the contract were included inadvertently in the envelope with the Disclosure Statement, statements in the irrelevant material would be treated as warranties. The way around this problem, it was submitted, was to read the reference to "any material accompanying the disclosure statement" as referring only to material of the type required to be contained in a disclosure statement under s 213 of the Act or to the material which the Disclosure Statement "must be accompanied by" under s 213(2)(e).

[46] As s 215 and s 216 of the Act relevantly provide:

> "**215 Statements and information sheet form part of contract**
>
> (1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.
> (2) The information sheet does not form part of the provisions of the contract.

216 Buyer may rely on information

The buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy."[31]

[47] Section 213 of the Act makes provision for the giving by a "seller" to a "buyer" of a proposed lot in a community titles scheme a disclosure statement before a contract for the sale of such a lot is entered into. Sub-section (2) of s 213 contains a list of matters which "must" be stated or included in the disclosure statement. Section 213(2)(e) requires that the disclosure statement "must be accompanied by" the proposed community management statement and, if the proposed scheme is to be a subsidiary scheme, a community management statement of "each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary". Section 213(2)(f) requires the disclosure statement to "identify the regulation module proposed to apply to the scheme". The disclosure statement "must be signed by the seller or a person authorised by the seller"[32] and "must be substantially complete".[33]

[48]

[140500]

I accept that s 215(1) should not be construed so as to produce an absurd result. Like any other words in a statute, the words "any material accompanying the disclosure statement" take their colour from their context and from the evident purpose they were intended to achieve.

[49] The *Shorter Oxford English Dictionary* defines accompany as:

> "1. To add or conjoin to …; to send (or give) with the addition of …
> 2. To keep company with… to combine."

[50] Whether, for the purposes of s 215, any material accompanies a disclosure statement will normally depend, not only on physical proximity and the nature and degree of attachment or annexation, but the nature of the additional material. Plainly, the Legislature did not intend that the seller warrant the accuracy of statements in material which did not relate in any way to the contract; for example a sales brochure for another development.

[51] The respondent's reading down of "any material accompanying the disclosure statement" has the advantage of certainty and simplicity but, in my view, provides a far from obvious construction of the words "any material", which are general and all encompassing in nature. Also, it may be thought that those words are not particularly apt to describe either any material accompanying the disclosure statement of a kind required to be provided under s 213(2) or the proposed community management statement required to accompany the disclosure statement by s 213(2)(e).

[52] It is unnecessary for present purposes, and perhaps undesirable, to attempt any fuller exploration of what may constitute "material accompanying". Whether, in any particular case, the material comes within the description needs to be determined by reference to the facts or circumstances of that case. Also, it does not appear to me that the outcome of this appeal turns on the resolution of the questions now under consideration.

[53] Here, not only was the Information Page bound up with the three page Disclosure Statement, it was paginated as part of it, followed and was listed in an index headed "Index of documents contained in this Disclosure Statement" which was preceded by a "Disclosure Statement" front sheet. These considerations seem to me to overwhelm the significance of the heading of "Disclosure Statement" which commences at page 2 of the collocation of documents and the description in the index of the document as "Body Corporate and Community Management Act Disclosure Statement". The fact that the pagination extends to page 22 and that the paginated documents comprise two annexures each headed "Disclosure Statement" is also relevant. Viewed objectively, as it must be, the Disclosure Statement provided by the respondent included the cover page, the index and the Information Page. I do not accept the argument that the "Disclosure Statement" is limited to those parts of a document provided by a vendor as a disclosure statement which met the requirements of s 213. That section proscribes matters which must be included in a disclosure statement. It does not purport to otherwise confine the content of such documents.

[54] For the above reasons, I conclude that the Information Page was part of the Disclosure Statement. As the appellants submitted, the effect of s 215(1) of the Act was to make any statement in the Information Page "part of the provisions of the contract". That being so, the Information Page could not be read and understood in isolation from the provisions of the contract or, for that matter, as divorced from the balance of the Disclosure Statement, all of which formed part of the provisions of the contract.

[55] When the critical words in the Information Page, "The residential component, to be known as The Oracle", are considered in their context, it is doubtful that they can mean anything more than that the seller's present intention, subject to rights which may be exercised under the contract, the Caretaking and Letting Agreement, or the lease, is that the residential component will be known as "The Oracle".

[56] These words are not promissory in nature. If they were intended to be promissory, or even to provide a representation as to a state of affairs which would exist at settlement or continue beyond that, the terminology would

[140501]

have been quite different. More precise language would have been used in respect of matters such as rights to names and logos, their continued use and the nature and location of signage.

The brand name argument

[57] The appellants argued that the primary judge:

- failed to properly consider and characterise the effect of a change of name or brand on the value of the lots; and
- failed to consider the effect of "indexation" of the value of the apartments to the Pepper's brand generally.

[58] The argument, at best, has a marginal bearing on the nature of the term found to exist by the primary judge and on the appellants' rights in the event of breach or repudiation and is unsustainable.

[59] The primary judge's relevant findings are in paragraphs [224], [232], [233], [234], [235] and [237] of the reasons. Paragraph [232], in particular, deals with the impact of a deterioration in the Pepper's brand generally. The primary judge found, with respect correctly, that the point that the apartments may fluctuate in value "in line with the value of the Pepper's brand and/or the *Peppers Broadbeach* brand… seems to go [nowhere]". His Honour's finding that there is "no evidence that the value of an apartment would fluctuate any more if the letting business was conducted by Peppers as opposed to any other manager" is unchallenged and the impact of changes in fortune of the Pepper's brand cannot be considered in isolation from its business in respect of Tower 1. It is only whilst that business continues that the Pepper's name will have any bearing on the value of the apartments in Tower 1.

[60] The respondent submitted, accurately, that there is no evidence which required the primary judge to make findings contrary to those under consideration.

[61] But even if the statutory warranty is as found by the primary judge, it is not a contractual provision which is essential or which would give rise to a right of termination in the event of a sufficiently serious breach. Ample justification for that conclusion is to be found in paragraphs [32] – [40] and [56] above. It is of particular significance that the warranty is not to be found in the contract proper, but in a document which was plainly not intended by the parties to have contractual force. The Information Page expressly stated that it was intended to provide only "a general outline" of the development. To the extent that there is conflict or inconsistency between the Information Page on the one hand and the contract, the Disclosure Statement and the documents which expressly form part of the Disclosure Statement on the other, it may be readily inferred that the intention of the parties was that the latter documents would prevail over the former. For the above reasons, grounds 1, 2 and 3 of the Grounds of Appeal have not been made out.

Ground 4

[62] There was no issue on the appeals concerning the content of the pleadings or the primary judge's findings in that regard and, consequently, ground 4 ceased to have relevance.

Conclusion

[63] For the above reasons, I would order that the appeals be dismissed and that the appellants' pay the respondent's costs of the appeals, including reserved costs if any, on the indemnity basis. Clause 7.3 of the Terms of Contract provides that "The Seller is entitled to damages for any loss which it suffers as a result of the Buyer's default, including legal costs on a full indemnity basis". It was not argued that this provision did not apply to the costs of the appeal.

Margaret Wilson J: I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.

Footnotes

1 Appeal transcript 1-6 to 1-7.
2 Reasons at [54].
3 Reasons at [75].
4 (2007) 233 CLR 115 at [48].
5 (1938) 38 SR (NSW) 632 at 641 – 642.
6 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at [48].
7 Emphasis added.
8 Reasons [224].
9 [1962] 2 QB 26; approved in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at [51].
10 Reasons [114] – [116].
11 Reasons [119].
12 Reasons [199].
13 Reasons [157].
14 Reasons [177].
15 Reasons [193].
16 [2011] QSC 361 at [204] – [206].
17 Reasons at [102].
18 (1938) 38 SR (NSW) 632 at 641-642.
19 (2007) 233 CLR 115 at 137.
20 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 138.
21 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 140.
22 Reasons [213].
23 Reasons [228].
24 Reasons [231].
25 Reasons [232].
26 Reasons [233].
27 Clause 11.1.
28 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 137.
29 *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 233 CLR 115 at 140.
30 Reasons at [143] and [144].
31 *Body Corporate and Community Management Act* 1997, reprint 3D as in force 15 March 2006.
32 Section 213(3).
33 Section 213(4).

FAMESTOCK PTY LTD v THE BODY CORPORATE FOR NO 9 PORT DOUGLAS ROAD COMMUNITY TITLE SCHEME 24368

(2012) LQCS ¶90-178; Court citation: [2012] QSC 129

Supreme Court of Queensland

Decision delivered on 10 May 2012

Community schemes — Whether a body corporate's committee can decide to terminate a caretaking and letting agreement, or whether a decision by the general meeting of the body corporate is required — Decision on a restricted issue — Whether a decision changed the "rights, privileges or obligations of the owners of lots included in the scheme" — By-law conferring rights and privileges on the owner of the managers' lot during a current property management agreement — Acts Interpretation Act 1954 (Qld), s 32C — Body Corporate and Community Management Act 1997, s 92 — Body Corporate and Community Management (Accommodation Module) Regulation 1997, reg 24(b).

The plaintiff and the defendant, a body corporate for a community title scheme, entered a caretaking and letting agreement for the plaintiff to manage a unit complex. Subsequently, the defendant purported to terminate the agreement.

The decision to issue the notices of termination was at best a decision of the committee of the body corporate, not a decision of a general meeting of the body corporate. This was not in dispute.

The plaintiff submitted that the notices of termination were invalid and ineffective. It was contended that the decision to terminate was ultra vires because it was a decision which could only be made by the body corporate in a general meeting.

The agreement stated that it could be terminated by the body corporate by written notice, but did not indicate whether the decision to terminate could be made by the body corporate's committee, or whether a decision of a general meeting or extraordinary meeting was required.

Under s 92 of the *Body Corporate and Community Management Act 1997*, the body corporate's committee cannot make decisions on a "restricted issue", as specified by regulation. Regulation 24(b) of the Body Corporate and Community Management (Accommodation Module) Regulation 1997 provides that a decision "to change rights, privileges or obligations of the owners of lots included in the scheme" is a decision on a restricted issue. The plaintiff submitted that the decision to terminate was a decision on a restricted issue under reg 24(b).

In this scheme, by-law 34 conferred rights and privileges on the owner of Lot 1, which was the managers' lot. These rights included the right to use Lot 1 for residential purposes and for the purpose of caretaking the unit complex, and for the sale and letting of units in the complex. The rights also included the exclusive use of the office in the lobby next to Lot 1. The rights in by-law 34 were qualified as existing only during the currency of any property management agreement between the body corporate and the owner of Lot 1.

Held: body corporate's committee not entitled to terminate the caretaking and letting agreement.

1. When the plain meaning of reg 24(b) of the Body Corporate and Community Management (Accommodation Module) Regulation 1997 is considered in context, the words "rights, privileges or obligations of the owners" clearly refer to the rights, privileges or obligations that arise in a person's capacity as an owner of a lot in the scheme. They are rights, privileges or obligations which derive from the person's ownership of the lot, and not from a different source, such as a contractual caretaking and letting agreement: [30].

2.

[140504]

Under by-law 34, the rights to use Lot 1 for certain purposes and the rights to exclusive use of the office in the lobby were clearly the rights of the owner of Lot 1 in their capacity as an owner of a lot in the scheme. A decision to change those rights fell within reg 24(b): [32], [33].

3. Despite the use of the plural in the words: "the owners of lots", reg 24(b) should be read as including a right, privilege or obligation which might only relate to a single owner of a single lot in the scheme. The ordinary meaning of these words was consistent with this interpretation. It was well known that different owners may have different rights in such schemes. Under s 32C of the *Acts Interpretation Act 1954* (Qld), the pluralised words included the singular.

4. Rights and privileges could derive from both the property management agreement and from the by-laws; they were not mutually exclusive. On the plain meaning of by-law 34, during a current property management agreement, the owner of Lot 1 has rights and privileges in their capacity as the owner of a lot in the scheme. A decision to terminate the property management agreement was necessarily a decision that changed those rights because the owner could not enjoy those rights if the agreement was not current. The rights existed "*only*" during the currency of the agreement. The decision to terminate the agreement removed the condition for the existence of the rights under by-law 34, namely a current property management agreement: [36]–[37], [39].

5. Under reg 24(b), the decision to terminate the current property management agreement was a decision on a restricted issue. Therefore, it was a decision that the committee of the body corporate could not lawfully make. It was a decision requiring the

authority of a general meeting of the body corporate. This was because the decision changed and removed the rights that the plaintiff otherwise enjoyed as an owner of a lot in the scheme, under by-law 34: [40]–[41].

[Headnote by the CCH CONVEYANCING LAW EDITORS]

D A Savage SC (instructed by Alexander Law) for the plaintiff.

C J Ryall (instructed by Williams Graham Carman) for the defendant.

Before: Henry J

Henry J:

[1] At the outset of the current trial the plaintiff successfully made an application for an order under *Uniform Civil Procedure Rules 1999* (Qld) r 483 for the decision of a question before and separately from the other questions in the trial.

Background

[2] In a claim filed on 7 February 2008, the plaintiff seeks damages for breach of contract and a declaration.

[3] The defendant, a body corporate for a community title scheme, entered into a written caretaking and letting agreement, exhibit 4 ("the agreement"), with the plaintiff to perform caretaking and letting duties and obligations in respect of a unit complex. It was a condition[1] of the agreement that the plaintiff[2] would obtain all licences required to enable it to conduct the business of letting the units.

[4] At the commencement of the agreement the plaintiff obtained a letting agents licence from the Auctioneers and Agents Committee pursuant to the provisions of the *Auctioneers and Agents Act 1971* (Qld)[3] in order for it to carry out its duties as letting agent. However, the plaintiff pleads that in or about May 2001, it discovered the licence had expired and it had failed to renew its licence.

[5] The plaintiff sought a letter from the defendant confirming that the agreement was still in existence in order to provide such a letter to the licensing authority as evidence of the relevant body corporate's approval of the conduct of the letting business. It is implicit in the pleadings that such a letter was not forthcoming.

[6] The plaintiff also pleads that in August 2001 the defendant's chairperson, Mr Hurst, advised Ms Pusztay, a representative of the

[140505]

Auctioneers and Agents Committee at the Office of Fair Trading, that the view of the defendant was that the agreement was no longer valid and the defendant would subsequently be voting not to approve the plaintiff as the caretaking and letting agent.

[7] The plaintiff relies upon the failure to provide the letter as well as the representation by Mr Hurst to Ms Pusztay as conduct that breached an allegedly implied term of the contract.

[8] The defendant issued notices of termination on 7 February 2002 purporting to terminate the management agreement relying on a variety of grounds. It is common ground the decision to issue the notices was at best a decision of the body corporate's committee rather than a decision of a general meeting of the body corporate. The validity of the termination letters is denied by the plaintiff for various reasons, one of which is, in effect, that the purported termination was ultra vires. The plaintiff alleges that, in addition to the aforementioned breaches, the purported but ultra vires determination also constituted a breach of the agreement.

[9] The plaintiff seeks damages for breach of contract in the sum of $544,230. The plaintiff also seeks a declaration that the notices to terminate were invalid and of no effect and did not terminate the agreement.

[10] The trial of the proceeding has commenced although save for the opening of the plaintiff's case it has not proceeded substantively, there having been argument and rulings in respect of a number of applications relating to the state of the pleadings as well as the successful application for the Court to determine the separate question now under consideration.

The question to be determined

[11] The question to be determined is:

"*Was the committee of the defendant entitled to determine the plaintiff's caretaking and letting agreement the subject of this proceeding, or was that a matter within the authority of the general meeting of the defendant*?"

[12] The plaintiff's relevant pleading as to the invalidity of the notices to terminate is:

"*29. The notices to terminate were invalid and of no effect because*:

…
(b) the Defendant had not lawfully made the decision to terminate the Agreement and issue the notices to terminate.

Particulars

(i) The committee of the Body Corporate resolved to terminate the Agreement and issue the notices to terminate at a meeting of the Committee on 11 February 2002.
(ii) The decision to terminate the Agreement was a decision on a restricted issue as defined in regulation 24(b) of the BCCM (Accommodation Module) Regulation.
(iii) Therefore such decision should have been made by the body corporate and not by the committee .
(iv) In the premises, the decision of the committee was not a decision of the body corporate as provided for in s 92 of the BCCM Act." (emphasis added)

[13] In summary the purported decision to terminate is said to be ultra vires because it was at best a decision of the committee of the body corporate when, on the plaintiff's argument, it was only a decision which could be made by the body corporate in a general meeting. That is, it is contended it was not a decision the committee could make.

The Agreement

[14] The agreement which the defendant purported to terminate provides at clause 10 that it may be terminated by the body corporate by notice in writing but gives no indication of whether the decision to send such a termination notice can be made by the committee of the body corporate or whether it requires a decision of a general or extraordinary meeting of the body corporate members.

The Statute

[15] The relevant statute in force at the time of the purported termination notice was the *Body Corporate and Community Management Act 1997* (Qld) Reprint 1F ("the Act"). Section 88 of the Act expressly vested in the body corporate for a community titles scheme all the powers necessary for carrying out its functions, including entering into contracts.

[16]

[140506]

As to the power of a committee of the body corporate, s 92 relevantly provides:

"***92. Power of committee to act for body corporate***

(1) A decision of the committee is a decision of the body corporate.
(2) Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee. …" (emphasis added)

[17] This means decisions of the committee are deemed to be decisions of the body corporate, except for decisions of the committee on restricted issues, which are specified under regulation. If decisions fall to be made by the body corporate on restricted issues they could not be decided by its committee and by necessary implication would have to be made or authorised by the body corporate in a general meeting.

The Regulation

[18] The relevant regulation module in force at the time of the purported termination was the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld) Reprint 2 ("the Regulation").

[19] The Regulation specifically provided at reg 85 that the body corporate could only engage a person as a body corporate manager or service contractor, or authorise a person as a letting agent with the approval by ordinary resolution of a general meeting of the body corporate. On the other hand in empowering the body corporate to also terminate such engagements, reg 84 did not specify whether such a decision could be made by the committee only or required approval by a general meeting.

[20] As to the Regulation's definition of restricted issues for the committee, reg 24 provided:

"***24. Restricted issues for committee – Act, s 92[SM, s 26]***

A decision is a decision on a restricted issue for the committee if it is a decision –

(a) fixing or changing a contribution to be levied by the body corporate; or
(b) to change rights, privileges or obligations of the owners of lots included in the scheme ; or
(c) on an issue reserved, by ordinary resolution of the body corporate, for decision by ordinary resolution of the body corporate; or
(d) that may only be made by resolution without dissent, special resolution or ordinary resolution of the body corporate; or
(e) to bring a proceeding in a court, other than –

(i) a proceeding to recover a liquidated debt against the owner of a lot; or
(ii) a counterclaim, third party proceeding or other proceeding in relation to a proceeding to which the body corporate is already a party; or

(f) to pay remuneration, allowances or expenses to a member of the committee, unless the decision –

(i) is made under the authority of an ordinary resolution of the body corporate; or
(ii) is for the reimbursement of expenses of not more than $50." (emphasis added)

[21] The plaintiff submits the decision to issue termination notices was a decision on a restricted issue because it was a decision, described at reg 24(b), "*to change rights, privileges or obligations of the owners of lots included in the scheme*".

Rights, privileges and obligations under the contract

[22] It is not in dispute that the plaintiff had rights, privileges and obligations under its agreement with the body corporate.

[23] The plaintiff was obliged as a condition of the agreement to purchase and retain ownership of the Managers unit or "lot", which was lot 1.[4] The agreement also made provision for the mandatory transfer of the manager's lot in the event of termination.[5]

[24] Under the agreement the plaintiff was to perform management and caretaking duties,[6] for which it was to receive monthly remuneration[7] as well as reimbursement for the cost of consumable materials and equipment required

[140507]

to carry out its duties.[8] It was required to carry on from its unit the business of letting lots for the owners thereof, supervise tenants and promote the letting of units, including by erecting promotional signs.[9]

Rights, privileges and obligations under the Scheme

[25] The plaintiff's rights, privileges and obligations as manager did not derive solely from the agreement between the parties but also derived from the so-called New Community Management Statement, exhibit 3, relating to the community title scheme with which this case is concerned.

[26] In Schedule C to that document, by-law 34 makes specific provision for the use to which Lot 1 can be put:

> "***34. USE OF LOT 1***
>
> *34.1 Lot 1 in the Parcel may be used for both residential purposes and only during the currency of any property management agreement made between the Body Corporate and the registered proprietor of Lot 1, for the purpose of caretaking the Parcel and for the sale and letting of units on the Parcel on behalf of the proprietors. The proprietors of Lot 1 may with the prior consent of the Committee of the Body Corporate display signs or notices for the purposes of offering for sale or for lease or for letting of any lot on the Parcel.*
> *34.2 During the currency of any Property Management Agreement made between the Body Corporate and registered proprietor of Lot 1, the proprietor of Lot 1 shall be entitled to the exclusive use for office purpose of that area designated on the building plan as an office situated within the Common Property lobby area of the ground floor and being immediately adjacent to Lot 1*." (emphasis added)

[27] The rights of use conferred by by-law 34 are rights or privileges. They are of potentially very significant value to the proprietor of lot 1 given the nature of the business they effectively allow that person to conduct. They were described as "*special privileges*" of the agent in *Victorian Professional Group Management Pty Ltd* v *The Proprietor "Surfers Aquarius" Building Units Plan No. 3881*.[10]

Discussion

[28] The meaning of reg 24(b) does not appear to have received any reported authoritative consideration. Its meaning can be readily derived from the plain meaning of the words used and the context of their use.[11]

[29] The reference in reg 24(b) to "*rights, privileges or obligations of the owners of lots included in the scheme*" ought not be read literally as a reference to any right, privilege or obligation which a person who owns a lot in the scheme happens to have. That would ignore the context of the words, which necessarily implies a connection between the rights, privileges or obligations and the person's status as an owner of a lot included in the scheme.

[30] When the plain meaning of the words is considered in context, the reference to an owner's rights, privileges or obligations is obviously a reference to the rights, privileges or obligations that arise in the person's capacity as an owner of a lot included in the scheme. That is, they are rights, privileges or obligations which derive from the fact of the person's ownership of the lot and not from some other source, for example, from a contractual agreement such as the Caretaking and Letting Agreement in this case.

[31] At first blush it might appear that the decision to terminate the contractual agreement in the present case was a decision that changed the plaintiff's rights, privileges or obligations deriving from the agreement and not in the plaintiff's capacity as an owner of a lot included in the scheme and was therefore not a restricted decision. However, that reasoning ignores the fact the community titles scheme expressly confers rights or privileges upon the owner of lot 1, the manager's lot, under by-law clause 34 in the community management statement for the scheme. Those are rights or privileges that do derive, as reg 24(b) contemplates, from the plaintiff's capacity as an owner of a lot included in the scheme.

[32]

[140508]

The rights and privileges of the owner of lot 1 in the scheme include, under the scheme's by-law 34, the right to use lot 1 for the purpose of caretaking the parcel, ie. the unit complex, and for the sale and letting of units on the parcel. They also include the exclusive use of the office area in the lobby of the unit complex.

[33] Under the by-laws these rights and privileges are clearly those of the owner of lot 1 in that person's capacity as an owner of that lot in the scheme. A decision to change those rights is a decision described in reg 24(b).

[34] Such a decision only bears upon one owner of one lot included in the scheme whereas the regulation refers in the plural to "the owners of lots". However, the ordinary meaning of the words of the regulation is

consistent with the rights, privileges or obligations not having to relate to all owners and all lots included in the scheme. It is well known in such schemes that there may be differences in the rights, privileges and obligations of some owners of lots compared to others. In any event, pursuant to s 32C of the Acts Interpretation Act 1954 (Qld), words in the plural include the singular. It follows reg 24(b) ought be read as including a right, privilege or obligation which might, as here, only relate to a single owner of a single lot included in the scheme.

[35] The defendant submitted that the aforementioned rights and privileges under by-law 34 are qualified as only existing "*during the currency of any Property Management Agreement*" and therefore are not rights and privileges which derive from ownership of a lot included in the scheme and, rather, derive from the property management agreement. The submission seems to assume a mutual exclusivity between rights and privileges that flow from the agreement and rights and privileges that flow from the by-laws. It ignores the reality that rights and privileges can derive from both. The issue is not whether the plaintiff has rights or privileges under the agreement; it is whether it has rights or privileges under the by-laws as an owner of a lot included in the scheme.

[36] On the plain meaning of by-law 34, if a Property Management Agreement is current, the owner of lot 1 has rights and privileges in that person's capacity as the owner of a lot included in the scheme. A decision to terminate the Property Management Agreement is necessarily a decision that will change those rights or privileges because they are not rights or privileges that the owner can enjoy if the agreement is no longer current.

[37] The defendant contended that the by-laws did not grant the plaintiff a right to insist, if the agreement were to be terminated, that it be terminated in any particular way. That is not to the point. The issue here is whether the committee had the power to decide to terminate.

[38] The defendant also contended that even if the agreement is terminated that does not change the rights and privileges accorded by by-law 34. It was submitted in effect that even though the decision would render those rights and privileges worthless or dormant, those rights and privileges still existed, unchanged, as rights and privileges under the by-laws. However, this ignores the reality that the rights and privileges accorded by by-law 34 exist, as the by-law says, "*only during the currency of any Property Management Agreement*" (emphasis added).

[39] It was submitted the body corporate had resolved in advance by clause 10 of the agreement that the rights or privileges could be terminated. The argument was in effect that the right or privilege in by-law 34 was subject to a determination in advance that it could be terminated and thus a decision of the committee to terminate could not be said to have changed a right or privilege under the by-law. This ignores the relevant sequence of events and ignores the difference between the potential for a decision to be made and the making of a decision. If an agreement is current and a decision is taken to terminate it, the rights and privileges under by-law 34 will exist up to and at the time the decision is being made. It is only when the decision has been made, assuming it is validly made, that the rights and privileges which up to that time were held by the owner of the lot will change. As at the time a decision to terminate a current agreement is being considered, the rights and privileges of the owner of the manager's lot included in the scheme still exist. The making of the decision to terminate will

[140509]

change those rights and privileges by removing the condition for their existence under by-law 34, namely a current Property Management Agreement.

[40] It follows the decision to terminate a current Property Management Agreement in this case must have been a decision to change rights and privileges in as much as it would remove the rights and privileges the plaintiff otherwise enjoyed as an owner of a lot included in the scheme pursuant to by-law 34. Regulation 24 therefore deemed the decision to be a decision on a restricted issue and it was therefore a decision the committee could not lawfully make.

[41] I determine the answer to the question is:

The committee of the defendant was not entitled to determine the plaintiff's caretaking and letting agreement, that being a matter requiring the authority of a general meeting of the defendant.

Footnotes

1 Clause 8.1.5

2 The terms of the agreement quoted in the Further Amended Statement of Claim refer to the "manager" but the pleadings treat that as a reference to the plaintiff

3 Since replaced by the *Property Agents and Motor Dealers Act 2000* (Qld)

4 Ex 4 cl 2 & 5

5 Ex4 cl 11

6 Ex 4, preamble C, cl 4

7 Ex 4 cl 3.3

8 Ex4 cl 6.3 & 7.1

9 Ex4 cl 8

10 [1991] Qd R 487 at 489, referred to in *Humphries and Anor* v *The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597

11 Context being of primary importance in the modern approach to statutory interpretation – see *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384

MACKENZIE v KENTCADE PROPERTIES PTY LTD

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Court Ready PDF

(2012) LQCS ¶90-179; Court citation: [2012] QSC 299

Supreme Court of Queensland

5 October 2012

Conveyancing — Contracts — Put Option Agreements — Management Rights — Managed Investment Scheme — Actions triggering a Put Option Event — Where the plaintiff was the owner of Lot 9 and held the on-site caretaking and letting agreements for the resort which had been developed by the defendant developer and in which a majority of lots were unsold — Where the plaintiffs entered into an Option Agreement allowing them to Put the lot and the management rights to the defendant for the defendant to purchase those back provided certain "Put Option Events" were met — Where the Plaintiff had a specific letting engagement form — Where the plaintiffs contend that certain Put Option Events occurred granting them the right to exercise their option — whether the Put Option Events occurred — Whether the plaintiffs exercised that Option — Whether the Plaintiffs were entitled to a grant of specific performance — Whether there was a breach of the implied obligation of good faith — Whether the discretion not to order specific performance ought to be exercised by the court on the grounds of unfairness — PAMD Form 20a — Corporations Act 2001 (Cth), s 601ED — Property Agents and Motor Dealers Act 2000 (Qld), s 114, 115.

[140510]

The defendant (Kentcade Properties Pty Ltd) developed a resort which comprised 47 apartments.

Subsequently on 15 May 2009 the defendant appointed the plaintiffs (David John Mackenzie and Vicki Elizabeth Mackenzie) as its agent in respect of each of the 41 apartments which were still owned by the defendant. The plaintiffs became the resident managers and caretakers. The plaintiffs purchased Lot 9 from the defendant and began operating their letting business from the development by taking advanced holiday bookings. In the document appointing the plaintiffs as the agent for each of the 41 unsold apartments, the developer undertook to ensure that if any of the 41 lots were sold or transferred, then it would:

> i. give notice to the incoming purchaser of the particular lot of all of the advance holiday bookings relevant to that lot, and
> ii. obtain from the incoming purchaser an undertaking to accept the transfer of the lot to that purchaser subject to the conditions of such advance bookings, and
> iii. ensure that both the notice and the undertaking were enshrined in a contract between the defendant and the incoming purchaser (see [2]).

Later on 3 November 2011, the plaintiffs and the defendant entered into an Option Agreement, which would allow the plaintiffs to sell the management rights and Lot 9 to the defendant if certain Put Option Events occurred. Those Put Option Events included:

> a. breaches of a notice obligation requiring the defendant to give the plaintiffs notice of both the execution of a contract of sale and the completion of that contract of sale
> b. termination of a Form 20a letting agency form between the plaintiff and the incoming purchaser, the effect of which would mean the plaintiff no longer had the right to let that particular lot
> c. the defendant's breach of an undertaking (see [5]).

Contracts for nine lots were entered into and completed by the defendant to sell those lots to incoming purchasers prior to 15 February 2012.

The plaintiffs alleged that Put Option Events did take place and then took steps to exercise the Option. They sought an order from the court that the defendant specifically perform the contract and purchase the lot and management rights from the plaintiffs.

On 30 November 2011, the plaintiffs took steps to prepare a specific PAMD Form 20a, which protected their rights as letting agents while also providing the Managed Investment Scheme exemption provision allowing them to attract an exemption under s 601ED of the *Corporations Act 2001* (Cth) and this form was provided to the developer to use with incoming purchasers (see ¶39-300).

The defendants contended that the Put Option Events did not take place and alternatively that the court should exercise its discretion not to order specific performance. A further argument was raised by the defendant that the plaintiffs had breached their implied obligation of good faith.

Held: Put Option Events did take place allowing the plaintiffs to require the defendant to purchase the rights and Lot 9 from the plaintiffs. The plaintiffs validly exercised their Option.

1. The defendant breached their notice requirement — the defendant should not have taken longer than "a few business days" (see [40]) to communicate the relevant event (either a contract being executed or settling) to the plaintiffs. In *obiter*: the giving of notice was not an onerous task — the passage of weeks between the event and the notice was not a reasonable time: [40]–[41].

2. The completion of the settlement of the nine lots terminated the agency agreement between the defendant and the plaintiffs as to the ability to control the letting of those nine sold lots: [64].

3.

The defendants failed to have each of the nine purchasers enter into a letting agreement on the plaintiff's terms which would allow the plaintiffs to control the letting of each of those units: [85].

4. The defendant breached its undertaking obligation to ensure that the contractual terms agreed with the plaintiffs (to incorporate the advanced holiday letting into all contracts with the nine purchasers) were incorporated. In *obiter* — the terms were agreed in correspondence between the conveyancing staff. This was not sufficient; it had to be within the contract itself. This was an event of default triggering the Put Option: [93]–[94].

5. The plaintiffs validly exercised their Put Option: [95].

6. Specific performance was an appropriate remedy. An order for specific performance was made: [96], [101].

7. The plaintiffs in exercising their option did not act in a manner which was "exploitative conduct" defeating the purpose for which the contract was made: [98].

[Headnote by JOANNE BENNETT]

GA Thompson SC and DM Turner (instructed by MacGillivrays Solicitors) for the plaintiffs.

FL Harrison QC and MP Amerena (instructed by Greenhalgh Pickard Solicitors) for the defendant.

Before: Applegarth J

Editorial comment: In this case, the developer obviously had difficulties selling all of the lots off the plan prior to the development being finished. To stop the loss, the developer appointed the plaintiffs so that they could come on site and at least ensure that people were using the lots for holidays. The developer would have received cash from these holiday lettings and it would have made it much easier for the developer to hold onto stock.

This case shows that it is very important for a developer to work with the onsite manager, especially in a staged development, to ensure that the onsite manager picks up as many potential letting contracts with incoming buyers as quickly as possible as the letting contracts go to the very heart of the profitability of the management rights business for the onsite manager and is relevant to the purchase price paid for the rights.

Applegarth J highlighted the significance of notice (of each unit sale to a fresh buyer) being provided by the developer to the onsite managers in compliance with the agreement to do so under the option, to allow them to take advantage of the ability to capture future holiday rentals and preserve the value of their management rights business. The developer's position that the requirement to provide advance notice was only sometime prior to settlement was soundly rejected by the bench. His Honour noted that the passage of weeks following the execution of a binding contract between the developer and a third party buyer was not a "reasonable time".

This case also discusses the importance of using the PAMDA Form 20a (Appointment of agent — Letting and property management) which meets with the approval of and/or is drafted by the onsite manager's lawyer in order to escape the managed investment scheme provisions administered by ASIC. Instead of using the correct form, the developer's solicitor issued a blank Form 20a to each of the buyers, effectively destroying any chance that the managers had of capturing those units into the letting pool.

This case is an example of "how not to" handle the sale of management rights to a resident manager where there is an option in place.

[140512]

Applegarth J:

[1] The plaintiffs ("the Mackenzies") hold the management rights associated with the Coolum Seaside Resort, which comprises 47 apartments. They are resident managers and own Unit 9 from which they operate their caretaking and letting business. The resort was developed by the defendant ("Kentcade").

[2] On 15 May 2009 Kentcade appointed the Mackenzies its agent in respect of each of the 41 apartments it then owned ("the Kentcade Lots"). By Part 21 of the document that appointed it ("the Bulk Form 20a") Kentcade:

> (a) undertook that in the event of any of the Kentcade Lots being sold or otherwise transferred, Kentcade would:
>
> > (i) give notice to the purchaser or transferee of the relevant Kentcade Lot of all advance bookings for the Kentcade Lot;
> > (ii) obtain from that purchaser or transferee an undertaking to accept the purchase or transfer subject to the conditions of such advance bookings; and

(b) agreed that such undertaking on the part of the purchaser would form part of the contract for the purchase or transfer of the Kentcade Lot.

I shall refer to this as "the Undertaking Obligation".

[3] On 3 November 2011 the Mackenzies and Kentcade entered into an Option Agreement under which Kentcade granted to the Mackenzies an option ("the Put Option") to sell the management rights and Lot 9 to Kentcade upon the happening of a "Put Option Event". The Mackenzies contend that certain Put Option Events occurred, that they exercised the Put Option and are entitled to orders that the contract for the sale of the management rights and the contract for the sale of Lot 9 be specifically performed.

[4] Kentcade denies that there was a "Put Option Event". Alternatively, it submits that the Court should exercise its discretion to not order specific performance.

[5] The Mackenzies allege three separate Put Option Events:

(a) Breaches of clause 3.4 of the Option Agreement ("the Notice Obligation");
(b) Termination of "one or more of the Forms 20a" in the circumstances provided for by clause 4.1(4) of the Option Agreement ("the Form 20a Termination Event");
(c) Breach of the Undertaking Obligation.

The issues

[6] The substantial issues may be summarised as follows:

1. Did Kentcade breach the Notice Obligation contained in clause 3.4? This issue turns largely upon the meaning of "on" in clause 3.4.
2. Was there a Form 20a termination event as provided for in clause 4.1(4)? This issue turns on:
    (a) whether there was a termination of "one or more of the Forms 20a";
    (b) if so, whether the exception contained in clause 4.1(4) applies.
3. Is the Undertaking Obligation contained in a document "associated with" the Option Agreement and, if so, was there a breach of the Undertaking Obligation?
4. If the Mackenzies validly exercised the Put Option, whether orders for specific performance should be declined as a matter of discretion on the grounds that:
    (a) in exercising the Put Option the Mackenzies breached an implied obligation of good faith;
    (b) it would be unfair to order specific performance.

Background facts and relevant provisions

[7] The income that the Mackenzies derive from the ownership of the management rights comes mainly from their management of the letting of lots in the resort. There is no obligation on the owner of a lot in the resort to put their lot into the letting pool.

[8] Because the Kentcade Lots constituted 41 of the 47 lots in the scheme, any sale by Kentcade of the Kentcade Lots carried with it a risk that a purchaser or purchasers would decide not to place the lots in the letting pool as Kentcade had done pursuant to the Bulk Form 20a. This carried the risk of a diminution in the

[140513]

income derived by the Mackenzies from the letting business and a devaluation of their business.

[9] It was in this context that on or about 3 November 2011 the Mackenzies entered into the Option Agreement with Kentcade. The Option Agreement refers to the Mackenzies as "the Seller" and to Kentcade as "the Grantee".

[10] Clause 4 of the Option Agreement provides that each of a number of matters are Put Option Events. These include "all Events of Default". Clause 1.1(16) defines "Event of Default" to mean the following events:

> "(a) if a party fails to pay or repay money which is due and payable to the other party under this Agreement, a Contract or document associated with either of them;

(b) if a party defaults in the performance of an Obligation on that party's part under this Agreement, the Contract or **a document associated with** either of them; or
(c) any other event specifically described as an Event of Default in this Agreement." (emphasis added)

[11] Clause 3.4 contains obligations to give notice as follows:

"3.4 The Grantee must, in respect of each lot in Coolum Seaside (other than the Discretionary Lots and the Excluded Lots) which the Grantee intends to sell, transfer or assign ('Lot Sale'), give Notice to the Seller **on** both:

(1) the execution of a contract, or reaching of an agreement with the buyer for that Lot Sale; and
(2) the completion of the contract or agreement for that Lot Sale." (emphasis added)

Clause 3.5 provides that a breach of clause 3.4 by Kentcade is an Event of Default.

[12] Clause 4.1(4) includes among the Put Option Events the following:

"(4) Termination of any one or more of the Forms 20a except:

(a) where required to permit the completion of an arms length sale of one or more of the Grantee's lots in the Development to a third party unrelated to the Grantee ("Third Party"); and
(b) either:

(i) the Grantee procures the Third Party to enter into a PAMD[1] form 20a, in the Seller's standard form and terms, with the Seller on or before completion of the sale; or
(ii) no more than 2 Third Parties in any 12 month period fail to enter into a PAMD form 20a, in the Seller's standard form and terms, with the Seller on or before completion of their purchase …".

This provision prompts attention to the definition of "Forms 20a". This term is defined to mean "the PAMD forms 20a between the Seller and the Grantee, or an associate of the Grantee, for all of the Grantee's Lots".

Principles of construction

[13] The principles governing the interpretation of commercial contracts are not in dispute, and need not be restated at length. The meaning of the contract is to be determined objectively according to what a reasonable person in the position of the parties would understand the words to mean. If there is ambiguity, regard may be had to the commercial purpose of the transaction and background knowledge which would have been available to the parties. An interpretation which will give the contract a businesslike operation is to be preferred. Commercial contracts should be construed to make commercial sense of them. An absurd, unreasonable or capricious result is to be avoided.

[14] The starting point is the natural and ordinary meaning of the expression. The Court seeks to ascertain what the parties meant by the words which they have used. An objective approach is applied.[2] It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe.[3]

[15] Evidence of the surrounding circumstances is only admissible where the words are ambiguous. Unambiguous language cannot be disregarded simply because the contract would have a more commercial and

businesslike operation if an interpretation different to that dictated by the language were adopted.

[16] The interpretation should accord with what commercial people in the position of the parties would understand the words to mean. The interpretation should be "consistent with business common sense."[4] In the case of an ambiguous expression, the "more commercially sensible" construction should be preferred.

The Notice Obligation

[17] The issue of whether Kentcade breached the Notice Obligation turns principally on the meaning of "on" in the context of clause 3.4. Clause 3.4 required Kentcade to give notice to the Mackenzies "on" both:

1. the execution of a contract, or reaching of an agreement with the buyer for that Lot Sale; and
2. the completion of the contract or agreement for that Lot Sale.

The relevant facts are not in dispute. Paragraph 8 of the statement of claim, which was admitted, contains a table of the contracts entered into by Kentcade to sell a total of 15 of the Kentcade Lots. The table sets out the date of each contract, the date notice of each contract was given to the Mackenzies, the completion date of each contract that settled and the date notice of the completion of each contract was given to the Mackenzies. To take one example, the date of the contract for the sale of Lot 2 was 2 December 2011, but notice was not given of it until more than four weeks later on 5 January 2012. In most other cases the period between the date of the contract and the date of notice of it was about a month. In one case the length of time was 38 days.

[18] The Mackenzies submit that the word "on" is used in clause 3.4 in a temporal sense, and should be given its natural ordinary meaning. The *Oxford English Dictionary* defines "on" in a temporal sense as meaning "indicating the day or part of a day during which an event takes place; at the time of". The Mackenzies submit that even if some temporal latitude is allowed, "on" should not be construed to extend very far beyond the time of occurrence of the relevant event.[5] The expression "on" is incapable of accommodating a notice given many days or weeks after the relevant event.

[19] Such an interpretation of "on" is submitted to be supported by its context, including:

(a) the apparent commercial purpose of the provision;
(b) the requirement for a notice to be given "on" the occurrence of one of the events stated in clause 3.4(1), and a further notice "on" the completion of the contract pursuant to clause 3.4(2).

They submit that the flexible or imprecise construction of the word "on" contended for by Kentcade does not reflect the "business commonsense" approach to construction referred to by Diplock L in *Antaios Compania Naviera SA* v *Salen Rederierna AB*.[6]

[20] Kentcade submits that clause 3.4 does not stipulate the giving of notice within a particular time and, accordingly, clause 16.10 of the Option Agreement which provides that "time will be of the essence" is not engaged. It further submits that, by parity of reasoning with authorities that have construed the synonym "upon", the word "on" identifies "the trigger for the giving of the notice", not the time within which it must be given.

[21] Clause 3.4 is described by Kentcade as a "machinery provision" intended to assist the Mackenzies in obtaining the benefit of the Put Option Event in clause 4.1(4) if it becomes available.

[22] Although the requirement to give a further notice "on" the completion of the contract means that the first notice must be given before the completion date, Kentcade submits that the critical time is the date of completion of the contract of sale since it is only upon the completion of such a contract that the interests of the Mackenzies as the holders of the management rights may be threatened by diminution in the letting pool if Kentcade fails to secure their appointment at the settlement. Against that background, Kentcade submits that the context in which clause 3.4 appears and the subject matter of the Option Agreement lead to the conclusion that the requisite notices must be given after:

(a) entry into a contract for a Lot Sale, but probably before completion of that contract; and
(b) after completion of such a contract, but within a reasonable time so as to permit the Mackenzies a fair and reasonable opportunity to exercise the Put Option, if appropriate, within the applicable 90 day time limit.

[23] Kentcade's preferred construction is submitted to accord with reason and good sense where, for example, a buyer may make use of the statutory cooling-off period of five business days, or a contract may not proceed, for example, because it is subject to finance and the finance condition fails. The notice requirement in clause 3.4(1) is said to be intended to be "an advance warning that the seller should get ready to consider its position if ultimately it was informed in accordance with clause 3.4(2) that such a contract had been completed."

[24] Finally, Kentcade submits that its notices of entry into contracts and its notices of the completion of certain contracts were all within a reasonable time.

[25] Each party cited authorities which involved consideration of expressions "on", "on or about" or "upon" in a variety of contexts. As Stephen J stated in *Bowman* v *Durham Holdings Pty Ltd*:

> "'Upon' may mean 'before', 'simultaneously with' or 'after' the act done to which it relates and it will take its intended meaning from its context."[7]

Accordingly, in their context, the words "upon the exercise of the option" in that case did not require that payment of the purchase price should occur simultaneously with the exercise of the option. In other contexts, for example where the expression "on the death" is used the word "on" means either before the death, or simultaneously with the death, or immediately after the death.[8] Depending upon its context, the word "on" may impose a stricter time requirement than "on or about" which has been interpreted to mean no more than a few days away from the nominated event.[9]

[26] In other contexts the word "on" or "upon" has been construed as not imposing a temporal requirement in the nature of "at the same time as".[10] In some contexts it means "after".

[27] The authorities cited by both parties in relation to the meaning of "on", "on or about" or "upon" serve to illustrate that in some contexts the word "on" or its synonym "upon" does not stipulate a time for something to be done. *Bowman* v *Durham Holdings Pty Ltd* illustrates that point in respect of the synonym "upon". However, as Jordan CJ has observed:

> "The word 'upon' in different cases may undoubtedly either mean *before* the act done to which it relates, or *simultaneously* with the act done or *after* the act done, according, as reason and good sense require, the interpretation with reference to the context and the subject matter of the enactment."[11]

[28] The issue then is what reason and good sense require in the context of the present contract. This includes the context in which clause 3.4 appears, the apparent purpose[12] of including such a term in an agreement that related to management rights and the circumstances under which the Put Option might be exercised to sell them.

[29] I am not persuaded that the text or context of clause 3.4 supports the conclusion that the execution of a contract, or reaching an agreement for the sale of a lot, was simply a trigger, leaving Kentcade with latitude to give the first notice at any time after entry into the contract but before its completion.

[30] In its context, clause 3.4 is not a mere "machinery provision" that was intended to provide an advance warning that the Mackenzies should be ready to consider their position if they were later informed, in accordance with clause 3.4(2), that such a contract had been completed. The provision is not simply ancillary to the relevant Put Option Event under clause 4.1(4). Clause 3.4(1) is prescriptive in its terms and its requirement for the first notice to be given may assist the Mackenzies in the conduct of their business and thereby enhance its value. It may assist them to make forward bookings in respect of the lot and other lots, and arrange bookings so as to secure future bookings in later years to their advantage. Early notice assists them to make administrative arrangements for a possible

change in ownership of a lot. Clause 3.4 is not necessarily linked to clause 4.1(4). Performance of its obligations may assist the conduct of the management rights business.

[31] The practical significance of the dual notice requirements to the conduct of the management rights business should be fairly apparent. Even without resort to the evidence of Mrs Mackenzie, I accept the Mackenzies' submission that the obvious purpose of the notice required by clause 3.4 is to apprise them of an agreement to sell a lot as soon as it occurs. Mrs Mackenzie gave evidence which touched upon the practical operation of the business. The nature of the business, as explained by Mrs Mackenzie, supports the submission that the construction of the word "on" contended for by the Mackenzies is to be preferred, so as to give the clause a business-like interpretation and an interpretation which business people would have understood in the circumstances of an agreement relating to the subject matter of a management rights business.

[32] Such a business relies on forward bookings of accommodation. Because bookings are often taken many months in advance, and customers pay deposits and otherwise plan holidays on the basis of their booking, it is important for the manager of such a resort to be given the earliest possible notice that a lot may be taken out of the letting pool. Although some forward bookings may be protected by the Undertaking Obligation, the risk exists that after the contract of sale is entered into and before the Mackenzies are informed of the contract, they will take further advance bookings. Lot owners are not obliged to join the letting pool. The earliest possible notice that a lot may change hands enables the Mackenzies to avoid the problem of continuing to take accommodation bookings for a lot purchased by a third party who may not join the letting pool. Taking such bookings and not being in a position to honour them could lead to upset customers and other consequences that might have an adverse impact on the business. The Mackenzies were protected against some problems to the extent that Kentcade promised to obtain an undertaking from each purchaser to honour all forward bookings. Some buyers might be unwilling to give such an undertaking or to honour it. In any event, directing forward bookings to a unit that is not subject to contract and which is expected to remain in the pool for the long term might enhance the business, particularly in respect of "repeat" holidaymakers who in following years will try to book the same unit. Having the earliest possible notice of entry into sales is an advantage to the Mackenzies in relation to their conduct of the business and the management of forward bookings.

[33] The notice requirements of clause 3.4 are also practically important to a manager to enable it to make appropriate plans to deal with the accounting and other administrative consequences of a change in ownership of one or more lots. Substantial administrative tasks are required in relation to accounting for income and expenses, and to make appropriate arrangements to ensure the continuity of the supply of utilities and other essential services to lots.

[34] In its practical operation the notice requirement contained in clause 3.4(1) may serve to inform the Mackenzies of the identity of the purchaser and facilitate their negotiation of a fresh authorisation in accordance with the PAMD Form 20a agreement to act as the incoming buyer's letting agent. However, the notice requirement does not expressly require Kentcade to inform the Mackenzies of the name and address of the buyer and I do not rely upon this aspect as a separate or additional basis to conclude that giving the Mackenzies as much time as possible might enhance the efficient conduct of their business and its value.

[35] Instead, the other matters pointed to by the Mackenzies in their submissions in relation to arranging forward bookings for the relevant lots or alternative lots within the letting pool and making appropriate arrangements for a possible changeover in ownership support the conclusion that the purpose of the notice required by clause 3.4(1) is to inform the Mackenzies of an agreement to sell as soon as the agreement is reached or the relevant contract is executed.

[36] The possibility that such a contract will not settle, for example because finance to complete it is not obtained, does not detract from the practical importance to managers such as the Mackenzies of having as much advance

notice as possible of the real possibility that the contract will be completed, and for them to make suitable arrangements for the letting of the subject lot or others. Such arrangements are important to the practical operation of their business.

[37] An interpretation of "on" which requires the notice to be given on the date of the relevant occurrence or within a few days thereafter accords with the ordinary meaning of the word "on", while allowing for the

exigency that it may not be possible for a notice to be given on the very same day that the contract is executed. For example, the contract may be executed late in the day and it may not be possible to give the notice that same day. In such a case the notice would be given in accordance with clause 3.4 if it was given on the next working day or possibly the next few working days. An interpretation which permits such a notice to be given many days or weeks after the event would not accord with the apparent commercial objective of clause 3.4.

[38] One reason for this conclusion is that the word "on" apparently has the same meaning in its application to both the event referred to in clause 3.4(1) and the event referred to in clause 3.4(2), namely completion. In certain circumstances the completion of the contract will bring to an end the authority of the Mackenzies in respect of the lot. It would be important for them to know that a contract has been completed on the day of completion for a variety of practical reasons, including that in some cases their authority would be at an end. An interpretation which interprets the word "on" in the sense contended for by the Mackenzies in respect of both parts of clause 3.4 makes commercial sense and gives the agreement a business-like interpretation.

[39] These considerations are not outweighed by Kentcade's countervailing argument that the event is simply a trigger, leaving, in the case of the notice required by clause 3.4(1), an obligation to give the notice at some indefinite time prior to completion.

[40] There is no contest between the parties that clause 3.4(1) was intended to provide "an advance warning" to the Mackenzies. Ultimately, the issue is whether an interpretation of the word "on" in accordance with its ordinary meaning and so as to give the Mackenzies as much warning as possible is to be preferred, as according with the parties' presumed intention in using that word. Having considered the competing submissions of the parties, including arguments based upon commercial sense, I conclude that the word "on" was used in a temporal sense, and its context meant the day of the relevant event or within a short time thereafter, being no more than a few business days.

[41] If, instead, the notices had to be given within a reasonable time after the relevant event, then I am not satisfied that the notices required by clause 3.4(1) were given within a reasonable time. The giving of the notices was not a demanding task. There is no suggestion that it was not possible to give such a notice on or shortly after the execution of a relevant contract, or after agreement was reached with the buyer of the relevant lot. The passage of weeks before the notice was given was not a reasonable time.

[42] In summary, the construction contended for by Kentcade of the meaning of "on" should not be accepted. I prefer the construction contended for by the Mackenzies. There was a breach of the Notice Obligation. The breach of the Notice Obligation was an Event of Default and gave rise to a Put Option Event.

Was there a Form 20a Termination Event?

[43] For there to be a Put Option Event pursuant to clause 4.1(4) there first needed to be "termination of any one or more of the Forms 20a". In other words, there needed to be termination of any one or more of the PAMD Forms 20a between the Mackenzies and Kentcade for all of the Kentcade Lots.

[44] Next, there would not be a Put Option Event if the exception in clause 4.1(4) applied, namely:

> (a) where the termination was required to permit the completion of an arms length sale of one or more of the Kentcade Lots to a third party unrelated to Kentcade; and
> (b) either:
>
> > (i) Kentcade procured the third party to enter into a PAMD Form 20a in the Mackenzies' standard form and terms with the Mackenzies on or before completion of the sale; or
>
> [140518]
>
> > (ii) no more than two third parties in any 12 month period fail to enter into a PAMD Form 20a in the Mackenzies' standard form and terms with the Mackenzies on or before completion of their purchase.

[45] The Mackenzies allege that nine contracts were completed by Kentcade prior to 15 February 2012, and:

> (a) the act of completing each contract terminated the Form 20a insofar as it applied to each relevant lot;

(b) Kentcade failed to procure entry by any of the purchasers under the Kentcade contracts into a Form 20a with the Mackenzies in the Mackenzies' standard form and terms on or before completion of the sale.

[46] The term "the Seller's standard form and terms" in clause 4.1(4) (which I have described as "the Mackenzies' standard form and terms" for ease of reference) requires some explanation. Part 21 of the Bulk Form 20a contained the following condition:

> "The Client undertakes that in the event of the Property being sold or otherwise transferred, notice will be given of all advance bookings to the buyer or transferee and an undertaking shall be obtained from that buyer or transferee to accept the purchase or transfer subject to the conditions of such advance bookings and such undertaking shall be part of the contract for the purchase or transfer of the Property and the Client indemnifies the Agent against any claim due to non-compliance with this part and against any loss the Agent may suffer due to any such non-compliance."

The Mackenzies' solicitor, Mr Kleinschmidt, who has extensive experience in the law in this area, prepared a new document which his affidavit describes as the Standard Form 20(a) on behalf of the Mackenzies. It included as paragraph 2 of Part 21 what Mr Kleinschmidt describes as "the MIS Exemption Provision" in the following terms:

> "The Client and the Agent acknowledge and agree that the Agent has rights with respect to property that facilitate the use of the strata units in the complex and that should a majority of owners of units in the complex and whom have current letting appointments ('Investors') with the Agent require that those rights be assigned to another person specified by those Investors then the Agent will:
>
> (a) Assign those rights to that person at their market value determined by a qualified independent valuer instructed by the Agent disregarding any special value of the property because it can be used to operate a resort, hotel, motel service department (sic) complex; and
> (b) Give reasonable assistance to enable that person to operate the resort, hotel, motel or serviced apartment complex including making available information concerning and in respect of bookings."

Mr Kleinschmidt explains that the MIS Exemption was incorporated by him into the Standard Form 20a in order to enable the Mackenzies to attract an exemption from the operation of some of the provisions of the *Corporations Act* 2001 (Cth) dealing with managed investment schemes. On one view of the relevant legislation, it operates to require registration of a managed investment scheme once the letting pool had more than 20 members. If a managed investment scheme is not registered as required by s 601ED, it is liable to be wound up. These provisions did not apply to the letting pool of the resort at the time of entry into the Option Deed because Kentcade owned 41 of the 47 lots. However, Mr Kleinschmidt was concerned that as soon as sales by Kentcade of its lots caused the letting pool to have more than 20 members then s 601ED might apply. A winding up of any scheme constituted by the letting pool had the potential to have a catastrophic impact on the financial affairs of the Mackenzies. Hence the need to obtain an exemption from the operation of the Act. The MIS Exemption Provision was included in the Standard Form 20a in order to attract an exemption under an ASIC Class Order.

[47] The Mackenzies instructed Mr Kleinschmidt to send to the solicitors for Kentcade a Form 20a that included the MIS Exemption Provision, and to tell them that this was the standard Form 20a used by the Mackenzies for the purposes of clause 4.1(4).

[48]

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On 30 November 2011 Mr Kleinschmidt, acting on those instructions, caused a letter to be sent to the solicitors for Kentcade which enclosed the Standard Form 20a. The letter explained that it was the Mackenzies' "standard form and terms" PAMD Form 20a, including for the purposes of clause 4.1(4)(b)(i) of the Option Agreement. The letter anticipated that the Mackenzies would receive signed copies of the Forms 20a upon the settlement of each sale.

[49] The forms that Kentcade procured from the nine third parties who completed contracts of sale prior to 15 February 2012 were not in this form. Save in respect of one lot (Lot 15) the Form 20a that was signed by the third party was signed after 30 November 2011. In those circumstances, the Mackenzies submit that the Put Option Event provided for in clause 4.1(4) occurred because:

(a) there was termination of "one or more of the Forms 20a"; and
(b) the exception in clause 4.1(4) was not engaged.

[50] Kentcade submits:

(a) there is only one Form 20a, and it was not terminated;
(b) the change in the scope of the Bulk Form 20a arising upon completion of the sale of a lot does not constitute termination of "one or more of the Forms 20a" as it applied to the relevant lot;
(c) what clause 4.1(4) required in the circumstances was not termination of the Mackenzies' authority as it applied to particular lots, but the termination of the Bulk Form 20a.

[51] Next, Kentcade submits, in the alternative, that the circumstances of exemption envisaged in clause 4.1(4) applied with respect of the completion of the nine Kentcade contracts. This submission is advanced on the basis that:

(a) the Form 20a procured was in the form of the Mackenzies' standard form and terms (as appearing in the Bulk Form 20a); and
(b) what the Mackenzies describe as their "standard form and terms" Form 20a does not constitute a "PAMD Form 20a, in the Seller's standard form and terms" within the meaning of clause 4.1(4).

[52] On either basis, Kentcade submits that no Put Option Event under clause 4.1(4) of the Option Agreement has arisen.

The termination issue

[53] Kentcade resists the proposition that the words "any one or more of the Forms 20a" should be construed in circumstances in which the parties were aware that there was only one Form 20a between them (the Bulk Form 20a) as if the words referred to the numerous appointments in respect of each of the Kentcade Lots that were made, as a matter of convenience, in one Form 20a. Its essential submission is that there was only one Form 20a and, as a consequence, clause 4.1(4) was engaged only in the event of "the termination of the entirety of the obligations under a Form 20a". It speculates that the drafter of the Option Agreement may have thought that there were multiple Forms 20a, when in fact there was only one. I find it unnecessary to speculate about what the drafter had in mind, since it is the parties' presumed mutual intention that is relevant in construing the words, and the parties knew that there was only one Form 20a, covering multiple lots and making numerous appointments. The possibility that at some future time there might be a change of circumstances and the parties might enter into more than one Form 20a does not alter the fact that at the time they entered the Option Agreement they knew that there was only one Form 20a document, albeit one which made appointments in respect of numerous separate lots.

[54] Kentcade submits that although the interpretation of clause 4.1(4) urged by it may have unintended consequences, one must interpret the actual words used by the parties, and not read them as if they applied, in effect, to the numerous appointments made by the single form, or as if the single form that was used for convenience was made up of many Forms 20a. According to Kentcade, the opening words of clause 4.1(4) focus upon forms, not lots or appointments, and should be literally interpreted.

[55] This argument has surprising consequences. To take a simple, hypothetical example, if there were three Kentcade lots the subject of a single Form 20a, and one of the lots

[140520]

was sold, on Kentcade's argument, the Form 20a would not be terminated even in respect of the lot that was sold upon completion of the sale contract. The manager would still have obligations to Kentcade in respect of it.

[56] According to Kentcade, the opening words of clause 4.1(4) would be engaged only if it completed a sale of all of the lots. This interpretation is not said to advance any purpose, but is one which is said to be dictated by the words used in the agreement in circumstances in which there is only one Form 20a.

[57] The clause should be construed in circumstances in which the parties knew at the time they entered the Option Agreement that there was a single document, the so-called "Bulk Form 20a", which made numerous appointments in respect of many lots, and the clause addressed the circumstance in which "**one or more** of the Grantee's lots"[13] might be the subject of a sale to a third party. The clause contemplates the sale of one or more, but not necessarily all, of the Kentcade Lots to a third party.

[58] A PAMD Form 20a appoints a letting agent to perform letting services for an owner in respect of an identified lot. It is required by law.[14] The appointment does not run with the title to the lot. Leaving aside accrued rights and obligations, it ceases to operate upon the completion of a sale of the lot to a third party. The appointment of the agent, and its authority to act with respect to the lot, terminates, unless the agent is appointed by a Form 20a by the incoming buyer. This is the situation addressed by clause 4.1(4) and the word "termination" should be construed to refer to the termination of the agent's appointment upon completion of the sale of a lot.

[59] In the case of a sale by Kentcade of a single lot, the Bulk Form 20a is terminated in respect of that lot upon completion of the sale, but continues to apply to the remainder of the Kentcade Lots. This permits continuity of the Mackenzies' appointment in respect of lots that are still owned by Kentcade, and the obtaining of a Form 20a, if possible, from the new owner of the lot in respect of which the Mackenzies' appointment is terminated.

[60] Kentcade's argument that the Bulk Form 20a is not terminated in respect of the lot that is sold does not give the clause a sensible, business-like interpretation in circumstances in which the parties, as a matter of convenience, used the Bulk Form 20a rather than enter numerous, separate Form 20a documents. On Kentcade's argument the Bulk Form 20a is not terminated in respect of the relevant lot and the parties' obligations continue in respect of a lot that is no longer owned by Kentcade. This would seemingly extend to an obligation on the manager to account for rent and an obligation on the part of Kentcade to pay fees. Such an unreasonable and apparently unintended interpretation of the operation of the clause in the case of the sale of one or more, but not all, of the Kentcade Lots should not be preferred if another interpretation, consistent with the principles of construction is open which gives the clause a practical and apparently intended operation.

[61] The interpretation contended for by the Mackenzies is to be preferred. The clause, by its terms, was not concerned simply with the possibility of the sale of all of the Kentcade Lots, bringing the Bulk Form 20a to an end upon the completion of those sales. It applied to the sale of one or more, but not all, of the lots. In such a case, and in circumstances in which the parties knew there was only one Form 20a (the so-called "Bulk Form 20a"), a sensible interpretation of the clause is to treat the Bulk Form 20a as if it was, in effect, more than one Form 20a, and was inelegantly described as "the Forms 20a" in the opening words of clause 4.1(4). The words "the Forms 20a" should be so understood in circumstances in which the parties contracted on the basis that there was only one Form 20a which governed their relationship and operated as if a Form 20a had been given in respect of each lot to which the Mackenzies were appointed to act. If the Bulk Form 20a was to be treated for the purposes of clause 4.1(4) as if it was only one form then the clause would not have been cast in terms of "the Forms 20a".

[62] If, instead, the Bulk Form 20a is to be treated as a single form for the purpose of clause 4.1(4), then the opening words of the clause should be construed as relating to the termination of the appointment and the

authority conferred by the Bulk Form 20a in respect of a lot that is the subject of a sale contract to a third party. Upon the completion of such a sale the Form 20a is terminated in respect of that lot.

[63] It is true that the literal words of the clause relate to the termination of the form, not the termination of an appointment conferred by that form. However, in their context, the words of clause 4.1(4) should be construed to refer to the termination of the authority conferred by the form to let a lot when the sale of one or more of the lots is completed.

[64] The completion of several of the Kentcade Lots terminated the Form 20a (being the Bulk Form 20a) in respect of each of the lots that were sold upon the completion of that sale.

Does the exception in cl 4.1(4) apply?

[65] The Mackenzies allege in respect of the nine Kentcade contracts completed prior to 15 February 2012 that Kentcade failed to procure entry by any of the buyers into a Form 20a with the Mackenzies in the Mackenzies' standard form and terms on or before completion of the sale. Kentcade contests this and says that it procured from each such buyer "a PAMD Form 20a in the Seller's standard form and terms", being the form of the Bulk Form 20a which was the only Form 20a that the Mackenzies had used at that time and was therefore their "standard PAMD Form 20a".

[66] The solicitor for Kentcade explains that until he received the correspondence from the Mackenzies' solicitors dated 30 November 2011, he proceeded on the basis of providing the Form 20a to the purchaser based on the Bulk Form 20a previously used. The Bulk Form 20a was the only form the Mackenzies had used to his knowledge up until the receipt of that correspondence. Upon receipt of the new Form 20a he then used it "for future contracts", being contracts that were issued after 30 November 2011. In respect of contracts which were in the process of being negotiated or executed (and in the case of Lot 15 had been executed by a buyer), no steps were taken to have the buyer enter into the new Form 20a that the Mackenzies' solicitors on 30 November 2011 had described as their "standard form and terms" PAMD Form 20a. As a result, the PAMD Form 20a that was signed by the buyer of each of the contracts of sale which were completed and which were referred to in paragraph 8 of the statement of claim was generally in the form of the Bulk Form 20a.

[67] The Mackenzies' point is that after 30 November 2011, and prior to completion of the relevant contracts, they had a Form 20a which constituted "a PAMD Form 20a, in the Seller's standard form and terms" being the document sent to Kentcade's solicitors on 30 November 2011, and Kentcade did not procure each buyer to enter into this form on or before completion of the sale. The Mackenzies raise other issues about the forms that were obtained by Kentcade, including the fact that in some cases the insurance information sought by Part 11 of the form was not completed.

[68] Kentcade submits that to constitute the Mackenzies' standard form and terms it was not sufficient for the Mackenzies' solicitors to nominate the same as being their "standard form and terms". This simply identified intended standard terms, not a form that had been used so as to become the seller's standard form. I do not accept this argument. A party starting a business can nominate its standard form and terms. From time to time, a party can change its standard form and terms. They may become the party's standard form and terms when they are so described by that party. To be effective they could not be kept a secret. But here the Mackenzies' standard form and terms were notified to Kentcade on 30 November 2011 and, in clear terms, Kentcade was told that this was the Mackenzies' "standard form and terms" PAMD Form 20a, including for the purposes of cl 4.1(4)(b)(i).

[69] The next, and more substantial submission by Kentcade is that the matters relied upon by the Mackenzies in support of the proposition that the PAMD Form 20a forms procured by buyers did not accord with the Mackenzies' standard form and terms are, in the main, about matters in the addendum to the form. On this basis they argue that a failure to provide information sought by the addendum to the Mackenzies' so-called "Standard Form 20a" is not a failure to have the third party "enter into a PAMD Form 20a in the Seller's standard form" within the meaning of the

clause. Expressed differently, when the Option Agreement refers to a PAMD Form 20a, in the Mackenzies' standard form and terms, it should not be read as the Standard Form 20a "plus any addendum that the plaintiff might choose to tack on to the end of it". If, and to the extent, the Option Agreement authorised the Mackenzies to specify a "standard" Form 20a, it did not give them license to impose obligations on the buyer outside the scope of the statutorily-prescribed form.

[70] The approved statutory form has a number of parts, ending with Part 8 for signatures. Beneath that part the form allows for "SCHEDULES OR ATTACHMENTS (IF APPLICABLE)". Both the Bulk Form 20a and the form which the Mackenzies nominated as their standard Form 20a on 30 November 2011 contain an addendum. Each addendum is in a form authorised to be used under licence by members of the Queensland Resident Accommodation Managers Association. The Form 20a addendum in this form contains additional parts that deal with matters such as sole agency, bank account details, insurance, presentation of property,

agents' responsibilities, clients' responsibilities and acknowledgments, cancellation policy, use of the property by the client, promotions, assignment, charges, commission and in Part 21 "Other Conditions". The addendum concludes with provision for a separate signature and a privacy statement and consent in order to comply with the requirements of the *Privacy Act* 1988 (Cth).

[71] Kentcade submits that to the extent the addendum goes beyond what is required by s 114 of the *PAMD Act* and contains additional information not mentioned in the approved form or permitted by s 49 of the *Acts Interpretation Act* 1954,[15] the addendum is not to be regarded as part of the Form 20a. The consequence is that a failure to provide the information sought by the addendum is not a failure to procure entry into a "PAMD Form 20a, in the Seller's standard form".

[72] The appropriate starting point is the Option Agreement itself and the meaning which should be given to the words "PAMD Form 20a, in the Seller's standard form and terms" in that context. Those words are not necessarily confined to matters which must, pursuant to s 114, be stated in an appointment. In any event, the statutory form contemplates that it might be supplemented with attachments. The status of the addendum relied upon by the Mackenzies in this case does not turn upon the fact that it was headed "Form 20a Addendum" rather than "Attachment".

[73] Section 114(3)(c)(iv) provides that the appointment must state "any condition, limitation or restriction on the performance of the service", and Part 4 of the approved form makes provision for this and states that if the space provided is insufficient additional sheets should be attached to the form.

[74] The terms of cl 4.1(4) and its subject matter serve to limit what the Mackenzies might choose to provide by way of their "standard form and terms". The attempted inclusion of extraneous items that do not relate to their appointment and the performance of the service would mean that such extraneous items could not be described as part of "a PAMD Form 20a, in the Seller's standard form and terms". However, many matters will relate to the appointment and be permitted to be included in an attachment or addendum to the PAMD Form 20a since they bear upon the rights and obligations of the client and the agent in respect of the appointment. Many matters will constitute a "condition, limitation or restriction on the performance of the service" and be required to be stated in the form. Insurance is an example. Both the Bulk Form 20a and the Mackenzies' Standard Form 20a includes as Part 11 a provision that the client must:

> "• maintain a public liability insurance policy for at least $5 million;
> • maintain a policy of insurance for the furniture and effects in the Property;
> • provide to the agent the following details of such insurance …".

These obligations in relation to insurance are not a matter which s 114 specifically prescribes, but are a condition upon which the agent agrees to perform the service. They bear upon the rights and obligations of the client and the agent

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in respect of the subject matter of the agent's appointment. Accordingly, the Mackenzies' standard form and terms in relation to insurance form part of a PAMD Form 20a.

[75] The position in relation to Part 21 of the form is more contentious. Kentcade submits that these conditions are not a "condition, limitation or restriction" on the performance of the service so as to be required to be stated in accordance with s 114(3)(c)(iv), and fall outside of the contents of a "PAMD Form 20a, in the Seller's standard form and terms".

[76] As to the first paragraph of Part 21, a condition by which the client undertakes in the event of sale to give notice of advanced bookings and to obtain an undertaking from the buyer to honour them is a condition upon which the agent agrees to perform the service. It relates directly to the subject matter of the agreement and is a condition or term which falls within the expression "a PAMD Form 20a, in the Seller's standard form and terms".

[77] The second paragraph in Part 21 provides for circumstances in which a majority of owners of units may require the manager's rights to be assigned to another person. The granting of such rights and the obligation imposed upon the agent to, among other things, give reasonable assistance to enable a new person to operate the resort, including making available information about bookings, relates to the terms of the agent's

appointment and the conduct of the service that is the subject matter of the agreement. It confers rights upon the client and other owners affecting the conduct of letting. It is the kind of provision which an owner might seek for their protection, and the provision for assignment constitutes a limitation on the agent's rights in connection with the subject matter of the agreement. In short, it relates to the circumstances under which the agent will not be able to continue to provide the service. It also falls within the terms of cl 4.1(4)(b).

[78] I conclude that the Mackenzies' Standard Form 20a, as conveyed under cover of the letter of 30 November 2011, became the "Seller's standard form and terms" after their contents and status were communicated to Kentcade.

[79] To attract the exception in cl 4.1(4) Kentcade had to procure a PAMD Form 20a in that form from a buyer if it had not already done so.

[80] I leave open, but shall assume in Kentcade's favour that, in procuring the Form 20a signed by the buyer of Lot 15 prior to 30 November 2011 in accordance with the previous form, it fulfilled the requirement of cl 4.1(4)(b)(i). There is a competing argument that, having been notified of the new form, and possibly having not executed the contract, Kentcade was obliged to obtain a further, new Form 20a in respect of Lot 15. However, it is unnecessary to resolve this argument.

[81] In respect of other lots, it did not procure the buyer to enter into a PAMD Form 20a before it was informed of the Mackenzies' Standard Form 20a terms and conditions. It failed to do so. The fact that it subsequently procured buyers to execute a form which was not, and had ceased on 30 November 2011 to be, the Mackenzies' "standard form and terms" does not assist it. If Kentcade wished to attract the exception in cl 4.1(4) it was required to procure the buyer to enter into a form in the Mackenzies' "standard form and terms". After 30 November 2011 Kentcade knew what this form was.

[82] The possibility always existed that the Mackenzies might, at some stage and before a Form 20a had been executed by a buyer, nominate new standard terms and conditions. If Kentcade wished to guard against this possibility and engage the exception in cl 4.1(4) it should have contractually obliged the buyer to execute such a document or, in the absence of a contractual entitlement, requested the buyer to execute such a document.

[83] That the Mackenzies might adopt standard terms and conditions which differed from the contents of the Bulk Form 20a was something which might be expected. For example, the Bulk Form 20a in Part 16 contained no provision for the client or the client's relatives or friends to use the property, subject to availability. Kentcade presumably was content with such a provision. However, the standard forms and conditions introduced after 30 November 2011 in Part 16 provided a period of four weeks for the client's use. The

[140524]

Mackenzies might have thought that such a provision was attractive to owners and should form part of their standard terms and conditions.

[84] It is unnecessary to address all of the various respects in which the forms that were provided to the Mackenzies are alleged to have failed to reflect their standard terms and conditions. As noted, some of the forms did not complete the section in relation to insurance by naming the insurer and giving a policy number. This information was only provided later, and well after settlement. The better view, it seems to me, is that Part 11 of the form required details of the insurance to be provided as part of the form. A form which failed to include these required details would not be a form which complied with the Mackenzies' standard form and terms, which required these details to be completed on the form.

[85] It is sufficient for present purposes to conclude that in respect of two or more sales, Kentcade failed to procure the buyer to enter into a PAMD Form 20a in the Mackenzies' standard form and terms. It failed to procure entry into that form after 30 November 2011. More than two third parties failed to enter into such a form with Kentcade on or before completion of their purchase. As a result, a Put Option Event pursuant to cl 4.1(4) arose.

The Undertaking Obligation

[86] The Mackenzies contend that in respect of the nine Kentcade contracts completed by it prior to 15 February 2012, Kentcade failed to:

> (a) obtain from the buyer of each Kentcade Lot an undertaking to accept the purchase subject to the conditions of such advance bookings applicable to the lot;
> (b) include such undertaking as a term of each of the Kentcade contracts,
>
> and thereby breached the Undertaking Obligation. Kentcade denies this. Its first submission is that a breach of the Undertaking Obligation is not an event of default. In this regard, it submits that the Undertaking Obligation is contained in the Form 20a and this document is not "associated with" the Option Agreement.

[87] One obstacle to this argument is that Kentcade's defence admitted that the Form 20a is associated with the Option Agreement or the contract to be entered into upon exercise of the Put Option. When this was pointed out during oral submissions, senior counsel for Kentcade in his submissions in reply sought leave to withdraw the admission on the grounds that it was not an admission of fact, related to the construction of a document, but was more in the nature of a concession on a point of law and that withdrawing the admission would not cause the Mackenzies prejudice. An explanation as to why the admission was made was not proffered, but the point only arose late in the hearing and the efficient conduct of the hearing did not justify its prolongation to explore this issue. It is unnecessary to decide whether leave to withdraw the admission should be granted since I conclude that the admission was properly made.

[88] Kentcade submits that, whilst the Form 20a was connected or related to the Option Agreement, it is not "associated with" it. Expressions such as "associated with", "in connection with" and "related to" can bear a variety of meanings, depending upon their context. The word "associated" does not appear to have been used in cl 1.1(16)(b) in any special or technical sense. Kentcade submits that the word "associated", as used in that clause, requires something more than a connection or relation between the Bulk Form 20a and the Option Agreement.

[89] I accept that a passing reference to the Form 20a in the Option Agreement might not be sufficient to mean that the form is "associated with" the Option Agreement. However, there is more than a passing reference to the form. It is pivotal to the Put Option Event provided for in cl 4.1(4). I conclude that the Form 20a is associated with the Option Agreement.

[90] The Mackenzies submit that Kentcade did not comply with the Undertaking Obligation because, first, it did not give notice to the purchaser or transferee of the relevant lot of all advance bookings for that lot. This is apparent because no request for information about those advance bookings was made to the Mackenzies. This alleged breach is not contested. Instead, Kentcade appeared to argue that any such breach was of no consequence because suitably

worded undertakings were obtained from the purchasers. However, this does not alter the fact of a breach.

[91] The Mackenzies further argue that they did not receive, on or before the completion date of the Kentcade contracts, any written undertakings on behalf of the purchasers undertaking to be bound by all forward bookings applicable to the relevant lot. The Mackenzies and their solicitors gave evidence that no such undertakings were given on or before completion. Insofar as undertakings were contained in the sale contracts, a complete copy of the contracts was not provided to the Mackenzies or their solicitors prior to 11 September 2012. However, in the case of Units 12, 13, 15, 16, 17, 18 and 24, the conveyancers for those purchases did not wish to have the undertakings referred to in Part 21 of the Form 20a as a term of the written contract for sale. Instead those undertakings were given in correspondence by which the conveyancers acknowledged and confirmed the existence of a collateral agreement.

[92] The obligation in Part 21 of the Form 20a required such undertaking to "be part of the contract for the purchase or transfer of the property". Kentcade submits that this expression is sufficiently broad to comprehend collateral agreements of the kind given here. The collateral agreements recorded in correspondence are said to be enforceable and "part" of the contract for the purchase or transfer of the property.

[93] In my view, the requirement that the undertaking "shall be part of the contract for the purchase or transfer of the property" should be interpreted in its context to require the undertaking to form part of the contract itself, whether this be in the form of a special condition or otherwise. The requirement for the undertaking to be part of the contract, and not simply recorded in correspondence by way of a collateral agreement, was apt to give greater practical assurance to the Mackenzies that such an undertaking would be honoured, without the need for argument as to whether the undertaking had the force of a contractual promise that was enforceable either at the instance of Kentcade or at the instance of the Mackenzies for whose benefit the undertaking was obtained.

[94] I conclude that Kentcade breached the Undertaking Obligation. This amounted to an event of default and gave rise to an additional Put Option Event.

Exercise of the Put Option

[95] The Mackenzies were entitled to exercise the Put Option. There is no dispute that the Put Option was exercised as required and that Kentcade failed to sign contracts in the form of the annexures to the Option Agreement and necessary associated materials. The Mackenzies, as attorney for Kentcade, executed the contracts and associated materials. The contracts which they seek to have specifically enforced came into existence. The Mackenzies remain ready, willing and able to complete them.

[96] There is no dispute that specific performance is an appropriate remedy, and more appropriate than a remedy in damages. The remaining issue is whether an order for specific performance should be declined as a matter of discretion.

Did the Mackenzies exercise the Put Option in breach of an implied obligation of good faith or unfairly?

[97] This matter was raised in argument, but not pleaded. The scope of an implied obligation of good faith in the exercise of an option of the present kind was not extensively argued in the hearing before me. Reference was made to leading authorities and articles on the implied obligation of good faith. Reference was made to the implied obligation of good faith in the context of the exercise of powers. The present context is somewhat different involving the exercise of a Put Option.

[98] In any event, Kentcade argues that, having regard to the purpose of the contract, and the fact that the Mackenzies do not suggest that the Put Option was exercised out of fear for the value of the management rights, I should infer that it was exercised for the purpose of merely realising on their investment at what for other reasons was a convenient time. I decline to draw this inference. It was not put to Mr Mackenzie when he was cross-examined, and Mrs Mackenzie was not cross-examined at all. I decline to find that the Mackenzies' conduct in exercising the option constitutes "exploitative conduct which defeats the purpose for which

[140526]

the contract was made". The option was exercised in circumstances in which the Mackenzies perceived it was in their interest to do so. One of the relevant circumstances is that the completion of the sales will bring Kentcade's interests to a level close to the level at which it will cease to have majority voting rights on the body corporate. The Mackenzies may have a legitimate concern as to the future. In short, Kentcade has not persuaded me that the Mackenzies exercised their rights under the Option Agreement in breach of an implied duty of good faith.

[99] The remaining discretionary ground is unfairness. Reference was made to *Blomley* v *Ryan*.[16] However, the present circumstances are far removed from the circumstances of that case.

[100] Kentcade argues that the burdens of management of the complex should not be forced onto it as an unwilling purchaser in the present circumstances, nor should an unwilling manager with no suggested management competence or experience be forced on the owners of units who are not parties to the present proceedings. However, I do not accept that there is any unfairness in the circumstances of the execution of the Put Option, or in the circumstances of the creation of the contracts that are sought to be specifically enforced. It is consistent with equity and good conscience to enforce the bargain reached between the Mackenzies and Kentcade. Kentcade agreed to acquire the management rights in certain circumstances. It

is a substantial development corporation. If it lacks the staff or experience to undertake management of the resort, it can appoint suitably qualified managers or attempt to sell the management rights to such persons.

[101] I decline to exercise the discretion not to order specific performance.

Conclusion

[102] The Mackenzies have established at least one Put Option Event. They were entitled to exercise the Put Option, and did so. The contracts should be specifically enforced.

[103] I will hear the parties in relation to a suitable form of order.

Footnotes

1 *Property Agents and Motor Dealers Act* 2000 ("PAMD Act").

2 *Equuscorp Pty Ltd* v *Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 483 [34]; *Pacific Carriers Ltd* v *BNP Paribas* (2004) 218 CLR 451 at 461-462, [22].

3 *Toll (FGCT) Pty Limited* v *Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40].

4 *Rainy Sky S.A. and Ors* v *Kookmin Bank* [2011] UKSC 50 at [29]-[30].

5 *Larter* v *Skone James* [1976] 1 WLR 607.

6 [1985] AC 191 at 201.

7 (1973) 131 CLR 8 at 16, following *Ex parte Lesiputty* (1947) 47 SR(NSW) 433 at 436.

8 *Larter* v *Skone James* (supra).

9 *Blackett* v *Clutterbuck Bros (Adelaide) Ltd* [1923] SASR 301; *Ruzeu* v *Massey-Ferguson (Aust) Ltd* [1982] VR 529; *Edwards* v *Stocks* [2008] TASSC 12.

10 *R* v *Arkwright* (1848) 12 QB 960 at 970; 116 ER 1130 at 1134; *Ex parte Lesiputty* (supra); *R* v *Fairford Justices*; *ex parte Brewster* [1976] QB 600 at 604; *AMCO Wrangler Ltd* v *Sukkar* (1985) 1 NSWLR 577 per Kirby P at 580; *Flowers* v *Vescio* [2006] NSWCA 342 per Santow JA (with whom Beazley and Bryson JJA agreed) at [48] to [50]; *Bowman* v *Durham Holdings Pty Ltd* (supra).

11 *Ex parte Lesiputty* (supra) at 436

12 The subjective intention of a party is not admissible in this regard.

13 Clause 4.1(4)(a), emphasis added.

14 PAMD Act, ss 114, 115.

15 Which provides that substantial compliance with an approved form is sufficient.

16 (1956) 99 CLR 362 at 401-402.

THE PROPRIETORS CATHEDRAL VILLAGE BUILDING UNITS PLAN NO. 106957 & ORS v CATHEDRAL PLACE COMMUNITY BODY CORPORATE & ORS

(2012) LQCS ¶90-180; Court citation: [2012] QSC 301

Supreme Court of Queensland

5 October 2012

Conveyancing — By-laws — Management of common property — Commercial car park using common property — Control of exclusive use areas — Where the plaintiffs (the proprietors of Cathedral Village and 24 individual lot owners) carried on the business of a commercial car park in the development at Cathedral Place from 2001 — Where the property on which they were parking was the common property of four schemes — Where the First Defendant adopted by-law 28 in 2008 which created the rights to the common property — Whether the interest in the car park was in fact terminated and whether the court ought to impose a statutory right allowing the plaintiffs to continue using the common property for car parking — Plaintiff's equitable interest in the common property — Mixed Use Development Act 1993 (Qld), s 3, 206, 206A — Property Law Act 1974 (Qld), s 180.

The Cathedral Village development comprised a number of residential and commercial units referable to a number of different bodies corporate. Within the development a car park existed as part of the common property of four separate bodies corporate. The first plaintiff — Cathedral Village — had six car parks as part of its common property within the subject common property.

During the sale of the units, the developer agreed to procure at least 55 car parks for use by Cathedral Village using either "exclusive use easement or some other mechanism". On 29 November 2000, a new by-law 28 was passed by way of resolution without dissent, which attempted to reserve a portion of the common property which was not part of the Cathedral Village Scheme for the lot owners in Cathedral Village. In fact, it was part of the Notre Dame Scheme. Notre Dame did not pass a resolution to give effect to the by-law. The easements granted by Notre Dame also did not mention car parking — they were to allow right of way.

The plaintiffs argued that the by-law was necessary to give effect to the development approval and comply as required. When by-law 28 was subsequently revoked by a comprehensive resolution at an extraordinary general meeting on 28 June 2010, the plaintiffs argued that the resolution did not revoke by-law 28 as only a resolution without dissent could possibly have revoked it.

A number of plaintiffs gave evidence of the fact that they purchased their residential or commercial unit with the expectation of receiving a car park which did not eventuate.

Held: claim dismissed.

1. The plaintiff has an interest in its own common property (that is, the six car parks): [1], [4].

2. The plaintiff may have had a licence (at best) to use the common property car parks of the three other schemes; however, this was terminated: [3].

3. By-law 28 (giving rise to the licence) was revoked by comprehensive resolution under the *Mixed Use Development Act 1993* (Qld) — a resolution without dissent was not necessary: [36].

4. The plaintiffs did not have an equitable interest in the car parks comprised of the common property of the three other schemes: [58]–[59].

5. The circumstances of the case did not warrant a statutory right of user under s 180 of the *Property Law Act 1974* (Qld) being levelled against the development: [63].

[Headnote by JOANNE BENNETT]

[140528]

RA Perry SC (instructed by Herbert Geer) for the plaintiffs.

B D O'Donnell QC and M Gynther (instructed by Gadens Lawyers) for the defendants.

Before: Douglas J

Douglas J:

Introduction

[1] The plaintiff, The Proprietors Cathedral Village Building Units Plan No. 106957 ("Cathedral Village"), has been operating a commercial car park in the development known as Cathedral Place in Fortitude Valley, Brisbane since some time in 2001. Cathedral Place is a development with a complex structure, which houses residential and commercial units referable to a number of different bodies corporate. The area of the car park

is principally the common property of four of those bodies corporate, including Cathedral Village which has six car spaces there as part of its common property.

[2] A controversy about the provision made for car parking for the owners of units in Cathedral Village through the purported adoption of by-law 28 by the first defendant, Cathedral Place Community Body Corporate ("Cathedral Place CBC"), on 29 November 2000 has led to disputes within and among the members of all the bodies corporate over many years since then.

[3] Cathedral Village's tenure of the area owned by the other bodies is, at best at the moment on the view I have formed, a licence that has been terminated. The questions for me to consider in forming that view were:

> (a) whether Cathedral Village had acquired a legal or equitable interest in the area of the car park beyond its own common property;
> (b) whether any interest in the general area of the car park it may have had has been terminated; and
> (c) whether a statutory right of user should be imposed on the car park land in favour of Cathedral Village or its members.

[4] As will become clear, it is my view that the only interest that Cathedral Village now has in the car park area is the spaces forming part of its own common property. The rights it may have had earlier have been terminated and no statutory right of user should be imposed.

Background

[5] The task of comprehending the evidence will be assisted by reference to a plan of the basement area of the development which was incorporated into the statement of claim and which I have included as a schedule to this judgment. It is also important to become familiar with the parties.

[6] Cathedral Village is the first plaintiff. The remaining 24 plaintiffs hold lots in that body. The first defendant, Cathedral Place CBC, owns common property associated with the whole development in an area of the basement car park known as "CPL4" which is shown on the plan. The development includes a number of separate residential blocks as well as the Cathedral Village section devoted to commercial lots. The residential blocks each consist of separate bodies corporate. Two of those residential bodies corporate, the Proprietors Notre Dame Building Units Plan No. 106912 ("Notre Dame") and the Proprietors Oxford & Cambridge Building Units Plan No. 106905 ("Oxford & Cambridge") are the second and third defendants respectively and also own common property in the area of the car park.

[7] On the plan, the overall area in contention is outlined in yellow and CPL4 is hatched in green. Notre Dame common property is hatched in red, while Oxford & Cambridge's common property, appropriately, is hatched in blue.

[8] Four of Cathedral Village's car parks are hatched in red on the south-west corner of the plan. Another two are located in the basement below this level. Entry to the car park is from Gotha Street, which is at the bottom of the plan. It is controlled through a boom gate adjacent to the words "bollards and chains" at the entrance to the lift shown in the plan. Another entrance to the right is used for access to residential car parks allocated to owners of units in the residential bodies corporate.

[9] Two easements, "R" and "S" are shown on the plan and were registered over the community property of Notre Dame in favour of Cathedral Place CBC for access, defined as

"for the purpose of a right of way … which shall include but not be limited to the right to pass up over and along the Servient Tenement." There is also an easement "A" at the entrance to the car park in favour of Cathedral Place CBC given by Cathedral Place Developments Pty Ltd ("CPD"), the company that developed the whole site, again for the purpose of a right of way.

[10] No allocation of car parks was made to the owners of commercial units in Cathedral Village but representations were made to purchasers of those units when the development was created that they would have unallocated car spaces available to them in the area of the car park in a number proportionate to the area of the commercial units bought.

[11] The vendor, CPD, was a development company and a subsidiary of the Devine Limited group of companies. It is not a party to these proceedings. It agreed, when selling units in Cathedral Village, that it would procure the benefit of at least 55 car parks to that body corporate "by either exclusive use easement or other mechanism at the Seller's discretion".[1] CPD's attempt to perform this condition occurred on 29 November 2000 at a meeting of Cathedral Place CBC whose chairman was Mr William Ritchie, then an officer of CPD. He also represented the unit holders of Cathedral Place CBC as all its units were then held by CPD. There was no other person with a vote present at the meeting. The attempt to comply with cl 46 of the contracts with unit buyers in Cathedral Village consisted of the passage by "comprehensive resolution" of a new by-law 28 of Cathedral Place.

[12] There were in existence already 27 by-laws which had been passed as special resolutions and resolutions without dissent. One of them was by-law 25 dealing with car parking for the lot owners and occupiers of the residential units. By-law 25 provided as follows:

"**25. VEHICLE PARKING**

(a) **Purpose**

The Body Corporate is responsible for the allocation of the exclusive use of carparking spaces that are either:-

- Located on the Common Property; or
- Located on the Common Property of a subsidiary Body Corporate and subject to an easement in favour of the Common Property.

The purpose of this By-law is to allocate the exclusive use of the carparking spaces.

(b) **Allocation**

(i) This By-law 25 refers to the Carparking Plans and the Allocation Schedule annexed to these By-laws;
(ii) The Lot Owners and Occupiers for the time being of the lots in the building designated in the Allocation Schedule are allocated exclusive use of the corresponding carparking space listed in the Allocation Schedule and identified in the Carparking Plan.

(c) **Effective Date of Allocation**

The allocation of the benefit of the exclusive use of the carparking space in this By-law 25 is effective from the date that both:-

(i) The Building Units Plan for the Lot Owners has registered; and
(ii) If applicable, the easement granting the benefit of the carparking space to the Body Corporate has registered.

(d) **Swapping Carparking Spaces**

Any two Lot Owners may by agreement swap carparking spaced provided that both give notice in writing of the swap to the Body Corporate."

[13] The new by-law 28 adopted on 29 November 2000 provided as follows:

"**28. Restricted Community By-law**

(a) **Application of By-law**

This By-law applies to the Visitor Carpark designated on the plan attached to this By-law ('Visitor Carpark'). Part of the Visitor Carpark is Community Common Property and part of the Visitor Carpark is Common Property for the subsidiary body corporate known as

'Notre Dame'. The by-law applies to the portion on the Visitor Carpark that is on Community Common Property. The by-law is intended to apply to that portion of the Visitor Carpark that is Common Property for Notre Dame on registration of an easement from the proprietors Notre

[140530]

Dame BUP 106911 granting the benefit of that area to the Community Body Corporate for carparking purposes.

(b) **Persons Entitled to use**

The persons entitled to use the Visitor Carpark are the Proprietors 'Cathedral Village' 106957 and any person authorized by them, all of whom are individually and collectively referred to as 'Authorised Persons'.

(c) **Conditions of Use**

The Proprietors Cathedral Village BUP 106957 must ensure that the Visitor Carpark is used:-

(i) only for purposes ancillary to the Mixed Use Development of Cathedral Place;
(ii) in a manner that complies with the by-laws form [sic] time to time for the Cathedral Place Community Body Corporate.

(d) **Maintenance**

The proprietors 'Cathedral Village' BUP 106957 must maintain the Visitor Carpark in a state similar to the other carparking areas on the common property for the Cathedral Place Community Body Corporate."

[14] The plaintiffs also pleaded in paragraph 45 of the statement of claim that in about July 2000 Mr Ritchie agreed with himself in his capacities as representative of both Cathedral Village and Cathedral Place CBC at the time that:

"(a) The First Defendant would at its cost install a traffic control boom gate, parking ticket dispensing machine and associated equipment at the western Gotha Street entry and exit point for the carpark;
(b) The Plaintiff would, over time and on terms to be agreed, reimburse to the First Defendant the cost of installing the carpark equipment;
(c) The Plaintiff would pay levies imposed by the First Defendant including those calculated by the First Defendant to allow for the cost of carpark operation;
(d) The Plaintiff would manage and maintain the carpark at its cost and risk;
(e) The Plaintiff would receive the income from the parking tickets issued and paid for by users of the carpark."

[15] Such an agreement was not established formally on the evidence although there was some discussion of the facts related to the assertions in Mr Ritchie's evidence.[2]

[16] The plaintiffs argue that by-law 28 was intended to regulate the use of the car park in order to achieve compliance with the development approval for the project which provided, in respect of car parking that the developer should:[3]

"2. Construct/delineate/sign (as required) the following requirements as indicated on the approved plans of layout numbered A2001(4) and A2002(4) each as amended on 14 September 1998:

i. parking on the site not to exceed 556 cars and for the loading and unloading of vehicles within the site;

…

v. unrestricted access for bonafide (sic) visitors to any visitor car parking bay;

…
37. Demonstrate how it is proposed to ensure that the designated public parking area on Basement Plan Level B1 will not be used as a public car park for purposes other than ancillary to the approved development.

In particular:

(a) Notices are to be displayed in Basement Plan Level B1 alerting the public that the designated public parking area is for patrons of the retail/commercial area and visitors of residents only;
(b) The on-site Body Corporate Manager is to be responsible to monitor and police the designated area on Basement Plan Level B1 to ensure that it will not be used as a public car park for purposes other than ancillary to the approved development; and
(c) The designated public parking area is to remain as part of the Common Property of the development."

[17] Section 3 of the *Mixed Use Development Act 1993* (Qld) ("the MUD Act"), the Act which regulated this [140531] development, defined a "comprehensive resolution" to mean a resolution that has been passed at a properly convened meeting of the body corporate and for which the members that vote in favour have not less than 75% of the voting entitlements recorded in its body corporate roll. It can only be repealed by a comprehensive resolution.[4]

[18] Although by-law 28 purports to deal with the common property of Notre Dame in the car park on registration of an easement from its proprietors, there was no resolution on Notre Dame's part in respect of the by-law. There was controversy also, whether easements "R" and "S" to which I have referred, which were registered later, were intended to be the easement from the proprietors of Notre Dame granting the benefit of that area to Cathedral Place CBC for car parking purposes referred to in by-law 28. The argument focussed on the fact that the easements registered were simply for access as a right of way and not for parking.

[19] At a meeting of Cathedral Place CBC held in June 2001, it was resolved that up to $65,000 be paid by it for the installation of a boom gate and ticket dispenser. One was eventually located on the common property of Notre Dame but was paid for by Cathedral Village and it charges fees for entry to the car park. No account of profits has been sought by the defendants in respect of that income.

[20] At an extraordinary general meeting of Cathedral Place CBC on 28 June 2010 by-law 28 was revoked by a comprehensive resolution but the efficacy of the resolution purporting to revoke the by-law is an issue in these proceedings because the plaintiffs contend that by-law 28 was actually a resolution without dissent which can only be repealed by a resolution without dissent.

[21] It is clear that Mr Ritchie, in passing the original resolution creating by-law 28, regarded it as a means of meeting CPD's obligations under its agreements with purchasers of units in Cathedral Village to procure them the benefit of at least 55 car parks. In his evidence, he agreed that he had a divided loyalty in his capacity as an employee of CPD as well as being the representative of each of the bodies corporate of Cathedral Place.[5] One issue that arose from that evidence was whether there had been a "fraudulent" exercise of the power given to Cathedral Place CBC to control its community property, as that concept is understood in *Gambotto* v *WCP Limited*[6] and other decisions, requiring that the by-law be set aside.

[22] There was also an issue about the construction of the by-law, what rights it conferred, and in what circumstances it could be repealed.

[23] A number of the plaintiffs, but by no means all of them, gave evidence that the existence of car parking for their business was highly relevant to their decisions to purchase units in Cathedral Village and necessary

for the efficient running of their businesses. There was other evidence that commercial car parks operated nearby that would be able to be used by the unit holders or their employees and that deliveries to the commercial units in Cathedral Village could be made by the use of existing and proposed delivery bays.

[24] In managing the car park, Cathedral Village had caused it to be marked off from the balance of Cathedral Place CBC's community property by the use of chains, bollards and fencing. After the first defendant passed its resolution revoking by-law 28 on 28 June 2010, its committee gave instructions to remove the chains and bollards which had been installed at the eastern end of easement "R" shown on the plan attached. That had the effect of disabling the operation of the car park and enabling users to enter and exit without passing through the boom gate or taking a ticket from the ticket dispensing machine operated by Cathedral Village. The status quo was reinstated, however, by an interlocutory injunction pending the final hearing of this matter.

[25] In addition to the issues related to the meaning and continuing effect of by-law 28, there were issues including whether the plaintiffs or Cathedral Village had a registered interest in the car park or an equitable interest arising from some form of proprietary estoppel and whether a statutory right of user over the car park should be imposed.

[26] It is convenient to deal with the issues in the following order:

(a) What is the proper meaning and effect of by-law 28?
(b) Has by-law 28 been validly repealed?

[140532]

(c) Should by-law 28 be set aside as an abuse of power?
(d) Does Cathedral Village have a registered interest in Cathedral Place CBC's community property?
(e) Do the plaintiffs, or some of them, have an equitable interest in the car park?
(f) Should a statutory right of user under s 180 of the *Property Law Act 1974* (Qld) be imposed over the area of the car park?

What is the proper meaning and effect of by-law 28?

[27] To understand the argument about the effect of by-law 28, it is necessary to consider the effect of s 206 and s 206A of the MUD Act. Those sections provide relevantly:

"**Community property by-laws**

206.

(1) Subject to subsection (5), the community body corporate may, by comprehensive resolution, make by-laws (**"property by-laws"**) for the control, management, administration, use or enjoyment of the community property.
(2) A community property by-law does not have effect until—

(a) the Minister approves the by-law; and
(b) notification of the Minister's approval is published in the gazette.

…

Restricted community property by-laws
206A.

(1) The community body corporate may make by-laws under section 206 that restrict the use of any part of the community property (**"restricted community property"**) to—

(a) a member of the community body corporate; or
(b) a body corporate created by the registration of a building units or group titles plan; or

(c) a proprietor of a lot created by the registration of a building units or group titles plan; or
(d) a precinct body corporate; or
(e) a member of a precinct body corporate; or
(f) a proprietor of a lot created in a staged use precinct by the registration of a building units or group titles plan; or
(g) a lessee or occupier of a lot within the site; or
(h) someone else while the person is engaged in construction works in the site or in a future development area or subsequent stage.

(2) Despite section 206(1), the by-law may only be made by resolution without dissent.

…

(5) The by-law that restricts the use of any part of the community property—

(a) must include—

(i) subject to paragraph (c), a description of the restricted community property; and
(ii) details of the persons entitled to use the restricted community property; and
(iii) the conditions on which the persons may use the restricted community property; and

(b) may include—

(i) particulars about—

(A) access to the restricted community property; and
(B) the keeping and supply of any necessary key; and

(ii) particulars of the hours when the restricted community property may be used; and
(iii) provisions about the maintenance of the restricted community property; and
(iv) provisions about imposing and collecting levies from the persons entitled to use the restricted community property; and

(c) need not describe the restricted community property, if—

(i) the by-law prescribes a way of identifying the property; or

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(ii) the by-law authorises a person to identify the property; and

(d) may authorise a person to allocate the use of the restricted community property.

…

(7) If a person allocates the use of the restricted community property under a by-law mentioned in subsection (5)(d), the person must, as soon as practicable, give the community body corporate details of the persons to whom use of the property has been allocated.

(8) The description and details given to the community body corporate under subsection (6) or (7) are taken to be a by-law made under section 206 when both the description and details are received by the community body corporate.

(9) The community body corporate must give a by-law made or taken to be made under this section to the Minister for approval under section 206 as soon as practicable but not later than 3 months after it is made or taken to be made.

Maximum penalty—50 penalty units.
(10) If the by-law is approved by the Minister, the Minister must give details of the by-law to the registrar of titles as soon as practicable after the Minister approves it.
(11) A by-law made under this section does not have effect until the registrar of titles has recorded details of the by-law on the relevant community plan."

[28] The defendants argue that by-law 28 was made pursuant to s 206 while the plaintiffs' contention was that it was made pursuant to both s 206 and s 206A as a by-law restricting the use of part of Cathedral Place CBC's community property which could only be made by resolution without dissent and only similarly repealed. It is significant that it was proposed and passed as a comprehensive resolution, apparently pursuant to s 206 and given ministerial approval on the same basis.

[29] The defendants also point out that by-law 28 is expressed as the grant of an entitlement to the Cathedral Village proprietors and any person authorised by them to use the car park rather than an attempt to restrict the car park's use. The plaintiffs drew attention, however, to the description in the heading of the by-law "Restricted Community By-law".

[30] The critical feature, to my mind, precluding the resolution from being treated as a restricted community property by-law for the purposes of s 206A is that it does not restrict the use of that part of the community property to the entities listed in s 206A(1). Nor is there any history relied on by the plaintiffs to establish that somebody has been authorised to allocate the use of the property for the purposes of s 206A(5)(c) and (7) of the Act. In fact there was a car parking attendant but it is not clear to me that he has been authorised pursuant to those subsections.

[31] Properly construed, therefore, the by-law does not fall within s 206A. It does not restrict the use to s 206A's nominated classes of people but permits its non-exclusive use by the Cathedral Village proprietors and those they authorised. In that context, as the defendants submitted, it is relevant that by-law 25, in contrast, expressly refers to the allocation of "the exclusive use of the carparking spaces".

[32] There were other persuasive arguments relied on by the defendants, including the fact that the resolution was passed as a comprehensive resolution rather than one without dissent. The happenstance that it was passed without dissent does not mean that it therefore falls within that statutory category which requires a resolution without dissent. One might as well describe a company resolution, notified and passed as a general resolution, as a special resolution simply because it achieved the majority required for a special resolution.

[33] As the defendants submitted, the effect of the plaintiffs' literal interpretation of the statute is that a resolution about a matter which only requires an ordinary resolution, where the resolution is put to the meeting as an ordinary resolution, but passed without a vote against it, would meet the requirements of a "resolution without dissent", which would, in turn, attract the entrenching provision of the *Building Units and Group Titles Act 1980* (Qld). They urged a purposive construction of the Act based on the submission that the legislation reflects an intention that something that is to be put to a meeting as other than an ordinary resolution

should be notified as being a special resolution, a resolution without dissent or a comprehensive resolution or a unanimous resolution. That does make sense when one bears in mind that unit holders need to know the category of resolution that is proposed to them to be voted on at a meeting in order to help them to decide whether their attendance is desirable.

[34] The defendants also submitted convincingly that it would be improbable that the by-law was intended to give exclusive use to the visitors' car park to Cathedral Village and any person authorised by it as it could mean that a proprietor of a lot in Cathedral Village would only be able to use the car park if the proprietor first secured authorisation from the Cathedral Village body corporate. Similarly, they argued that it would be improbable that Cathedral Place CBC would be proposing to prevent Notre Dame and Oxford & Cambridge lot owners from using their own common property.

[35] The by-law was not put to the Minister as a by-law made under s 206A or as one which operated to restrict the use of community property. That is significant when one bears in mind that the Minister, when

considering whether to approve the by-law, would be taken to address it as a resolution for non-restrictive use of community property only requiring a comprehensive resolution under s 206. It was submitted that the Minister's approval was important and that the way in which the by-law was presented was as one made pursuant to s 206.

[36] In my view, taking into account these matters, the by-law is one passed pursuant to s 206 which can be revoked by a comprehensive resolution, not a resolution without dissent.

[37] If I had formed the view that it was one made pursuant to s 206A the defendants argued persuasively that I should hold it to be invalid because of its failure to meet the requirements of s 206A because it went beyond the categories of permissible exclusive uses under s 206A(1) and gave exclusive use over areas that are not community property such as the common property of Notre Dame, Oxford & Cambridge and Cathedral Village and failed to properly describe the community property in respect of which the restriction of use is imposed.

[38] The latter argument arose because the by-law was said not to identify which area of the car park hatched on a plan said to be attached to it was community property. The by-law registered did not include the plan or, at least, no plan can now be identified as associated with the by-law registered in the Titles Office.

[39] Alternatively, the defendants also argued that if the by-law was validly passed under s 206A then the plaintiffs' actions went beyond what by-law 28 allowed and could not be saved by s 203.

[40] Had it been necessary for me to approach the case on the basis that the resolution had been made pursuant to s 206A, those submissions would have been persuasive but it is clear to me that the resolution was, as it was expressed to be, one made pursuant to s 206.

[41] The defendants also argued that the intention expressed in by-law 28 that it was to apply to that portion of the car park that was common property for Notre Dame had not been realised because no easement had granted the benefit of that area to Cathedral Place CBC "for carparking purposes". Rather, easements "R" and "S" and easement "A" granted rights of way only which did not confer a right to park on the easement.[7]

[42] Mr Perry SC for the plaintiffs argued that, in context, even though there was no express reference to parking in the easement, a right to park on the area of the easement was reasonably necessary for the effective and reasonable exercise and enjoyment of the rights expressly granted and should be implied here. He referred to easements over the common property of other residential bodies corporate to Cathedral Place CBC which, he argued, were also only for the purpose of access but which he submitted had been used for car parking as an example of parallel conduct.

[43] The conclusion does not necessarily follow however as it is clear that reference to material extrinsic to the registered easement to establish the intention or contemplation of the parties is contrary to the principles of the Torrens system.[8] Nor do other decisions relied on by Mr Perry persuade me that he has established that permanent or casual parking on these easements can be characterised as

necessarily part of passing and re-passing to and from the dominant property.[9] Factually, also, the easements in the residential car parks do seem to operate as rights of way rather than the use for parking to which easements "R" and "S" have been put. If it were necessary, I would also decide therefore that the condition expressed in by-law 28 regarding the application of the by-law to Notre Dame's common property has not been met.

Has by-law 28 been revoked validly?

[44] On the view I have formed that by-law 28 was passed pursuant to s 206 of the MUD Act it is therefore one which can be revoked by a comprehensive resolution. That occurred in 2010 with the consequence that by-law 28 has not been in force since then.

Should by-law 28 be set aside as a fraud on the power?

[45] Another argument for the defendants was that by-law 28, in purporting to limit the persons entitled to use the "Village Carpark" to the proprietors of Cathedral Village and any person authorised by them, should

be set aside. The submission was that Mr Ritchie for CPD preferred his, or its, self interest under the sales contracts to the original lot owners over the duty in the first defendant, Cathedral Place CBC, to discharge appropriately its power to control the use of its community property.

[46] The submission proceeds on the basis that CPD obtained an unauthorised benefit from the exercise of the voting power at the meeting from being able to regard itself as having discharged its contractual obligations to the purchasers of the plaintiffs' lots without regard to the implications for the other bodies corporate as a result of the passage of the resolution. It was asserted that if some resolution was needed to control parking in the visitors' car park then that could have been achieved by ensuring Cathedral Place CBC remained in control of its common property and expended money on installing boom gates and a system for operating the car park for the benefit of all the proprietors, their guests, and visitors.

[47] Rather, the argument went on, CPD illegitimately disposed of the common or community property if, as the plaintiffs contended, they had some kind of exclusive use or control of the visitors' car park. The following features were said to be important:

> "38. …
>
> (a) no duration was set for the plaintiffs' 'use' of the carpark;
> (b) no fee, charge or rent or other remuneration was stated to be payable by the plaintiff for such use, and the evidence from Mr Gilliland was that no special fee or levy was paid to the body corporate for the use or operation of the car park: only the pro rata proportion of sinking fund and administrative levy;
> (c) no fee, charge rent or other remuneration has in fact been paid by the plaintiffs to the defendants (or any of them);
>
> 39. On the above facts, the conferral of some sort of entitlement to exclusive use of the 'visitor car park' as contended by the plaintiffs amounted to a gift of that part of the community property of the first defendant (and probably the common property of the second and third defendants); or alternatively, a disposition of that part of the community property of the first defendant."

[48] Although, in his re-examination, Mr Ritchie emphasised the importance to the overall development of maximising the success of the commercial units in Cathedral Village,[10] the defendants' argument was that, if the effect of by-law 28 was to appropriate part of the common property of Cathedral Place CBC and the other defendants then CPD had preferred its interests to those of Cathedral Place CBC illegitimately in a fraud on the power given to Cathedral Place CBC to regulate its common property because the power was used to discharge CPD's obligations to the buyers of units in Cathedral Village.[11] This was partly at least because the rights of unit holders in common property are significant and should not be removed unheedingly or inadvertently to their detriment.[12]

[49] Mr Perry submitted that Mr Ritchie's evidence should be construed as an attempt to balance the respective unit holders' competing interests by reference to the overall success of the development as a mixed use project. He compared it with by-law 25 which gave Cathedral Place CBC the responsibility for allocating the exclusive use of car parking spaces on its common property or on the

common property of a subsidiary body corporate and subject to an easement in favour of Cathedral Place's common property and argued that, if by-law 28 was bad, then by-law 25 should also be invalid.

[50] The analogy does not seem appropriate for the reasons advanced by Mr O'Donnell QC for the defendants, namely that by-law 25 merely implements the residents' contractual rights to exclusive use car parks, where by-law 28 deals with use generally. Further, by-law 25 was adopted pursuant to a proposed resolution without dissent under s 206A of the MUD Act which permits the restriction of the use of any part of the community property where the by-law is made by resolution without dissent.

[51] By-law 28, on the other hand, was moved as a comprehensive resolution, requiring a 75% majority to succeed. Although, with Mr Ritchie as the sole person entitled to vote, both resolutions were passed without

dissent, the distinction is important as a resolution passed without dissent can only be repealed by a similar resolution passed without dissent as I have already pointed out.[13]

[52] To revert to the question whether there has been a misuse of the power relied on for the creation of by-law 28, one needs to ask whether Mr Ritchie's expressed concerns about the need for Cathedral Village to have car parking to assist the development to "work together in its totality"[14] should be permitted to override Cathedral Place's interest in retaining control of its use of its common property. Having regard to the alternative possibility proposed where Cathedral Place CBC could have remained in control and spent money on installing boom gates for the benefit of all proprietors, their guests, and visitors, no obvious reason springs to my mind to justify an appropriation of its rights.

[53] If the resolution had resulted in the appropriation of Cathedral Place's rights then the result would have been that Mr Ritchie, on behalf of CPD, exercised his power to secure a particular gain for CPD, in apparent discharge of its contractual obligations to the original purchasers of lots in Cathedral Village, which did not arise fairly out of Cathedral Place CBC's power to control its own community property pursuant to s 206 of the MUD Act and would have been able to be set aside.

[54] I should hasten to add that although the law uses the description "fraud on a power" to describe this type of behaviour it is clear that it does not necessarily denote any conduct in the common law meaning of the term which could be properly termed dishonest or immoral. "It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."[15]

[55] Because I have reached the view that Cathedral Place CBC remains entitled to deal with its property itself and has done so effectively by removing by-law 28 at its meeting of 28 June 2010, the occasion to determine whether the licence created by by-law 28 in favour of Cathedral Village was an improper exercise of the power does not arise. If, contrary to the view I have formed, the by-law had the effect of appropriating Cathedral Place CBC's property in the car park, I would have set it aside.

Does Cathedral Village have a registered interest in Cathedral Place CBC's community property?

[56] Another consequence of Mr Perry's argument that by-law 28 was passed pursuant to s 206A was, he submitted, that when its details were recorded on the relevant community plan they created a registered, indefeasible interest in favour of Cathedral Village unlike the situation that applies to a by-law passed pursuant to s 206. It is sufficient therefore, for present purposes, to rely on my conclusion that by-law 28 was an attempt at an exercise of power under s 206 not s 206A.

[57] Section 184 of the *Land Title Act 1994* (Qld), as Mr O'Donnell pointed out, also makes indefeasible only the registered proprietor's interest, namely that of Cathedral Place CBC. The right to use its property ostensibly given by the by-law does not amount to a proprietary interest in it and is not registered on the title as such.

Do the plaintiffs or some of them have an equitable interest in the car park?

[58] Nor does the claimed proprietary estoppel arise. Although Cathedral Village has expended money on the car park, it has been reimbursed from its takings from those who park there and did not spend the money on any understanding, express or implied, that it would

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thereby acquire a proprietary interest in the car park. All that it has ever had was, at best, a licence without an expectation that it or its unit holders would obtain an interest in the land beyond the six car spaces allocated to Cathedral Village.

[59] It was argued that it had, in effect, become entitled to an irrevocable licence in the land by analogy with the discussion in cases such as *Pearce* v *Pearce*[16] and *Vinden* v *Vinden*.[17] But, in each of those cases, there was an expenditure of money on the assumption that the plaintiff would acquire an interest in the land which is not this case. In my view, there is no entitlement to such a proprietary interest in the car park that would be recognised in equity either in Cathedral Village or in its unit holders.

Should a statutory right of user under s 180 of the *Property Law Act 1974* (Qld) be imposed over the area of the car park?

[60] The claim for the imposition of a statutory right of user under s 180 is brought on behalf of all the unit holders in Cathedral Village but not on its part. It appears to be a claim on behalf of each of the second and subsequent plaintiffs for a licence in perpetuity over the whole car park subject only to termination by Cathedral Place CBC by a resolution without dissent. It is not clear in favour of what land the imposition of the licence is sought, but I infer that it is in respect of each lot held by each of those plaintiffs. The section provides relevantly:

"**180 Imposition of statutory rights of user in respect of land**

(1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (the dominant land) that such land, or the owner for the time being of such land, should in respect of any other land (the servient land) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
(2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—

(a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
(b) on 1 or more occasions; or
(c) until a date certain; or
(d) in perpetuity or for some fixed period;

as may be specified in the order.
(3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—

(a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
(b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
(c) either—

(i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
(ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

…"

[61] The jurisdiction is used normally in cases where the relevant land has no or limited legal access available for rights of way or utilities. In determining whether it is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land, the relevant principles have been summarised as follows:[18]

"[23] The applicant usefully and accurately summarised the relevant principles on this issue as follows:

(a) One should not interfere readily with the proprietary rights of an owner of land.
(b) The requirement of 'reasonably necessary' does not mean absolute necessity.
(c) What is 'reasonably necessary' is determined objectively.

(d) Necessary means something more than mere desirability or preferability over the alternative means; it is a question of degree.

[140538]

(e) The greater the burden of the imposition that is sought the stronger the case needed to justify a finding of reasonable necessity.
(f) For a right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.
(g) Regard must be had to the implications or consequences on the other land of imposing a right of user."

[62] It is not a remedy apt to be applied to enforce the creation of a car park for the holders of units in a particular part of a development such as this over the community property of another body corporate in the same development for what appears to be a claim to permit the unit holders to park permanently. The defendants made a number of submissions which appear to me to be insuperable, namely:

(a) the section is not designed to assist in creating a licence or lease over land for exclusive car parking rights;
(b) the evidence does not establish that it is reasonably necessary for the effective use of the units that such a right be imposed over the car park, rather only some of the unit holders gave evidence that it was highly desirable for the businesses they ran from their units to have convenient car parking;
(c) as to that factual issue the defendants argued that the evidence of the existence of delivery bays on the property and a proposal by Cathedral Place CBC to pass a new by-law permitting deliveries within the car park to the units in Cathedral Village and creating additional delivery bays as well as the evidence of the availability of other commercial car parks nearby made the issue one not of reasonable necessity but simply convenience of the unit holders;
(d) no evidence established that it was consistent with the public interest[19] to use the car park in the manner proposed, as opposed to the interests of the individual unit owners;
(e) the development approval required the area to be used for patrons of the retail/commercial area and visitors of residents only, not for use by proprietors of units exclusively;
(f) no evidence was led to show that there had been an unreasonable refusal by Cathedral Place CBC to agree to accept the imposition of such an obligation pursuant to s 180(3)(c), having regard to the wish of that body to maintain access to the car park for other unit holders in it, the other bodies corporate and visitors;
(g) the imposition of the obligation would be inconsistent with the legislation governing the community property of Cathedral Place CBC and the common property of the other defendants by which those bodies corporate are obliged to manage their common or community property for the benefit of their members, rather than surrendering its control to the members of Cathedral Village.

[63] It also seemed to me to be inappropriate to use this remedy in this situation where the legislature has already created a complex statutory scheme for the regulation of bodies corporate. Decisions dealing with car parking are are intended to be made pursuant to those relevant statutes and the bodies corporate have been empowered to deal with community property in precisely regulated circumstances. For these reasons it would be quite inappropriate to use the remedy provided by s 180 in favour of those plaintiffs.

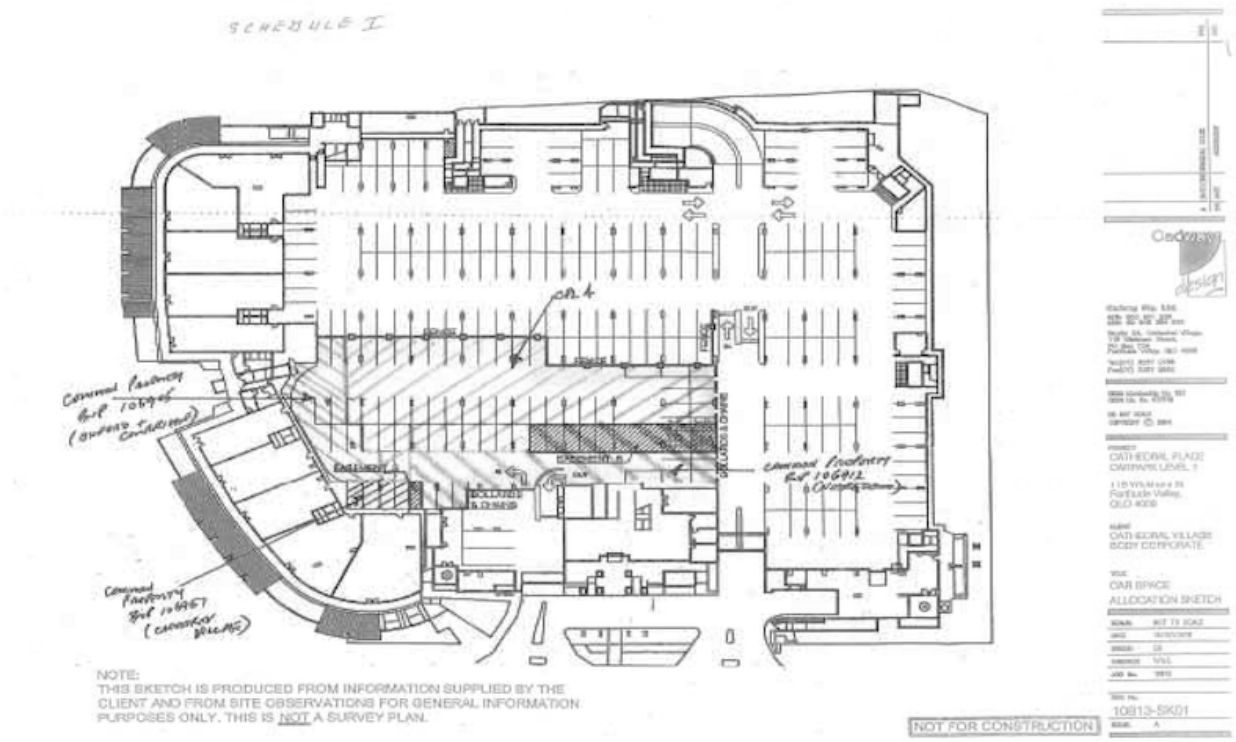
Conclusion

[64] Although one can sympathise with the unit holders in Cathedral Village for not having obtained what they were promised by CPD, it is not open to them to seek to obtain what they were promised by attempting to prolong the revocable licence given by the original passage of by-law 28 by Cathedral Place CBC.

Orders

[65] I propose to dismiss the claim and make orders in terms of paragraphs 37(a), (b), (d), (e), and (h) and 38(a) and (b) of the counterclaim subject to further submissions as to the form of the orders and costs.

[140539]



Footnotes

1 See cl 46 in ex 1 tab J1, a typical contract between CPD and a purchaser of a unit in Cathedral Village.

2 See T 2-85 to T 2-86.

3 See ex 8, pp 6 and 29.

4 See s 14 of Schedule 2 Part 2 of the *Building Units and Group Titles Act 1980* (Qld).

5 See T 3-12 ll 30-55; T 3-15 ll10-32 and T 3-22 ll 14-45.

6 (1995) 182 CLR 432.

7 *Boglari* v *Steiner School and Kindergarten* (2007) 20 VR 1,8 at [34].

8 *Westfield Management Ltd* v *Perpetual Trustee Co Ltd* (2007) 233 CLR 528, 539 and *Currumbin Investments Pty Ltd* v *Body Corporate Mitchell Park Parkwood CTS* [2012] QCA 9 at [41]-[53].

9 See *Trewin* v *Felton* [2007] NSWSC 851 at [46]-[52].

10 See T 3-22 ll 14-45.

11 See *Houghton* v *Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 53, applying general principles relating to fraud on a power in the context of legislation dealing with bodies corporate such as these. See also *Community Association DP No 270180* v *Arrow Asset Management Pty Ltd* [2007] NSWSC 527 at [216]-[225] and *Radford* v *The Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250 at [157]-[162].

12 *Katsikalis* v *Body Corporate for the Centre Community Titles Scheme 14718* [2009] 2 Qd R 320, 326 at [32].

13 See s 14 of Schedule 2 Part 2 of the *Building Units and Group Titles Act 1980* (Qld).

14 See T 3-22 ll 44-45.

15 *Vatcher* v *Paull* [1915] AC 372, 378.

16 [1977] 1 NSWLR 170, 174-175.

17 [1982] 1 NSWLR 618, 624-625.

18 *Lang Parade Pty Ltd* v *Peluso* [2006] 1 Qd R 42, 47-48 at [23] (footnotes omitted).

19 See s 180(3)(a).

FLETCHER v KAKEMOTO & ANOR

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(2011) LQCS ¶90-167; Court citation: [2011] QCA 46

Queensland Court of Appeal

Judgment delivered on 18 March 2011

Community schemes — Contract for sale dispute — Changes were subsequently made to the special conditions after contract had been signed by purchaser — purchaser subsequently purported to terminate the contract asserting, inter alia, that he did not sign the warning statement again (or sign a new warning statement) when the vendor made the changes and thus the consumer protection provisions of s 366B(4) or 366D(3) of the Property Agents and Motor Dealers Act 2000 (as these sections existed at the time, now s 368A(2)(b) and (c)) were not complied with — Trial judge was correct in finding that the purchaser's purported termination of the contract (on the grounds of s 366B or s 366D of the Act not being complied with) was invalid.

This was an appeal from a decision of the Queensland Supreme Court (Martin J) reported at *Fletcher* v *Kakemoto* [2010] QSC 219.

In April 2007, the appellant purchaser was in the vicinity of an apartment complex and noticed that the penthouse apartment was for sale. The vendor was the first respondent in these proceedings. The purchaser informed the vendor's estate agent that he was interested in making an offer of $8.5 million to purchase the apartment. The estate agent advised the purchaser that it was essential that the "cooling-off period" be waived when making any offer.

The estate agent then prepared the necessary documentation so that the purchaser could make the offer. The estate agent handed the purchaser the documentation, explaining relevant parts. Before the purchaser signed the contract, he signed the warning statement.

Some changes were subsequently made to the special conditions of the contract on 13 April 2007. The changes were explained to the purchaser by the estate agent and the purchaser initialled those parts of the document which had been amended. The purchaser's attention was again drawn to the same warning statement. The certificate from the purchaser's solicitor regarding the waiving of the cooling-off period was also given at this time.

A second round of changes was required by the vendor. They were duly inserted into the contract and were again initialled by the purchaser. The vendor then signed the contract for the first time.

The purchaser subsequently purported to terminate the contract asserting, inter alia, that he did not sign the warning statement again (or sign a new warning statement) on 13 April 2007 when the vendor made the changes and thus the consumer protection provisions of s 366B(4) or 366D(3) of the *Property Agents and Motor Dealers Act 2000* (as these sections existed at the time) had not been complied with.

The trial judge determined that the alterations made to the proposed contract were not such as to constitute a new contract, necessitating the re-signing of the warning statement. In reaching this decision, the trial judge noted that there was no offer made by the purchaser and counter-offer made by the vendor. Even though the document was prepared by the vendor's real estate agent (and was then subject to some further changes), it still amounted to an offer being made by the purchaser. The trial judge categorised the changes as minor in

[140314]

nature, being made for the purpose of "tidying up" the proposed contract in a form which could be put to the vendor.

On appeal, the purchaser asserted that the trial judge erred in finding that the changes to the contract were insignificant. The purchaser noted that one amendment imposed an obligation on the purchaser to bear the outgoings on the property from the date of his taking possession of the property (rather than from the settlement date as per the draft contract). This change would have added an additional $23,000 to the balance of the purchase money on settlement for adjustments to rates, land tax and body corporate levies. As such, the amendment constituted a significant alteration to the contract such that there was a second proposed relevant contract warranting a further warning statement to be signed by the purchaser.

It was also argued by the purchaser that because the real estate agent had delivered the documents signed by the purchaser to the vendor, the purchaser had at that time, made an offer. The amendments that followed were therefore the vendor's.

Held: Appeal dismissed.

1. The trial judge was correct in finding that the purchaser's purported termination of the contract (on the grounds of s 366B or s 366D of the Act not being complied with) was invalid. However, the trial judge's consideration of whether the course of negotiations between the parties resulted in there being a counter-offer was irrelevant. It was also not necessary to examine whether the nature of the alterations to the contract were material.

The trial judge's approach failed to have proper regard to the purpose of the warning statement provisions. The purpose of the warning statement provisions was not to provide a caution to the proposed buyer as to any particular term of a proposed relevant contract or alteration that might be made to its terms, but to ensure (inter alia) that all proposed relevant contracts include consumer protection information.

2. Once it was accepted that bringing the warning statement to the proposed buyer's attention was the object of the provisions, then that object was achieved in circumstances such as occurred in this case by having the warning statement attached to the front of the unsigned draft contract and drawn to the purchaser's attention and signed before the final contractual offer document was signed. The making of amendments to the contract document before it was submitted to the vendor for acceptance did not detract from the fact that the warning statement had been drawn to the attention of the purchaser.

3. The view above accords with the 2010 amendments to the Act which make it clear that a proposed relevant contract does not become another proposed relevant contract merely because, as a result of negotiations, the terms and condition of the proposed relevant contract change (provided the property and parties remain the same).

As per McMurdo P

4. In any case, the purchaser was wrong in asserting that the changes to the contract were significant when considered in the context of an $8.5 million sale. The changes were of the fine-tuning kind which are commonly made when parties negotiate the final terms of a contract for the sale of residential property.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

The appellant appeared on his own behalf.

J Sweeney (instructed by Hickey Lawyers) for the first respondent.

S Couper (instructed by Carter Newell Lawyers) for the second respondent.

Before: Margaret McMurdo P, Chesterman JA and Philippides J.

Editorial comment: The interesting point to this case decision is the Court of Appeal clearly expressed that the *Doolan* v *Rothmont Projects Pty Ltd* [2010] QSC 193 decision was wrongly decided by the Supreme Court and should not be accepted as good law. The trial judge's approach

[140315]

in following the approach in *Doolan* was wrong (ie whether the course of negotiations between the parties resulted in there being a counter-offer was irrelevant). The Court of Appeal determined that the correct approach is to give effect to the object of the Act, which is to draw the attention of the purchaser to the warning statement before the final contractual offer document was signed.

Margaret McMurdo P: The appellant, Brian Fletcher, entered into a contract with the first respondent, Akeo Kakemoto, for the sale of the penthouse in the Q1 apartment building, Surfers Paradise, for $8.5 million on 13 April 2007. Settlement was due "on or before 9 months from the contract date". Mr Fletcher purported to terminate the contract on 14 January 2008. He contended he was entitled to do so under s 367 *Property Agents and Motor Dealers Act* 2000 (Qld)[1] because of non-compliance with s 366B(4) and s 366D(3), contained in Ch 11 (Residential Property Sales) of that Act.[2]

2. I agree with Philippides J's reasons for refusing this appeal with costs, but add a brief observation in case our construction of Ch 11 is wrong.

3. Philippides J has set out the relevant statutory provisions.[3] On 9 April 2007, Mr Fletcher signed both a proposed contract for the purchase of the penthouse and a Ch 11 warning statement. The primary judge found this was "a proposed relevant contract" under Ch 11. A few days later, on 13 April 2007, the parties executed a contract for the sale of the penthouse. It is not disputed that this contract was "a relevant contract" under Ch 11. There were variations between the proposed contract of 9 April 2007 and the relevant contract executed on 13 April 2007. These changes, as the primary judge recognised and as is clear from Philippides J's reasons,[4] were not significant, especially in the context of an $8.5 million sale. The relatively minor changes were of the fine-tuning kind, common as parties negotiate the final terms of a contract for the sale of residential property. These relatively minor changes between the proposed contract of 9 April 2007 and the relevant contract executed on 13 April 2007 were not such as to make the proposed contract of 9 April 2007 something other than "a proposed relevant contract" within the meaning of that phrase in s 366B; s 366D and s 367 of the Act. If this Court is wrong, and *Doolan* v *Rothmont Projects Pty Ltd*[5] is rightly decided, the primary judge correctly distinguished it from the present case.

4. I agree with the orders proposed by Philippides J.

Chesterman JA: I agree with the orders proposed by Philippides J and with her Honour's reasons for making those orders.

Philippides J: On 13 April 2007 the appellant, Mr Brian Fletcher, as purchaser, entered into a contract with the first respondent, Mr Akeo Kakemoto, as vendor, for the sale of an apartment in the Q1 building at the Gold Coast ("the property") for $8,500,000. The sale was a "unit sale" within the meaning of that term in the *Property Agents and Motor Dealers Act* 2000 ("the Act"). On 14 January 2008 Mr Fletcher purported to terminate the contract pursuant to s 367 of the Act.

7. The issue of whether Mr Fletcher had validly terminated the contract by reason of alleged non-compliance with s 366B(4) and s 366D(3) of the Act was ordered to be tried as a preliminary matter.

Background facts

8. On 9 April 2007, Mr Fletcher attended at the offices of the second respondent, Lucy Cole Prestige Properties Paradise Waters Pty Ltd and spoke to its principal, Ms Lucy Cole, indicating that he wanted to make an offer to purchase the property for $8,500,000. Ms Cole instructed an employee to prepare the relevant documentation so that Mr Fletcher could do so. Mr Fletcher was handed a bundle of documents by Ms Cole which included:

> (a) an unsigned and undated copy of a contract for the sale of the property ("the 9 April proposal");
> (b) a two-page "PAMD Form 30c" document ("the warning statement"); and
> (c) a one-page document headed "The Buyer/The Seller" ("the first buyer's acknowledgment").

9. The trial judge set out the factual background from the time of the 9 April 2007 meeting to the signing of the contract as follows:

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"[Mr Fletcher] in his written submission stated that he was in agreement with all of the events around the meeting of 9 April as stated in the affidavit of Lucy Cole. At that time there was only one affidavit from Ms Cole (dated July 2008), in which she said that:

> (a) she, Mr Fletcher and Mr Blunt of her office discussed matters including the terms on which Mr Fletcher would be prepared to make an offer to purchase the property;
> (b) she told Mr Fletcher that it was essential that the 'cooling-off period' be waived when making any offer as the auction of the property was set to proceed on 15 April;
> (c) [Mr Fletcher] said that he would leave his offer open until 5 pm on Friday (13 April), was prepared to waive the cooling-off period and would get the necessary solicitor's waiver form by Friday;
> (d) she took [Mr Fletcher] through the bundle of documents referred to above, document by document;
> (e) she directed [Mr Fletcher's] attention to the warning statement, the information sheet and the disclosure statement; and
> (f) [Mr Fletcher] then signed documents including the warning statement under the Act. It was signed by Mr Fletcher before he signed the proposed contract.

In her affidavit of July 2008 Ms Cole said that between 10 April and 12 April [Mr Fletcher] kept coming back to her office asking whether there was any news about the contract. She told him that there were some changes being made to the special conditions and would advise him as soon as she had further details. On the morning of Friday 13 April a document from Mr Fletcher's then solicitors was sent to Ms Cole's office. That document demonstrated that [Mr Fletcher] had received the appropriate advice about waiving the cooling-off period and that he did, in fact, waive the cooling-off period.

At 3.30pm on 13 April [Mr Fletcher] arrived at the premises of the third party to go through the proposed changes to the offer. Ms Cole took [Mr Fletcher] through the documents, explained them to him, and he initialled those parts of the documents which had been changed. There were no changes to the warning statement under the Act but Ms Cole deposes and, in the absence of any cross-

examination of her on this or any other point, I accept that she drew [Mr Fletcher's] attention to the warning statement under the Act.

After that some further changes were sent from the lawyers for the vendor and they were inserted into the proposed contract and were again initialled by [Mr Fletcher].

Ms Cole met with the vendor and his solicitors at 4.30pm and the vendor signed and initialled the documents. By 14 May, [Mr Fletcher] had paid the sum of $850,000 as the deposit. Settlement of the contract was due to take place on or before 9 months from the contract date.

On 14 January 2008, the then solicitors for [Mr Fletcher] wrote to the solicitors for the vendor in the following terms:

> 'We are instructed that section 366B(4) of the Property Agents and Motor Dealers Act 2000 was not complied with, in that our client's attention was not directed by your client or your client's agent to the information sheet and any disclosure statement.
>
> On that basis we are instructed and do terminate the contract pursuant to section 367(2).
>
> Please have your client refund the deposit within fourteen (14) days.'"

The trial judge's decision

10. The primary issue raised before the trial judge by Mr Fletcher concerned the fact that, while he signed the warning statement on 9 April, he did not sign the same or another warning statement on 13 April. It was contended that the Act required that he sign the statement again, notwithstanding having signed one on 9 April. The respondents disputed that proposition, submitting that the contract signed by Mr Fletcher on 13 April was, in all relevant respects, the document signed by him on 9 April.

11. In considering this issue, the trial judge referred to the statements made by Mr Fletcher

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and Ms Cole at their meeting on 9 April and made the following observations:

> "It is important to note that [Mr Fletcher] then became aware that the 'cooling-off period' had to be waived when making any offer. That was accepted by him and, as I have recorded above, the relevant solicitor's certificate with respect to waiving the cooling-off period was received on the morning of 13 April. It was, then, at that point that an offer could begin to be made. I accept that the documents signed on 9 April were not presented to [Mr Kakemoto] until late on the afternoon of 13 April. In the period before the presentation of those documents on 13 April a number of changes were suggested by an employee of Hickey Lawyers (Mr Boseljevic), who were acting for Mr Kakemoto."

12. The learned judge commented on the changes made at Mr Boseljevic's suggestion as follows:

> "(a) Page 6 of the reference schedule. He made some minor changes to the reference to the certificate of title, the time for payment of the deposit, some body corporate information, and some information concerning insurance. All of these were contained elsewhere in the documents which constituted the bundle signed by Mr Fletcher. Those changes made no difference to the terms of the contract.
> (b) Page 7. He inserted the words 'from the contract date' after the words 'on or before nine months' with respect to the date for settlement. That change would have been a necessary implication in the contract.
> (c) Page 8. He deleted Special Conditions 5, 6 and 7, and renumbered 8 and 9 so that they became Special Conditions 5 and 6. Clause 5 was irrelevant as it was a subject to finance clause and the contract was not of that type. The former clauses 6 and 7 were reworded and inserted in annexure 'A'. They had the same effect and more precisely represented the intentions of [Mr Fletcher].
> (d) He replaced the words 'PAMD 30(c)' with the words 'cooling-off period' in renumbered Special Condition 5, which was consistent with the intention of [Mr Fletcher].
> (e) He drafted page 9 in order that clauses 6 and 7 might be more clearly understood. The effect of those provisions was the same as those which had appeared earlier in the contract."

13. The trial judge noted that later on 13 April a further change was made by Mr Boseljevic with respect to the licence fee to be paid and concluded that those changes would have been implied in the contract had they not otherwise been inserted. There was one further late change with respect to the responsibility of Mr Fletcher for the consumption of electricity from the date of possession. His Honour observed that that "was inserted but would have been the case, in any event, from the terms of the contract for residential lots in the Community Titles Scheme".

14. The trial judge observed that on 13 April, as mentioned, Ms Cole took Mr Fletcher through all the documents again and Mr Fletcher initialled the changes to the proposed contract (his attention having been drawn to the warning statement made under the Act, the agent's disclosure statement, the pre-signing acknowledgement, and the disclosure statement under the *Body Corporate and Community Management Act* 1997). His Honour further noted that thereafter, the documents were presented for the first time to Mr Kakemoto, who then signed the contract and initialled the appropriate places in that document. Mr Fletcher was then provided with the documents and his attention drawn to the warning statement as required by the Act.

15. In respect of Mr Fletcher's argument that the alterations made to the proposed contract were such that it was in fact a new contract, the trial judge noted that he had dealt with a similar submission in *Doolan* v *Rothmont Projects Pty Ltd* [2010] QSC 193. His Honour, however, distinguished *Doolan* stating:

> "The difference in that case, though, was that the prospective purchasers made an offer which was responded to by the vendor with a counter-offer. In other words, the vendor had received and considered the offer, assessed it as being inadequate in some respects, and proposed a different contract. That is not what occurred here. It was clear to Mr Fletcher that until the
>
> [140318]
>
> certificate from a solicitor about the waiving of the cooling-off period was obtained, the vendor would not consider his offer. After that certificate was obtained he accepted and initialled changes which had been suggested. He need not have done so. It was his offer. Unlike the position in *Doolan*, the vendor had not considered his proposal and had not made a counteroffer. The circumstances which played out on 13 April are such that they should be categorised as, in the main, a 'tidying up' of the proposed relevant contract in a form which could be put to the vendor. Even though the document was prepared by the vendor's real estate agent (and then subject to some further changes) it still amounts to an offer being made by [Mr Fletcher]."

16. In rejecting Mr Fletcher's submission, his Honour further stated that:

> "The major aim of the warning statement provisions in the Act is to bring them to the attention of a prospective purchaser. That statement must be signed before any proposed relevant contract is signed. That does not mean, though, that a prospective purchaser is required to sign a new warning statement or resign the original warning statement on each occasion that the purchaser makes any changes to a proposed relevant contract before it is submitted to a vendor."

Notice of Appeal

17. The appellant seeks a declaration that he has lawfully terminated the contract pursuant to s 367 of the Act and an order that the sum of $850,000 be paid to him pursuant to s 367(8).

18. The grounds of appeal as outlined in the Notice of Appeal are:

> # the learned judge erred in finding that there was one proposed relevant contract (within the meaning of that term as used in s 366 of the Act), and ought to have found that there were two proposed relevant contracts.
> # the learned judge made his decision on points that were not introduced or argued by the parties, breaching the rules of natural justice.
> # the learned judge erred in finding that it was only after the receipt of the relevant solicitor's certificate with respect to waiving the cooling off period on the morning of 13 April that an offer by Mr Fletcher could begin to be made. This was said to be contrary to the evidence

of Ms Cole that she met Mr Kakemoto on 10 April 2007 to go through the offer documents, although he was unwilling to sign them until he met with his lawyers.
the learned judge erred in finding that the changes suggested by Mr Boseljevic to clauses 6 and 7 had the same effect and more precisely represented the intention of Mr Fletcher because as stated in the Notice of Appeal:

> "Clause 8.2 The introduction of a licensing agreement to replace the rental offer materially altered the rights and positions of the parties.
>
> Clause 8.3 (a and b). The requirement that [Mr Fletcher] accept the condition of the building in the condition at the date and make no claim. (There were in fact significant problems with the air conditioning and pool heating discovered on inspection after the 13th April).
>
> Clause 8.3 (e). The vendor required variable outgoings in addition to the rent offered in the first offer, the amount of which would have been in the region of a further $22,000."

Notice of Contention

19. The respondents sought an extension of time to file a Notice of Contention (which being unopposed was granted). The respondents thereby contended that the decision of the trial judge should be affirmed on the following alternate basis:

> "For the purpose of s 366D(3) of the *Property Agents and Motor Dealers Act* 2000, a draft contract to which a warning statement is attached when the warning statement is signed remains the same proposed relevant contract notwithstanding alterations to the terms of the draft contract provided that the identity of the seller and purchaser and the identity of the land remain unchanged."

[140319]

Submissions

20. Mr Fletcher's submission before the trial judge was that the alterations made to the draft contract were such that it became a new or further proposed relevant contract requiring the warning statement to be signed again. As the respondents submitted, it appears that the learned judge understood this argument to have two aspects. One was that the terms of the offer contained in the document changed between 9 April and 13 April 2007 so that the document could not be regarded as the same proposed relevant contract. The other aspect was that the alterations to the terms were made at the instruction of the solicitors for Mr Kakemoto and, although this was not clearly articulated by Mr Fletcher, the learned primary judge took this as involving a submission that Mr Fletcher had made an offer which had been rejected and that Mr Kakemoto had made a counter-offer.

21. Mr Fletcher's arguments on the hearing of the appeal addressed both aspects.

22. As to the first aspect, Mr Fletcher submitted that the alterations to special condition 7 by the insertion of a new special condition 8 were significant alterations in that the consequence of the amendment was to impose an obligation on him to bear the outgoings on the property from the date of his taking possession of the property (rather than from the settlement date in accordance with clause 2.6(1) of the draft contract). The result was to add a sum of some $23,000 to the balance of the purchase money on settlement for adjustments to rates, land tax, and body corporate levies. Mr Fletcher contended that it was incorrect to claim that the special condition 8.3 would therefore be implied. He submitted that the amendment constituted a significant alteration to the contract such that there was a second proposed relevant contract warranting a further warning statement to be signed by him.

23. As to the second aspect, his contention was that, because Ms Cole delivered the documents signed by him to Mr Kakemoto on 10 April 2007, Mr Fletcher had, at that time, made an offer (notwithstanding the evidence that Mr Kakemoto was not prepared to consider any offer until the cooling-off period had been waived). The amendments that followed therefore were those of Mr Kakemoto. Dealing with this issue, counsel for Mr Kakemoto contended that what occurred should not be seen in terms of offer and counter-offer, but rather variations to an offer made by Mr Fletcher.

24. The respondents contended that the learned primary judge was correct in his observations concerning the issues of whether there had been an offer followed by a counter-offer and also as to whether the amendments made to the contract document simply gave expression to the unexpressed, but nevertheless held, intentions of the parties so as not to constitute variations. Nevertheless, they acknowledged that such an approach to the question of whether a proposed relevant contract became a different proposed relevant contract was one fraught with difficulties. The respondents' primary submission therefore was to urge the construction of s 366D(3) put forward in the Notice of Contention and to argue against an approach which analysed the issue of whether a proposed relevant contract became a new relevant contract by reference to the nature and course of negotiations and the materiality of alterations made to the terms of the proposed contract. It is convenient to deal firstly with that matter.

25. A starting point in considering the proposition raised in the Notice of Contention is the purposes and structure of Chapter 11 of the Act. The purposes of Chapter 11 are set out in s 363:

"**363 Purposes of ch 11**

The purposes of this chapter are—

(a) to give persons who enter into relevant contracts a cooling-off period; and
(b) **to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period**; and
(c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers." (emphasis added)

26.

[140320]

Central to the implementation of the purposes stated in Chapter 11 of the Act is Part 2 which concerns the giving of a warning statement. A "warning statement" is defined in s 364 as a statement in the approved form that includes the information mentioned in s 366D(1). The manner in which a warning statement is required to be given depends upon the way in which a proposed relevant contract is given to a proposed purchaser. The provisions of s 366B, which applied in the present case provide:

"**366B Warning statement if proposed relevant contract is given in another way**

(1) This section applies if a proposed relevant contract is given to a proposed buyer or the proposed buyer's agent for signing in a way other than by electronic communication.
(2) The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement and, if the proposed relevant contract relates to a unit sale, an information sheet with the warning statement appearing as its first or top page and any information sheet appearing immediately after the warning statement.

…
(4) If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Note—

A contravention of this subsection is not an offence. **Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer**.

(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.
(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the

proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Maximum penalty — 200 penalty units.
(7) It is a defence to a prosecution for an offence against subsection (3) or (6) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C." (emphasis added)

27. The contents of a warning statement and the prerequisites for its effectiveness are set out in s 366D:

"**366D Content and effectiveness of warning statements**

(1) The warning statement for a proposed relevant contract or relevant contract must include the following information—

(a) the relevant contract is subject to a cooling-off period;
(b) when the cooling-off period starts and ends;
(c) a recommendation that the buyer or proposed buyer seek independent legal advice about the proposed relevant contract or relevant contract before the cooling-off period ends;
(d) what will happen if the buyer terminates the relevant contract before the cooling-off period ends;
(e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the relevant contract is terminated before the cooling-off period ends;
(f) a recommendation that the buyer or proposed buyer seek an independent valuation of the property before the cooling-off period ends;
(g) if the seller under the proposed relevant contract or relevant contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property

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developer's employees can not make a claim against the claim fund.
(2) A statement purporting to be a warning statement is of no effect unless the words on the statement are presented in substantially the same way as the words are presented on the approved form.

…
(3) If the seller or the seller's agent **hands** a proposed relevant contract to the buyer for signing, **a warning statement is of no effect unless the buyer signs the warning statement before signing the proposed relevant contract**.
(4) If a proposed relevant contract is given to the buyer for signing and subsection (3) does not apply, a warning statement is of no effect unless the buyer signs the warning statement.
(5) For subsection (3), the buyer's signature on the warning statement is taken to be proof that the buyer signed the warning statement before signing the proposed relevant contract unless the contrary is proved." (emphasis added)

28. Section 365 sets out the circumstances in which the parties to a relevant contract will be bound. It relevantly provides:

"**365 When parties are bound under a relevant contract**

(1) The buyer and the seller under a relevant contract are bound by the relevant contract when—

…

(b) for a relevant contract relating to a unit sale—the buyer or the buyer's agent receives the warning statement, the information sheet and the relevant contract in a way mentioned in subsection (2A).

…

(2A) For a relevant contract relating to a unit sale, the ways are—

…

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii), (iii) and (iv) other than by electronic communication, if—

(i) the warning statement and the information sheet are attached to the relevant contract with the warning statement appearing as the first or top page of the document and the information sheet appearing immediately after the warning statement; and
(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement, the information sheet and the relevant contract.

…

(3) Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the seller or the seller's agent.

…

(5) If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.
(6) In this section—

buyer's agent includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."

29. If the warning statement is not given or if it does not comply with s 366D then the buyer's rights are provided for in s 367:

"367 Buyer's rights if a warning statement is not given or is not effective

(1) This section applies if—

(a) a warning statement requirement for a proposed relevant contract is not complied with and notice is not given under section 366C; or
(b) a warning statement is of no effect under section 366D(2), (3) or (4).

(2) The buyer under a relevant contract may terminate the relevant contract at any time before the relevant contract settles by giving signed, dated notice of termination to the seller or the seller's agent.

[140322]

(3) The notice of termination must state that the relevant contract is terminated under this section.
(4) If the relevant contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the relevant contract to the buyer.

Maximum penalty — 200 penalty units.
(5) If the seller, acting under subsection (4), instructs a licensee acting for the seller to refund the deposit paid under the relevant contract to the buyer, the licensee must immediately refund the deposit to the buyer.

Maximum penalty — 200 penalty units.
(6) If the relevant contract is terminated, the seller and the person acting for the seller who prepared the relevant contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the relevant contract after the buyer signed the relevant contract.
(7) If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.
(8) An amount payable to the buyer under this section is recoverable as a debt.
(9) In this section—

warning statement requirement, for a proposed relevant contract, means—

(a) if the proposed relevant contract is sent by fax — a requirement to comply with section 366(2) or (3); or
(b) if the proposed relevant contract is given by electronic communication other than fax — a requirement to comply with section 366A(2) or (3); or
(c) if the proposed relevant contract is given in a way other than by electronic communication — a requirement to comply with section 366B(2), (4) or (6)."

30. The respondents submitted that the structure of the warning statement provisions in Part 2 of Chapter 11 of the Act demonstrated that the object of the provisions is to ensure that the warning statement was drawn to the attention of the buyer, so that the buyer was made aware of the wisdom of obtaining independent legal advice and an independent valuation and of the existence of the cooling-off period during which the advice and valuation can be obtained. This was achieved, where a proposed relevant contract was provided to the buyer, in the various methods outlined in sections 366, 366A and 366B. It was said that in relation to a proposed relevant contract which does not fall within those provisions, because it is the proposed buyer that brings into existence a proposed relevant contract, which is signed and then provided to the proposed seller, the protection afforded by the Act came from s 365.

31. It was further submitted that Part 2 should be construed on the basis that it is directed towards the taking of those steps necessary to bring the warning statement to the proposed buyer's attention in a clear and unequivocal way. Nothing in the express purpose of the chapter or the terms of the provisions in question suggested that Chapter 11 is concerned at all with the terms of a proposed relevant contract or offer or any change in the actual terms of an offer made before a binding contract comes into existence.

Conclusion

32. While I agree with the conclusion reached by the learned judge as to the invalidity of the purported termination of the contract on the grounds of s 366B and s 366D, I accept the submissions made by the respondents that the learned judge adopted an incorrect approach in construing Part 2, and in particular the effectiveness of the warning statement under s 366B, from the viewpoint of whether the course of negotiations between the parties (that remained the same) resulted in there being a counteroffer or whether the nature of the alterations to the proposed relevant contract (which at all times concerned the same property) were material so that it could be said that there was a new proposed relevant contract. Such an approach failed to have proper regard to the purpose of the warning statement provisions being to achieve the objects in s 363, especially the consumer protection provisions in s 363(b), and not to provide a caution to the proposed buyer as to any particular term of a proposed relevant contract or alteration that might be made to its terms.

33. Section 363(b) states that the purpose of Chapter 11 is to require "all proposed relevant

contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information". The word "all" should be construed as encompassing both categories of contracts referred to; there is no basis, for example, for construing "all" as intending to refer to each and every proposed relevant contract as materially varied.

34. As I have mentioned, to construe s 363 so as to require that the warning statement be signed again, on each and every occasion on which a material variation to the proposed contract is made, would serve no purpose in promoting the object in s 363. Such a construction proceeds on the implicit assumption that the relevant contract as ultimately concluded will remain in materially the same terms as the proposed relevant contract, yet there is nothing in the Act to suggest such a legislative intention. "Relevant contract" is defined in s 364 as a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction. No definition of "proposed relevant contract" is provided. However it is apparent, given that "relevant contract" is defined in terms of a type of contract, that is, a contract for residential property, that "proposed relevant contract" is simply a proposed contract of that nature.

35. Once it is accepted as the respondents contended that bringing the warning statement to the proposed buyer's attention is the object of the provisions, then that object is achieved in circumstances such as occurred in the present case by having a warning statement attached to the front of the unsigned draft contract and drawn to the proposed buyer's attention and signed before the final contractual offer document is signed. The making of amendments to the contract document before it was submitted to the seller for acceptance did not detract from the fact that the warning statement had been drawn to the attention of the proposed buyer. There is nothing in the consumer protection aims of Chapter 11 to support the view that the Act should be construed so as to require the documents ultimately submitted to the seller to have precisely the same terms, unaltered from those in existence when the warning statement was signed. Such a construction serves no useful purpose.

36. Given the view I have expressed, the respondents' proposition raised in the Notice of Contention should be accepted and accordingly, for the purpose of s 366D(3) of the Act, the draft contract to which the warning statement was attached and signed on 9 April remains the same proposed relevant contract, notwithstanding alterations to the terms of the draft contract.

37. It follows that the learned judge erred in the approach he took in analysing the issue that required determination in accordance with the approach outlined in *Doolan*. It also follows that *Doolan* should not be accepted as good law.

38. I note that this view accords with amendments made to the Act which took effect from 1 October 2010 (see *Property Agents and Motor Dealers and Other Legislation Amendment Bill* 2010). The amendments provide in s 368(A)(4) and (5) as follows:

> "(4) For this section a proposed relevant contract does not become another proposed relevant contract merely because, as a result of negotiations, the terms and conditions of the proposed relevant contract change if the residential property concerned and the parties remain the same.
> (5) For subsection (4) it is immaterial whether the proposed relevant contract is textually amended to show the changed terms and conditions or another proposed relevant contract form is prepared that incorporates the changes."

39. I also note that it is apparent from the explanatory notes that these amendments were dictated by a legislative perception of a lack of clarity in the original provisions rather than to address an omission or alter the previous legislative intent: cf *Johnston* v *Jewry* [2007] QCA 188 at [32]. As the explanatory notes to the Bill state, "Section 368(A)(4) and (5) make it clear that a proposed relevant contract does not become another proposed relevant contract if the residential property concerned and the parties to the contract remain the same".

40. As stated, I agree with the conclusion reached by his Honour that Mr Fletcher was not entitled to terminate the contract. My view,

however, for reaching that conclusion is that the warning statement signed on 9 April 2007 at the time the proposed contract was signed remained effective for the purpose of s 366D(3), and notwithstanding that the contractual document signed by Mr Fletcher on 13 April 2007 contained altered terms, the latter did not become another proposed relevant contract. It follows from the conclusion I have reached that it is unnecessary to deal further with the grounds of appeal raised by Mr Fletcher.

Orders

41. I would order as follows:

1. The appeal be dismissed.
2. The appellant pay the respondents' costs of and incidental to the appeal.

Footnotes

1 It was agreed at the appeal that reprint 3 was the relevant reprint.

2 Ch 11 has been extensively amended by *Property Agents and Motor Dealers and Other Legislation Amendment Act* 2010 (Qld), pt 2.

3 See Philippides J's reasons at [25]–[29].

4 See Philippides J's reasons at [12] and [13].

5 [2010] QSC 193.

ROSS NIELSON PROPERTIES PTY LTD v ORCHARD CAPITAL INVESTMENTS LTD

(2011) LQCS ¶90-168; Court citation: [2011] QCA 49

Queensland Court of Appeal

Judgment delivered on 22 March 2011

Community schemes — Development agreement entered into between purchaser and developer — Put and Call option included in development agreement — Whether nature of the agreement is a "relevant contract" under the Property Agents and Motor Dealers Act 2000 — Whether the agreement complied with s 364 and 367 of the Property Agents and Motor Dealers Act at the time (now repealed and replaced with s 368A(2)(b) and s 368A(2)(c)(ii)) — A "relevant contract" is a contract "for the sale" of "residential land" between parties who may be described as "the buyer" and "the seller" of that land — the development agreement did not meet the statutory definition of "relevant contract".

Ross Nielson Properties Pty Ltd (RNP), the developer, and Orchard Capital Investments Limited (OCIL), the entity for the property fund, had entered into a development agreement. Before RNP and OCIL entered into the development agreement, RNP and Starlistic Pty Ltd (Starlistic), the owner of the land, made a contract which was the Starlistic Call Option Agreement. The Starlistic Call Option Agreement required RNP to pay Starlistic an Option Fee of $100,000 comprising of an initial $10,000 and a balance fee of $90,000. In exchange, Starlistic granted RNP an option to purchase the land. The Starlistic Call Option allowed RNP to nominate another person as the person entitled to exercise the option to purchase the land. If the option was exercised, the Option Fee of $100,000 would constitute the deposit under the contract for sale of the land (Land Contract). The Land Contract price was $2.2 million.

The development agreement between RNP and OCIL, recited that Starlistic was the registered owner of the land, that as at the "Effective Date" (being the completion of the Land Contract as a result of the exercise of the Starlistic Call Option), OCIL would be entitled to be the registered owner of the land. Further, OCIL would engage RNP as the developer for the site to procure a development approval in respect of the land for the building of a shopping centre and procure the execution of an agreement for lease with Coles as the anchor tenant. In return, OCIL paid to RNP:

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- $100,000 which $90,000 of it will be paid by RNP to Starlistic for the balance of the Option Fee and $10,000 retained by RNP
- $500,000 on execution of the development agreement, and
- $200,000 after RNP lodge the application for development approval.

OCIL was to pay RNP $2 million after notification by RNP that the development approval had been issued.

When RNP was unable to obtain development approval for a shopping centre to be built on the site, the joint venture between RNP and OCIL broke down. In accordance with the development agreement, RNP recommended to OCIL that an alternative use for the land would be to build townhouses and apartments instead. The proposal was rejected by OCIL. OCIL wished only to recoup its expenditure but not proceed with any development of the land.

Under the development agreement, OCIL may recoup its expenditure in pursuing the development as follows:

- RNP (with full control of the sale process) could require OCIL to execute all necessary documents to sell the land to a third party and distribute the net proceeds of the sale in accordance with the agreement.
- If the net proceeds of sale are less than $2.9 million, then RNP was required to pay to OCIL on settlement of the land, an amount equal to $2.9 million less the net proceeds of sale.
- If the net proceeds of sale of the land was more than $2.9 million, then OCIL will pay to RNP 50% of the excess on settlement of the land.

If no sale of the land was made within 12 months of the specified date in the development agreement, then OCIL could "put" it to RNP, that RNP (or its nominee) must purchase the land from OCIL for $2.9 million, with 60 days settlement. The agreement also conferred a call option in RNP's favour in similar terms.

OCIL's solicitors exercised OCIL's put option to RNP to require RNP deliver and execute the necessary documents to purchase the land. RNP did not comply with that demand. RNP gave OCIL notice purporting to terminate the development agreement under s 367(2) of the Property Agents and Motor Dealers Act (PAMDA) as it then was (now repealed and replaced with s 368A(2)(c)(ii)), on the ground that OCIL had not attached or drawn RNP's attention to a warning statement which is required in relation to "relevant contracts".

OCIL commenced proceedings in the trial division for orders to enforce RNP's obligations under the development agreement. RNP defended the proceedings. The trial judge found in favour of OCIL and declared that the development agreement was not a "relevant contract" as that term is defined in s 364 of the PAMDA and that RNP was not entitled to terminate the development agreement as it purported to do so. This was an appeal of the trial judge's decision by RNP.

According to RNP, it accepted that what was in issue was the characterisation of the development agreement itself. RNP's case on appeal was that the "put option" in cl 13.11 of the development agreement characterised the agreement as a "relevant contract" under PAMDA. RNP contended:

• that the trial judge erred in applying the "substance test" derived from the *Cheree-Ann* case in its determination of whether the development agreement was a relevant contract under PAMDA
• in *Vale 1 P/L as Trustee for the Vale 1 Trust v Delorain P/L as Trustee for the Delorain Trust* ("Vale"), the court (Applegarth J, with whose reasons McMurdo P and White JA

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agreed) upheld an appeal against the decision in the trial division, holding that the trial judge had erred by applying the "substance test"
• *Vale* dictated the conclusion that the development agreement was a "relevant contract".

Held: Appeal dismissed.

1. What *Vale* decided was that an option agreement held to be a relevant contract was not deprived of that character by addition of provisions found in the option agreements in *Vale* and *Cheree-Ann*. *Vale* did not decide that the mere presence in any agreement of any "put option" relating to residential land, whatever may be the terms of the option and agreement, defines the agreement as a "relevant contract" under the Property Agents and Motor Dealers Act. Here the question is instead whether a very different kind of agreement should be characterised as a "relevant contract" because it included a put option which would become exercisable only upon fulfilment of a series of contingencies. *Vale* could not and does not answer that question. It is necessary to examine the particular agreement in issue and decided whether it falls within the statutory definition.

2. The provisions in Ch 11 of the Act themselves indicate that a "relevant contract" is a contract "for the sale" of "residential land" between parties who may be described as "the buyer" and "the seller" of that land, which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. As a matter of ordinary language the development agreement was not a contract "for" the sale of residential property in which RNP was "the buyer" and OCIL was "the seller". Nor was the agreement of a character which might partake of the payment by "the buyer" of a refundable deposit upon the purchase of land.

3. Regardless of the precise legal nature of any interest OCIL held in the land after execution of the development agreement, the fact that the supposed "buyer" was a person who contracted to give up the right to exercise that party's option to purchase land in favour of the supposed "seller" militates against the characterisation of the development agreement as a contract "for" the sale of the land. Nor do the expressed purposes of PAMDA suggest that the ordinary meaning of the expression "contract for sale" should be stretched so far. The purpose, understood in light of the statutory scheme, indicates that the consumer intended to be protected is "the buyer" of residential land from "the seller" under a contract "for the sale of" that land, being a contract of a kind which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. That consumer protection purpose would not be served by extending the drastic remedy given by s 367(2) (as it then was in PAMDA) to cases in which the ordinary meanings of those terms are inapplicable.

4. When regard is had to the whole of the development agreement, as is necessary for the purposes of Ch 11 of PAMDA, it is clear that the development agreement did not meet the statutory definition of "relevant contract".

[Headnote by the CCH CONVEYANCING LAW EDITORS]

PH Morrison QC with GJ Handran (instructed by Broadley Rees Hogan Lawyers) for the appellant RNP.

AB Crowe SC with VG Brennan (instructed by McMahon Clarke Legal) for the respondent OCIL.

Before: Fraser and Chesterman JJA and Martin J.

Fraser JA: The appellant, Ross Nielson Properties Pty Ltd ("RNP") as "developer", and the respondent, Orchard Capital Investments Limited ("OCIL"), as "owner", were parties to a "development agreement" made on 2 September 2005. On 8 February 2010, RNP purported to terminate the development agreement under s 367(2) of the

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Property Agents and Motor Dealers Act 2000 (Qld) ("PAMDA"[1]) on the ground that OCIL had not attached or drawn RNP's attention to a "warning statement", which PAMDA requires in relation to "relevant contracts".

2. OCIL commenced proceedings in the trial division for orders designed to enforce RNP's obligations under the development agreement. RNP defended the proceedings. The trial judge found in OCIL's favour and declared that the development agreement was not a "relevant contract" as that term is defined in s 364 of PAMDA and that RNP was not entitled to terminate the development agreement as it purported to do by letter dated 8 February 2010.[2] Consequential orders giving effect to those declarations were made.

3. There was no warning statement attached to the development agreement. RNP sought to justify its purported termination of the development agreement under s 367(2) of PAMDA, which provides that if a warning statement is not attached to a "relevant contract" the buyer may terminate the contract at any time before the contract settles. The term "relevant contract" is defined in s 364 to mean "a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction." There was no provision for sale by auction in the development agreement and the relevant land was at all times "residential

property" (because it was in a "residential area", since it was, in terms of s 17(4), "an area identified on a map in a planning scheme as an area for residential purposes.")

4. Accordingly, the question in RNP's appeal is whether the development agreement was "a contract for the sale of" the land, and thus a "relevant contract", within the meaning of those expressions in s 364. RNP contended that the development agreement possessed that character because one clause in it conferred a "put option" in favour of OCIL, the exercise of which would require RNP to purchase residential land from OCIL.

Chapter 11 of PAMDA

5. In construing the definition of "relevant contract" the trial judge derived assistance from the statutory purposes expressed in PAMDA. Section 10(1) expresses PAMDA's objects as including the provision of a system for (amongst other things) regulating persons as property developers, which "… achieves an appropriate balance between—

> "(a) the need to regulate for the protection of consumers; and
> (b) the need to promote freedom of enterprise in the market place."

6. Section 10(2) provides that another significant object of PAMDA is "to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property." Section 10(3) provides that the objects are to be achieved mainly by, amongst other methods, "(d) providing protection for consumers in their dealings with marketeers". More specifically, s 363 sets out the purposes of Chapter 11 of PAMDA as being:

> "(a) to give persons who enter into relevant contracts a cooling-off period; and
> (b) to require all relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that the contract is subject to a cooling-off period; and
> (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers."

7. The trial judge also found assistance in the scheme established by Chapter 11. Section 366(1) provides that a "relevant contract" must have attached, as its first or top sheet, a warning statement in the approved form containing information specified in s 366(3), including that the contract is subject to a "cooling-off period". Section 366(4) requires the statement to be signed and dated by "the buyer" before the buyer signs the contract. Under s 364 the cooling-off period is five business days from the first business day upon which the buyer is bound by the contract which, under s 365(1), is when the buyer or the buyer's agent receives a copy of the contract signed by the buyer and "the seller". As I have mentioned, s 367(2) provides that if a warning statement is not attached to a relevant contract the buyer may terminate the contract at any time before the contract settles. By s 368, a buyer under a relevant contract who has not waived the

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cooling-off period may terminate the contract before the end of that period, in which event the seller must refund to the buyer "any deposit paid under the contract" less the "termination penalty" (a term defined in s 364 to mean 0.25 per cent of the purchase price). In broad terms, the effect of s 369 is that the cooling-off period may be waived before the buyer is bound by the contract by the buyer giving to the seller a lawyer's certificate which confirms that the lawyer is independent of the seller and others involved in the sale, the lawyer will not benefit in connection with the sale otherwise than by receiving professional costs and disbursements from the buyer, and the lawyer has explained to the buyer the effect of the contract and the purpose, nature and legal effect of the certificate.

The development agreement

8. It is necessary now to refer to the effect of the development agreement. At the same time I will mention some events that occurred in relation to that agreement.

9. The original parties to the development agreement were RNP and SAI Teys McMahon Property Ltd ("SAITMPL"). SAITMPL contracted in its capacity as the responsible entity for a property fund. Subsequently,

OCIL was appointed in place of SAITMPL as the responsible entity for the fund. The parties were content to adopt the convention that OCIL should be regarded as having been a party to the development agreement when it was made. In what follows I will adopt the same convention for ease of reference, as did the trial judge.

10. Before the parties entered into the development agreement, RNP and Starlistic Pty Ltd ("Starlistic"), the owner of land at Caloundra West ("the Property"), made a contract dated 7 April 2005 (the "Starlistic Call Option"). The Starlistic Call Option required RNP to pay Starlistic an "Option Fee" of $100,000, comprising an initial option fee of $10,000, which RNP paid, and a balance option fee of $90,000. In exchange, Starlistic granted RNP an option to purchase the Property. The Starlistic Call Option permitted RNP to exercise the option to purchase the Property or to nominate another person as the person entitled to exercise the option. If RNP gave Starlistic a notice of nomination, the nominee would be entitled to exercise the option to the exclusion of RNP. If the option were exercised, the Option Fee of $100,000 would constitute the deposit under the resulting "Land Contract" for the purchase of the Property.

11. The development agreement was formed some months later, on 2 September 2005. It recited to the effect that Starlistic was the registered owner of the Property, that as at the "Effective Date" (completion of the Land Contract resulting from exercise of the Starlistic Call Option) OCIL would be entitled to be the registered owner of the Property, and that OCIL wished to engage the services of RNP to procure a development approval in respect of the Property, the execution of an agreement for lease with Coles Myer Limited as the "Anchor Tenant", and completion of construction of "the Works" (which included the building of a shopping centre and related improvements) on the Property.

12. The development agreement included provisions to the following effect:

> (a) OCIL should pay RNP the Option Fee of $100,000 by a specified "Option Condition Date".
> (b) RNP should pay to Starlistic the balance Option Fee of $90,000 payable under the Starlistic Call Option.
> (c) RNP would be entitled to retain $10,000 from the $100,000 paid to it by OCIL as reimbursement for RNP's payment of that amount as the initial Option Fee under the Starlistic Call Option.
> (d) In consideration of the payment by OCIL to RNP of the Option Fee, RNP should nominate OCIL (or its nominee), by notice to Starlistic, as the purchaser under the Land Contract resulting from exercise of the Starlistic Call Option.
> (e) OCIL must comply with its obligations under the Land Contract (or ensure that its nominee does so) and do anything necessary to effect completion under the Land Contract in accordance with its terms.
> (f) If OCIL did not complete the Land Contract (otherwise than by its default or that of its nominee), then the development agreement should be at an end.
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> (g) RNP would use its best endeavours to obtain a development approval for a retail centre with approximately 4,250 square metres net lettable area and otherwise in accordance with plans annexed to a pre-commitment from Coles Myer as the Anchor Tenant. The development approval was to be on terms and conditions acceptable to RNP in its absolute discretion and to OCIL acting reasonably.
> (h) RNP would use its best endeavours to procure Coles Myer Limited to enter into an agreement for lease in certain terms by a specified date.
> (i) OCIL would pay RNP $500,000 seven days after the date of execution of the development agreement by OCIL, $200,000 seven days after RNP lodged the development application with the local authority, and $2 million seven days after notification by RNP to OCIL that the development approval had issued.
> (j) RNP would carry out the development (including by engaging a builder to construct the shopping centre) and OCIL would pay RNP the balance of the "Contract Price" under the development agreement by way of periodic progress payments to RNP or, in specified cases, to the builder.

13. RNP embarked upon its obligations under the development agreement, including by nominating OCIL under the Starlistic Call Option and pursuing the necessary development approval and agreement for lease. OCIL paid the first instalment of $500,000 to RNP on 9 September 2005. On 16 September 2005

Starlistic contracted to sell the Property to the then custodian of the fund by a contract which, the parties accepted, should be regarded as being the Land Contract contemplated by the Starlistic Call Option and the development agreement. The purchase price under the Land Contract was $2.2 million. It was completed on 23 September 2005. OCIL paid the second instalment under the development agreement of $200,000 to RNP on 21 December 2005.

14. RNP was unable to obtain the necessary development approval from the local authority so that the development could not proceed. Clause 13 of the development agreement made provision for that contingency. Clause 13 applied if RNP had not obtained the development approval and the agreement for lease. Clause 13.2 provided that in this event RNP would "procure an independent valuation of the Property by a reputable valuer with at least 5 years experience in valuing similar properties" and prepare and submit to OCIL a "development and/or realisation strategy in relation to the Property". Clause 13.3 provided that the recommendation would consider, as alternatives, the sale of the Property, the development of the Property on terms or conditions other than that proposed in the development application, the retention of the Property, and such other commercial proposal as RNP determined. Clause 13.4 obliged RNP to base its recommendation on specified criteria, which included the highest and best use of the Property and the value of the Property obtained pursuant to the independent valuation conducted under clause 13.2. Clause 13.5 provided that OCIL must advise RNP as to whether it accepts or rejects the recommendation in relation to the future development of the Property no later than 14 business days after RNP made the recommendation. Clause 13.6 provided that if RNP's recommendation was to sell the Property and OCIL accepted that, or if the recommendation was to hold or develop the Property and OCIL rejected that, then the Property was to be sold as soon as practicable in accordance with clauses 13.7-13.14.

15. On 2 October 2008 RNP submitted to OCIL a recommendation under clause 13.2 that a development approval be sought for a development incorporating 12 townhouses and 114 units on the land, with RNP to prepare and submit the application and to provide development management services at no cost. OCIL was to pay certain costs of the application and approval (approximately $150,000). On receipt of approval the Property was to be marketed and sold with the benefit of the approval, with the profits to be shared equally between RNP and OCIL. OCIL rejected that recommendation on 8 October 2008 and indicated that it wished to proceed with the sale of the Property. (At the trial, RNP claimed that OCIL's rejection of the recommendation was made in breach of a contractual obligation to act in good faith. The trial judge rejected that

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claim. RNP abandoned its challenge to that decision at the commencement of the hearing of the appeal.)

16. By this point the development venture had failed. The Property would not be improved by a development approval, RNP would not be paid the third instalment ($2 million) or any further amount under the development agreement and, under provisions which I will now set out, OCIL might merely recoup expenditure it had made in pursuing the development:

> "13.7 As the Developer is required in accordance with clause 13.10 to contribute to any shortfall between the Net Property Sale Proceeds and the amount of $2.9million, the Owner acknowledges that the Developer is to have control over the sale process including, without limiting the generality of the foregoing:
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> 13.7.1 the appointment of any agent to effect the sale of the Property, including the terms of such appointment;
> 13.7.2 the manner in which the Property is to be offered for sale (i.e. by auction, tender, etc.);
> 13.7.3 any negotiations with third parties in respect of the terms for the sale of the Property; and
> 13.7.4 such other matters relating to the sale process of the Property that the Developer requires control over in order to properly effect the sale of the Property.
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> 13.8 The Owner shall (or if applicable, procure the Owner's Nominee to), no later than 2 business days after written request from the Developer:

13.8.1 execute any document required to appoint an agent recommended by the Developer to effect the sale of the Property;
13.8.2 execute any contract recommended by the Developer for the sale of the Property provided that such contract is in the form of an Approved Contract; and
13.8.3 such other documents as the Developer may reasonably require to be executed by the Owner in order to effect the sale of the Property.

13.9 The Owner shall (or if applicable, procure the Owner's Nominee to) strictly comply with the terms of any Sale Document and acknowledges that any failure by the Owner (or Owner's Nominee) to comply with the terms of the Sale Document constitutes a breach of this Agreement.

13.10 If the Property is sold and the Net Property Sale Proceeds are:

13.10.1 less than $2.9million, then the Developer shall pay to the Owner on settlement of the sale of the Property an amount equal to $2.9million less the Net Property Sale Proceeds; or
13.10.2 greater than $2.9million, then the Owner shall pay to the Developer 50% of the excess on settlement of the sale of the Property."

17. There was no sale within the 12 month period specified in clause 13.11, which expired on about 8 October 2009. In this event, the "Put Option" in clause 13.11 became available for exercise. Clause 13.11 provided:

"13.11 If the Property is not sold by that day being 12 months from the date that the provisions of clause 13.6 apply (**Sale Date**), then the Owner (or Owner's Nominee) shall be entitled to exercise the Put Option contained in this clause 13.11:

13.11.1 The Developer grants to the Owner (or Owner's Nominee) for a period of 7 days from the date the Developer delivers to the owner the Supporting Material an option to require the Developer or its nominee to purchase the Property in accordance with the Option Contract. The Developer shall execute and deliver to the Owner (or Owner's Nominee) the Supporting Material no later than 2 business days after the Sale Date.
13.11.2 The Developer may at any time prior to exercise of the Put Option, nominate in writing to the Owner (or Owner's Nominee), another person or corporation who is to acquire the Property from the Owner (or Owner's

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Nominee) (**Nominee**). In order for the nomination to be effective, the Developer must procure the Nominee [to] deliver the Supporting Material to the Owner (or Owner's Nominee) duly executed.
13.11.3 The Put Option may only be exercised by the Owner (or Owner's Nominee) delivering to the Developer on a business day at the address for service of notices on the Developer specified in Schedule 1, Item 4, a Put Option Notice executed by the Owner (or Owner's Nominee).
13.11.4 On exercise of the Put Option, the Option Contract will be deemed to have been entered into between the Owner (or Owner's Nominee) as Vendor and the Developer or its Nominee as Purchaser.
13.11.5 Following receipt of the Option Notice, the Owner (or Owner's Nominee) shall cause to be delivered to the Developer 2 copies of the Option Contract duly completed by inserting the appropriate details in any blanks, duly executed by the Owner (or Owner's Nominee). Following receipt of the Option Contract duly executed by the Owner (or Owner's Nominee), the Developer shall also promptly execute both copies of the Option Contract and deliver 1 copy to the Owner (or Owner's Nominee) duly executed by both parties.
13.11.6 Any duty under the Duties Act arising in relation to the provisions of this clause 13.11 or any transaction arising as a result of the Owner (or Owner's Nominee) exercising the Put Option under this clause is to be borne by the Owner,

other than any duty under the Duties Act payable in respect of the Option Contract which shall be paid by the Developer."

18. Clause 13.12 conferred a call option in RNP's favour, in similar terms.

19. A draft of the Option Contract which would result from the exercise of the Put Option in clause 13.11 (or from the exercise of the call option in clause 13.12) was set out in a schedule to the development agreement. It provided for RNP (or its nominee) to purchase the Property for $2.9 million, with settlement in 60 days. That price was equivalent to the sum of the purchase price paid by OCIL to Starlistic to buy the Property and the two instalments paid by OCIL to RNP under the terms of the development agreement.

20. The "Supporting Material" referred to in clause 13.11.1 of the development agreement was defined to mean:

> "(a) a Lawyer's Certificate under section 369 of the Property Agents and Motor Dealers Act 2000 (Qld), waiving the cooling-off period under the Contract, duly signed by the Developer or Nominee's solicitor; and
> (b) Form 30C under the Property Agents and Motor Dealers Act 2000 (Qld), annexed as the top sheet of the Contract, duly signed by the Developer or its Nominee."

The fact that the Supporting Material appears to have been designed to meet requirements of PAMDA has no enduring significance because the parties accepted that the relevant time for the application of PAMDA was when the development agreement was made.

21. In the events that had occurred, the effect of clause 13.11.1 was that RNP became obliged to execute and deliver to OCIL (or its nominee) the Supporting Material and RNP granted to OCIL (or its nominee) an option to require RNP (or its nominee) to purchase the Property. On 16 October 2009 OCIL's solicitors wrote to RNP's solicitors calling upon RNP to deliver the Supporting Material to OCIL. RNP did not comply with that demand. Ultimately, RNP gave OCIL the notice purporting to terminate the development agreement under s 367(2) of PAMDA which I mentioned earlier.

The reasons of the trial judge

22. The trial judge referred to authorities which described the general character of an option to purchase land as a conditional contract to purchase land,[3] and to *David Deane & Associates Pty Ltd* v *Bonnyview Pty Ltd*,[4] in which Keane JA referred to that characterisation and held that, in the circumstances of that case, certain option agreements constituted "contracts of sale" within the meaning of a commission agency agreement. The trial judge then discussed *Devine Ltd* v *Timbs*[5] and *Mark Bain Constructions Pty Ltd* v *Barling*[6] (in which option agreements in forms similar to the options in clause 13.11 and clause 13.12 of the development agreement were characterised as "relevant contracts" under PAMDA) and *Cheree-Ann Property Developers Pty Ltd* v *East West International Development Pty Ltd*[7] ("*Cheree-Ann*") and *Vale 1 Pty Ltd* v *Delorain Pty Ltd*[8] (in which the opposite conclusion was reached where option agreements included additional provisions which facilitated or permitted the prospective purchaser under the options to market the land and profit by introducing a third party as a substitute purchaser).

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23. From those cases the trial judge derived the propositions that, in the case of an option, it is the option agreement, rather than a document executed after the exercise of the option, to which attention must be paid for applying the provisions of PAMDA; and in the case of an option agreement which includes a put option, the potential purchaser becomes bound to purchase the land "by virtue of obligations it undertakes as part of the option agreement, though the engagement of those obligations depends upon an act of the seller."[9] It followed that it was necessary to consider whether PAMDA applied to the development agreement in which clause 13.11 created the Put Option. The focus was upon the character of the development agreement itself: in a subsequent passage of the reasons,[10] the trial judge concluded that the provisions of PAMDA did not apply in relation to the Put Option considered separately from the development agreement, or in relation to any exercise of the Put Option or any contract which would result from that exercise.

24. RNP did not challenge those conclusions. It accepted that what was in issue was the characterisation of the development agreement itself. RNP's case on appeal was that the Put Option in clause 13.11 clothed the development agreement with the character of a "relevant contract".

25. The trial judge rejected that case in the following passage:

> "[46] Immediately before the parties entered into the Development Agreement, RNP had the benefit of the Starlistic option. Accordingly, it had an equitable interest in the land. At that time, neither OCIL nor any entity associated with it had any interest in the land. It seems to me it would produce a curious result if the Development Agreement were held to be a 'relevant contract' for the purposes of the PAMD Act, in respect of which OCIL was the 'seller' and RNP was the 'buyer'.
> [47] I have previously summarised the principal features of the Development Agreement. In substance, it was an agreement intended to bring about the development of the land as a shopping centre. It may be that the Development Agreement constituted a joint venture, and that as a result of its contributions, RNP acquire, or may have acquired, some equitable interest in the land, but it is unnecessary to reach a final view about this. The primary mechanism chosen by the parties to bring the project to an end, in the event that its primary purpose could be achieved, was the sale of the land, to be conducted by RNP, with a guaranteed minimum return to OCIL related to the amount paid by it (or an entity associated with it) for the purpose of the project, and a provision for sharing any excess above that amount between RNP and OCIL. If that mechanism was unsuccessful, and RNP had not previously exercised its call option rights under the Development Agreement, the put option came into effect. The put option appears to be a mechanism of last resort.
> [48] Adopting the analysis of Mullins J [in *Cheree-Ann*], it cannot be said that the sale of the land by OCIL (or an associated entity) to RNP is the substance of the Development Agreement.
> [49] The question which has to be determined is whether the Development Agreement was, in the language of the definition of 'relevant contract' in the PAMD Act, a 'contract for the sale of residential property'. It seems to me that some assistance in understanding the expression can be obtained by a consideration of the type of transaction envisaged by Chapter 11. It envisages a party who can be characterised as the buyer,
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> and another who can be characterised as the seller, in relation to the contract. The contract is likely to be prepared by the seller. It is likely to be signed by the buyer, before it is signed by the seller. It is likely to make provision for the payment of a deposit. The envisaged contract is one which 'settles'. It is not easy to see the development agreement as a contract to which the provisions of Chapter 11 are intended [to] apply.
> [50] The stated purposes of Chapter 11 include that purchasers who 'enter into relevant contracts' have the benefit of a cooling-off period, and to require 'all relevant contracts for the sale of residential property in Queensland' to include certain consumer protection information with regards to s 363. These statements of purpose provide no real assistance in understanding what is a relevant contract. More assistance is to be found in the provisions of s 10 of the PAMD Act. One of the significant objects of the Act is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property. Moreover, additional context may be derived from s 17, which identifies residential property as a single parcel of land, on which a place of residence is constructed or is being constructed, or if vacant, is in a residential area. Taken together, these considerations strongly suggest that Chapter 11 is directed to transactions involving consumers, and not to a transaction including the commercial complexities of the development agreement."[11] (citation omitted)

26. The trial judge found that those considerations indicated that a "relevant contract" was "one, the principal purpose of which is to bind the parties to the purchase and sale of residential property of the kind identified in s 17 of [PAMDA]". His Honour held that the development agreement was not a "relevant contract",

compliance with s 366 was not required, and RNP's attempt to terminate the development agreement on the basis of non-compliance with that section was ineffective.[12]

Consideration

27. RNP's principal contention in this appeal was that the trial judge erred by applying the "substance test" which was derived from *Cheree-Ann*. That contention was based upon a decision which was delivered after the trial judge gave judgment. In *Vale 1 P/L as Trustee for the Vale 1 Trust* v *Delorain P/L as Trustee for the Delorain Trust*[13] ("*Vale*"), the Court (Applegarth J, with whose reasons McMurdo P and White JA agreed) upheld an appeal against the decision in the trial division, holding that the trial judge had erred by applying the "substance test". RNP contended that *Vale* dictated the conclusion that the development agreement was a "relevant contract".

28. That argument attributed too much to the decision in *Vale*. The option agreement considered in that decision was a "Call and Put Option Deed" by which a property developer ("Delorain") undertaking the construction of a residential development granted an option to purchase to Vale, who wished to purchase proposed apartments, and Vale granted to Delorain a "put option" to require Vale to purchase the apartments. The only conditions relating to the exercise of those options concerned the time and manner of their exercise. Notwithstanding reservations expressed in a different case,[14] the Court proceeded on the basis of earlier decisions in which certain option agreements in relation to residential property had been held to constitute "relevant contracts".[15] The option agreement in *Vale* differed from the agreements considered in the earlier cases because it contained additional clauses which permitted Vale to find a third party to purchase the property in Vale's place on terms which entitled Vale to share in any excess over the purchase price at which Vale would be obliged to purchase. In *Cheree-Ann* Mullins J held that an option agreement which contained similar provisions was not a "relevant contract" for the purposes of the consumer protection provisions of Chapter 11 because that agreement "in substance" provided stock for a property marketer. In that context, Applegarth J framed the first question for decision in *Vale* as being whether *Cheree-Ann* should be followed in concluding that, "… an option agreement that in substance provides stock for a property marketer should

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not be characterised as a "contract for the sale of property" for the purposes of the consumer protection provisions of Chapter 11".[16]

29. It was that question which Applegarth J addressed in the observations that "… the mere presence in an option agreement of provisions that permit a party to market an 'off the plan' lot to a potential purchaser and to refer that third party purchaser to the grantor/developer does not mean that what otherwise would be a 'relevant contract' ceases to be so …", and that "[t]he contingency that the property may be sold to a third party purchaser … does not alter the nature of the Deed as one that provided for the sale of residential property."[17] The rejection in *Vale* of the "substance test", though expressed at times in general terms,[18] must be understood in that context. What *Vale* decided was that an option agreement of a kind which had been held to constitute a "relevant contract" was not deprived of that character by the addition of provisions to the effect of those found in the option agreements in *Vale* and *Cheree-Ann*. *Vale* did not decide that the mere presence in any agreement of any "put option" relating to residential land, whatever may be the terms of the option and the agreement, necessarily defines the agreement as a "relevant contract".

30. RNP emphasised Applegarth J's references to the desirability of a certain definition of "relevant contract".[19] His Honour identified the significance of that consideration in the following passage:

> "In this matter Delorain invites the Court to apply, or even extend, the exception recognised in *Cheree-Ann*. However, such an approach is apt to create undesirable uncertainty concerning the application of the definition of 'relevant contract' in future cases. Certainty concerning parties' rights in relation to transactions for the sale of residential property is important. Consumer protection is enhanced by certainty in determining whether or not an agreement constitutes a 'relevant contract'. Unnecessary uncertainty and the potential for litigation of the present kind is not in the interests of consumers or other persons involved in contracts for the sale of residential property. The first basis upon which

Cheree-Ann was decided leaves the definition of 'relevant contract' in an uncertain state and, on balance, I consider that the decision should not be followed in that respect."[20]

31. The concern about commercial certainty related to the creation of an exception to the general proposition concerning option agreements of the kind which had been held to constitute a "relevant contract".[21] Here the question is instead whether a very different kind of agreement should be characterised as a "relevant contract" because it included a put option which would become exercisable only upon fulfilment of a series of contingencies. *Vale* could not and does not answer that question. It is necessary to examine the particular agreement in issue and decide whether it falls within the statutory definition.

32. Where such questions of statutory characterisation are concerned, cases may arise where it is debatable whether or not a particular arrangement falls within the statutory definition. In the case of Chapter 11 of PAMDA, uncertainty inevitably results from the absence of any express limitation of its application to "consumers", the absence of any definition of that term, and the generality of the definition of "relevant contract". That has been manifested in the extensive litigation about those provisions. If that uncertainty is thought to be undesirable, the remedy lies with the legislature.

33. The parties accepted that an option agreement might constitute a "contract for sale" and thus a "relevant contract". However the exercise of applying the definition is not foreclosed by reference to tags such as "option agreement". As I have sought to emphasise, the question in this appeal is whether the development agreement itself was a "contract for the sale of" residential property, and thus a "relevant contract", within the meaning of s 364 of PAMDA.

34. As to that, it is significant that the expression "contract for the sale of" does not have a fixed, technical meaning. Its meaning is capable of being influenced by the context in which it appears. The trial judge therefore adopted the conventional approach of construing that expression in a way which

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sought to reconcile it with the statutory context and the underlying legislative purpose, so far as that purpose could be detected in the language of the statute and any admissible extrinsic material.[22] The trial judge summarised the statutory context and the legislative purpose in paragraphs [49] and [50] of his Honour's reasons. I will return to the legislative purpose but, as OCIL contended, the provisions in Chapter 11 themselves indicate that a "relevant contract" is a contract "for the sale" of "residential land" between parties who may be described as "the buyer" and "the seller" of that land, which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. That is not an apt description of the development agreement.

35. Nor is there any real analogy between the development agreement and those option agreements which have been held to constitute "relevant contracts". In that regard, it is sufficient to refer to one such case. In *Mark Bain Constructions Pty Ltd* v *Barling*,[23] Philippides J held that a "Put and Call Option Deed", under which the grantee was entitled to exercise a call option to purchase residential property during a specified period and the grantor was entitled to exercise a put option requiring the grantee to purchase that property if the grantee had not exercised the call option, constituted a "contract for the sale of land", and therefore a "relevant contract", for the purposes of s 366 of PAMDA. Philippides J was influenced by Gibbs J's view in *Laybutt* v *Amoco Australia Pty Ltd* that an option to purchase was "a contract to sell the land upon condition that the grantee gives the notice and does the other things stipulated in the option."[24] Her Honour also relied upon a passage in *David Deane & Associates Pty Ltd* v *Bonnyview Pty Ltd*[25] in which Keane JA explained "how an option or contract relating to the sale of property may, by mutual resolution of the contingencies to which it was previously subject, become properly characterised as a contract of sale."[26] After referring to those decisions Philippides J said:

"In the present case, even if the option deeds could only be characterised as contracts *of* sale upon the fulfilment of the contingent conditions to which they were subject, the option deeds are, nevertheless, in my view properly characterised as contracts *for* the sale of residential property. Although contingent on the exercise of the put and call options granted under the deeds, the applicant assumed obligations to sell and the respondents assumed obligations to purchase from which they

could not withdraw. The form and substance of the contracts resulting from the exercise of the options, including the sale price, fell to be determined by reference to the option deeds. The option deeds thus contained the machinery provisions which were facultative of the realization of the lots by sale by the applicant to the respondents. Further, as Barwick CJ observed in *Petelin* v *Deger Investments Pty Ltd*, a clause in an option requiring a new contractual document in an identified form to be signed or exchanged does not contemplate the formation of a new and different contract, but merely the recording in a formal fashion of the agreement which resulted from the exercised option."[27] (citations omitted)

36. In *David Deane & Associates Pty Ltd* v *Bonnyview Pty Ltd*[28] one question was whether such a transaction constituted a valid and enforceable "contract of sale" the completion of which would entitle an agent to commission under a commission agency agreement. In the passage cited by Philippides J, Keane JA said:

"Further, to speak of a contract of sale is to speak of a contract to transfer property for money. Those are the essential rights and obligations which characterize a contract as a contract of sale. The option agreements provided a mechanism by which these rights and obligations could be engaged. If the appellants elected to exercise their put option then the form and substance of the resulting contract, including the sale price, would be determined by reference to the provisions of the option agreements. In that regard, clauses 3 [which provided for the exercise of the call option by the grantee] and 5 [which provided for the exercise of the put option by the grantor] of the option agreements were machinery provisions facultative of realization of the lots by sale

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by the appellants to Traspunt or its nominees. Once the machinery conditions in the option agreements became irrelevant to the respective substantive rights of the appellants and Traspunt, the description of the arrangements in the option agreements as a contract of sale was undeniably accurate. What might have originally been characterized as options or contracts relating to a sale or even contracts simpliciter, but not contracts of sale, had become, by the mutual resolution of the contingencies to which they were previously subject, contracts which were properly characterized as contracts of sale and which were, indeed, performed as such. This point, that the character of a contract may change as its conditions are fulfilled or dispensed with, may be illustrated by reference to the observations of Wilson J in *Perri* v *Coolangatta Investments Pty Ltd* where his Honour said:

'The obligation to complete [the contract] is contingent on the fulfilment of the condition, but in the meantime there is a conditional contract in existence from which neither party is at liberty to withdraw at will. Interim obligations were undertaken by both parties. The vendor had to make good its title to sell, and the purchasers were obliged to pay the deposit and make all reasonable efforts to bring about a sale of the Lilli Pilli property.

Speaking for myself, I have difficulty in assigning the decision in *Aberfoyle* to the very limited category of cases dealing with conditions precedent to the formation of a contract. It seems to me that when Lord Jenkins ([1960] AC at pp 128, 130) spoke of a condition precedent, he was speaking of the condition in that case as precedent to the coming into existence of a binding contract *of sale*. As Sachs L.J. remarked in *Property and Bloodstock Ltd* v. *Emerton* ([1968] Ch 94 at p 121), after referring to Lord Jenkins' words,

"The distinction, of course, is there drawn between a contract and a contract of sale, and that particular distinction is one which derives from the long-used phraseology, almost the traditional phraseology, such as that to be found in *Anson on Contract*, 22nd ed. (1964), p. 111, and in *Chalmers' Sale of Goods* 14th ed. (1963), p. 243."

Again, in *In re Sandwell Park Colliery Co.*; *Field* v *The Company* ([1929] 1 Ch 277 at p 282), Maugham J. refers to a "condition upon which the validity of the contract as one sale depends" (sic "*one of sale*") and to a "condition precedent to the validity of a contract *for sale* of land" (my emphasis) ([1929] 1 Ch at p 283).'

The result, in my view, is that it must be accepted that the option agreements constituted valid and enforceable contracts of sale between the appellants and Traspunt."[29] (citations omitted)

37. The expression "contract for sale" in the definition of "relevant contract" encompasses a broader range of transactions than does the technical term "contract of sale". In that light, notwithstanding Keane JA's observation that the option agreements "might have originally been characterized as options or contracts relating to a sale or even contracts simpliciter, but not contracts of sale" before "the mutual resolution of the contingencies to which they were previously subject", his Honour's analysis supported the conclusion that the similar put and call options in *Mark Bain Constructions Pty Ltd* v *Barling* constituted "contracts for sale". In both cases one party assumed a binding obligation to sell and the other party assumed a binding obligation to purchase, the obligation in each case being contingent only upon exercise by one party of the relevant option. That contingency might properly be disregarded for present purposes, particularly bearing in mind the consumer protection purposes of Chapter 11 of PAMDA: sellers could not evade the legislative purpose merely by substituting options for conventional contracts of sale.[30]

38. With those considerations in mind, for the purposes of Chapter 11 of PAMDA a contract of sale formed upon the exercise of such an option might be assimilated with the

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option agreement from which it originated so that the option agreement itself, though not a contract "of" sale, might be treated as a contract "for" sale; and it then does not unduly stretch the language to treat the purchaser and vendor under the contract of sale formed upon exercise of the option as "the buyer" and "the seller" under the option agreement, to treat settlement of the contract of sale as amounting to settlement of the option agreement, and to treat a deposit payable upon the purchase as a deposit payable under the option agreement. That process of assimilation may also be justified in a case like *Vale*, where an option agreement of the same kind contains additional provisions which facilitate marketing of the land and the introduction of a substitute purchaser. Such provisions create uncertainty about the identity of the ultimate purchaser, but a party to such an option agreement may nevertheless be characterised as "the buyer" where, as in *Vale*, that party remains bound to purchase if it is unable to find a third party to complete the purchase instead.

39. The development agreement does not lend itself to any similar process of assimilation. OCIL would become entitled to exercise the Put Option only if OCIL had earlier exercised RNP's option to purchase the land from the owner and then only if three further contingencies were subsequently fulfilled: first, that the contemplated shopping centre could not proceed, because RNP was unable to procure the necessary development approval or the agreement for lease with Coles Myer Ltd; secondly, that OCIL then decided not to retain the land after considering the recommendation by RNP; and thirdly, that RNP did not within 12 months after OCIL's decision arrange a sale of the land to a third party at any price, on terms that RNP would make up any shortfall between the price and $2.9 million or would be entitled to 50 per cent of any amount by which the price exceeded that amount. Only if all of those contingencies were fulfilled would the Put Option become available for exercise by OCIL.

40. It is clear from the last of those contingencies that the Put Option was merely one of the contractual mechanisms which implemented the allocation of risk in the development venture. RNP's contention that the development agreement comprised an option with other provisions grafted on to it has the tail wagging the dog. The contractual terms reveal instead that the aim of the development agreement was a shopping centre development under which the land would cease to be "residential land" and it would be retained by OCIL. It was only in the unwanted event that such a development proved to be unachievable that there was to be any possibility of OCIL selling the land to RNP. As a matter of ordinary language such an agreement was not a contract "for" the sale of residential property in which RNP was "the buyer" and OCIL was "the seller". Nor was the agreement of a character which might partake of the payment by "the buyer" of a refundable deposit upon the purchase of land.

41. Further, if RNP were entitled to terminate the contract after OCIL had exercised the Starlistic Call Option, OCIL would forfeit substantial payments it had made to RNP and it would be left holding land in which it held no interest before it entered into the development agreement. I do not accept RNP's contention that the last mentioned consideration was irrelevant. As RNP contended, there is nothing unconventional about a contract

for the sale of land by a seller who does not then own the land but expects to be in a position to secure title to the buyer at the time of settlement. In this case, however, OCIL was not in a position to secure title to the land before it contracted with RNP. It was RNP which held the right to acquire the land. Further, it was RNP, not OCIL, which had negotiated the price at which the option was to be exercised under the Starlistic Call Option, and that price would ultimately form one of the components in the price payable by RNP to OCIL upon any exercise of the Put Option. Regardless of the precise legal nature of any interest OCIL held in the land after execution of the development agreement, the fact that the supposed "buyer" was a person who contracted to give up the right to exercise that party's option to purchase land in favour of the supposed "seller" militates against the characterisation of the development agreement as a contract "for" the sale of the land.

42. Nor do the expressed purposes of PAMDA suggest that the ordinary meaning of the expression "contract for sale" should be stretched so far. RNP contended that the trial

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judge was mistaken in taking into account the consideration that Chapter 11 of PAMDA was directed towards transactions involving "consumers". As I have indicated, there is no definition of the term "consumer" and that term is not expressed to be a criterion for the application of Chapter 11. It follows that an agreement might amount to a "relevant contract" even if "the buyer" might not be thought to be a "consumer" in the popular sense of that term. As Applegarth J held in *Vale*, PAMDA "does not state an exception of the kind formulated in *Cheree Ann* for cases of parties who seemingly are not in need of the consumer protection that Chapter 11 provides."[31] That is not to say, however, that the expressed consumer protection purpose of PAMDA is irrelevant to the construction of the definition of "relevant contract". The purpose, understood in light of the statutory scheme, indicates that the consumer intended to be protected is "the buyer" of residential land from "the seller" under a contract "for the sale of" that land, being a contract of a kind which might "settle", and in respect of which a "deposit" might be payable and, if paid, might be returned to "the buyer" upon termination. That consumer protection purpose would not be served by extending the drastic remedy given by s 367(2) to cases in which the ordinary meanings of those terms are inapplicable. As the trial judge considered, the statutory purpose tends to confirm that Chapter 11 is not directed to the "commercial complexities of the development agreement."[32]

43. RNP did not seek to rely upon decisions under the *Statute of Frauds* that a contract fitted the statutory description where the contract included both a discrete promise which answered the statutory description and other promises.[33] Those decisions are distinguishable both because of differences between the applicable legislative regimes and because the Put Option in clause 13.11 of the development agreement was not a discrete promise which amounted to a contract for the sale of residential land. Its effect could not be ascertained without reference to the other provisions of the development agreement, particularly those provisions which identified the contingencies upon which the Put Option might become available for exercise.

44. When regard is had to the whole of the development agreement, as is necessary for the purposes of Chapter 11 of PAMDA, it is clear that the development agreement did not meet the statutory definition of "relevant contract".

Proposed Orders

45. I would dismiss the appeal, with costs to be assessed on the standard basis.

CHESTERMAN JA: I agree that the appeal should be dismissed with costs for the reasons given by Fraser JA.

MARTIN J: I agree, for the reasons given by Fraser JA, with the order he proposes.

Footnotes

1 The relevant version of PAMDA is that which was in force on 2 September 2005 when the development agreement was made (reprint 2F).

2 *Orchard Capital Investments Limited* v *Ross Neilson Properties Pty Ltd* [2010] QSC 340 at [51], [135]. The trial judge also resolved other issues but they are not the subject of the appeal.

3 *Laybutt* v *Amoco Australia Pty Ltd* (1974) 132 CLR 57; *Mercantile Credits Ltd* v *Shell Co of Australia Ltd* (1976) 136 CLR 326; *Whitemore Pty Ltd* v *OF Gamble Pty Ltd* (1991) 6 WAR 110 at 116–117; *Rosebridge Nominees Pty Ltd* v *Commonwealth Bank of Australia* [2008] WASCA 107 at [16]–[18]; *Traywinds Pty Ltd* v *Cooper* [1989] 1 Qd R 222.

4 [2005] QCA 270.

5 [2004] 2 Qd R 501.

6 [2006] QSC 48.

7 [2007] 1 Qd R 132.

8 [2009] QSC 425.

9 *Orchard Capital Investments Limited* v *Ross Neilson Property Pty Ltd* [2010] QSC 340 at [45].

10 [2010] QSC 340 at [60]–[87].

11 *Orchard Capital Investments Limited* v *Ross Neilson Property Pty Ltd* [2010] QSC 340 at [46]–[50].

12 *Orchard Capital Investments Limited* v *Ross Neilson Property Pty Ltd* [2010] QSC 340 at [51].

13 [2010] QCA 259.

14 *Hedley Commercial Property Services P/L* v *BRCP Oasis Land P/L* [2010] 1 Qd R 439 at 441 [5], per Chesterman JA, with whose reasons Dutney J agreed.

15 See *Vale 1 P/L as Trustee for the Vale 1 Trust* v *Delorain P/L as Trustee for the Delorain Trust* [2010] QCA 259 at [4] per McMurdo P, at [9]–[14] per White JA, and at [33]–[35], [86] per Applegarth J, and the cases there cited.

16 [2010] QCA 259 at [40].

17 [2010] QCA 259 at [36] and [37]. See also the expressions to similar effect at [38], [39], [54], [59], [68], [84], and [86].

18 See, for example, [2010] QCA 259 at [67].

19 [2010] QCA 259, particularly at [55], [67], [73], [81], [89].

20 [2010] QCA 259 at [89].

21 See also [2010] QCA 259 at [4]–[5] per McMurdo P and at [13]–[14] per White JA.

22 See *CIC Insurance Limited* v *Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ. See also *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, which Applegarth J applied in this context in *Vale* at [46].

23 [2006] QSC 48.

24 (1974) 132 CLR 57 at 76.

25 [2005] QCA 270 at [23].

26 [2006] QSC 48 at [32].

27 [2006] QSC 48 at [32].

28 [2005] QCA 270.

29 [2005] QCA 270 at [23].

30 See *Nguyen* v *Taylor* (1992) 27 NSWLR 48 at 52E-F per Kirby P.

31 [2010] QCA 259 at [88].

32 [2010] QSC 340 at [50].

33 See, for example, *Horton* v *Jones* (1935) 53 CLR 475 at 485 per Rich and Dixon JJ; *Marginson* v *Ian Potter & Co* (1976) 136 CLR 161 at 168–169 per Gibbs and Mason JJ.

DUNWORTH v MIRVAC QLD PTY LTD (NO 3)

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(2011) LQCS ¶90-169; Court citation: [2011] QSC 27

Supreme Court of Queensland

Judgment delivered on 7 February 2011

Community schemes — Purchaser contracted to purchase a ground floor apartment — Vendor called for completion of contract upon establishment of community scheme — Purchaser claimed breach of contract for misleading and deceptive conduct but was unsuccessful — Court ordered specific performance of contract — Completion of contract was due 8 February 2011 — Before settlement the apartment was flooded by the Brisbane River — Vendor made an open offer to purchaser to clean up and restore the apartment to original condition at vendor's costs — Settlement to be extended by four months for clean up to be done — Purchaser rejected the offer and purported to rescind the contract on reliance of s 64 Property Law Act 1974 — Property destroyed or damaged so as to be unfit for occupation as dwelling house — Purchaser asked for this matter to be determined summarily — Court declined request as there were matters to be considered relating to application of s 64, including the date at which unfitness must be established, the meaning of unfitness and the relevance, if any, of the damage being capable of repair.

The plaintiff purchaser agreed to buy a residential apartment in a building located in Queensland from the defendant vendor. The apartment was on the ground floor of the building and included car parking and storage on one of the basement levels.

After the community titles scheme was established, the vendor called for completion. The purchaser unsuccessfully sought an order declaring the contract void, alleging misleading and deceptive conduct in breach of the then *Trade Practices Act 1974* (Cth). The purchaser's claim was dismissed and an order for specific performance was made, with the new completion date being fixed as 8 February 2011.

Before the new settlement date arrived, the Brisbane River flooded. Both basement levels of the building were inundated. Water entered the apartment on the ground floor. The vendor made an open offer to the purchaser to clean up and restore the apartment to its original condition at the vendor's cost. The vendor said it required four months in which to complete that work and proposed a new settlement date of 4 June 2011.

However, on 28 January 2011 the purchaser rejected that offer and purported to rescind the contract in reliance on s 64 of the *Property Law Act 1974* (Qld). Section 64(1) provides that:

> "In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs."

The purchaser then sought a declaration that the contract was duly rescinded. In support of her claim, she submitted that occupation of the premises would be illegal under statutory provisions relating to fire safety and other safety and health aspects.

The vendor argued that there were factual and legal issues which could not be determined summarily and asked the court to extend the date for completion without prejudice to the purchaser's right to maintain that the contract had been validly terminated pursuant to s 64.

Held: For the vendor.

1. There were legal questions and related factual questions about the application of s 64, including the date at which unfitness must be established, the meaning of unfitness and the

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relevance, if any, of the damage being capable of repair. These were matters which should go to trial and could not be determined in a summary fashion.

2. The purchaser would be adequately protected by an order extending the date for completion without prejudice to her right to maintain that the contract had been validly rescinded.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

RA Myers (instructed by Hall Payne) for the plaintiff.

MD Martin (instructed by ClarkeKann) for the defendant.

Before: Wilson J.

Margaret Wilson J: The plaintiff agreed to purchase an apartment in the Softstone building, which is part of the Tennyson Reach Development, from the defendant.

The defendant was developing land at Tennyson where a community titles scheme under the *Body Corporate and Community Management Act* 1997 (Qld) was to be established.

The apartment in question is a residential apartment on the ground floor of the Softstone building; it includes car parking and storage on one of the basement levels. As well, the plaintiff was to acquire an interest in the common property, as tenant in common with proprietors of other apartments.

The community titles scheme was established on 28 April 2009. The defendant called for completion on 12 May 2009. The plaintiff alleged misleading and deceptive conduct in breach of the *Trade Practices Act* 1974 (Cth) and sought an order declaring the contract void. The defendant counterclaimed for specific performance.

On 10 December 2010 the plaintiff's claim was dismissed and an order for specific performance was made. The completion date was fixed as 8 February 2011. On 13 January 2011 the Brisbane River flooded. Both basement levels of the building were inundated. Water entered the apartment on the ground floor.

The plaintiff has deposed to being informed that it rose to a level of 605 millimetres within the apartment; however, she has not provided the source of that information and strictly that evidence is inadmissible.

The defendant is in possession of the apartment. After the flood, it removed the mud. The walls of the apartment consisted of Gyprock sheeting. The defendant removed the lower level of the Gyprock, which was flood affected. Wiring was disconnected; switches were removed and piled into a heap; appliances were disconnected. I refer to the affidavit of Georgina Louise Madsen, filed on 3 February 2011, as well as two photos of the apartment taken by the plaintiff's husband between 17 and 19 January 2011 (after the cleanup had started) which are exhibited to an affidavit by him filed on 2 February 2011.

On 24 January 2011 the defendant made an open offer to the plaintiff to clean up and restore the apartment to its original condition at the defendant's cost and to waive any right to default interest. The defendant said it required four months in which to complete that work and proposed a settlement date of 4 June 2011, with time remaining of the essence.

On 28 January 2011 the plaintiff rejected that offer and purported to rescind in reliance on section 64 of the *Property Law Act* 1974 (Qld), which provides:

> **64 Right to rescind on destruction of or damage to dwelling house**
>
> (1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.
> (2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the
>
> [140342]
>
> purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.
> (3) In this section—
>
> ***sale of a dwelling house*** means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act* 1980 or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act* 1997 if the lot—
>
> (a) wholly or substantially, consists of a dwelling; and
> (b) is, under the *Land Title Act* 1994—
>
> (i) a lot on a building format plan of subdivision; or

(ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.

(4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary.

Each party filed an application on 2 February 2011. The plaintiff sought a declaration that the contract was duly rescinded in accordance with section 64 of the *Property Law Act* 1974 (Qld) by notice from her solicitors to the defendant's solicitors on 28 January 2011, an order dissolving the decree of specific performance and the ancillary and incidental orders, or, alternatively, a perpetual stay of the decree of specific performance.

The defendant's application sought variation of the order of specific performance by replacing 8 February 2011 with 8 June 2011.

Both applications came before the Court in the Applications List on 3 February 2011. The plaintiff's counsel submitted that section 64 had been satisfied and sought orders in terms of her application. Counsel for the defendant submitted that there were factual and legal issues which could not be determined summarily, and asked the Court to extend the date for completion, without prejudice to the plaintiff's right to maintain that the contract had been validly terminated pursuant to section 64.

Upon a decree of specific performance of a contract for the sale of land, the contract continues to govern the rights and obligations of the parties, but the provisions of the order and not those of the contract regulate how the contract is to be carried out.

Once an order for specific performance has been made:

> 1) a party cannot rescind unless the order is vacated (*Sunbird Plaza Pty Ltd* v *Maloney*;[1] *Kenning Investments Pty Ltd* v *Rusty Rees Pty Ltd*;[2]) and
> 2) the Court has power to extend the time for compliance, both under its power to control the working out of the order for specific performance and pursuant to its power under *Uniform Civil Procedure Rules* 1999 (Qld) rule 665 to extend the time for compliance with an order (*Zorbas* v *Titan Properties (Aust) Pty Ltd*).[3]

In general, the Court has a discretion whether to vacate the order for specific performance to allow a party to rescind: see *Facey* v *Rawsthorne*;[4] *JAG Investments Pty Ltd* v *Strati*;[5] *Buckman* v *Rose*;[6] *Hamdan* and *Widodo (No 2)*.[7]

Where a statutory right of rescission arises after an order for specific performance has been made, it may be that the party with the benefit of the statutory provision has an absolute right to the vacation of the order for specific performance. This is a matter on which I do not express a concluded view.

Pursuant to the contract, the property was at the plaintiff's risk from 12 May 2009. This was the result of the application of clause 15.2, which provided that it should be at the risk of the seller until the Date of Possession. That date was defined in clause 17 as the earlier of the Settlement Date or the date the buyer took possession of the lot. Settlement Date was in turn defined as 14 days after the seller notified the buyer that the scheme had been established, that a certificate of classification has been

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issued, for the building containing the lot, and that, in the reasonable opinion of the seller, the lot was ready for occupation.

However, the contractual provision about the passing of risk is subject to section 64, which has effect despite any stipulation to the contrary.

Counsel were unable to refer me to any reported decisions on the meaning of section 64, and I have found none. There was no discussion of it in the Queensland Law Reform Commission Report which preceded the introduction of the *Property Law Act* 1974 (Qld). Indeed, the section seems to have been added to the bill after that report was finalised.

Section 64 refers to a dwelling house being so destroyed or damaged as to be unfit for occupation as a dwelling house "before the date of completion or possession whichever earlier occurs."

It affords a right to rescind, “not later than the date of completion or possession whichever the earlier occurs.”

It is a moot point whether, “date of completion” means the date set for completion or the date of actual completion.

Here, the original date for completion was 12 May 2009. Pursuant to the order for specific performance the date for completion became 8 February 2011.

Counsel for the defendant submitted that it is arguable that section 64 applies only in the case of destruction or damage before 12 May 2009.

If the expression “date of completion” in section 64 means the date set for completion, I think it is more likely that 8 February 2011 is the relevant date, because the machinery for completion is now governed by the order of the Court. However, I am not expressing a concluded view on what “date of completion” means.

The section refers to the property being “so destroyed or damaged as to be unfit for occupation as a dwelling house.” I am inclined to think that on its proper construction it is referring to unfitness at the date of rescission.

Unfitness involves an assessment of the degree of damage. It may be, as counsel for the plaintiff submitted, that it does not matter whether the damage was all caused by the flood or partly by the flood and partly by work subsequently undertaken by the defendant.

Counsel for the defendant has pointed to the shortness of time available to his client to respond to the application and the absence of a full report on the extent of the damage. Whether the property was rendered unfit for occupation as a dwelling house by the time the notice of rescission was given, whether the damage is able to be rectified, and how long rectification will take are all matters which would require evidence. They are, in my opinion, matters strongly arguably relevant to the assessment of unfitness.

Counsel for the defendant submitted that his client ought to be given the opportunity to lead evidence on these matters at trial.

Counsel for the plaintiff relied heavily on *Georgeson* v. *Palmos*.[8] That concerned the lease of commercial premises for use as “a modern coffee shop and restaurant in conjunction with a retail business for the sale of coffee, tea and similar lines and also cakes, scones, confectionary, cigars, cigarettes, matches and tobacco and for no other purpose.”

Clause 10 of the lease provided for an abatement of rent in the case of destruction or damage subject to this proviso: “provided always that in the event of the demised premises or any part being destroyed or so damaged as to be wholly unfit for occupation or use for the purposes for which the premises were demised either of the parties hereto may at their option terminate the tenancy hereby agreed to be created by giving to the other fourteen days notice in writing to that effect.”

There was a fire in the premises. The Trial Judge found that the damage done by the fire and by the steps taken to quell it reduced the premises to such a state that for a time which could not be regarded as negligible the only purpose for which they could be occupied was to repair the damage that had been done in order to render them fit for use again, and that for that time occupation was not possible for any of the purposes for which the premises were demised.

By making some temporary repairs it was possible for the tenant to open a retail shop (a counter on the street front for restricted business) within 14 days of the fire. It was

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possible only to sell cigarettes and matches and the like from that counter.

The tenant refused to deliver up possession. The question before the Court was whether the premises were wholly unfit within the meaning of the proviso. It concluded that the premises were wholly unfit for occupation and use for the purposes specified, and that the applicability of the proviso could not depend on estimates of time and costs for carrying out repairs necessary to restore the premises to a state fit for such occupation and use.

While that case is helpful, particularly to the plaintiff, it may be able to be distinguished in the present case. It was concerned with a lease where the tenure was of limited duration and there was provision for abatement of the rent.

Here, the case is concerned with the sale of the fee simple in a property.

There are legal questions and related factual questions about the application of section 64, including the date at which unfitness must be established, the meaning of unfitness and the relevance, if any, of the damage being capable of repair.

In my view, these are matters which should go to trial.

Counsel for the plaintiff also told the Court that occupation of the premises at the moment would be illegal under statutory provisions relating to fire safety and other safety and health aspects. He referred to the *Fire and Rescue Service Act* 1990 (Qld) and the *Building Act* 1975 (Qld). Counsel for the defendant submitted that not having had notice of such arguments, he was not in a position to respond to them.

In my view, these arguments really support a favourable exercise of the discretion to extend time for completion, but do not provide a basis upon which the Court could or should determine whether the contract has been validly rescinded under section 64 on this application.

At the hearing I expressed concern about the delay and costs inherent in sending this matter to another trial. I remain concerned about those matters. However, there are questions of fact and law which cannot be determined in a summary fashion. I am satisfied that the plaintiff would be adequately protected by an order extending the date for completion without prejudice to her right to maintain that the contract has been validly rescinded.

I will hear the parties on the form of the order and on costs.

Footnotes

1 (1988)166 CLR 245, 260.
2 [1992] QCA 149.
3 2005] NSWSC 440, [12] and [13].
4 1925) 35 CLR 566.
5 1981] 2 NSWLR 600.
6 1980) 1 BPR 97059.
7 [2010] WASC 6.
8 (1962) 106 CLR 578.

GALLAGHER v BOYLAN

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(2011) LQCS ¶90-170; Court citation: [2011] QSC 94

Queensland Supreme Court

Decision delivered on 28 April 2011

Community schemes — Where plaintiff and defendant executed a put and call option deed relating to land on which a dwelling, swimming pool and tennis court were constructed — Where the land comprised two lots on one indefeasible title — Where the plaintiff sought to withdraw her offer to purchase pursuant to the then s 365(3) of the Property Agents and Motor Dealers Act 2000 as a result of the vendor's failure to comply with the warning statement provisions of the Act — Whether the vendor needed to comply with the consumer protection provisions of the Act — Whether the lot was "residential property" as defined in s 17(1)(a) of the Act — Property Agents and Motor Dealers Act 2000: s 17(1)(a).

The plaintiff purchaser executed a put and call option deed with the defendant vendor in respect of two adjoining lots on which a dwelling, swimming pool and tennis court were constructed. At the time the deed was executed, there was a single indefeasible title for the two lots and the dwelling, swimming pool and tennis court were built across both lots.

Clause 1A of the deed provided that the deposit was to be released to the vendor after a signed copy of the deed had been delivered to the purchaser. The deposit was expressed to be non-refundable unless the vendor was in default of its obligations under the deed or the contract. The purchaser sent the deed and the deposit to the vendor and the vendor complied with cl 1A.

Subsequently the purchaser sought to withdraw her offer to purchase pursuant to the then s 365(3) of the *Property Agents and Motor Dealers Act 2000* as a result of the vendor's failure to comply with the warning statement provisions of the Act. However, the vendor later purported to exercise the put option. When the purchaser failed to complete, the vendor sought to terminate the contract for the purchaser's breach and resold the land to a third party.

In these proceedings, the purchaser was seeking a refund of the deposit paid under the deed. The vendor claimed that the Act did not apply to the transaction as the land was not "residential property" within the meaning of s 17 of the Act as the two lots were two parcels of land. "Residential property" is defined in s 17(1) of the Act as inter alia, "a single parcel of land on which a place of residence is constructed or being constructed …". "Place of residence" is defined in Sch 2 of the Act as a building used, or currently designed for use, as a single dwelling and any outbuildings or other appurtenances incidental to the use of the building. The purchaser countered that the land was residential property as the two lots were a single parcel and were used as such by the residents.

The vendor counterclaimed for the shortfall on the resale of the land plus the expenses of resale which was agreed at $2.1 million.

Held: For the plaintiff.

1. The definition of "residential property" in the Act is critical for determining whether the consumer protection rights that are conferred under the Act on purchasers of residential property apply in a particular case. The words "a single parcel of land" are descriptive rather than technical. Those words take their meaning from the balance of the definition in s 17(1) of the Act and the definition of "place of residence" which concentrates on the use to which the parcel of land is or can be put and, where there is a place of residence that has been or is being constructed, whether it is built on land that is properly characterised for the purpose of the definition in s 17(1)(a) of the Act as a single parcel of land.

As both lots were used as one parcel of land for the residence and appurtenances that were constructed on them, the two lots comprised a single parcel of land for the purposes of s

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17(1) of the Act. Consequently, the deed related to residential property and was therefore a relevant contract for the purposes of the Act.

2. Further, in *Cheree-Ann Property Developers Pty Ltd & Anor* v *East West International Development Pty Ltd* [2007] 1 Qd 132 it was noted in passing that a parcel could comprise more than one registered lot, if they adjoined and were intended to be used for the construction of one place of residence.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

DA Savage SC (instructed by Morgan Conley) for the plaintiff.

MR Bland (instructed by Reichman Lawyers) for the defendant.

Before: Mullins J.

Mullins J:

1. On 7 May 2008 the plaintiff executed a put and call option (the deed) with the defendant who was the owner of land described as Lots 17 and 18 on CP WD5294 in the Parish of Gilston. At all material times a residential dwelling, swimming pool and tennis court were constructed on the land. The plaintiff's solicitor sent the deed together with the call option fee and security deposit payable under the deed of a total sum

of $250,000 to the defendant's solicitors on 8 May 2008. On 12 May 2008 the defendant executed the deed and the defendant's solicitors sent the deed to the plaintiff's solicitor and requested confirmation that the call option fee and security deposit paid by the plaintiff under the deed could be released to the defendant.

2. Clause 1A of the deed provided:

> "The Grantee must pay the Security Deposit to the Depositholder when the Grantee signs this Deed, which amount is non-refundable unless the Grantor is in default of its obligations under this Deed or the Contract, and the Depositholder is authorised to release and pay it to the Grantor immediately after a fully executed copy of this Deed has been delivered to the Grantee."

3. On 14 May 2008 the plaintiff's solicitor wrote to the defendant's solicitors in the following terms:

> "I refer to previous communications in relation to this matter and confirm that it is in order for you to account to the Grantor for the Security Deposit in terms of clause 1A of the Put and Call Option document".

4. The plaintiff's solicitor wrote two letters to the defendant on 13 October 2008 seeking either to terminate the deed under s 367(2) of the *Property Agents and Motor Dealers Act* 2000 (the Act) or to withdraw her offer to purchase the land under s 365(3) of the Act. (Reprint No 3A was the relevant version of the Act that was in force at the time the parties signed the deed.)

5. On 17 October 2008 the defendant's solicitors wrote to the plaintiff's solicitor purporting to exercise the put option conferred by the deed. The defendant was ready and willing to complete the transaction of 20 November 2008, but the plaintiff did not complete. On 28 January 2009 the defendant's solicitors sought to terminate the contact for the plaintiff's breach and the defendant then resold the land.

6. The plaintiff commenced this proceeding to seek a refund of the deposit paid under the deed. The defendant has counterclaimed for the shortfall on the resale of the land plus the expenses of resale which are agreed at $2.1m.

7. There are no facts in dispute. It is common ground that, if the deed were a relevant contract for the purpose of chapter 11 of the Act, the plaintiff neither received from the defendant the warning statement and the deed in the manner required by parts 1 and 2 of chapter 11 of the Act, nor was the plaintiff's attention drawn to the warning statement in the manner specified in the Act. The parties are now agreed that, if the plaintiff were entitled to exercise any right under the Act, it would have been the right under s 365(3) to withdraw the offer to purchase. The issues that are raised by the proceeding are therefore:

> (a) whether the subject land is residential property within the meaning of s 17 of the Act; and
>
> [140347]
>
> (b) if so, whether the plaintiff waived her entitlement under s 365(3) of the Act to withdraw the offer to purchase, as a result of the plaintiff's solicitor's letter dated 14 May 2008 sent to the defendant's solicitors.

Did the deed relate to residential property?

8. Chapter 11 of the Act contains consumer protection provisions for buyers of residential property. The provisions apply to a "relevant contract" which is relevantly defined in s 364 of the Act to mean a contract for the sale of residential property.

9. The definition of "residential property" is found in s 17(1) of the Act:

> "Property is ***residential property*** if the property is
>
> > (a) a single parcel of land on which a place of residence is constructed or being constructed; or
> > (b) a single parcel of vacant land in a residential area".

10. There is no definition of "parcel" in the Act. There is a definition of "place of residence" in schedule 2 to the Act which relevantly means a building used, or currently designed for use, as a single dwelling and any outbuildings or other appurtenances incidental to the use of the building.

11. The subject land comprises two adjoining reverse hatchet lots on a registered plan of subdivision that together have a total area of 2531m^2. The land has a street frontage on its eastern boundary and adjoins the Nerang River on its western boundary. The photographs and plans included in the valuation (exhibit 5) show that at the relevant time the house, tennis court and swimming pool were constructed across both lots and the tennis court and the swimming pool were used in conjunction with the house. A single indefeasible title had been issued by the Registrar under the *Land Title Act* 1994 (*LTA*) for the two lots.

12. The title search for the subject land shows that the title was created on 17 December 1982 which would have coincided with the registration of Crown Plan WD5294. The issue of a single title for Lots 17 and 18 may therefore have occurred prior to the commencement of the *LTA*. That single indefeasible title may not have been issued by the Registrar in exercise of the discretion under s 39(1) of the *LTA*, as suggested by the parties during submissions in this proceeding. Whatever power had been exercised that resulted in the single indefeasible title, it is relevant is that at the time the deed was executed by the plaintiff there was a single indefeasible title for the two lots.

13. The plaintiff's contention is that on the evidence the two lots are a single parcel and were used as such by the residents. Reliance is placed on an observation which I made in *Cheree-Ann Property Developers Pty Ltd & Anor* v *East West International Development Pty Ltd* [2007] 1 Qd R 132 (*Cheree-Ann*) at [55]:

> It is consistent with the genesis of chapter 11 and the consumer protection purpose sought to be achieved by the imposition of additional statutory requirements in relation to contracts for the sale of residential property that the word 'single' is used to describe the parcel of land that must be the subject matter of the contract before chapter 11 of the Act will apply. Although 'parcel of land' is not defined in the Act, it takes its meaning from the context of s 17(1) of the Act. Conceivably a parcel could comprise more than one registered lot, if they adjoined and were intended to be used for the construction of one place of residence."

14. This observation was made in *Cheree-Ann* in dealing with one of the arguments advanced in that case which was based on the definition of "residential property" in s 17(1) of the Act. The Court of Appeal in *Vale 1 Pty Ltd as Trustee for the Vale 1 Trust* v *Delorain Pty Ltd as Trustee for the Delorain Trust* [2010] QCA 259 (*Vale* v *Delorain*) at [1], [7], [73] and [89] did not follow *Cheree-Ann* to the extent that the decision was based on the conclusion that the substance of the subject agreements was to provide stock for the purchasers as property marketers and the agreements could therefore not be characterised as contracts for the sale of the property. The Court of Appeal in *Vale* v *Delorain* at [42] and [73] did not disapprove the other basis for the decision in *Cheree-Ann* which relied on the definition of "residential property." The specific comment made at [55] of *Cheree-Ann*

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suggesting that a parcel could comprise more than one registered lot if the lots were adjoining and intended for use for the one place of residence did not relate to the facts of *Cheree-Ann* and was therefore not essential for the decision.

15. The defendant contends that Lots 17 and 18 are two parcels of land. The defendant relies on the definition of "lot" in schedule 2 to the *LTA* as "a separate, distinct parcel of land created on the registration of a plan of subdivision." The defendant suggests that the explanation for the use of the word "parcel" arises from the mischief that chapter 11 was originally enacted to remedy which was the sale of residential property by unscrupulous property marketeers who may have used the tactic of selling a parcel of residential property off an unregistered plan with settlement to occur 30 days after the registration of the plan. The defendant therefore submits that neither the creation of a single indefeasible title for Lots 17 and 18 nor the construction of a single place of residence across both lots converted the subject land into a single parcel, as it remained divided into two lots that are shown as such on Crown Plan WD5294.

16. The definition of "lot" in schedule 2 to the *LTA* is for the purpose of the use of the word "lot" in the *LTA:* see s 4 *LTA*. It is of note that the legislature chose not to use the word or description "lot" for defining a residential property in s 17(1) of the Act. The definition of "residential property" is critical for determining whether the consumer protection rights that are conferred under chapter 11 of the Act on purchasers of residential property apply in a particular case. The words "a single parcel of land" are descriptive rather than technical. Those words take their meaning from the balance of the definition in s 17(1) of the Act including

the definition of "place of residence" which concentrates on the use to which the parcel of land is or can be put and, where there is a place of residence that has been or is being constructed, whether it is built on land that is properly characterised for the purpose of the definition in s 17(1)(a) of the Act as a single parcel of land. The parcel of land accommodated the curtilage of the residence in addition to the residence and the appurtenances.

17. The defendant's submission merely equates "lot" for "parcel" and gives no significance to the legislature's choice of the word "parcel." The vice of the property marketeers was originally addressed by the introduction in chapter 11 of the requirement of warning statements and cooling off periods. I remain of the same opinion that I expressed in passing in *Cheree-Ann* in the last sentence of [55]. The single indefeasible title for Lots 17 and 18 is consistent with treating them as comprising a single parcel of land, but I did not find that fact decisive of the issue. As Lots 17 and 18 were used as one parcel of land for the residence and appurtenances that were constructed on them, the two lots comprised a single parcel of land for the purpose of s 17(1)(a) of the Act. That has the consequence that the deed related to residential property and was therefore a relevant contract for the purpose of chapter 11 of the Act.

Did the plaintiff waive her right to withdraw from the deed?

18. The right that the plaintiff claims she was entitled to exercise is that conferred by s 365(3) of the Act:

> "Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax to the seller or the seller's agent."

19. The defendant submits that, if the deed were a relevant contract for the purposes of the Act, the plaintiff's solicitor's letter dated 14 May 2008 waived the plaintiff's right to withdraw the offer to purchase arising from any non-compliance by the defendant with s 365(2) of the Act.

20. The parties referred to a number of authorities concerning the application of chapter 11 of the Act. Chapter 11 was substantially amended by part 5 of the *Liquor and Other Acts Amendment Act* 2005 (the 2005 amendments). These amendments addressed concerns raised by, and as a result of, the Court of Appeal decision in *MNM Developments Pty Ltd* v *Gerrard* [2005] 2 Qd R 515: see the reasons given for the *Bill* in the Explanatory

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Notes. In relation to some of the authorities, the statements of principle found in the judgments have to be considered by reference to whether the judgment was given in respect of the Act as it stood either before or after the 2005 amendments.

21. The issue of waiver of a right of termination conferred by the Act (before the 2005 amendments) was considered in *M P Management (Aust) Pty Ltd* v *Churven* [2002] QSC 320 (*M P Management*). The purchaser had purported to terminate the contract on the basis that the warning statement had not been executed and witnessed or dated by the vendor or someone acting for the vendor at the time the purchasers signed the contract nor was it attached as the first and top sheet of the contract. This was not a case where s 365(1) applied to preclude the parties from being bound by the contract. The only statutory right that was in issue was that found in s 367(2) of the Act. Muir J (as his Honour then was) found that the purchaser did not waive its right of termination, because the right to terminate conferred by s 367(2) of the Act was able to be exercised at any time before the contract settled. Muir J explained at [46]:

> "Returning to the question for determination, there is no inconsistency between acknowledging the existence of the contract and taking a step under or in reliance on it on the one hand and the maintenance of the right to terminate conferred by s 367(2), on the other. That provision gives a buyer the right to terminate 'the contract at any time before the contract settles', irrespective of the nature and extent of the performance under the contract and irrespective of the party's conduct by reference to it. Consequently, failure to exercise the right of termination of a contract, even with full knowledge of the right to terminate, is not necessarily inconsistent with acts which acknowledge the continued existence of the contract."

22. In *Juniper* v *Roberts* [2007] QSC 379 the purchaser offered to purchase a residential property from the vendors on terms that did not require settlement for two years and entitled the purchaser to take possession on payment of the initial deposit and acceptance of title which the purchaser did within about two weeks of signing the contract (before the 2005 amendments). While in possession the purchaser leased the property to other persons, did some renovations, removed some fixtures and fittings, and advertised the property for sale. Towards the end of the period of two years and shortly before settlement was due, the purchaser gave notice of termination of the contract on the basis there had been a failure to conform with s 366 of the Act which at the relevant time had required the contract to have attached as its first or top sheet the warning statement containing the information set out in s 366(3). This was also not a case where s 365(1) precluded the parties from being bound to the contract. It was argued that the purchaser had waived his right to terminate the contract under s 367(2) of the Act or elected not to exercise that right by the steps taken by the purchaser under the contract. Douglas J followed the approach of Muir J in *M P Management* and stated at [13]:

> "Because s 367(2) provides a right to terminate at any time before the contract settles it also seems to me that it is correct to say that there is no occasion to elect between alternative rights in this case. In proceeding with the contract until close to the time for settlement, Mr Juniper did not elect to forego the statutory right to terminate at any time before settlement. Accordingly, there is no occasion to apply the doctrines of waiver or election."

23. It was the purchasers in *Blackman* v *Milne* [2006] QSC 350 (*Blackman*) who wished to enforce the contract (which was entered into after the 2005 amendments) and relied on their express waiver of the right conferred by s 365(2)(c)(ii) of the Act. The vendors were seeking to rely on their agent's failure to direct the purchasers' attention to the warning statement. It was therefore not a case involving any issue of waiver of the statutory right to withdraw the offer to purchase under s 365(3) of the Act. To the contrary, Douglas J concluded at [21] that the purchasers had waived the breach by the vendors and their agent of their statutory obligations to direct the purchasers' attention to the warning statement

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by affirming the contract, in spite of those breaches, and stated at [20]:

> "It seems to me, therefore, that the right in this case to have the buyers' attention directed to the warning statement was a statutory right created for the buyers' private benefit which they can, by their conduct, waive. That the performance of that obligation also permits sellers to clarify when the parties are bound to a contract does not stop the sellers' breach of the obligation from being characterised as a breach of a statutory right created for the buyers' private benefit."

24. A case in which waiver of the statutory right under s 365(3) of the Act to withdraw the offer to purchase was considered, but was not necessary for the decision, was *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd* [2008] QSC 261 (*Hedley*). Fryberg J found that the subject contract did not relate to residential property by virtue of the exclusion in the definition in s 17(3)(b)(ii) of the Act. The Court of Appeal in *Hedley* [2009] QCA 231 dismissed the appeal, upholding the decision that the land was not residential property, as a result of s 17(3)(b)(ii) of the Act, but for different reasons to those of Fryberg J. Although Fryberg J considered the alternative arguments canvassed before him, the Court of Appeal at [55] decided they were hypothetical and that it was not necessary or appropriate to consider them.

25. *Hedley* concerned a call and put option deed signed by the parties after the 2005 amendments. If it were a relevant contract, Fryberg J found at [101] that the purchaser had waived any right under s 365(3) of the Act to withdraw its offer. Fryberg J did note, however, at [103] that no argument was addressed as to whether the right under s 365(3) was of such a nature as to be incapable of being waived.

26. The finding made by Fryberg J in *Hedley* was assisted by the admission that was made by the purchaser that the act that constituted the waiver was intended to convey to the vendor and the Office of Fair Trading that it was a party to a binding contract. After the parties had exchanged part and counterpart of the subject deed, the solicitor for the vendor applied to the Office on behalf of the vendor for exemption from ss 8, 9, 10A and 11 of the *Land Sales Act* 1984. The application informed the Office that the vendor had granted the purchaser an option to buy the subject land. The Office issued a requisition for the consent of the purchaser to the exemptions applied for by the vendor. The purchaser signed the consent identifying itself as a party

to the subject deed with the vendor. Fryberg J found at [100] that conveying the consent to the vendor for forwarding to the Office with the intent to convey to both the vendor and the Office that it was a party to a binding contract was inconsistent with retaining an option not to be bound by the deed.

27. As illustrated by the authorities summarised above, waiver arises where a person who is entitled to alternative rights inconsistent with one another makes an election between the rights: see also *Sargent* v *ASL Developments Ltd*(1974) 131 CLR 634, 641, 645, 646, 655 and 658. It is not easy to analyse what occurred between the plaintiff and the defendant in this matter in terms of inconsistent rights, when the effect of s 365(1) of the Act was that they were not bound by the deed, because of the failure of the defendant to comply with s 365(2) of the Act. Apart from statutory rights, there was no binding contract to source the rights.

28. This is a very different case to *Blackman* where it was the purchasers who waived the right conferred by s 365(2)(c)(ii) of the Act to prevent the vendors from relying on their non-compliance with that provision. It makes sense to characterise the purchaser's right to receive the warning statement in the manner specified by s 365(2) of the Act when the relevant contract has been signed by both parties as a statutory right created for the purchaser's private benefit which can be waived expressly by the purchaser to enable the purchaser to obtain the benefit of having both parties bound by the relevant contract.

29. Unlike the purchasers' conduct in *Blackman,* it is difficult to characterise the plaintiff's solicitor's letter of 14 May 2008 as referable to the exercise of an election in relation to any statutory right. The letter authorising the release of the deposit amounts followed from the parties having signed the deed and the plaintiff having paid the total sum

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of $250,000 on account of the call option fee and the security deposit. Although the parties referred to the terms of clause 1A of the deed in the context of the plaintiff's authorising the release of the sum to the defendant, the deed was not, in fact, binding on the parties by virtue of s 365(1) of the Act. The release of the deposit which followed immediately on the payment was not the exercise of any right, as such, by the plaintiff pursuant to the deed or to assert a right that was inconsistent with the statutory right under s 365(3) of the Act. Unlike the purchaser in *Hedley* which asserted in a form required by the Office of Fair Trading that it was the purchaser under the subject deed made with the admitted intention of conveying that it was a party to a binding contract, the act of the plaintiff's solicitor was not made with any such intention. To characterise the letter of the plaintiff's solicitor sent within a day or two days after the deed signed by both parties had been received by the plaintiff's solicitor, and without any attention being given to the operation of s 365 of the Act, would negate the beneficial operation of the consumer protection provisions found in s 365 of the Act.

30. I am therefore not satisfied that in the circumstances the authorisation by the plaintiff, as a result of her solicitor's letter dated 14 May 2008 to release the deposit to the defendant, as anticipated by clause 1A of the deed, amounted to an election by the plaintiff in respect of inconsistent rights. I find that the plaintiff did not by her solicitor's letter dated 14 May 2008 waive her entitlement under s 365(3) of the Act to withdraw the offer to purchase Lots 17 and 18.

Orders

31. The plaintiff is therefore entitled to the refund of the deposit paid under the deed. In August 2009 the defendant paid the sum of $272,725 into court in this proceeding which I infer comprised the deposit and interest accrued until that time. Those moneys will have accrued further interest. The parties indicated that if the plaintiff were successful, she was entitled to the return of the deposit together with interest pursuant to s 47 of the *Supreme Court Act* 1995 from 20 November 2008 to the date of judgment, but taking into account the accretions added to the original deposit sum. The parties were agreed that 10 per cent per annum was the appropriate interest rate to apply under s 47 of the *Supreme Court Act* 1995 which I accept is an appropriate rate to use for this purpose. I calculate the total interest on the deposit of $250,000 to be $60,890.41.

32. The draft order that was provided on behalf of the plaintiff at the conclusion of the plaintiff's submissions sought an order for costs on the standard basis. As the plaintiff has been successful, but subject to giving the defendant an opportunity to make submissions on costs, that is the order for costs that I am inclined to make.

33. In the meantime the orders that I make are:

1. Judgment for the plaintiff against the defendant for the sum of $250,000 and interest pursuant to s 47 of the *Supreme Court Act* 1995 of $60,890.41.
2. The sum of $272,725 plus any accrued interest being the moneys held in court on account of this proceeding be paid out to the plaintiff on account of the judgment sum.

EMVALLE PTY LTD v AQUA VISTA APARTMENTS CTS 37051

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(2011) LQCS ¶90-171; Court citation: [2011] QCAT 224

Queensland Civil and Administrative Tribunal

Decision delivered on 23 May 2011

Community schemes — Dispute between the body corporate for a residential scheme and caretaker and letting agent — Original management rights were assigned twice — Current caretaker and letting agent wished to review remuneration and obligations under the assigned agreement — Body corporate asserted there was no right of review of remuneration as the "original owner control period" has expired — The assignment were akin to a novation meaning that there was a new agreement between the body corporate and current caretaker and letting agent — This essential new agreement was outside the "original owner control period" and not applicable for review under the Act — The current caretaker and letting agent disagreed and asserted that Emvalle (current caretaker) stood in the same position as the entity to which the management rights were originally granted as per the successive deeds of assignment — Tribunal decided Emvalle assignment agreement effected a novation of the original caretaking and letting agreement — It constituted a new contract on the terms of the original caretaking and letting agreement — Application for review of the remuneration under the Emvalle agreement dismissed — Body Corporate and Community Management Act 1997, s 130; 134.

The Body Corporate for Aqua Vista Apartments CTS 37051 (Aqua Vista) entered into a caretaking and letting agreement with Qld Rights Operations Pty Ltd appointing the company as caretaker of the common property and letting agent for the residential scheme for a period of 10 years commencing from 19 July 2007 and ending 18 July 2017. The caretaker's duties and remuneration was set out in a schedule to the agreement. There was an assignment of those management rights from Qld Rights Operations Pty Ltd as original caretaker and letting agent to Blue Chip Holiday Accommodation Pty Ltd (Blue Chip). Blue Chip then assigned those management rights to the current caretakers and applicant Emvalle Pty Ltd (Emvalle).

The assignments were all consented to by Aqua Vista. The terms of the assignment deed are set out at [12] and [13], which essentially stated that Blue Chip agreed to assign all its interest in the caretaking and letting agreement for the unexpired term to Emvalle. Emvalle accepted the assignment of the interest of Blue Chip and all the rights, benefits and obligations of the Manager in the caretaking and letting agreement. Aqua Vista agreed to be bound by the agreement as if Emvalle was the manager originally named in it from the assignment date.

On 19 April 2010, the solicitors for Emvalle wrote to the secretary for Aqua Vista and said that Emvalle sought a review of the agreement in order to decide whether the functions of the caretaker and the remuneration paid to the caretaker were fair and reasonable under s 130 of the Body Corporate and Community Management Act. Emvalle proposed the review be conducted by an independent person to provide a report based on the criteria under s 134 of the Act.

On 29 April 2010, Aqua Vista responded that in accordance with s 130 of the Act, the original owner control period had ended (on 20 September 2007) before the Emvalle assignment agreement was made and therefore Emvalle had no legal right of review. Emvalle was invited to participate in a review of the scope of works under the agreement but without any remuneration review.

On 5 May 2010, solicitors for Emvalle responded to Aqua Vista disagreeing with the construction of s 130 of the Act and asserted that Emvalle stood in the same position as the entity to which the management rights were originally granted as per the successive deeds of

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assignment. By letter of 13 May 2010 Emvalle confirmed that it intended to proceed with the process of review of remuneration. A report was prepared by an independent firm who conducted the review and the report recommended that the remuneration under the agreement be increased to $11,511.67 per annum. Emvalle delivered a copy of the report to Aqua Vista on 15 July 2010 and commenced proceedings for the matter to be heard by the tribunal on 19 July 2010.

Aqua Vista argued in the proceedings that although there were deeds of assignment between the original caretaker Qld Rights Operations Pty Ltd to Blue Chip, and from Blue Chip to Emvalle, the agreements did not operate as assignments of the original caretaking and letting agreement but rather as a new agreement between Emvalle and Aqua Vista. It was a novation of the caretaking and letting agreement. Aqua Vista relied on the principle of law [at 24] that the only manner in which the entirety of the original caretaker and letting agent's interest in the agreement can be passed to Emvalle is by a tripartite contract in which Aqua Vista released the original caretaker and letting agent from its obligations and Aqua Vista and Emvalle agreed that Emvalle will effectively take over the original caretaker and letting agent's obligations and rights. The effect of such a contract is to create a new contract between Aqua Vista and Emvalle.

Aqua Vista also argued that the tribunal had no jurisdiction to hear the application because Emvalle did not comply with s 132(1) as it did not obtain a review advice and give a copy of the advice to Aqua Vista within two months after requesting the review. Accordingly there was no review in respect of which a dispute may arise.

The solicitors for Emvalle submitted that the Act created a new statutory type of contract called a "transfer" [at 29] which may be combination of a deed of assignment and a contract for novation which allows benefits and burdens under a caretaking and letting agreement to be transferred intact to another contractor, therefore keeping the original contract alive. The solicitors referred to s 120 of the Body Corporate and Community Management (Accommodation Module) Regulation 2008 which provides for a "transfer" of service contracts as a separate form of dealing with service contracts to Pt 2 and 3 of the Regulation, which dealt with

the making of service contracts. Further s 112 provides that the engagement of a service contractor under a new agreement must be approved by the body corporate in general meeting whereas the Emvalle assignment was approved by the committee of the body corporate for Aqua Vista.

Emvalle also contended that the request for review was only made in its letter of 13 May 2010 and therefore within the time limit under s 132(1) of the Act.

Held: Application dismissed.

1. The Accommodation Module did not give rise to a new statutory creature known as a "transfer" which is different from a novation of a service contract. Section 120 refers to a "transfer" of service contracts that is not inconsistent with a "transfer" taking effect as a novation or an assignment of rights. Nothing in the Act alters the common law as to assignment and novation of contractual rights and obligations [at 33–34]. The Emvalle assignment agreement effected a novation of the original caretaking and letting agreement. It constituted a new contract on the terms of the original caretaking and letting agreement. For the purposes of s 130 of the Act, Aqua Vista entered into a service contract with Emvalle after the end of the original owner control period. The proceeding brought under s 133(2)(b) by the applicant should be dismissed.

2. The letter of 19 April 2010 sent by Emvalle to Aqua Vista constituted a request for a review. The review advice was not obtained and provided to Aqua Vista within two months after Emvalle requested the review, it has not complied with s 132. The requirement under s 132(1) to obtain a review advice and provide it to the other party was obligatory. If it was not

complied with then no review has been undertaken and no dispute may arise. As a consequence the tribunal has no jurisdiction under s 133.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

D Simpson solicitor for the applicant, Emvalle Pty Ltd.

H Alexander counsel for the respondent, Body Corporate for Aqua Vista Apartments CTS 37051.

Before: Kenneth Barlow SC (Member).

Kenneth Barlow SC, Member:

Introduction

1. Emvalle Pty Ltd is the current caretaking and letting service contractor for the respondent body corporate (Aqua Vista). On 19 July 2010, Emvalle filed an application to resolve a complex dispute pursuant to the *Body Corporate and Community Management Act* 1997. The application states that it relates to a dispute arising out of a review of the terms of the service contract, pursuant to s 133 of the Act. Emvalle seeks, among other things, an order that its remuneration under the caretaking and letting agreement which it has with Aqua Vista be increased to $111,511.67 (plus GST) per annum as and from 19 July 2010.

2. On 27 August 2010, Aqua Vista filed an application within the proceeding seeking to dismiss Emvalle's application, on the ground that the tribunal has no jurisdiction to hear the application because there has not been a review carried out and therefore there is no dispute arising out of a review carried out in accordance with s 133.

3. In response to Aqua Vista's application, on 16 September 2010 Emvalle filed an application for leave to amend its principal application. By the proposed amended application, it added what it stated to be a dispute about a claimed or anticipated contractual matter, pursuant to s 149B of the Act. Emvalle proposes to allege, in its amended application, that there is a dispute concerning the services required to be performed by it under the caretaking and letting agreement, the services actually necessary for the discharge of Aqua Vista's obligations as body corporate, and the amount of reasonable remuneration payable for the necessary services where they exceed the agreed scope of services.

4. These reasons concern the application by Aqua Vista to dismiss Emvalle's principal application and Emvalle's application for leave to amend its principal application.

Background facts

5. On 23 July 2007, Aqua Vista and Qld Rights Operations Pty Ltd made a caretaking and letting agreement in respect of the scheme (which I shall refer to as the "original agreement"). Aqua Vista engaged the caretaker as caretaker of the common property for a period of 10 years commencing on 19 July 2007 and expiring on 18 July 2017. The remuneration of the caretaker was set out in a schedule to the agreement and the caretaker's duties were described in clause 5 and schedule B. The caretaker was also authorised by that agreement to conduct a letting business for unit owners.

6. Clause 13 of the agreement relevantly provided that the caretaker was entitled to assign its interest in the agreement with the consent of the committee of Aqua Vista. The committee could not withhold its consent arbitrarily or capriciously but, among other things, it was entitled to require, before giving its consent, "satisfactory evidence that the proposed assignee is a reputable responsible respectable person capable of satisfactorily performing the duties of the Caretaker pursuant to this agreement".

7. Emvalle and Aqua Vista agree that the "original owner control period" for this scheme[1] ended no later than 20 September 2007. The importance of this date is that, under s 130 of the Act, the body corporate or a service contractor under a service contract (such as the original agreement in this case) may request a review of the functions and powers of the service contractor or the remuneration payable to the service contractor only if the service contract was made within the original owner control period and the contractor's term of engagement has not ended.

8. On 23 April 2008, Aqua Vista, Qld Rights Operations, Blue Chip Holiday

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Accommodation Pty Ltd and two individuals (as guarantors) made an agreement under which Qld Rights Operations assigned to Blue Chip its interest in the original agreement and Aqua Vista consented to that assignment. That agreement relevantly provided:

> *"3.1 The Previous Manager transfers and assigns to the New Manager from the Assignment Date the Previous Manager's right title estate and interest as Caretaker and Letting Agent in, to and under the Agreement."*

9. The Blue Chip assignment agreement (described as a deed of assignment) went on to provide that the new manager (Blue Chip) agreed to perform all of the obligations in the original agreement from the assignment date as if it had originally been named as caretaker and letting agent in that agreement.

10. The Blue Chip assignment agreement also provided that Aqua Vista released the previous manager, in essence, from the performance of its obligations in respect of anything that occurred after the assignment date. Aqua Vista also agreed to be bound by the provisions of the agreement as if the new manager were the caretaker and letting agent originally named in it. The assignment agreement provided that Aqua Vista and Blue Chip ratified and confirmed all of the terms and conditions of the original agreement and agreed to be bound by those terms and conditions.

11. On 31 August 2009, Blue Chip, Emvalle and Aqua Vista, as well as Emvalle's director, Allan Vale, entered into a deed of assignment of the caretaking and letting agreement (the "Emvalle assignment agreement").

12. The Emvalle assignment agreement recited (incorrectly) that Aqua Vista had entered into a caretaking and letting agreement with Blue Chip dated 23 July 2007 for a term of 10 years commencing on 19 July 2007, and Blue Chip had agreed to sell and Emvalle had agreed to purchase the interest of Blue Chip in the caretaking and letting agreement.

13. The Emvalle assignment agreement went on to provide that Blue Chip "hereby assigns to [Emvalle] all its interest in the caretaking and letting agreement from 1 September 2009 … for the residue then unexpired of the term of the caretaking and letting agreement on and from the assignment date", Emvalle accepted the assignment to it of the interest of Blue Chip and "all the rights, benefits and obligations of the Manager named in" the caretaking and letting agreement, agreed to be bound by its terms, and undertook to observe and perform the covenants and conditions contained in the agreement on the part of the manager. The agreement also provided that Aqua Vista consented to the assignment of the caretaking and letting agreement from Blue Chip to Emvalle and covenanted with Emvalle that Aqua Vista agreed to be bound by the provisions of the caretaking and letting agreement as if Emvalle was the manager originally named in it, and in every respect Aqua Vista confirmed the provisions of the caretaking and letting agreement. Finally, the agreement provided that Aqua Vista released Blue Chip from any liability in respect of the performance of Emvalle under the caretaking and letting agreement, from the assignment date.

14. The phrase "caretaking and letting agreement" was defined in the Emvalle assignment agreement as meaning the caretaking and letting agreement dated 23 July 2007 between Aqua Vista and Qld Rights

Operations and the deed of assignment dated 23 April 2008 between Aqua Vista, Qld Rights Operations and Blue Chip.

15. On 19 April 2010, Watson & Quinn, solicitors for Emvalle, wrote to the secretary of Aqua Vista. Relevantly, they said that Emvalle was a party to the caretaking and letting agreement dated 23 July 2007 following its acquisition of its management rights under the Emvalle assignment agreement; that Emvalle sought a review of the terms of the agreement in order to decide whether the functions of the caretaker and the remuneration paid to the caretaker were fair and reasonable; and that Emvalle proposed to appoint an independent person to provide advice concerning those two matters, based on the review criteria described in s 134 of the Act.

16. By a letter dated 29 April 2010, the secretary of Aqua Vista responded to Watson & Quinn's letter of 19 April. He asserted that, in accordance with s 130 of the Act, the original owner control period had ended before the Emvalle assignment agreement was made and

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therefore Emvalle had no legal entitlement to a review. He invited Emvalle to participate in a review of the scope of works under the agreement, but without any remuneration review.

17. By a letter dated 5 May 2010, Watson & Quinn responded to the letter from the secretary of Aqua Vista, disagreeing with his construction of s 130 of the Act. They asserted that Emvalle stood in the same position as the entity to which the management rights were originally granted, as recorded in the successive deeds of assignment. They said that Emvalle remained open to a review of its duties and remuneration as outlined in their earlier correspondence. Emvalle reserved its rights to proceed with the procedure outlined in ss 130 and 131 of the Act.

18. By a letter dated 11 May 2010, the secretary of Aqua Vista responded to Watson & Quinn, reiterating that s 130 did not apply as the original owner control period had ended at a time when the service contractor was not Emvalle.

19. By a letter dated 13 May 2010, Watson & Quinn said that Emvalle intended to proceed with the process for review of remuneration.

20. Emvalle then engaged a building management consultancy and services firm to review the duties and remuneration of the caretaker, having regard to Aqua Vista's obligations as body corporate of the scheme. That firm produced a report in which it recommended that a more specific schedule of the caretaker's duties and responsibilities be included in the agreement to better reflect the requirements of the complex, and that the annual remuneration of the caretaker be increased to $111,511.67 (excluding GST).

21. Emvalle delivered a copy of that report to Aqua Vista on 15 July 2010 and, as I have said, commenced this proceeding on 19 July 2010.

Application to dismiss proceeding

Agreement outside original owner control period

22. The principal basis upon which Aqua Vista seeks an order to dismiss the proceeding is that the agreement between Aqua Vista and Emvalle, which governs their relationship, is the Emvalle assignment agreement. As that agreement was made outside the original owner control period, s 130 of the Act does not apply.

23. Aqua Vista contends that, although called a "deed of assignment", the Emvalle assignment agreement did not operate as an assignment of the original caretaking and letting agreement but as a new agreement (a novation of the caretaking and letting agreement) between Emvalle and Aqua Vista.

24. In this respect, Aqua Vista relies on the principle of law that, while a party to a contract (A) can assign to another person (C) the benefits of the contract, the burdens of the contract (that is, the obligations that A has under it to the other party — B) cannot be assigned. The only manner in which the entirety of A's interest in the contract (the benefits and burdens) can be passed on to C is by a tripartite contract between A, B and C, in which B releases A from its obligations and B and C agree that C will effectively take over A's obligations

and rights. The effect of such a contract is to create a new contract between B and C. This process is, in law, known as "novation".

25. The differences between assignment and novation were usefully discussed by Mr Dorney QC (as his Honour then was) in *Silva Care Australia Pty Ltd* v *Body Corporate for Indigo Blue Beachside Residences* [2009] CCT KC003-07, at [34]–[36]. As Mr Dorney said, there is no principle that a total assignment of both benefits and burdens can occur in a continuing agreement without the contract being novated.

26. Mr Dorney referred in particular to three important passages from the reasons for judgment of Finn and Sundberg JJ in *Pacific Brand Sport & Leisure Pty Ltd* v *Underworks Pty Ltd* (2006) 149 FCR 395. Mr Dorney said:

> *"First, it is stated that while it is ' not legally possible to assign the burden of the contract (ie the obligation to render performance)', it may be possible to assign the 'entire benefit' of a contract or, if a right under a contract is separate and severable, such a separate and severable right or, if some only of the rights under a contract are assignable, those rights: at 404 [32]. Secondly, a third party may become a 'substituted contracting*
>
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>
> *party' by 'novation of the original contract' but novation will, ordinarily, require the agreement of the original and the substituted party … But, on novation, there is 'no assignment of rights and obligations', but rather the creation of new rights and obligations in a new contract: at 405 [32]. Thirdly, 'a contractual obligation cannot be assigned without the consent of the other contracting party' …, although ' for practical purposes ' this ' requires novation of the original contract' (emphasis added) … : at 405 [32].*
>
> *What is abundantly clear from these considerations is that, where continuing contractual obligations are to be undertaken by a new party, the legal analysis must give rise to the consequence of novation: particularly should the original obligor be no longer required to undertake the performance of those contractual obligations."*

27. Mr Dorney went on to analyse the deed of assignment before him. That document appears to have contained very similar provisions to some of those in the Emvalle assignment agreement. In particular, looking at the Emvalle assignment agreement, Emvalle accepted the assignment to it of all the rights, benefits and obligations of the manager named in the "caretaking and letting agreement" (as defined) and undertook to observe and perform all the covenants and conditions of the manager that were in that agreement; Aqua Vista consented to the agreement between Blue Chip and Emvalle and agreed with Emvalle that Aqua Vista would be bound by the provisions of the caretaking and letting agreement as if Emvalle was the manager originally named in it; and Aqua Vista released Blue Chip and its guarantors from any liability in respect of the performance of Emvalle under the agreement from the assignment date.

28. Mr Dorney said, of the agreement before him, "it is difficult to escape the conclusion from the Deed of Assignment that there has been a novation of the Caretaking Agreement, in particular because there was a 'new' set of obligations cast upon the applicants, and the Body Corporate agreed that the applicants were to perform those obligations in place of the previous manager" — at [38]. Those comments are entirely apposite to the Emvalle assignment agreement. The latter agreement does not appear to be relevantly distinguishable from the agreement before Mr Dorney.

29. Mr Simpson, who appeared for Emvalle, submitted that the Act creates a new statutory type of contract, called a "transfer", which may be a type of amalgam of a deed of assignment and a contract for novation, and which allows both the benefits and the burdens of a service contract to be "transferred", intact, to another contractor, while keeping alive the original contract and simply substituting a party to it. He supported this submission by referring to the fact that part 4 (s 120ff) of the Accommodation Module provides for the "transfer" of service contracts, as contrasted with parts 2 and 3, which deal with the making of service contracts, and s 112 provides that the engagement of a service contractor under a new agreement must be approved by the body corporate in general meeting using a secret ballot, whereas the Emvalle assignment agreement was only approved by Aqua Vista's committee.

30. The Accommodation Module is, of course, a regulation under the Act. There is some doubt whether the meaning of terms in an Act can be construed by reference to the terms of a regulation made under that Act, but even if it can the provisions to which Mr Simpson referred do not assist him. Section 120 expressly declares that approval of a "transfer" may be by the committee, so that overcomes the point arising from s 112. And part 4, in referring to the "transfer" of service contracts, is not inconsistent with a "transfer" taking effect as a novation, or simply being an assignment of rights. Indeed, s 120(1) refers to a transfer as being a transfer of a person's "rights" under a service contract, and s 120(5) specifically provides that the approval by a body corporate of a transfer may be given on condition that the transferee enter into a deed of covenant to comply with the terms of the service contract. That provision itself appears to allow for what would, in law, be a novation.

31.

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Thus, the Accommodation Module does not, in my view, give rise to a new statutory creature known as a "transfer", which is somehow different from a novation of a service contract.

32. I have also considered Mr Simpson's submission having regard to the terms of the Act that deal with the transfer of service contracts. Section 122(3) permits a regulation module to include provisions for payment of a transfer fee if any "rights" under a service contract are "transferred to another entity". And chapter 3, part 2, division 8 of the Act, which is immediately after the division concerning review of the terms of service contracts, provides for the required transfer of a letting agent's management rights. The division sets out circumstances in which a letting agent must "transfer" the letting agent's management rights for a scheme. Perhaps most relevantly, s 144 says, of a contract that has been transferred under ss 141 or 143, that the terms of the transferred service contract are the terms applying to the service contract immediately before the transfer. Do those provisions affect the ordinary law as to assignment and novation?

33. In my view, they do not. First, s 122(3) is simply an empowering provision allowing the making of regulations. Secondly, division 8 deals only with the compulsory transfer of a letting agent's management rights under ss 141 and 143. It does not deal with transfer by consent of the terms of a letting agent's contract. Thirdly, although the sections only talk about transfer of the letting agent's "rights", clearly they are intended also to require the letting agent's obligations under its contract to be transferred. There is a way, under the existing law, to transfer both rights and obligations, namely by novation. There is no apparent need for a new statutory concept. It would have been easy for Parliament to make it clear if that had been its intention.

34. Therefore, there is nothing in the Act that appears to alter the common law as to assignment and novation of contractual rights and obligations.

35. Consequently, in my opinion the Emvalle assignment agreement effected a novation of the original caretaking and letting agreement. In other words, it constituted a new contract on the terms of the original caretaking and letting agreement.

36. In fact, the original caretaking and letting agreement, between Aqua Vista and Qld Rights Operations, came to an end when the Blue Chip assignment agreement came into effect in April 2008, as that agreement also appears to have constituted a novation of the original caretaking and letting agreement.

37. The consequence of this conclusion, for the purposes of s 130 of the Act, is that Aqua Vista entered into a service contract with Emvalle after the end of the original owner control period. Therefore, s 130 and the rest of division 7 do not apply to this contract and, insofar as this proceeding was brought under s 133(2)(b), it is misconceived and lacking in substance. It therefore ought be dismissed or struck out under s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009.

No review advice within 2 months of request

38. In case this matter proceeds further and I am held to be wrong in my conclusion above, I shall proceed to consider the other bases on which Aqua Vista seeks to have the application dismissed or struck out.

39. The first is that the tribunal has no jurisdiction to hear the application because Emvalle did not comply with s 132(1) in that it did not, within 2 months after requesting the review, obtain a review advice and give a copy of the advice to Aqua Vista.

40. In this respect, Aqua Vista contends that Emvalle requested Aqua Vista to review the terms of the contract, pursuant to s 130(2), by Watson & Quinn's letter dated 19 April 2010. Emvalle, on the other hand, contends that the request was made by Watson & Quinn's letter dated 13 May 2010. Clearly, if Aqua Vista is right, then the review advice was not obtained and given to Aqua Vista within 2 months of the request, as the report obtained by Emvalle was (it is agreed) dated 2 July 2010 and given to Aqua Vista on 15 July 2010.

41. To my mind, there is no doubt that the letter of 19 April 2010 constituted a request for a review. It says so in so many words, namely "our client seeks a review of the terms of the agreement". The letter of 13 May 2010, which says, "we are instructed our client intends to

proceed with the process for review of remuneration" does not, in my view, constitute a request, but is rather a confirmation that, having requested a review, Emvalle proposed to proceed to undertake a review in accordance with the process set out in the Act. Indeed, s 132 sets out the "procedure for review" and Emvalle purported to take steps in accordance with that procedure by seeking a review advice.

42. Therefore, as the review advice was not obtained and provided to Aqua Vista within 2 months after Emvalle requested the review, it has not complied with s 132.

43. However, does that mean that Emvalle is not entitled to apply to the tribunal under s 133?

44. In *Silva Care,* Mr Dorney formed the conclusion that, where no step had been taken toward a review after the request for a review had been made, the failure to carry out a review "does deprive this tribunal of the jurisdiction to seek to resolve a dispute that, in reality, has not arisen." But this case is distinguishable from *Silva Care* because Emvalle has taken further steps, namely by obtaining a review advice and providing it to Aqua Vista, although outside the period of 2 months after requesting the review.

45. In *Clarke* v *The Body Corporate for Linear Kings Beach* [2009] CCT KC 011-09, Mr Thomas AM QC said, at [13]:

> *"No 'review advice' was obtained by the trust within 2 months of making that request [for review]. Accordingly so far as that request is concerned, the Trust failed to comply with a mandatory requirement of section 132. It would seem to follow that the applicant cannot succeed if he were to base his case upon that particular request."*

46. Mr Alexander, who appeared for Aqua Vista, contended that the effect of s 132(1) is similar to that of s 459G(2) of the *Corporations Law.* The latter subsection provides that an application to set aside a statutory demand served on a company may only be made within 21 days after the demand is served. If an application to set aside a statutory demand is not filed within 21 days after service of the demand, then the court has no jurisdiction to hear the application: *David Grant & Co Pty Ltd* v *Westpac Banking Corp* (1995) 184 CLR 265. Similarly, Mr Alexander contended, because s 132(1) provides that the reviewing party must obtain a review advice and give a copy of it to the other party "within 2 months after requesting the review", if it does not do so no review was required to be carried out under that division and therefore no dispute may arise under s 133 in respect of which this tribunal has jurisdiction.

47. Although not without some hesitation, I agree with Mr Alexander's contention. A review must be carried out (that is, it is required to be carried out) once a request is made under s 130(2): that subsection provides that if requested the reviewing parties must review the terms of the contract. I agree, with respect, with Mr Dorney insofar as he says that, if no further step is taken after a request, then there is no review in respect of which a dispute may arise. Similarly, the requirement under s 132(1) to obtain a review advice and provide it to the other party is obligatory. If it is not complied with, then no review has been undertaken and no dispute may arise. As a consequence, the tribunal has no jurisdiction.

48. Notwithstanding the word "must" in subsection 130(2), it is arguable that the provision is, to use some old terms, directory only and not mandatory: it is procedural and the act does not indicate that a failure to comply with the procedure set out results in there being no jurisdiction in the tribunal to hear a dispute. But in

my view the purpose of the division is to enable a review to take place promptly and within a certain period. Indeed, the period for a review is limited not only by the period of 2 months from the date of a request, but also by the fact that a review must be completed within the "review period". (In this case, the parties agree that the review period ended on 26 July 2010.) The strict time limits indicate, to my mind, an intention by Parliament that the right of review only persists if the time limits are complied with. To paraphrase the words of Gummow J in *David Grant & Co Pty Ltd* (at 270), the division of the Act providing for the review of service contracts constitutes a legislative scheme for a limited right to an early and quick resolution of the extent of duties and remuneration under service contracts. And (at 277) the effect of the requirement that a review advice "must" be obtained and given within 2 months and that a review "must" be finished within the review period, is to define the limited

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circumstances in which the right of review arises. Once that right of review is lost, there can be no review out of which a dispute may arise for this tribunal to determine.

49. Mr Simpson relied on s 61 of the QCAT Act to seek an order extending the time limit provided by s 130(2). However, s 61 only allows for an extension of procedural time limits. As I have found that s 130(2) is not merely procedural, but sets out a substantive requirement, s 61 provides no power to extend the time limit. The relationship between the two sections is similar to that between s 459G(2) and s 1322(4)(d) of the *Corporations Law* which were considered by the High Court in *Dabid Grant & Co Pty Ltd.*

50. Therefore, on this ground as well I consider that the application is misconceived, because there is no dispute in respect of which the tribunal has jurisdiction under s 133.

Inadequate time for review

51. Another submission made on behalf of Aqua Vista was that, even if a request had been made and the review advice was given to it within 2 months of the request, or a period of 2 months was not mandatory, subsection 132(4) provides that a review must be finished as soon as reasonably practicable after a copy of the review advice is given to a reviewing party and within the review period. The review advice was given to Aqua Vista on 15 July 2010, only 8 days before the end of the review period. Aqua Vista could not possibly undertake its review and make a decision about the outcome of the review before the end of that period, because subsection 132(3) provides that a body corporate's final decision about the outcome of the review must be made by ordinary resolution. That would require a general meeting of the body corporate to be called, which could not be done within 8 days. Mr Alexander relied in this respect upon the decision of this tribunal in *Mynex Pty Ltd* v *Body Corporate for Captain's Corner* [2010] QCAT 157. In that case, Ms Reid said that, as the body corporate had not been afforded sufficient time to consider the review document in a reasonably practical timeframe, or one that would permit it to respond to the applicant's request to consider the review advice, the tribunal could not exercise its jurisdiction under s 133.

52. That case involved a similar circumstance to this, as the review advice was provided 10 days before the end of the review period.

53. With all due respect to Ms Reid, I disagree with the proposition that, because a review advice is delivered very shortly before the end of the review period, thus disabling the other party to the review from undertaking its own review, there is then no dispute arising out of a review. Subsection 133(4) says that subsection (5) applies if only one of the reviewing parties has carried out the review. Subsection (5) provides that a dispute is taken to exist between the reviewing parties if the reviewing party who carried out the review considers the reviewable terms are not currently fair and reasonable.

54. Where a party obtains a review advice and, having reviewed that advice, considers that the reviewable terms are not currently fair and reasonable, then a review has been carried out, although not by both parties who are required to carry it out. If that review is carried out too late for the other party to carry out a review within the review period, in my opinion that does not prevent subsections 133(4) and (5) from applying. Subsection (5) appears to me to apply whenever one party has not completed a review, for whatever reason, provided that the other party has completed a review and formed the necessary opinion.

55. Therefore, if this were the only ground upon which Aqua Vista had contended that there was no dispute giving rise to this tribunal's jurisdiction, it would not succeed.

Amendment

56. In the face of the application to dismiss or strike out the principal application, Emvalle seeks leave to amend its application. It wishes to contend that there is a dispute between it and Aqua Vista about a claimed or anticipated contractual matter about its engagement as a caretaking service contractor and its authorisation as a letting agent, and therefore it may apply to this tribunal under s 149B of the Act.

57.

[140361]

The dispute which Emvalle wishes to raise by its proposed amendment is said to arise from the following circumstances:

> a) the report comprising the review advice stated that, for the body corporate effectively to carry out its obligations, the caretaking and letting agreement ought to provide for a considerably greater number of services to be carried out by the caretaker than it does;
> b) Aqua Vista has asked Emvalle to review the services required to be provided under the agreements and Emvalle has agreed to review those services provided that Aqua Vista also agrees to review its remuneration;
> c) because Aqua Vista has sought to increase the duties provided by Emvalle but has refused to consider a review of remuneration, there is a dispute concerning the services contract.

58. Mr Alexander, for Aqua Vista, submitted that there is no dispute identified in the proposed amended application because, although Aqua Vista asked Emvalle to review the services which it provided under the contract, it has not insisted that Emvalle carry out any services additional to those which it is required to carry out under that contract.

59. In my view, that is correct. No real dispute has been identified by Emvalle as to the extent of services which it is obliged to provide, or the remuneration to which it is entitled, under the existing service contract. It is irrelevant whether the services which it is obliged to provide under the contract are sufficient to enable the Body Corporate to carry out its obligations to maintain the common property. If they are insufficient, then it would be to Aqua Vista's benefit to seek to reach agreement that Emvalle provide additional services, for which it might expect to have to pay additional fees. But at present there is no current dispute that I can see arising from the matters set out in the proposed amendment. It simply alleges that Aqua Vista "seeks to increase the duties provided by" Emvalle and has "refused to consider a review of remuneration payable" under the contract. In other words, Emvalle and Aqua Vista have been unable to agree on a different contract to the existing one. But neither has insisted that the existing contract imposes obligations which the other party disputes. The proposed amendment does not demonstrate any arguable dispute about the existing contract.

60. Therefore, I do not consider it appropriate to give Emvalle leave to amend its application.

61. Having reached this conclusion, I do not need to consider Aqua Vista's submission that, if the proceeding as currently constituted does not raise an issue for the tribunal, there is no proper proceeding on foot in which an amendment may be allowed.

Consequence

62. The consequence of my conclusions above is that the proceeding ought be dismissed or struck out. The QCAT Act does not make clear what the difference is between dismissal and striking out. Having regard to the practice in courts in Queensland, which was well known when this Act was passed, I consider that to strike out an application would be akin to striking out a pleading — that is, the proceeding remains on foot, but the pleading is treated as if it does not exist. The party concerned may be able to obtain leave, either at the time of the order or later, to file an amended pleading (or, in this tribunal, an amended application). On the other hand, an order dismissing the proceeding brings it to a complete end (subject, of course, to any rights of appeal).

63. Emvalle has not demonstrated any basis on which it may be able to make a valid application in this proceeding. In that circumstance, I consider that it is not appropriate simply to strike out the application. It ought be dismissed.

Footnotes

1 See definition of “original owner control period” in schedule 6 to the Act.

BATWING RESORTS PTY LTD v BODY CORPORATE FOR LIBERTY ON TEDDER CTS 27241

(2011) LQCS ¶90-172; Court citation: [2011] QCAT 277

Queensland Civil and Administrative Tribunal

Decision delivered on 24 June 2011

Community schemes — Dispute between caretaker and body corporate — Caretaker refused to maintain gardens outside of title line to scheme — Caretaker said it was not in the caretaker agreement — Body Corporate disagreed and deducted remuneration — Caretaker made application to QCAT as complex dispute — Body Corporate made cross claim against caretaker arguing caretaker had agreed to maintain gardens outside of contract therefore caretaker estopped from refusing to maintain those gardens — Caretaker applied to have dispute transferred to higher court as it argued that QCAT has no jurisdiction to hear equitable matters — Body Corporate disagreed — Body Corporate and Community Management Act 1997, s 149B — Queensland Civil and Administrative Tribunal Act 2009, s 9.

Batwing Resorts Pty Ltd (Batwing) was the on-site caretaking manager for the body corporate scheme, Body Corporate for Liberty on Tedder CTS 27241 (Body Corporate). The dispute arose when Batwing notified the Body Corporate and all unit owners in the scheme that it would no longer be attending to the care and maintenance of gardens and lawns beyond the "title line". The Body Corporate disagreed that Batwing could lawfully do that and deducted amounts from the monthly remuneration it paid to Batwing under the caretaking agreement.

Batwing applied to the QCAT for a mandatory injunction that the Body Corporate pay what had already been deducted and refrain from making further deductions or withholding remuneration until the dispute about the meaning and effect of the agreement and the manager's obligations had been resolved.

In the course of the litigation, the Body Corporate alleged that Batwing was prevented on equitable grounds from denying an obligation to maintain areas outside the title line and it cross claimed against Batwing for equitable damages. The Body Corporate claimed that there was an agreement between the parties and a promise from Batwing to maintain the gardens and lawns outside the common property and as a consequence Batwing was estopped from denying that obligation.

Batwing and the Body Corporate at first instance sought an application that the claims be transferred to the District Court on the grounds that QCAT did not have the power to grant the equitable relief it sought in its cross claim. However, at the hearing the Body Corporate took a different position and argued that the QCAT did have jurisdiction to hear the matter. Batwing disagreed and submitted that the Body Corporate's cross claim for equitable relief should be transferred to the Supreme Court.

QCAT has power under s 149B of the *Body Corporate and Community Management Act 1997* to decide on "contractual matters" concerning the engagement of a service contractor. Under the definitions of Sch 6 of the Act, a "contractual matter" includes the exercise of rights or powers and the performance of duties under it. The parties agreed that their original dispute about Batwing's obligations to maintain gardens outside the title line of the premises was of that kind and the QCAT had jurisdiction to deal with that specific matter. However, the question was whether the QCAT had equitable jurisdiction to deal with the Body Corporate's cross claim? It was noted that s 9(4) of the *Queensland Civil and Administrative Tribunal Act 2009* provided the tribunal with jurisdiction to "… do all things necessary or convenient for exercising its jurisdiction".

[140363]

The following points were made by the Body Corporate in support of its assertion that the tribunal had jurisdiction to grant equitable relief in this matter:

- In *Prasad* v *Fairfield City Council* [2000] NSWADT 164, the Judicial Member in the NSW Administrative Decisions Tribunal held that the ADT had jurisdiction to hear the matter concerning the applicant's right to conduct its business without competition based on principles of promissory estoppel. The Judicial Member held that the ADT's equitable powers should not be cut down.
- The High Court in *R* v *Ross Jones*: *ex parte Green* (1984) 156 CLR 185 held that if the equitable order sought is consequential on or incidental to an order being made in the other proceedings then it will have the appropriate relationship to link it as part of the tribunal's original jurisdiction.
- The degree of connection between the contractual dispute and the equitable relief sought was also considered by Cavanough J in the VACT decision of *Tucci* v *Victorian Civil and Administrative Tribunal & Anor* [2010] VSC 425. Cavanough J noted that the Victorian Tribunal had power to hear a consumer and trader dispute, and even though it was not a court, it was obviously intended to have power to recognise and give affect to equitable defences in cases of that kind.
- In *Emanuele* v *Australian Securities Commission* (1996) 188 CLR 114, Kirby J observed at 147:

  > "A feature of the administration of justice in more recent times has been a general disfavour towards procedural rigidities and a preference for a somewhat more flexible approach to statutory preconditions where these are of a procedural character."

- The QCAT is said to be a "court of record" under s 164 of the QCAT Act.

The following points were advanced in support of Batwing's application that the matter of equitable relief be transferred to a superior court:

> • A subordinate court or tribunal must find its powers in the express language of the statute which gives it existence and in the implications which derive from that language (*Walton* v *McBride* [1995] 36 NSWLR 440 per Kirby J at 447). The QCAT Act does not expressly bestow equitable jurisdiction upon the tribunal.
> • In *The Herald & Weekly Times* v *Victoria* [2006] VSCA 146, the President of VCAT, Morris J issued an injunction against the publication of the contents of a settlement agreement between parties who had been involved in proceedings and Morris J also ordered that a newspaper be restrained from publishing the contents of the terms of settlement and it was that order that came before the Court of Appeal. The Court of Appeal had to decide whether the suppression order could be said to be so related to the original proceeding that it formed part of it which the tribunal had original jurisdiction to determine. The Court of Appeal decided that the tribunal had not had jurisdiction because the different proceedings lacked the necessary inter-relationship.
> • The fact that QCAT is designated as a "court of record" does not automatically infer that the legislature intended to invest it with the power or right to draw upon the broad powers of a superior court. This was expressed in the High Court decision *DJL* v *Central Authority* (2000) 201 CLR 226, where the governing legislation of that court provides no express conferral of particular powers.

Held: Application dismissed.

1. It was clear that QCAT was not intended by the legislature to have all the same broad equitable powers as a superior court. It was improbable that the legislature intended that the tribunal would immediately cede jurisdiction when instances like the present arise. It was, as a matter of logic, equally improbable that there was legislative intent that inter-linked disputes like those arising here could or should be adjudicated separately.

2.

[140364]

In this case, the agreement between the parties which underpinned the tribunal's jurisdiction was affected by events and circumstances associated with it which gave rise to equitable defences or reliefs. Once that was appreciated, it was compelling that the different elements of the dispute formed part of the same proceeding. The test applied by the Victorian Court of Appeal in The Herald & Weekly Times, and suggested by the High Court in *R v Ross Jones*, and as observed in *Tucci*, expressed that it was readily foreseeable that, in the jurisdiction invested in QCAT by the Body Corporate and Community Management Act, equitable defences or matters involving equitable issues might from time to time arise. The grant of powers to the tribunal under the Queensland Civil and Administrative Tribunal Act pointed to sufficient clarity to a construction of the legislation which would empower the tribunal to address the equitable cross claims raised by the respondent here in a matter where the applicant has brought a claim which plainly, otherwise fell within the tribunal's statutory jurisdiction.

3. The proceedings should remain in the tribunal and Batwing's applications should be dismissed as should the Body Corporate's original application for a transfer of the proceedings.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

S McNeil (instructed by Hynes Lawyers) for the applicant Batwing Resorts Pty Ltd.

D Keane (instructed by Ledger & Co Lawyers) for the respondent Body Corporate for Liberty on Tedder CTS 27241.

Before: Justice Alan Wilson (President).

Editorial comment: Justice Alan Wilson referred to Dawson J's observation in *Grassby* v *R* (1989) 168 CLR 1 at 16–17, that while inferior courts are unable to draw upon the unrestrained and undivided powers of superior courts, they may possess jurisdiction arising by implication on principle that a grant of power carries with it everything necessary for its exercise. The word "necessary" defined in s 9(4) of the *Queensland Civil and Administrative Tribunal Act 2009* as identifying a power to make orders which reasonably requires or are legally ancillary to the accomplishment to specific remedies (*Pelechowski* v *Registrar* (1999) 162 ALR 336 at 348). It was observed that for an inferior tribunal to exercise an implied or "necessary" power, that power must be clearly evident in the statute said to confer it. For example, under s 69(1) of the *District Court of Queensland Act 1967* a court may exercise all the powers and authorities of the Supreme Court including giving effect to every ground of defence, whether equitable or legal. However, the Body Corporate and Community Management Act does not provide clear expression of conferral powers relating to the QCAT. The Body Corporate and Community Management Act, however, does provide that Adjudicators appointed under Ch 6 have power to make orders that are "just and equitable in the circumstances (including a declaratory order) to resolve a dispute" about contractual matters.

Justice Alan Wilson, President: The parties to this proceeding are the managers of a unit development on the Gold Coast, and its Body Corporate. Contractual arrangements between them are affected by the provisions of the *Body Corporate and Community Management Act 1997* (BCCMA). This Tribunal is invested with jurisdiction in some disputes arising under that legislation, but the question that has arisen now is whether or not QCAT also has jurisdiction concerning disputes referrable to the legislation but not, themselves, directly governed by it. In short, the question is whether or not QCAT has an

equitable jurisdiction which complements what it can do under the BCCMA and the *Queensland Civil and Administrative Act 2009* (QCAT Act).

2. The dispute goes back to 2009 when Batwing, as the on-site manager, notified the Body Corporate and all unit owners that it would not henceforth be attending to the care and maintenance of gardens and lawns beyond the "title line". The Body Corporate disagreed that Batwing could lawfully do that, and began to deduct amounts from the monthly

remuneration it paid Batwing under the On-Site Management Agreement.

3. Batwing then applied to QCAT for a mandatory injunction that the Body Corporate pay what had already been deducted ($26,837) and refrain from making any further deductions or withholding remuneration until the dispute about the meaning and effect of the agreement and the manager's obligations, if any, for maintenance of gardens outside the property itself was resolved.

4. On 7 June 2010 interim orders on those lines were made after Batwing provided the usual undertaking as to damages. The parties were then directed to exchange submissions and attend a compulsory conference.

5. In the course of these steps the Body Corporate alleged in tribunal documents that Batwing was prevented, on equitable grounds, from denying an obligation to maintain areas outside the title line, and it cross applied for equitable damages from Batwing.

6. In that cross-application the Body Corporate claimed that there was an agreement between the parties, and a promise from Batwing, to maintain gardens and lawns outside the common property and that, as a consequence, Batwing is legally prevented ("equitably estopped") from denying an obligation to maintain those lawns and gardens; or, that it should pay damages for its failure to fulfil its obligation under those promises.

7. Batwing says these claims are outside QCAT's jurisdiction and those parts of the Body Corporate's documents which raise them should be struck out; or, that those claims should be transferred to the District (or Supreme) Court, which has jurisdiction, under s 52 of the QCAT Act.[1]

8. The Body Corporate then filed a further application seeking an order that the entire proceeding be transferred to the District Court (or to a Commissioner appointed under the BCCMA, for specialist adjudication) on the grounds that QCAT does not have power to grant the equitable relief it seeks in its response and its cross application.

9. What came on for hearing before the Tribunal were:

a) Batwing's application to strike out parts of the Body Corporate's response and cross claim; or, for an order transferring those parts of the cross-claim to the District, or Supreme Court; and
b) The Body Corporate's application to transfer the entire proceedings to the District Court.

10. At the hearing however the Body Corporate, through its counsel, took a different position from what might have been expected, in light of its application: Mr Keane argued that QCAT *does* have jurisdiction to deal with the equitable relief the Body Corporate sought, and should do so. Batwing's representatives were (unsurprisingly) rather taken by surprise, they having attended the hearing in the belief that the Body Corporate not only did not oppose, but actively sought, a transfer of the proceedings to another court. Because of that surprise, counsel for Batwing was given leave to deliver supplementary written submissions after the hearing, as she did. In those submissions it is now said that the Body Corporate's claims for equitable relief should be transferred to the Supreme Court.

11. Under ss 6 and 9 of the QCAT Act this Tribunal has jurisdiction to deal with matters invested in it under that Act, or an enabling Act. Here, the enabling Act is the BCCMA and the substantive dispute concerns contractual relations between a body corporate, and its caretaker. QCAT's power to determine that dispute arises under s 149B of the BCCMA, which gives the Tribunal jurisdiction in a dispute about a *contractual matter* concerning the engagement of a service contractor.

12. Under the definitions in Schedule 6 of the BCCMA a *contractual matter* concerns, among other things, alleged contraventions of the terms of the contract of engagement, and the exercise of rights or powers and the performance of duties under it.

13. The parties agree that their original dispute about Batwing's obligations to maintain gardens outside the title line of the premises was of that kind, and QCAT has jurisdiction.

14. The QCAT Act does not expressly bestow equitable jurisdiction upon the Tribunal but it is invested, under s 9, with jurisdiction to deal with matters under the QCAT Act or

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enabling Acts in original, review or appeal jurisdictions — and, under s 9(4) it is given jurisdiction to "*… do all things necessary or convenient for exercising its jurisdiction".*

15. The QCAT Act is to be interpreted in a way which will best achieve its purposes.[2] Here, provisions concerning QCAT's jurisdiction appear in a number of different places in the legislation. Section 3 sets out its objects which include, in s 3(b), the purpose of having a tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick. The Tribunal's functions relating to these objects include, in s 4, encouraging the early and economical resolution of disputes before the Tribunal; ensuring proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and, ensuring the Tribunal is accessible and responsive to the diverse needs to the persons who use it.

16. In conducting its proceedings the Tribunal must act fairly and according to the substantial merits of the case, and with as little formality and technicality and as much speed as the requirements of the QCAT Act (or an enabling Act) and a proper consideration of the matters before the Tribunal permit: s 28.

17. The Tribunal also has particular powers which have historical foundations in the equitable jurisdiction of the courts: the power to grant injunctions, and to make declarations (ss 59 and 60).

18. A subordinate court or tribunal must find its powers in the express language of the statute which gives it existence and in the implications which derive from that language.[3] Even in the absence of an express power, however, an inferior court may have an implied power to grant certain kinds of relief. As Dawson J observed in *Grassby* v *R* (1989) 168 CLR 1 at 16–17 while inferior courts are unable to draw upon the unrestrained and undivided powers of superior courts, they may possess jurisdiction arising by implication, on the principle that a grant of power carries with it everything necessary for its exercise.

19. The word "necessary" has been defined, in a context similar to that appearing in s 9(4) of the QCAT Act, as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment to specific remedies.[4]

20. It has also been observed that, for an inferior tribunal to exercise an implied or "necessary" power, that power must be clearly evident in the statute said to confer it.[5]

21. In Queensland, inferior courts have been expressly given some equitable jurisdiction: for example, under s 69(1) of the *District Court of Queensland Act 1967* that court may exercise all the powers and authorities of the Supreme Court including giving effect to every ground of defence, whether equitable or legal. The Magistrates' Court is given a limited, equitable jurisdiction under s 4 of the *Magistrates Court Act 1921*.

22. No similar, clear expression of conferral of these powers appears in the QCAT Act (or, relevantly here, in the BCCMA).

23. Some reliance was placed, by the Body Corporate, upon a decision of the Administrative Decisions Tribunal of New South Wales in *Prasad* v *Fairfield City Council* [2000] NSWADT 164, which involved a dispute about retail shop leases under the *Retail Leases Act 1994* (NSW). The applicant there sought, in effect, a declaration that the respondent was estopped from denying the applicant's right to conduct its business without competition, relying upon principles of promissory estoppel. Under s 72 of the NSW legislation the Tribunal had power to determine matters concerning retail tenancy disputes which included remedies such as relief from forfeiture, injunctions, declarations and ancillary orders necessary to give full

effect to the provision. The judicial Member of the ADT held that these equitable powers should not be cut down, and rejected the respondent's contentions that the Tribunal lacked jurisdiction.

24. In Victoria, the Court of Appeal looked to the degree of connection between the matter in which the Victorian Civil and Administrative Tribunal did have jurisdiction, and its power in equity to grant an injunction, in *The Herald & Weekly Times* v *Victoria* [2006] VSCA 146.

25. In that case the President of VCAT, Morris J, had issued an injunction against the publication of the contents of a settlement agreement between parties who had been

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involved in proceedings before the Tribunal. The Tribunal's legislation gave it power to grant an injunction, but Morris J had also ordered that a newspaper be restrained from publishing the contents of the terms of settlement, and it was that order which came before the Court of Appeal.

26. The Victorian Court of Appeal[6] held that the critical question was whether or not VCAT had jurisdiction to entertain the application and said that the answer depended on whether the claim for a suppression order could be said to be so related to the original proceeding that it formed part of it or whether it was, in truth, a separate proceeding in respect of which the Tribunal's original jurisdiction had not been invoked. The Court ultimately found that the Tribunal had not had jurisdiction because the different proceedings lacked the necessary inter-relationship.

27. That question of relationship was addressed by the High Court in *R* v *Ross Jones*: *ex parte Green* (1984) 156 CLR 185 in which Gibbs CJ (with whom Mason J agreed) said[7] that proceedings will have the appropriate relationship if the order sought is consequential on or incidental to an order being made in the other proceedings.

28. The degree of connection was also considered by Cavanough J in a matter involving judicial review of another VCAT decision, *Tucci* v *Victorian Civil and Administrative Tribunal & Anor* [2010] VSC 425. The question was whether VCAT had jurisdiction to hear a claim by a landlord against a guarantor of the tenant's obligations under a lease. At [46]–[47] Cavanough J noted that, because the Victorian Tribunal had power to entertain a consumer and trader dispute, and even though it was not a court, it was obviously intended to have power to recognise and give affect to equitable defences in cases of that kind:

> Equitable principles and defences would potentially be relevant in many kinds (perhaps all kinds) of consumer and trader disputes, not only in disputes relating to guarantees. The posited inability of VCAT to have regard to equitable principles or defences surely could not have the effect that contracts of guarantee, alone amongst all contracts, are taken outside the notion of "services" and outside the definition of "consumer and trader dispute.

29. The Body Corporate also relied, in its submissions here, upon the fact that QCAT is said in s 164 of its Act to be a "court of record". The fact that QCAT is so designated does not, however, appear to carry any strong or automatic inference that the legislature intended to invest it with the power or right, either inherent or implied, to draw upon the broad powers of a superior court. As the High Court said of the Family Court in *DJL* v *Central Authority* (2000) 201 CLR 226, the governing legislation of that court provides no express conferral of particular powers.[8]

30. It is also to be observed that, despite the fact that the District Court of Queensland is categorised as a "Court of Record" in s 8 of its governing legislation, the legislature also apparently deemed it necessary to include an express provision granting it general powers to exercise wide equitable jurisdiction.

31. The Body Corporate also sought to rely upon the decision of the High Court in *Emanuele* v *Australian Securities Commission* (1996) 188 CLR 114 and, in particular, an observation of Kirby J at 147:

> A feature of the administration of justice in more recent times has been a general disfavour towards procedural rigidities and a preference for a somewhat more flexible approach to statutory preconditions where these are of a procedural character.

32. Gaudron J also observed in *Emanuele* that the powers of courts must be exercised in the interests of justice, which are not well served if the exercise is undertaken inflexibly and without regard to the "…

convenience of the situation".[9] Her Honour's judgment was a dissenting one, but it is not unfair to observe that a similar philosophy springs from the judgments in the subsequent decision of the High Court in *Aon Risk Services Australia Limited* v *Australian National University* (2009) 239 CLR 175.

33. Prior to 1 December 2009 disputes of the present kind were within the jurisdiction of the former Commercial and Consumer Tribunal (CCT). In *Sandmoon Pty Ltd* v *Body Corporate for South Pacific Noosa Apartments CTS 26117* [2008] QCCTBCCM 27 the presiding CCT member, Mr James Thomas AM QC was concerned with a dispute between a managing agent and a Body Corporate over whether the latter was entitled to terminate the managing agent's rights under the applicable agreements. The managing agent had sought a variety of forms of relief from the CCT, including alternative claims for relief against forfeiture of its interest in the agreements.

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34. As the learned and very experienced Member observed, under the CCT's governing legislation[10] the Tribunal was given jurisdiction to deal with particular matters and, under s 9 given the power to *"… do all things necessary or convenient to be done for exercising its jurisdiction"* — that is, the legislation was in almost identical terms to s 9(4) of the QCAT Act. The CCT Act also required, in s 4, that the CCT act in ways that were "… *just, fair, informal, cost efficient and speedy*".

35. Although Mr Thomas ultimately concluded that the legislation did not invest that Tribunal with powers to grant equitable remedies like relief against forfeiture or penalty he observed, in passing, that the BCCMA gives Adjudicators, appointed under Chapter 6, power to make orders that are "*just and equitable in the circumstances (including a declaratory order) to resolve a dispute*" about contractual matters: s 276; and, that it was odd that no similar provision appeared to have been included in the legislation for the CCT. He went on to observe that the failure appeared to be the product of an oversight, requiring serious reconsideration by the legislature.

36. Elsewhere, the provisions of the BCCMA make it clear that the legislature intended, in the Act, to confine and simplify dispute resolution processes: in s 228(1)(d) it is said that Chapter 6, relating to dispute resolution, is intended to establish arrangements for resolving disputes about matters arising under the engagements of persons as Body Corporate managers — that is, the provision is couched in broad terms, which might be said to include the disputes anticipated by the Act itself.

37. There are other indications that the legislature considered that QCAT would be a Tribunal undertaking important legal work, and that its jurisdiction ought not be unduly constrained: for example, persons can only be appointed Senior Members of QCAT if they are Australian lawyers of at least 8 years standing, and ordinary Members must have been Australian lawyers for 6 years.

38. While it is clear that QCAT was not intended, by the legislature, to have all of the same broad equitable powers as a superior court it is improbable that the legislature intended that the Tribunal would immediately cede jurisdiction when instances like the present arise. It is, as a matter of logic, equally improbable that there was legislative intent that inter-linked disputes like those arising here could, or should, be adjudicated separately.

39. In this case the Body Corporate is arguing, in effect, that the agreement between the parties which underpins this Tribunal's jurisdiction has been affected by events and circumstances associated with it which give rise to equitable defences, or relief. Once that is appreciated, it is compelling that the different elements of the dispute form part of the same proceeding — the test applied by the Victorian Court of Appeal in *Herald & Weekly Times,* and suggested by the High Court in *R* v *Ross-Jones*; and, as observed in *Tucci,* it is readily foreseeable that, in the jurisdiction invested in QCAT by the BCCMA, equitable defences or matters involving equitable issues might from time to time arise.

40. The grant, to this Tribunal in the QCAT Act, of specific powers to provide traditional equitable remedies under its legislation, read in combination with the clauses discussed earlier, points with sufficient clarity to a construction of the legislation which would empower this Tribunal to address the equitable cross claims raised by the respondent here in a matter where the applicant has brought a claim which plainly, otherwise, falls within the Tribunal's statutory jurisdiction.

41. For these reasons, I have concluded that the proceedings should remain here and Batwing's applications should be dismissed — as should the Body Corporate's application for a transfer of the proceedings.

Footnotes

1 Section 52 allows QCAT to transfer a proceeding, or part of a proceeding, to a court if it considers the subject matter would be more appropriately dealt with by that court.

2 *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

3 *Walton* v *McBride* [1995] 36 NSWLR 440 per Kirby P at 447.

4 *Pelechowski* v *Registrar, Court of Appeal* (1999) 162 ALR 336 at 348.

5 *Queensland Fish Board* v *Bunney*, *ex parte Queensland Fish Board* [1979] Qd R 301 at 303.

6 Chernov, Nettle and Ashley JJA.

7 At 197 citing *Perlman* v *Perlman* (1984) 155 CLR 474.

8 See also *R* v *Forbes*; *Ex parte Bevan* (1972) 127 CLR 1.

9 At 137.

10 *Commercial and Consumer Tribunal Act 2003.*

DUNWORTH v MIRVAC QLD PTY LTD

(2011) LQCS ¶90-173; Court citation: [2011] QCA 200

Queensland Supreme Court of Appeal

Decision delivered on 19 August 2011

Conveyancing — Contract for sale — Where appellant agreed to purchase an apartment from the respondent — Where the appellant had contended she was induced to enter the contract by false, misleading and deceptive representations and had previously obtained an injunction restraining the respondent from terminating and the respondent had counter-claimed for specific performance — Where the appellant's claim was dismissed and an order for specific performance was made with a new completion date set — Where apartment was subsequently flooded so as to be unfit for occupation as a dwelling — Where appellant purported to rescind the contract pursuant to s 64 of the Property Law Act 1974 due to flood damage — Where the appellant applied for a declaration that the contract had been validly rescinded and for dissolution of the order for specific performance — Where the trial judge extended the time for completion and made orders to facilitate trial of the issues raised — Whether purchaser's right of rescission under s 64 exists until the actual date of completion or only until the date of completion specified in the contract — Property Law Act 1974, s 64.

The appellant purchaser agreed to buy a residential apartment from the respondent vendor for $2.155 million. After the community titles scheme was established, the vendor called for completion by 12 May 2009. The purchaser unsuccessfully sought an order declaring the contract void, alleging misleading and deceptive conduct in breach of the then *Trade Practices Act 1974* (Cth). The purchaser's claim was dismissed and an order for specific performance was made, with the new completion date being fixed as 8 February 2011.

Before the new settlement date arrived, the building was inundated by flood water. The vendor made an open offer to the purchaser to clean up and restore the apartment to its original condition at the vendor's cost. The vendor said it required four months in which to complete that work and proposed a new settlement date of 4 June 2011.

The purchaser rejected the vendor's offer to restore the apartment and purported to rescind the contract on the ground that the apartment had been rendered "unfit for occupation as a dwelling unit". The purchaser thereby exercised a statutory right of rescission said to arise from s 64 of the *Property Law Act 1974*. Section 64(1) provides that:

> "In any contract for the sale of a dwelling house where, *before the date of completion* or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's
>
> [140370]
>
> solicitor not later than the date of completion or possession whichever the earlier occurs." (emphasis added)

Because the contract was subject to the earlier court order for specific performance, the purchaser needed the court's leave to enforce her right to rescind. She therefore applied for a declaration that the contract had been rescinded and the dissolution of the order for specific performance. Instead the trial judge extended the completion date by four months and made procedural orders to facilitate a trial of "the issues raised in the application". The extension of time for completion was expressed to be made without prejudice to the purchaser's right to maintain that the contract had been validly terminated pursuant to s 64 of the Property Law Act.

The trial judge did not think it necessary to determine whether the "date of completion" in s 64 refers to the date set for completion by the contract or the date of *actual* completion. If the "date of completion" refers to the date stipulated in the contract, the vendor contended that the purchaser's rescission was too late.

On appeal, the purchaser noted that as a consequence of the order made by the trial judge, the purchaser would have had to perform the contract by order of the court before the court had even determined whether she was ever obliged to do so. The purchaser submitted that the trial judge's order should be set aside and an order be made that the order for specific performance be vacated, with a declaration made that the contract was rescinded.

The vendor countered that the s 64 right of rescission could only have been exercised prior to the contractually appointed date for completion and that the purchaser's case was based on "an attempt to take advantage of her own wrong".

Held: for the appellant — appeal allowed (see para 46 of the judgment for the specific orders made).

1. Section 64 of the Property Law Act accords a right of rescission where premises are rendered uninhabitable "before the date of completion or possession". The apparent objective of the provision is to accord relief to a purchaser where, without fault on his or her part, the subject matter of an uncompleted contract is rendered unfit for the purpose. The interpretation of the meaning of the phrase "date of completion" that best fits with the objective of the provision, is that put forward by the purchaser: that is, if prior to *actual* completion or possession the premises are rendered unfit, the purchaser gains a right of rescission. This interpretation is supported by the fact that s 64 does not refer to the date of completion "appointed under the contract".

2. The vendor's submission that this construction of s 64 rewards a wrong-doing purchaser, was unfounded. The purchaser had at an anterior stage suffered the consequence of her breach of contract: she was subjected to court orders adverse to her, including

an order for specific performance of the contract. The subsequent damaging of the property was obviously entirely without fault on her part.

3. It followed that because, as conceded by the vendor, the unit was rendered uninhabitable by the date of the purported rescission, the purchaser gained a right to rescind at any time up to the date of actual completion or possession.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

W Sofronoff QC SG, with R Myers (instructed by Hall Payne Lawyers), for the appellant.

AJ Myers QC AO, with LF Kelly SC (instructed by Corrs Chambers Westgarth), for the respondent.

Before: de Jersey CJ, McMurdo and Dalton JJ

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Chief Justice:

Preliminary

1. By a contract dated 25 July 2007, the appellant agreed to purchase from the respondent a residential apartment in a proposed building at Tennyson, Brisbane. The purchase price was $2.155 million. Before any completion of the contract, the by-then completed building was, on or about 13 January 2011, inundated by flood water.

2. The ground floor unit which is the subject of the contract was flooded. It was necessary to remove the lower level of gyprock sheeting of the walls and to disconnect the electrical wiring and appliances. A measure of the devastation of the flood was that the respondent required four months to complete the necessary restoration work, which it offered to carry out. The respondent made that offer on 24 January 2011.

3. The appellant rejected the respondent's offer to restore the unit, and on 28 January purported to rescind the contract on the ground that the unit had been rendered "unfit for occupation as a dwelling unit". The appellant thereby exercised a statutory right of rescission said to arise from s 64 of the *Property Law Act* 1974 (Qld).

4. That section provides:

> "**64 Right to rescind on destruction of or damage to dwelling house**
>
> (1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.
> (2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.
> (3) In this section—
>
> ***sale of a dwelling house*** means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act 1980* or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act 1997* if the lot—
>
> (a) wholly or substantially, consists of a dwelling; and
> (b) is, under the *Land Title Act 1994*—
>
> (i) a lot on a building format plan of subdivision; or
> (ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.

(4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary."

5. The originally appointed completion date, following the establishment of the applicable community title scheme, was 12 May 2009. The appellant contended she had been induced to enter into the contract by false, misleading and deceptive representations. On 11 May 2009, the day before the originally appointed date for completion, the appellant obtained an injunction restraining the respondent from terminating for default, in order to preserve her opportunity to have the court declare the contract void under the *Trade Practices Act* 1974 should her contentions be vindicated. In the resultant proceeding, the respondent counterclaimed for specific performance.

6. On 10 December 2010 the appellant's claim was however dismissed, and an order made for specific performance, with a completion date fixed for 8 February 2011. It was on or about 13 January 2011 that the building was flooded and damaged, and the

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appellant purported to exercise her statutory right to rescind on 28 January 2011.

7. Because the sale contract was subject to the court order for specific performance, the appellant needed the court's leave to enforce her right. She therefore applied for a declaration that the contract had been rescinded and the dissolution of the order for specific performance. The learned primary Judge heard that application on 3 February 2011 and gave judgment on 7 February 2011 (completion was due under the specific performance order on 8 February 2011). The instant appeal is brought against that judgment.

The primary judgment

8. The learned Judge extended the completion date to 8 June 2011, that is, by four months, and made procedural orders to facilitate a trial of "the issues raised in the application", and entered the proceeding on the Commercial List. The extension of time for completion was expressed to be made "without prejudice to the [appellant's] right to maintain that the contract has been validly terminated pursuant to section 64 of the *Property Law Act* 1974 (Qld)". Her Honour said there were "questions of fact and law which cannot be determined in a summary fashion".

9. The question of fact the Judge identified was whether the premises had been damaged so as to be unfit for occupation as a dwelling, and as to the ambit of rectification. Counsel for the respondent had sought time to adduce evidence on those aspects (a position no longer maintained on appeal).

10. As to questions of law, Her Honour considered "moot" whether in referring to the date of completion, section 64 is referring to "the date set for completion [that is, by the contract] or the date of actual completion". If the former, then Counsel for the respondent now contend that no such rescission could have been effected after 12 May 2009. Her Honour also left open whether the exercise of a statutory right of rescission after a specific performance order has been made entitles the party exercising that right to the dissolution of the specific performance order.

11. The extended completion date of 8 June 2011 has now passed. The parties have however agreed to stay the operation of the orders made on 7 February 2011 until the determination of the instant appeal.

The parties' contentions

12. Mr Sofronoff QC, who appeared for the appellant, submitted that the learned Judge erred in failing to determine the following issues:

1. the effect of the subsistence of the specific performance order on the exercise of the statutory right to rescind;
2. the date at which the premises must have been unfit for habitation for the right under section 64 to have been available;
3. the date of completion contemplated by section 64, in circumstances where a specific performance order was subsisting; and
4. any relevance in the respondent's capacity to restore the damage.

He submitted that until those matters of law were resolved, Her Honour had no basis upon which to determine "whether to decide the issue or issues of fact herself or send the matter for trial".

13. Mr Sofronoff pointed to an unusual aspect of the order made by the Judge, in that "the appellant will have to perform the contract by order of the court before the court has even determined whether she was ever obliged to do so". He submitted that Her Honour's order should be set aside, and in lieu thereof, an order be made that the order for specific performance be vacated, with a declaration made that the contract was rescinded on 28 January 2011; or alternatively, in the event the respondent may wish to pursue a factual issue about habitability of the premises on 28 January 2011, that a short adjournment be granted for that purpose so that the respondent might gather and present material going to that issue. (The respondent now concedes the premises were relevantly uninhabitable.)

14. Mr Myers QC, who appeared for the respondent, submitted that the section 64 right of rescission could only have been exercised prior to the contractually appointed date for completion, and that the appellant's case is based on "an attempt to take advantage of her own wrong" — being her failure to complete in accordance with the contract. He submitted that

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while Her Honour erred in making orders numbers two to four (the procedural orders facilitating a trial) and five (in relation to costs), she correctly continued the operation of the specific performance order, and he sought a further extension of the time for completion under that order. (The respondent has filed a cross appeal.)

15. As mentioned already, Mr Myers conceded that as at 28 January 2011 the premises had been damaged so as to be unfit for occupation as a dwelling house, and that that remained the position as of 8 February 2011.

Discussion

The appropriateness of the approach taken at first instance

16. If the questions of law should be determined favourably for the appellant, then there would be no occasion for a trial.

17. The position now taken for the respondent invites attention to a limited question of construction, namely, whether a right of rescission under section 64 could subsist beyond the contractually appointed completion date, in circumstances where, as here, a specific performance order in effect took over. Had that issue been determined favourably to the respondent, there likewise would have been no need for a trial.

18. It would therefore have been preferable had the Judge addressed those questions definitively, because of the consequences if determined in a particular way.

19. The orders in fact made amounted to a deferring of the determination of issues of both law and fact, but with the unusual consequence, to which reference has already been made, of obliging the appellant to complete the contract in circumstances where a court may subsequently find that she was not in reality obliged to do so.

20. In making the orders she made, the learned Judge was exercising a discretion. While judges may in some circumstances decline to determine questions of law summarily because of their complexity, as upon applications for summary judgment, this was a situation where determinations should have been made so that the scope of the parties' respective obligations was clarified. In my respectful view, the learned Judge erred in not determining those questions of law, and this court should now do so. I therefore turn to those questions.

The question of construction

21. The effect of the specific performance order was to subject the future exercise of the parties' contractual rights and obligations to court control (*Singh (Sugadar)* v *Nazeer* [1979] Ch 474, 480-2). The contract remained in force and did not merge in the judgment for specific performance (*Johnson* v *Agnew* [1980] AC 367, 393, *Ogle* v *Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 460).

22. Mr Myers submitted that "[t]he only agreed date of completion was that for which the contract provided and which, in accordance with its terms, was 12 May 2009", and that that is the date relevant for the purposes of section 64, rather than "a date fixed of necessity by a court because one party breached the contract".

23. On the other hand, Mr Sofronoff primarily submitted that section 64 refers to the "actual date for completion which is current at the date of termination", including a date set by the court, although he advanced a less restrictive construction in his reply, to which I will come.

24. Mr Myers responded that the appellant thereby asked the court to interpret section 64 to "enable her to take advantage of her own wrong", and referred to well-established authority that "a statute should not be interpreted to enable a person to gain an advantage or profit from his or her own wrong" (for example, *Bennion on Statutory Interpretation,* 5th ed, p 1141).

25. The statutory provision accords a right of rescission where premises are rendered uninhabitable "before the date of completion or possession".

26. Subject to the terms of the particular contract (compare cl 15.2 of this contract), a purchaser would at common law have to suffer the consequence of that loss (*Fletcher* v *Manton* (1940) 64 CLR 37, 45, 49; *Lysaght* v *Edwards* (1876) 2 Ch D 499, 507). This statutory provision ameliorates that position. (Victoria has a broadly comparable provision: s 34 *Sale of Land Act* 1962 (Vic).)

27.

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Naturally read, those words in section 64 could refer to one or other of the following.

28. First, they could refer to the currently applicable date for completion or possession as at the time the premises suffered the requisite damage. If the damage occurs prior to that date, the right of rescission arises. In that regard, it may be noted the provision does not refer to the date of completion "appointed under the contract", suggesting a date ordered by the court could fall within the ambit of the provision.

29. Second, the words could refer to the earlier of the date of actual completion or possession, a possibility which engaged Counsel towards the end of their oral argument. Supporting that construction is the reference in section 64 to a date "of", rather than "for", completion or possession, as if referring to a date of actual completion, or the actual taking of possession.

30. The apparent objective of this beneficial provision is to accord relief to a purchaser where, without fault on his or her own part, the subject matter of an uncompleted contract is rendered unfit for the purpose. Consistently, the second of those constructions is textually preferable: if prior to actual completion or possession the premises are rendered unfit in that way, the purchaser gains a right of rescission.

31. As has been seen, the written submissions focused on the significance of the court's imposition of the date for completion by means of the order for specific performance, in the context of the contractually agreed date for completion. It is not necessary to analyse those competing contentions in detail because of what I consider to be the natural construction of the provision. But in deference to the arguments of Counsel, the following points may briefly be made, and they support the view that if the actual date "of" completion should yield to the current date "for" completion, the latter concept nevertheless embraces a date set by the court under an order for specific performance and is not limited to the contractual prescription.

32. First, Mr Myers submitted that the decree for specific performance need not have specified a date for completion, reinforcing his contention as to the irrelevance of the date in fact appointed here by the court. The submission would be sufficiently answered by the fact that the court did appoint the date which thereby became the currently applicable date for the purpose of section 64. Had no date been set by the court, one party could have given notice to complete, or the parties may have agreed on a date, or the court could itself subsequently have set a date. Had no date been nominated, agreed or set in that way prior to 28 January 2011, the section would nevertheless have been engaged, because "the date of completion or possession" would, although not yet prescribed, have remained in the future.

33. Second, the opening words of section 64(1), "[i]n any contract for the sale …", upon which Counsel for the respondent relied, would not require or suggest that the subsequent reference to "the date of completion

or possession" be limited to that contractually agreed. The opening reference to "the contract" is intended simply to signal that the availability of this right of rescission is limited to agreements for the purchase of dwellings.

34. Third, Counsel for the appellant pointed out that the respondent could have avoided the risk of this situation arising by terminating the contract for the appellant's failure to complete, rather than enforcing the contract following the dismissal of the appellant's claim on 10 December 2010. While the respondent would thereby have avoided this risk, with the inundation occurring later, I do not consider it necessary or especially helpful to have regard to that sort of consideration in determining the natural construction of section 64: the words are clear and speak for themselves.

35. Fourth, Counsel for the respondent provided an example of what was said to be the "capricious" operation of section 64 if the construction primarily urged by the appellant were adopted. Counsel submitted that "a purchaser who had no grounds for rescinding a contract and who was due to complete it under the contract, and who had an expectation from weather predictions that a severe flood could occur in the foreseeable future (or a damaging storm), could deliberately and wilfully breach the contract, fail to complete, and act on the chance that a court-ordered date for specific

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performance would post-date a flood or damaging weather event that might occur", and under that scenario derive a right of rescission. What I believe is the natural construction of section 64 should not yield to such an extreme possibility.

36. Fifth, I would in any case accept the responding submission for the appellant, that when the court specified a new date for completion, that became in all respects the applicable date under the contract which subsisted subject to court control.

37. But as I have said, it is compelling to conclude, and I do, that the provision should naturally be read as contemplating the actual date "of" completion or possession: if that has not arrived, in that neither completion has occurred nor possession been taken, and the requirement of the provision is satisfied (destruction or damage leading to unfitness for occupation), a right of rescission is available to the purchaser.

Conclusion

38. It follows that because, as conceded, the unit was rendered uninhabitable by the date of the purported rescission, the appellant gained a right to rescind at any time up to the date of actual completion or possession (whichever be the earlier date).

39. Addressing the other points left open by Her Honour, I would accept the submission that the unit must have been uninhabitable as at the date of the rescission which was effected. Also, noting that the provision gives no right to a vendor to maintain the contract in order to attempt to repair the damage, the possibility of restoration does not preclude rescission where the premise of the provision has been met, that is, the dwelling has been destroyed or damaged so as to be unfit for occupation as a dwelling.

40. The submission that this construction rewards a wrong-doing purchaser is unfounded. The appellant had at an anterior stage suffered the consequence of her breach of contract: she was subjected to court orders adverse to her, including an order for specific performance, the respondent having decided to enforce rather than terminate the contract. The subsequent damaging of the property was obviously entirely without fault on her part. Any benefit she gained from the exercise of her right of rescission was not consequent upon any "wrong-doing" on her part, the consequences of which had earlier been spent; it was the consequence of the operation of remedial legislation.

Appropriate relief

41. The orders made by the learned Judge should be set aside, and the order for specific performance originally made on 10 December 2010 and varied by Her Honour on 7 February 2011 set aside.

42. In *Sunbird Plaza Pty Ltd* v *Maloney* (1988) 166 CLR 245, 260 Mason CJ observed that "rescission after an order for specific performance requires the leave of the court or, more appropriately, the vacation of the order". Neither was sought in this case in advance of the purported rescission. In *Stevter Holdings Ltd*

v *Katra Constructions Pty Ltd* [1975] 1 NSWLR 459, 469–470, Helsham J dealt with such a situation by discharging the contract. See also the approach of the New South Wales Court of Appeal in *JAG Investment Pty Ltd* v *Strati* [1981] 2 NSWLR 600, 603. In *Stevter*, Helsham J observed that where a rescission had otherwise been duly effected, there would ordinarily be an entitlement to the discharge of the contract.

43. We were informed that whether the contract is discharged now, or the rescission on 28 January 2011 retrospectively authorized, has no commercial consequence. Which course is now followed is a formality.

44. However, following the approach suggested by Mason CJ in *Sunbird Plaza*, the preferable approach in this case is probably simply to order that the order for specific performance made on 10 December 2010 and varied on 7 February 2011 be vacated. That would fall within the court's power in regulating performance by the parties under the contract, and would operate to remove, retrospectively, the fetter upon the appellant's power to exercise her statutory right of rescission when she did.

45. There should also however be a declaration that the appellant validly rescinded the contract on 28 January 2011. With the vacating of the order for specific performance, such a declaration is strictly not necessary, but should be made lest there be any residual doubt

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as to the validity of the rescission. So far as necessary, the court would thereby be seen to be lending its authority to that course retrospectively.

Orders

46. The following orders should be made:

1. that the appeal be allowed, the orders and directions made on 7 February 2011 be set aside, and the order for specific performance made on 10 December 2010 also be set aside;
2. that there be a declaration that on or about 28 January 2011 the appellant validly rescinded her contract with the respondent dated 25 June 2007;
3. that the respondent's cross appeal be dismissed; and
4. that the respondent pay the appellant's costs of the appeal and cross-appeal, and the hearing in the Trial Division, to be assessed on the standard basis.

McMurdo J: I agree with the orders proposed by the Chief Justice and I substantially agree with his reasons.

48. The application to the primary judge involved no factual issue of any consequence. Clearly the property was unfit for occupation when the appellant purported to terminate the contract and was to remain so for some months. But the respondent suggested to the primary judge that there was a factual question, which was whether the unfitness for occupation came from the flooding itself as distinct from what the respondent had done afterwards, such as removing all sheeting and disconnecting electrical wiring. As I read the transcript of that argument, this was the factual issue which the respondent suggested required a trial. Not surprisingly, that was not a submission repeated in this appeal. The respondent could hardly have avoided the operation of s 64 by proving that the critical damage was that which it had inflicted.

49. The real question raised by the application concerned the proper interpretation of s 64 and, in particular, the meaning of the expression "date of completion". The appellant's principal argument is that this was the date fixed by the Court in ordering specific performance of the contract. The respondent's case is that it was the agreed date for completion, which had long passed. And ultimately the appellant further argued that it means the date of actual completion. In my view, it is that third argument which should be accepted.

50. A difficulty in this interpretation is that s 64 does not simply refer to completion, but to the date of completion. Against that, the term is date *of* completion rather than date *for* completion. And the respondent conceded that the alternative of "possession" means actual possession, rather than an agreed date on which the purchaser would take possession, which provides some support for the interpretation which I accept.

51. The evident policy underlying this provision is the protection of purchasers of dwelling houses from the burden of having to complete a contract where the house becomes uninhabitable by destruction or damage after the contract is made. Absent a term to the contrary, the common law position would be that the property

would be at the purchaser's risk pending completion.[1] The apparent purpose of this provision is to shift that risk to vendors.

52. The respondent argues that the legislative purpose could not have been to assist a purchaser who had failed to complete as agreed, which was the position here. However, the respondent's argument, if accepted, would also affect the position of an innocent purchaser. Upon its argument, if the agreed date for completion passed because of the default of the vendor, after which the house was destroyed but before completion, nevertheless the purchaser would be without the protection of s 64(1). That unattractive result, it is argued, would be the consequence of the purchaser's election to affirm the contract. This is difficult to reconcile with the apparent purpose of the provision. Moreover, an innocent purchaser would not be obliged to elect immediately upon the vendor's failure to complete on the agreed date,[2] so that upon the respondent's argument, a purchaser could lose the benefit of s 64 where the house is destroyed prior to an election to affirm.

53. The most likely intention, which is consistent with the words used, is that this alteration of the risk in favour of purchasers

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should remain in place notwithstanding the passage of the agreed date for completion. The burden of this risk upon the vendor is made an element of the contractual relationship for as long as the contract remains on foot. Where an innocent vendor affirms the contract after a purchaser's failure to complete, the contract which is affirmed retains that element. In this particular case, the innocent vendor was restrained by an interlocutory injunction from terminating the contract for the purchaser's failure to complete, although the purchaser's claim for ultimate relief, under s 87 of the *Trade Practices Act* 1974 (Cth), was for the termination of the contract. On one view, the operation for s 64 in these circumstances could appear harsh. But the particular circumstances could not have been considered to be so likely to occur that they should affect the interpretation of s 64.

54. Central to the respondent's argument is the proposition that the contract remained unaffected by the terms of the order for specific performance. I would accept that proposition which, although not affecting the interpretation of the section, is relevant to the terms of the relief which should be granted to the appellant. The appellant applied for a declaration that she had duly terminated the contract on 28 January 2011. She also applied for an order that "the decree of specific performance and the ancillary and incidental orders made herein on 10 December 2010 be dissolved". This was consistent with the longstanding view that an order for specific performance should not be left in place if the contract had been or was to be terminated. In *Sunbird Plaza Pty Ltd* v *Maloney*, Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) said that "… rescission after an order for specific performance requires the leave of the court or, more appropriately, the vacation of the order".[3]

55. But according to some authority, a contract could not be terminated after a decree of specific performance without first obtaining the permission of the Court, so that it would be by the Court's order that the termination occurred. For example, in *JAG Investment Pty Ltd* v *Strati*, Hope JA, citing *Johnson* v *Agnew*,[4] said that in this context "… it is clear that the contract cannot be determined until the approval or order of the court has been obtained, and that it is the order, or something done by authority of the order, that operates to terminate the contract".[5] At the same time, Hope JA said of this jurisdiction (to set aside the order for specific performance) that its "precise nature … is not entirely clear".[6]

56. In *Sunbird Plaza Pty Ltd* v *Maloney*, Mason CJ noted that a line of English authority, for the proposition that a plaintiff who has obtained an uncompleted order for specific performance cannot terminate for the defendant's subsequent repudiation, had been strongly criticised[7] and his Honour referred in particular to Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (2nd ed 1984) [2053], pp 504–507 (a criticism maintained in the current edition).[8] Meagher JA repeated that criticism in *Aarons* v *Advance Commercial Finance Ltd*[9] where, after a purchaser failed to perform according to an order for specific performance, the vendor went back to Court to seek to terminate the contract. His Honour said: "… [at] that point, in my view, the vendor could have terminated the contract without further ado. However, a doctrine seems to be

prevalent that a contract cannot be terminated by the innocent party if a decree for specific performance has been made by the court. I can see no justification for any such doctrine. Once it is conceded — and all authorities do concede it — that an order for the specific performance of a contract does not cause the contract to merge in the order, no rational justification of the doctrine can be formulated: sed dis aliter visum: *Johnson* v *Agnew* [1980] AC 827, *JAG Investments Pty Ltd* v *Strati* [1981] 2 NSWLR 600".[10]

57. That criticism has particular force, but it remains necessary to proceed according to *Sunbird Plaza Pty Ltd* v *Maloney*, from which it is clear that in this context, there must be some order which puts paid to the order for specific performance. Mason CJ was careful to point out that this was appropriately described as a vacation of the order for specific performance rather than the grant of the Court's permission for the termination of the contract. Here, although specific performance had been ordered, the contract retained in all respects its effect according to its terms. An order of the Court was unnecessary for the appellant to terminate this contract, as she did on 28

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January. But the order for specific performance could not be left unattended, and the Court's record had to be amended to correspond with what had become the contractual position. Accordingly, the appropriate orders are those proposed by the Chief Justice.

Dalton J: I agree with the orders proposed by the Chief Justice, and his reasons for them. I also agree with the reasons of Philip McMurdo J and the views he expresses as to vacation of an order for specific performance being the preferable course after a contract is properly terminated during the currency of such an order.

Footnotes

1 *Fletcher* v *Manton* (1940) 64 CLR 37 at 45.
2 *Tropical Traders Ltd* v *Goonan* (1964) 111 CLR 41.
3 (1988) 166 CLR 245 at 260.
4 [1980] AC 367 at 394.
5 [1981] 2 NSWLR 600 at 603.
6 Ibid.
7 (1988) 166 CLR 245 at 259.
8 Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (4th ed, 2002) [20-265].
9 (1995) Aust Contract R ¶90-056.
10 Ibid at 90,285.

HENDERSON & ANOR v THE BODY CORPORATE FOR MERRIMAC HEIGHTS

(2011) LQCS ¶90-174; Court citation: [2011] QSC 336

Queensland Supreme Court

Decision delivered on 11 November 2011

Community schemes — Where the defendant was the body corporate of a housing complex subject to a community title scheme — Where the defendant entered into a caretaking agreement and a landscape maintenance agreement with the plaintiffs — Whether the plaintiffs breached or repudiated the agreements — Whether each agreement was enforceable against the body corporate — Whether the plaintiffs should have been awarded damages for breach of contract for their lost profits from the performance of the agreements.

The defendant was the body corporate of a housing complex which was the subject of a community titles scheme. The body corporate entered into two agreements, one of which provided for the mowing of "[a]ll grass areas including front and back yards of units, common ground, back paddock and road frontage". These two agreements were later assigned to the plaintiffs. The agreements were valuable, with the plaintiffs paying their predecessors a price of $1,280,000 for the assignments of the agreements.

The body corporate subsequently obtained legal advice which noted that one of the agreements was beyond its powers as a body corporate. It thus asserted that it was never of any effect. The body corporate asserted that this was because it had no power to engage the plaintiffs to mow the front and back yards of units unless the body corporate had an agreement with each lot owner who required the service.

In response to the legal advice, the plaintiffs suggested alternative arrangements be made to the agreements, including that they cease performing services on private lots. The body corporate claimed that this constituted conduct by way of an abandonment of the agreements or, alternatively, a repudiation of them.

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The body corporate claimed to have terminated, or have been entitled to terminate, both agreements as a result of the plaintiffs' conduct. Alternatively, it argued that one of the agreements was terminated by the agreement of the parties with effect from October 2009.

The plaintiffs countered that each agreement was enforceable and validly made pursuant to s 158 of the *Body Corporate and Community Management Act 1997* and what is now s 167 of the Body Corporate and Community Management (Accommodation Module) Regulation 2008 ("the 2008 Accommodation Module"). As they were replaced by other gardeners from October 2009, they also claimed damages for breach of contract for their lost profits from the performance of the agreements.

The body corporate accepted that the services provided under the agreements were services of a kind which were permitted by s 167 of the Regulation, but argued that s 167 must be interpreted in the light of other provisions of the same regulation module, the evident intent of which was said to be to employ a "user pays" principle.

Held: for the plaintiffs.

Whether the agreements were valid

1. Section 167 of the Regulation does not require the body corporate to have an existing agreement with the lot owners as a condition of the exercise of the power to engage another person to supply the service. Section 167(1) provides that "The body corporate may … engage another person to supply, utility services and other services for the benefit of owners and occupiers of lots, if the services consist of 1 or more of the following …". That subsection expressly authorised the body corporate to engage the plaintiffs. Section 167(2) permits rather than *requires* an agreement with the lot owners where the body corporate acts under s 167(1).

2. Further, the body corporate's argument, that a body corporate cannot supply services without some sort of agreement in place with each lot owner, would cause considerable difficulty in practice. The validity of an agreement between a body corporate and the service provider would depend, in many cases, upon facts and circumstances of which the service provider could be unaware. In particular, it would depend upon whether the body corporate had made an agreement with each and every relevant owner upon terms by which the costs of servicing a lot would be assured of recovery from its owner.

Whether the plaintiffs abandoned or repudiated the agreements

3. The plaintiffs' attempts to review the agreements did not evince an intention to abandon the contracts or to refuse to perform them. Upon an objective view, the plaintiffs strongly and consistently protested the body corporate's proposal to put an end to the agreements. Further, the plaintiffs continued to perform the agreements and were paid for their services up until the time the body corporate selected a new contractor. Clearly the plaintiffs were insisting upon the enforcement of the contracts.

4. Additionally, in order to show that there was a repudiation of the contracts, the body corporate needed to demonstrate that there was conduct by the plaintiffs which evinced an unwillingness or an inability to render substantial performance of the

contracts. In support of its repudiation argument, the body corporate pointed to the plaintiffs' proposal for amendments to the contracts to make them compliant with the legal advice obtained by the body corporate. However, the plaintiffs, in doing this, did not evince an intention not to be bound by the contracts or to act inconsistently with its terms if no alternative arrangement could be agreed.

Whether the plaintiffs were entitled to damages

5. The plaintiffs established a loss of profits totalling $59,200 since being replaced by the alternative gardeners.

[140380]

Whether the body corporate had effectively terminated the agreements

6. The body corporate, in an attempt to terminate the agreements, had issued a remedial action notice in accordance with s 129 of the 2008 Accommodation Module. The notice listed a number of matters which the plaintiffs were required to remedy, failing which, the body corporate asserted it had the right to terminate the agreements.

However, the plaintiffs were not required to remedy any of the matters set out in the notice. For example, the body corporate asserted that the plaintiffs provided services under the agreements within individual lots "without knowing or understanding that the body corporate could not pay for work within the lots of individual members of the body corporate". That was said to have breached cl 1 of the Code in Sch 2 of the Body Corporate and Community Management Act (which is taken to have been included in the terms of any contract for the engagement of a caretaking service contractor).

Pursuant to cl 1 of the Code, a caretaking service contractor must have a good working knowledge and understanding of the Act relevant to the contractor's functions. The body corporate asserted that the plaintiffs did not have a good working knowledge and understanding of the Act because they believed that the agreements were valid. However, according to this judgement, the agreements were valid. On any view, it was at least arguable that the agreements were valid and failing to say otherwise did not demonstrate an ignorance or sufficient misunderstanding of the Act as to constitute a breach of the Code and thereby a breach of the agreements.

[By the CCH Conveyancing Law Editors]

JA Griffin QC with CJ Carrigan (instructed by Short Punch & Greatorix) for the plaintiffs.

PA Ahern (instructed by Teys Lawyers) for the defendant.

Before: McMurdo J

McMurdo J:

[1] At Merrimac on the Gold Coast there is a housing complex consisting of 150 dwellings situated on about six hectares of land.[1] It is the subject of a community titles scheme and the defendant is the body corporate.

[2] The defendant entered into two agreements, originally made with other parties, but which were assigned to the plaintiffs in 2007. Each agreement was in writing and was varied so that it would expire in 2022. One agreement, described as a Caretaking Agreement, was for the provision of services described as "caretaking, repair, maintenance, administration, control, use and enjoyment of the improvements and other property within the complex".[2] It also permitted the managers to conduct a letting agency from within the complex. The other agreement, described as a Landscape Maintenance Agreement ("LMA"), was for the provision of gardening services.[3] Each was assignable.

[3] Immediately prior to the assignments to the plaintiffs, the Caretaking Agreement was to have expired in October 2011 and the LMA was to have expired in October 2008. As was ultimately conceded by the defendant, the agreed duration of each agreement was extended coincidentally with the assignment to the plaintiffs. Each agreement became one which was to exist until 14 April 2022.[4] The agreements were valuable, the plaintiffs paying their predecessors a price of $1,280,000 for the assignments of the agreements as extended.[5]

[4] The issues here are whether each agreement is enforceable against the defendant. It says that it has terminated, or is entitled to terminate, the Caretaking Agreement for alleged breaches or a repudiation of that contract. To a large extent, its complaints about the plaintiffs' performance as caretakers are related to its complaints about the LMA. The defendant claims to have also terminated the LMA for alleged breaches or repudiation by the plaintiffs. Alternatively, it argues that the LMA was terminated by the agreement of the parties, with effect from October 2009. And it contends, in any event, that the LMA was made beyond its powers as a body corporate under the relevant legislation so that it has never been of any effect.

[5]

[140381]

The plaintiffs claim that each agreement is enforceable and they seek declarations to that effect. They continue to act under the Caretaking Agreement with the benefit of an injunction, granted with the defendant's consent, by the Queensland Civil and Administrative Tribunal ("QCAT"), which restrains the defendant from terminating or attempting to terminate the Caretaking Agreement pending the outcome of proceedings commenced in that jurisdiction. Those proceedings were transferred to this Court by an order of the President of QCAT and became BS 1792 of 2010. However, as I will discuss, this Court's jurisdiction to determine the dispute the subject of those transferred proceedings is not clear.

[6] As for the LMA, the plaintiffs were replaced by other gardeners from October 2009. They intend to resume their duties under the LMA if they are successful here. They claim damages for breach of contract for their lost profits from the performance of the LMA since October 2009 until they are able to resume its performance. Their claims in respect of the LMA are the subject of BS 14479 of 2009, for which this Court does have jurisdiction.

The LMA case

[7] The LMA, dated 26 October 2005, was originally made by the defendant with Berry Management Pty Ltd.[6] The services to be supplied included the mowing of "[a]ll grass areas including front and back yards of units, common ground, back paddock and road frontage."[7] At least in that way, the LMA required work to be done not only upon common property but also upon individual lots. The agreed consideration was $35,000 per year subject to increases according to movements in "the index", an expression which was not defined but which was apparently intended to refer to the Consumer Price Index.[8]

[8] In January 2007 the plaintiffs contracted with Berry Management Pty Ltd to purchase its rights according to the LMA and the Caretaking Agreement.[9] The contract of sale was conditional upon the defendant agreeing to extend the Caretaking Agreement for at least 15 years.[10]

[9] On 28 February 2007 there was an extraordinary general meeting of the defendant at which it was resolved to agree to the variation in the duration of both contracts to April 2022 and, in effect, to the assignment of the contracts as varied to the plaintiffs.[11] On the same day the plaintiffs and the defendant executed a deed, by which the duration of the two agreements was extended to 14 April 2022.[12]

[10] A further deed was executed on 27 March 2007, described as a deed of assignment of the Caretaking Agreement and the LMA.[13] The parties to it were the plaintiffs, the defendant and Berry Management Pty Ltd. The evident purpose of this deed was to record the consent of the defendant to the assignments to the plaintiffs and to have them covenant to perform the agreements. Within this deed, the duration of the LMA was recorded as being the (originally agreed) term to expire on 31 October 2008 and the duration of the Caretaking Agreement was recorded as expiring on 16 October 2011 (with an option for a further five years).[14]

[11] As is now accepted by the defendant, this deed of assignment wrongly recorded the duration of each of the contracts being assigned. It was not until late in the trial that the defendant made that concession, until then maintaining that the duration of the agreements had not been extended. Those extensions had been the subject of the deed dated 28 February 2007. But the defendant had alleged that this deed had not varied the LMA and Caretaking Agreement because Berry Management Pty Ltd was not a party to it. The defendant's ultimate concession that each agreement was extended to 2022 was rightly made.

[12] In January 2009 the defendant received legal advice that the LMA may be invalid as having been made by the defendant *ultra vires*. The defendant's solicitors advised the defendant's committee that:

> "The body corporate may only engage the gardener to perform services which it has a power or duty to carry out. The requirement for the gardener to mow the front and back yards of units would be invalid because the body corporate does not have the power to maintain those areas.

The body corporate may engage a gardener to provide services to lot owners (eg

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mowing the front and back yards of their lots) provided the body corporate has an agreement with each lot owner who requires the service. The agreement is made pursuant to s 167 of the Accommodation Module.

If it is not possible to separate the remuneration for services to lot owners and services to the body corporate, then the landscape maintenance agreement may be invalid in its entirety." [15]

[13] As I have said, there are other issues about the performance of this agreement which are relevant to the defendant's alternative grounds for denying that the LMA is now enforceable. But it is convenient at this point to consider the validity of the contract.

The LMA — was it valid?

[14] The plaintiffs say that the LMA was validly made pursuant to s 158 of the *Body Corporate and Community Management Act 1997* (Qld) ("the Act") and what is now s 167 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ("the 2008 Accommodation Module").

[15] At all relevant times, s 158 has provided as follows:

"158 Supply of services by body corporate

The body corporate for a community titles scheme may supply, or engage another person to supply, services for the benefit of owners and occupiers of lots in the way, and to the extent, authorised under the regulation module applying to the scheme."

As at October 2005, the regulation module applying to the scheme was the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld), of which s 118 was in these terms:

"118 Supply of services by body corporate — Act, s 158 [SM, s 119]

(1) The body corporate may supply, or engage another person to supply, utility services and other services for the benefit of owners and occupiers of lots, if the services consist of 1 or more of the following—

(a) maintenance services, which may include cleaning, repair, painting, pest prevention or extermination or mowing;
(b) communication services, which may include the installation and supply of telephone, intercom, computer data or television;
(c) domestic services, which may include electricity, gas, water, garbage removal, airconditioning or heating.

Example—

The body corporate might engage a corporation to supply PABX services for the benefit of the owners and occupiers of lots.

(2) The body corporate may, by agreement with a person for whom services are supplied, charge for the services (including for the installation of, and the maintenance and other operating costs associated with, utility infrastructure for the services), but only to the extent necessary for reimbursing the body corporate for supplying the services.
(3) In acting under subsections (1) and (2), the body corporate must, to the greatest practicable extent, ensure the total cost to the body corporate (other than body corporate administrative costs) for supplying a service, including the cost of a commercial service, and the cost of purchasing, operating, maintaining and replacing any equipment, is recovered from the users of the service."

As and from 30 August 2008, this regulation was remade, in relevantly identical terms, as s 167 of the 2008 Accommodation Module.

[16] As to s 158 of the Act, the defendant's argument accepts that the services provided under the LMA are services of a kind which may be provided pursuant to s 167 of the 2008 Accommodation Module. As to the regulation, the defendant says that it must be interpreted in the light of other provisions of the same regulation module, particularly what are now s 168 and s 169 of the 2008 Accommodation Module. Section 168 requires an occupier of a lot to keep those parts of the lot which are readily observable from another lot in a clean and tidy condition and to maintain the lot in good condition save for a part of the lot which the body corporate is required to maintain. Section 169 applies if the owner or occupier of a lot does not do work which it is obliged to do

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under, for example, s 168. In that event the body corporate may do the work and recover the reasonable cost of it from the owner. The defendant's argument also refers to s 163 of the Act, by which a person authorised by the body corporate may enter a lot in order to, amongst other things, carry out work which the body corporate is authorised or required to carry out.

[17] In the context of those provisions, the defendant submits that it is beyond the power of the body corporate to supply, or in this case engage another person to supply, the services of lawn mowing to areas within lots without having secured the recoverability of the costs of the provision of that service by having made an agreement with the relevant lot owners. This is said to result from the evident intent of ss 167–169 which is to employ a "user pays" principle. There was no agreement between the defendant and any lot owner, who required the service of lawn mowing and gardening upon his or her lot, for that work to be done.

[18] Section 167(2) is in permissive terms. It is not in terms which qualify the power under s 167(1). In other words, it does not require the body corporate to have an existing agreement with the user of the service as a condition of the exercise of the power to supply that service or to engage another person to supply it. Yet that is the defendant's argument as to the effect of s 167 as a whole. The defendant argues that "a body corporate cannot supply services without ensuring (as far as practicable) that the costs are recovered from the users of the service, and it cannot ensure that the costs are recovered from a user of the service without an agreement with that user. Accordingly, a body corporate cannot supply services without some sort of agreement in place".[16]

[19] The defendant's argument suggests that the legislative intention was to limit the powers of a body corporate, in a similar way to that found to exist under a previous statute in *Humphries* v *Proprietors of "Surfers Palms North" Group Titles Plan 1955*.[17] The provision there considered by the High Court was s 37 of the *Building Units and Group Titles Act 1980* (Qld). It empowered a body corporate to manage and maintain the common property for the benefit of proprietors. Section 37(2)(a) empowered a body corporate to "enter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof". By s 38(3), a body corporate was prohibited from disbursing its funds other than for the purpose of carrying out its powers and duties under the Act. The body corporate there entered into a management agreement, under which one of the manager's duties was to conduct a letting agency for such of the lot owners who required the service. It was held that the body corporate had no power to enter into the contract to procure the provision of that letting service and that as the letting service provision was not severable from the remainder of the agreement, the contract was wholly void. As Brennan and Toohey JJ said, the agreement which a body corporate was expressly authorised to make was one with a proprietor or occupier of a lot, rather than one between the body corporate and a person who was to provide lot owners or occupiers with a service.[18] Their Honours said:

> "The body corporate did not enter into an agreement with the proprietor or occupier of any lot to provide the services of a letting agency for the benefit of that proprietor or occupier. Had it done so, it would have had authority to perform that agreement by employing an agent or servant (such as the appellants) to provide the services contracted for …. However, if an agreement had been made with particular proprietors or occupiers, it would not have been a proper exercise of the body corporate's

powers to require the funds raised by contribution from all proprietors to bear the cost of provision of the service for particular proprietors or occupiers. In any event, cl 2(r) of the management agreement was not made in implementation of any agreement made under s 37(2)(a) between the body corporate and an individual lot proprietor or occupier. None of the other powers conferred by s 37(2) authorizes the making of an agreement for the conduct of the letting agency for the benefit of those proprietors of individual lots who might require such a service."[19]

[20]

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Section 167 of the 2008 Accommodation Module differs from the provision considered in *Humphries*. In *Humphries*, the power of a body corporate to engage a person to provide services existed only by an implication, as incidental to the express power to agree with persons to whom the services were to be provided. That provision was comparable to the present s 167(2). But s 167(1) expressly authorises a body corporate to engage the service provider and, as I have said, is in terms of a distinct authority from that conferred by s 167(2). This case is not governed by *Humphries*.

[21] The defendant's argument, if accepted, would cause considerable difficulty in practice. The validity of an agreement between a body corporate and the service provider would depend, in many cases, upon facts and circumstances of which the latter could be unaware. In particular, it would depend upon whether the body corporate had made an agreement, with each and every relevant owner, upon terms by which the costs of servicing a certain lot would be assured of recovery from its owner.

[22] The body corporate's duty under s 167(3) is expressed in relative terms: it is to ensure "to the greatest practicable extent" that the user pays. In many instances, there would be a need for estimation and approximation in assessing the costs of providing the service to users. That would provide a potential for controversy as to whether the amount being charged was as much as the total cost of supplying the service. In turn, this makes it less likely that the validity of the engagement of the service provider should depend upon the merits within that controversy.

[23] The defendant's argument is that the power to engage another person to supply the services is conditional upon the existence, at that point in time, of an agreement with the relevant lot owners. Yet there could be a significant difference in time between the engagement of the service provider and the provision of the relevant services. For example, there may be an engagement for a person to provide services only once, but not immediately. Upon the defendant's argument it would not matter that, after the engagement of the service provider, the body corporate made an agreement with the lot owner but before the service was supplied and the cost was incurred by the body corporate: the defendant says that the agreement with the lot owner must be in place before the agreement with the service provider is made.

[24] The engagement of the service provider would often be upon terms that the service would be supplied continuously or regularly over a period of time (as here). During that period, the identity of the users of the service might change. For example, lots might be sold. The consequences of the defendant's interpretation of s 167 in those circumstances are far from clear. On one view, the engagement of the contractor would remain valid, if at the time of its engagement, agreements had been in place with the then lot owners. On another view, the continuing engagement to service all lots would be unlawful unless and until the body corporate agreed with each new owner under s 167(2), an impracticable situation in many cases. This potential for invalidity of the contractor's engagement is but one example of the difficulties for a contractor in having the existence of its business subject to circumstances beyond his control or knowledge.

[25] The duty imposed by s 167(3) is not so much to make the cost recoverable, but to ensure (to the greatest practicable extent) that the total cost is recovered from users. It is a duty which requires more of the body corporate than the making of an agreement with the relevant owners. It would involve the ongoing task of getting in the money from them. Much of what a body corporate is bound to do pursuant to s 167(3) would necessarily occur after the supply of the services. This makes it yet more difficult to qualify the exercise of the power under s 167(1) by a precondition of the performance of the duty under s 167(3).

[26] To accept the plaintiffs' argument is not to deprive s 167(3) of any effect. The duty of the body corporate under s 167(3) would still exist, although the engagement of a person under s 167(1) has occurred in a

circumstance of non-compliance with that duty. It could be said that the likelihood of full compliance with the duty could be enhanced by accepting the

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interpretation of s 167 for which the defendant contends. But against that, there could be many circumstances in which the interests of lot owners could be disadvantaged by placing this impediment upon the body corporate. As I have endeavoured to stress, there is the commercial impracticality of making the engagement of the service provider susceptible to challenge by factual contests about of whether the body corporate had gone far enough to ensure that its costs were recovered. And most importantly, the defendant's argument is at odds with the terms of s 167, under which s 167(2) permits, rather than requires, an agreement with the users of the service where the body corporate acts under s 167(1).

[27] Accordingly, I am unpersuaded that the LMA was made beyond the authority given to the body corporate under what was then s 118 of the repealed module (now s 167 of the 2008 Accommodation Module).

The history

[28] Before going to the other arguments about the LMA, I will set out the relevant history, much of which is relevant also to the Caretaking Agreement.

[29] The advice from the defendant's lawyers, as to the potential validity of the LMA, was tabled at a meeting of the committee of the defendant on 6 February 2009.[20] Two of the plaintiffs, Mr and Mrs Henderson, were present. It was in that context (the possibility that the LMA was ineffective) that the plaintiffs were then exploring an alternative arrangement. However, the plaintiffs were not motivated only by the legal question of the validity of the agreement. They were interested in an alternative arrangement which would be more profitable. In those circumstances, the plaintiff Mrs Henderson wrote to the committee on 26 February 2009, suggesting in general terms that there be some change to the arrangements for mowing and gardening services.[21]

[30] On 21 March 2009, Mrs Henderson again wrote to the committee in terms which included the following:

> "Following many hours of careful deliberation and lengthy consultation with accounting & legal firms we have now compiled an account on the entire complex to enable an accurate assessment on its maintenance.
>
> Merrimac Heights total size — 14.683 acres (59,420 m^2)
>
> Area of Common Property — 6.178 acres (25,001 m^2)
>
> Contributions through levies can only cover Common Property, by law. Any Body Corporate responsibility on private property must be charged to the owner separately. It must be clearly defined in the By-Laws. This is the only legal way to perform such activities.
>
> While our [LMA] outlines mowing & whipper snipping all grass areas … it has not taken into account the many changes since this contract was implemented: including higher than average rainfall & temperatures. Please also consider that the original development partitioned back yards to hold the clothes line only. There are now fenced/gated yards to 75 units, hindering physical & legal access to 99 units. …
>
> Our proposal to the Body Corporate = $10 + GST/lot/week on top of existing remuneration. …
>
> The existing remuneration should be carried as we will continue to perform the basic duties + continuing weed control, which is not currently contracted.
>
> We hope this proposal will meet your expectation."[22]

[31] The defendant pleads that each of these letters constituted conduct by way of an abandonment of the LMA. This letter of 21 March is also relied upon as a repudiation. But neither letter evinced an intention to abandon the contract or to refuse to perform it. Each suggested that the parties make a different agreement and the second letter made a more specific proposal to that end.

[32] On 3 July 2009, the committee considered an opinion from its solicitors that the LMA was not enforceable. The minutes of its meeting also recorded that it had sought advice from a consultant, Mr Turner, to "report on the current remuneration of the gardening agreement" so as to be presented to owners at the upcoming annual general meeting.[23] Mr and

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Mrs Henderson were present at this meeting of the committee.

[33] On 31 July 2009, the plaintiffs made a written request, addressed to the secretary of the defendant, for a motion to be included in the agenda for the AGM. The motion was in these terms:

> "That in the event a resolution is not reached on review of the contract (including remuneration) for Henderson & Pearl Family Trusts [the plaintiffs] the Body Corporate shall increase the current Landscape remuneration to $7.10 cents per lot per week and continue the CPI increases that exist for duties defined ONLY to common property and allowing review annually."[24]

In the same document they wrote this under the word "memorandum":

> "Under this agreement all contracted duties for private property will cease from October 2009 as no authorisation has been made to enter private lots. Refer BCCM regulations 2008."[25]

[34] The defendant pleads that this document constituted an abandonment of the LMA or, alternatively, a repudiation of it. I do not accept that it was either of those things. Firstly, it was premised upon a resolution not being reached "on review of the contract", which was an apparent reference to the work being done by Mr Turner. It was not an unequivocal statement that the contract would not be performed from that point or from October 2009. Rather, it was a proposal for consideration at the annual general meeting and an element of the proposal was that the LMA would cease to operate from October 2009.

[35] On 14 August 2009, the committee of the defendant met in the presence of Mr and Mrs Henderson. The minutes record that the committee had notified the plaintiffs that the LMA would "cease as at the 1st of October 2009".[26] It further recorded that the plaintiffs had requested an increase in remuneration and that "irrespective if the report comes back from Barry Turner advising the increase is justifiable the committee is unanimous in the decision to have an increase would be unfair to lot owners; therefore the committee will not be submitting a motion from the Body Corporate to continue with the [LMA]… but give the lot owners their own means to mow their gardens …".[27]

[36] On the same day, Ms Hunter, the so-called general manager and strata manager for the defendant, wrote on behalf of the committee to Mr and Mrs Henderson as follows:

> "The committee requested we send you this email in relation to the last point raised at today's meeting;
>
> 1. The committee has agreed with the point you raised in ceasing the [LMA] as of the 1st of October 2009.
> 2. They will advise in the minutes of meeting that as at the 1st of October lot owners have 3 options; being
>
> (a) Liaise directly with [the plaintiffs] to mow their gardens and payment will be sort directly between you.
> (b) Use an outside contractor of their choice
> (c) Or mow their property themselves.
>
> We will be forwarding a letter of explanation with the minutes explaining that the current [LMA] is not valid and explain how your complex is governed by the Standard Format Plan …"[28]

The committee had misinterpreted the stated position of the plaintiffs. The plaintiffs had not said that, in any event, they would cease work under the LMA in October 2009.

[37] Not surprisingly, the plaintiffs responded, by an email from Mrs Henderson on the same day, rejecting that statement of their position. Mrs Henderson wrote:

> "NO … NO … NO!
>
> Please note the following and pass to committee members as you deem necessary.
>
> Our motion DOES NOT suggest ceasing the [LMA].
>
> It states that we request to only cease performing services on private lots at the increased remuneration rate documented.
>
> We signed for a 15 year contract & the committee of the day agreed and endorsed with the Body Corp common seal.
>
> This has been presented 'IN THE EVENT' that the other considerations toward
>
> [140387]
>
> resolving our contract concerns were not resolved.
>
> The committee have agreed to recruit Barry Turner and that should stand until he completes his task. He has not yet finished his work.
>
> As we agreed to pay half his cost we would like his service completed in full before any decision is made.
>
> You may need to revisit before minutes are sent to owners. …" [29]

[38] On 27 August 2009, the defendant's solicitors wrote to the plaintiffs as follows:

> "The committee wishes to formally advise that the [LMA] will cease as at 1st October 2009 and your last payment should be submitted at the end of September after the gardens of the lots have been mowed for that month.
>
> As stipulated in the minutes of meeting the Committee are contacting (4) four gardening companies to submit quotes for the common property gardens and the committee also invites you to submit your proposal for consideration. This would be required by 14th September 2009 to discuss at the next committee meeting.
>
> As your [Caretaking] Agreement does not require gardening equipment all of the gardening equipment will be sold and specific details of each item and expected sale prices will be disclosed to owners in the minutes of the next committee meeting. As at 1st October 2009 the Committee requests that all items be placed in the shed and the keys be given to a Committee Member. The golf buggy will also be sold as it's not an item required to carry out duties under the [Caretaking] Agreement.
>
> The Committee is taking these measures to resolve the unenforceable [LMA] in accordance with the Standard Format Plan regulations, which Merrimac Heights is governed under." [30]

[39] On 3 September 2009, the plaintiffs emailed committee members as follows:

> "Following recent discussions with some committee members & realising there are different opinions I wish to clear the misconception arrived at, from a motion we submitted for the upcoming AGM.
>
> 1. The motion will be put forward for owner vote and may or may not be accepted, therefore possibility of no change.
> 2. This was submitted as an alternative to results reached from Barry Turner's report on our contract/tasks/expectation with the Body Corporate. …" [31]

[40] On 7 September, the plaintiffs emailed committee members in these terms:

> "We hereby advise that we intend to honour the [LMA] and expect to be paid as usual." [32]

[41] On 9 September 2009, solicitors for the plaintiffs wrote to the body corporate manager (Teys Strata (Gold Coast) Pty Ltd), contending that the LMA was binding and stating that the plaintiffs would continue to

perform it. They wrote that the committee was acting "… unilaterally to bring a [c]ontract to an end unlawfully …".[33] A similar letter was sent by the plaintiffs' solicitors to the managers on 11 September 2009.[34]

[42] On 30 September 2009, the body corporate manager wrote to the plaintiffs advising that the firm called Executive Property Maintenance Services had been selected by the defendant's committee, at its meeting on 25 September, "… to carry out the gardening of common property".[35]

[43] On 1 October 2009, the plaintiffs replied to that letter through their solicitors, who wrote:

> "… Our clients agree to participate under protest and without prejudice to our clients' assertion that our clients hold a valid and enforceable Gardening Agreement, which we note is more properly described as a Landscape Maintenance Agreement. …" [36]

[44] Until October 2009 the plaintiffs continued to perform the LMA and to charge and (for the most part) to receive payment according to it. Consistently with that last-mentioned letter, the plaintiffs did not attempt to provide the services under the LMA as and from October 2009. They continued to send accounts for payment under that agreement. But they have been effectively prevented from

performing the LMA since the engagement of the alternative contractor.

[45] On 23 October 2009, the plaintiffs' solicitors wrote two letters to Teys (Gold Coast) Pty Ltd.[37] They wrote that the conduct of the defendant was an unlawful repudiation of the LMA but that the plaintiffs elected to affirm the contract. They foreshadowed proceedings involving a claim for specific performance of the LMA or, in the alternative, a claim for damages.

[46] The plaintiffs made an adjudication application against the defendant pursuant to the Act on 27 October 2009, seeking orders that the LMA be declared valid and enforceable and for its specific performance. Alternatively, they sought damages in the sum of $400,000.[38]

[47] The annual general meeting occurred on 30 October 2009. The minutes record that the motion put forward by the plaintiffs was ruled out of order, upon the basis that what was proposed required spending beyond a limit of $37,500, such that it could not be considered by the owners in the absence of "an alternative quote to be presented and voted on".[39]

[48] On 26 November 2009, the secretary of the defendant emailed the plaintiffs as follows:

> "We wish to advise that a Managers Report and your attendance will not be required at the meeting this coming Friday. …"[40]

None of the plaintiffs attended that committee meeting held on 27 November 2009. The minutes of the meeting record that the first item of business involved the plaintiffs.[41] They record the committee's concern that accounts totalling $3,971.87 had been submitted by the plaintiffs, over and above their annual remuneration when it was the committee which believed that this was for work required of the plaintiffs under the Caretaking Agreement. They also record that the committee then telephoned the defendant's solicitor, Mr Teys, who advised them to forward a "Caretaking Remedial Action Notice".

[49] In consequence, a remedial action notice, purportedly given pursuant to s 129 of the 2008 Accommodation Module was sent to the plaintiffs.[42] It alleged that there had been four types of contravention of the Caretaking Agreement, although in each case the point was related to the LMA. I will return to the terms of the notice when I discuss the case involving the Caretaking Agreement.

[50] On the same day, 27 November 2009, the Commissioner for Body Corporate and Community Management dismissed the adjudication application upon the basis that it should be dealt with in a court.[43]

[51] On 11 December 2009, the plaintiffs delivered their response to the remedial action notice, disputing each of the matters put forward by the defendant.[44]

[52] They commenced proceedings BS 14479 of 2009 on 22 December 2009 in this Court against the defendant, claiming specific performance and other relief in relation to the LMA.

[53] On 6 January 2010, the plaintiffs made an application to the QCAT against the defendant, seeking both interlocutory and final orders in relation to the Caretaking Agreement.[45] In some places, the application shows the applicant as Mrs Henderson alone. In others, it shows all three plaintiffs. Properly understood, it was an application by the three. They sought declarations that the remedial action notice was void and of no effect and that the Caretaking Agreement remained in full force and effect. They sought interim orders to restrain the body corporate from putting a motion to terminate the Caretaking Agreement to the extraordinary general meeting of lot owners which had been scheduled for 19 January 2010. They also sought an order that their application to the QCAT be remitted to this court to be dealt with the proceedings which had been commenced in respect of the LMA.

[54] The EGM took place on 19 January 2010. The minutes record that by a secret ballot, it was resolved (46 votes to 40, with four abstentions) that the Caretaking Agreement be terminated.[46] They also record that the defendant through its solicitor had agreed to "a limited injunction that restrains the implementation of the termination of the caretaking agreement … whilst the courts determine if the [determination] is valid".[47]

[55] A consent order was made by the QCAT restraining the defendant from terminating or attempting to terminate the

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Caretaking agreement pending the resolution and determination of these proceedings. By an order made in the QCAT on 8 February 2010, the proceedings there "were transferred to the Supreme Court of Queensland to be dealt with in conjunction with proceeding number 14479 of 2009 in that Court".[48]

The LMA — other arguments

[56] According to the defendant's pleading, the plaintiffs abandoned the LMA by their letters of 26 February and 21 March 2009 and their proposed motion for the AGM which they sent on 31 July 2009. As I have discussed, that conduct did not manifest an intention to abandon the contract.[49] However, in the final submissions for the defendant, additional conduct was relied upon. The defendant's counsel referred to what they said was an unchallenged statement of an employee of body corporate manager, a Ms Hunter, that "the plaintiffs communicated to the body corporate that the current agreement is invalid and unenforceable …".[50] Ms Hunter was called as a witness in the defendant's case, but she gave no evidence that the plaintiffs had made such a communication.

[57] Reliance was also placed upon evidence of the plaintiff Ms Davies that sometime prior to August 2009, she learnt that the defendant had indicated that the LMA would end from 1 October 2009, and that she thought from her then discussions with Mr and Mrs Henderson that they understood that the LMA would no longer be on foot from that date. I accept that it may have been the expectation, common to all of the plaintiffs, that they would not be performing the LMA from 1 October 2009. But that is not the way in which they acted towards the defendant. Moreover, it is one thing to say that they expected that the agreement would not be on foot because the defendant would not perform it; it is another to say that they consented to that course in the sense that they agreed to discharge the contract: *Fitzgerald* v *Masters*.[51] An abandonment of a contract is a matter which must appear upon an objective assessment of the conduct of the parties.[52]

[58] The defendant also relied upon an email from Mrs Henderson of 20 August 2009, apparently addressed to members of the committee of the defendant. The passage relied upon is where Mrs Henderson wrote:

> "Your best chance to present for the AGM is to [a]llow Barry to complete his report that you asked for & take the care & attention when you take it the next step to rectify contract(s)".[53]

The defendant submits that this was a concession that the contract had to be "rectified", in the sense that it could not be performed upon its present terms. However, what Mrs Henderson there wrote need not be

interpreted in that way. Undoubtedly, she was suggesting an amendment to the LMA or perhaps an entirely new LMA. But she was not agreeing to discharge the LMA without something being agreed in its place.

[59] The defendant's argument even extended to reliance upon conduct in 2008 (which again was unpleaded). This included the plaintiffs' attendance at a committee meeting in August 2008, in which the committee resolved to retain solicitors to advise on the validity of the LMA. The plaintiffs thereby knew of the committee's resolution. But the plaintiffs were not themselves members of the committee. Then the defendant argues that Mrs Henderson acknowledged in November 2008 "that it was illegal for the plaintiffs to enter into individual lots" to perform their work under the LMA. Nevertheless, the plaintiffs continued to perform that work. Importantly, prior to being effectively locked out from October 2009, the defendant did not argue that it became entitled to terminate the LMA because the plaintiffs had failed to perform it.

[60] The balance of the matters identified by counsel for the defendants, in their extensive written submissions on this question, need not be discussed paragraph by paragraph. The conduct relied upon falls into categories such as the plaintiffs' presence at meetings at which the suggested invalidity of the LMA was discussed, the plaintiffs' knowledge of and participation in the process by which Mr Turner was engaged and the plaintiffs' awareness of the defendant's intention to engage someone else to do work upon the common property (which the plaintiffs were required to do under the LMA). As to all of this, some matters should be restated. The first is that it is the apparent intention of the

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plaintiffs, that which objectively appears, which is relevant. Upon an objective view, their intention as demonstrated by their correspondence, strongly and consistently protested the defendant's proposal to put an end to the LMA. Secondly, throughout these events of 2008 and 2009, until October in that year, the plaintiffs continued to perform the LMA[54] and were paid for their services. Thus any abandonment of the contract could have occurred only from October 2009. But at that point, clearly the plaintiffs were strongly insisting upon the enforcement of the contract. In my conclusion, there was no abandonment of the LMA.

[61] Nor was there any repudiation by the plaintiffs, entitling the defendant to terminate the LMA. The repudiation alleged by the defendant appears to be what was described, in the joint judgment in *Koompahtoo Local Aboriginal Land Council* v *Sanpine*[55] as a renunciation. The defendant must prove that there was conduct by the plaintiffs which evinced an unwillingness or an inability to render substantial performance of the contract, or in other words which evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with their obligations.[56]

[62] In the defendant's final argument, the conduct which was relied upon as a renunciation was the lodgement of the proposed motion for the AGM.[57] It was submitted that this was accepted by the defendant on 14 August 2009 or alternatively on 27 August 2009. But this conduct of the plaintiffs was not repudiatory. It proposed a different contractual regime and to that end, it sought the support of members at the AGM. But it is another thing to say that the plaintiffs evinced an intention not to be bound by the LMA or to act inconsistently with its terms if no alternative arrangement could be agreed. The same applies to other conduct which was pleaded as repudiatory on the part of the plaintiffs, being the letters of 26 February and 21 March 2009.[58] In the same way as the plaintiffs had not evinced an intention to abandon the contract, their conduct was not repudiatory.

[63] I have now discussed each of the matters pleaded by the defendant in response to the plaintiffs' claim for relief in respect of the LMA. In particular, I have discussed the matters pleaded in response to paragraph 16(b) of the Consolidated Statement of Claim, which alleges that the plaintiffs have duly performed their duties pursuant to the LMA, and pursuant to the schedule to that agreement. However, within the conduct upon which the defendant relies as grounds for terminating the Caretaking Agreement, the defendant has alleged certain breaches of the LMA. In paragraph 39 of its Defence, it pleads facts upon which it made the four allegations within the remedial action notice to which I referred at [49].[59]

[64] In particular, it pleads breaches of the LMA as part of the plaintiffs' conduct which it describes within that notice as "Allegation 1" and "Allegation 4". Allegation 1 was not pursued at the trial. Within Allegation 4 is a contention that the plaintiffs were unable to obtain access to some lots in order to perform the work

required by the LMA. The defendant's case as there stated was not that they were in breach of the LMA by not performing the work upon those lots. Rather, it is that they were in breach of the Caretaking Agreement, in that they charged for work which could not be and was not performed, and without telling the defendant of that matter. This case is also pleaded in paragraphs 21(c) and 23 of the defendant's Counterclaim.

[65] Then in the defendant's final submissions it was argued that the plaintiffs breached the LMA by not performing some work on individual lots to which they enjoyed access. It was said that the plaintiff's carried out mowing and 'edging' tasks, but not other work which the LMA required to be performed on individual lots. The subject was explored in the cross-examination of Mrs Henderson,[60] Ms Davies[61] and a Mr Kalina.[62] It is clear that upon the individual lots the plaintiffs performed only mowing and edging and confined the performance of the other tasks to the common property. Notably the defendant did not make this complaint during the many months of manoeuvrings by each side which led to the unilateral suspension of the LMA in October 2009. Indeed the evidence does not reveal any complaint by the defendant, up to that point in time, that the plaintiffs were in breach of the LMA in any respect. This explains why no

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remedial action notice was given in relation to that contract. But what must now be considered is whether the LMA, objectively viewed, required further work to be performed upon individual lots.

[66] It is necessary to set out in full the schedule of work required by the LMA:

> "MOWING
>
> All grass areas including front and back yards of units, common ground, back paddock and road frontage—
>
> every 10–14 days in Summer
> 21–28 days in Winter
>
> EDGING
> Whippersnip all grass edges — every 10–14 days in Summer, 21–28 days in Winter
>
> PALM FRONDS
> Cocas Palms on road edges — every 3–4 months
> Palms down centre of main road — every 3–4 months
> Palms around tennis courts and pools — every 3–4 months
> Golden Palms as required
>
> FERTILIZING & TOP DRESSING
>
> As required
>
> PRUNING & MULCHING
>
> Pruning trees and shrubs in common areas and boons as required
>
> Mulching and spreading of mulch on gardens
>
> SUPPLEMENTARY SERVICES
>
> Plant replacement of supplementary planting from time to time as required
>
> Fill depression in lawns and top dressing as required
>
> BOONS
>
> Whippersnip boons as required including front of complex
>
> GARDEN AT FRONT GATES
>
> Maintain and trim garden beds at front gate entry"[63]

[67] As Mrs Henderson explained, the edging was incidental to the mowing work and therefore it may be accepted that this work was required upon individual lots as well as upon the common property. That is why the agreed frequency of the edging work coincided with that of the required mowing. The other items in the schedule can be distinguished from the mowing because it is only the mowing for which there was an express requirement for work to be done within individual lots. For some of the other items, the agreed

work was to take place in areas clearly outside individual lots. For other items in the schedule, there was no specification next to that item as to whether it would be work confined to common property. For the defendant it is submitted that there is no basis for limiting that work to common property when it was not expressly so limited. However, the schedule must be read as a whole. Most significantly, it specifically extended the mowing task to individual lots. As I interpret the schedule, this means that the other tasks are not intended to be performed on individual lots, at least pursuant to the LMA. That intention is more likely because the body corporate has no specific responsibility for the maintenance of individual lots. As I have discussed, it has the power to engage a contractor to do work on individual lots. But by this schedule, it is clear enough that it was intending to exercise that power only for the mowing and associated edging work. Therefore, there was no breach of the LMA by the plaintiffs failing to do this other work.

[68] I should add that had I upheld the argument for the defendant in this respect, I would not have accepted that it involved a breach of the LMA which justified the defendant's purported termination of it. One reason for that is that no remedial action notice was given under the LMA. Another is that because this point was not pleaded, there was no investigation of whether the defendant had been precluded by an estoppel from terminating upon this basis, given the circumstance that it

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had made no complaint to that point that these tasks were not being performed on individual lots.

[69] In its case for terminating the Caretaking Agreement, there is also the argument for the defendant that the plaintiffs have breached the LMA by not mowing within certain lots. According to the evidence of Mr Kalina, who assisted the plaintiffs in performing work under the LMA, mowing was not done on each and every lot. Some lots had no lawn but other landscaping such as paving. On some lots, access was difficult because of fences and gates. He also recalled that there were one or two lots where the owners did not want to have the plaintiffs mow their lawn. Similarly in her Affidavit, the plaintiff Mrs Davies identified some lots which had no lawns and therefore required no work from the plaintiffs. She also said that all of the lawns within the lots were mowed "… save for those above which either did not require work or in respect of which their owners had directed we not undertake any work".[64] That suggests that there was a small number of owners or occupiers who effectively refused access. But as to all of this, the LMA required certain work to be done on lots, but necessarily only as long as the owner or occupier consented and, by a fence or otherwise, did not prevent that work being done. The LMA did require the plaintiffs to trespass upon a lot. And again, this alleged breach was not the subject of a remedial action notice under the LMA.

[70] It follows that the LMA was not terminated. The contract remains on foot and the plaintiffs should have a declaration to that effect.

The LMA — damages for breach

[71] The plaintiffs claim damages for breach of the LMA, upon the basis that they have lost profits from being prevented from performing the contract since 1 October 2009. They have proved that breach and there is no substantial contest as to the quantum.

[72] The plaintiffs rely on the evidence of two valuers, each of whom was concerned with wider questions than the present one but who offered estimates of the likely income from performing the LMA. There is little between them and it is sufficient to refer to the evidence of Mr Thynne. He adopted an income for the year ended 31 October 2010 as $40,381 from which he deducted expenses of employing one person one day a week to assist the plaintiffs in their own efforts to perform the work. He estimated the cost of that employee as $9,687 over the year providing a net income of $30,694.[65] He referred also to the year ending 30 September 2009, in which the plaintiffs received from the defendant income of $36,314 under the LMA.[66] He noted also that this had not included adjustments under the CPI, for which he said the plaintiffs should have been paid a further $3,301.[67] I accept that his calculations for the 2010 year are substantially accurate. I assess the lost profit over the two years to 1 October 2011 as being at least $30,700 per year, a total of $61,400.

[73] His report also refers to work being done by the plaintiffs for some individual lot owners. For this work, the plaintiffs have used the services of Mr Kalina. Mr Thynne recorded Mrs Henderson's instructions that

from November 2009 to October 2010 the business received income of $7,620 and incurred expenses in the form of payments to Mr Kalina of $4,910, thereby representing a profit of about $2,700 over the year.[68]

However, Ms Davies gave evidence to the effect that there was no mark-up on Mr Kalina's invoices. On the basis of her evidence, the plaintiffs submit that nothing should be deducted for a profit for doing some of the work which was required under the LMA. However, I do not think that Mrs Henderson's instructions to the valuer should be ignored. Accordingly, I will deduct $2,700 per year, ie an amount of $5,400, for profits earned by the plaintiffs in performing some of the work which was required under the LMA.

[74] The result is that I am satisfied that the plaintiffs have established a loss of profits over the two years from 1 October 2009 of $56,000. Including the loss from a further six weeks to the date of this judgement, I will allow $59,200. I was also asked to include a further component, representing the loss of profits for a period after this judgment, upon the suggestion that it would take the plaintiff some time to resume performance of the LMA. I am not persuaded that there should be any significant delay in that respect and no component of that

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kind will be allowed. The outcome on the damages claim is that there will be judgment for the plaintiffs against the defendant in the sum of $59,200.

The Caretaking Agreement

[75] The plaintiffs sought relief in relation to the Caretaking Agreement within the proceedings which they brought originally in the QCAT. Undoubtedly, it had jurisdiction to grant the relief which was there sought, which was declaratory relief to the effect that the Caretaking Agreement was enforceable. The QCAT's jurisdiction was conferred by s 229 of the Act provides as follows:

> "229 Exclusivity of dispute resolution provisions
>
> (1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.
> (2) The only remedy for a complex dispute is
>
> (a) the resolution of the dispute by—
>
> (i) an order of a specialist adjudicator under chapter 6; or
> (ii) an order of QCAT exercising the tribunal's original jurisdiction under the QCAT Act; or
> (b) an order of the appeal tribunal on appeal from a specialist adjudicator or QCAT on a question of law.
> (3) Subject to section 229A, the only remedy for a dispute that is not a complex dispute is—
>
> (a) the resolution of the dispute by a dispute resolution process; or
> (b) an order of the appeal tribunal on appeal from an adjudicator on a question of law.
> (4) However, subsections (2) and (3) do not apply to a dispute if—
>
> (a) an application is made to the commissioner; and
> (b) the commissioner dismisses the application under part 5.
> (5) Also, subsections (2) and (3) do not limit—
>
> (a) the powers of QCAT under the QCAT Act to—
>
> (i) refer a question of law to the Court of Appeal; or
> (ii) transfer a proceeding, or a part of a proceeding, to the Court of Appeal; or
> (b) the right of a party to make an appeal from QCAT to the Court of Appeal under the QCAT Act."

[76] Section 229(2) appears to exclude the jurisdiction of this Court, except that of the Court of Appeal, in relation to what is defined for the purposes of the Act as a "dispute",[69] including a "complex dispute".[70]

After the conclusion of the hearing, I raised with the parties the question of whether this Court could determine whether the Caretaking Agreement was enforceable and I received written and oral argument on the question. The defendant submitted that this Court does not have jurisdiction in that respect. The plaintiff argues that it does. I will return to this jurisdictional question, which is more conveniently discussed after I have referred to the evidence and made findings about this part of the case. The parties agreed that I should make those findings, even if I held that I lacked jurisdiction to grant any relief, in case a different view on the jurisdictional question was reached in the Court of Appeal.

The requirement for a remedial action notice

[77] Section 122 of the Act provides that the regulation module applying to a scheme may prescribe certain things about the engagement of a person as a body corporate manager or service contractor, or the authorisation of a person as a letting agent. As is common ground, the plaintiffs were service contractors as well as letting agents as those terms were respectively defined for the Act within s 15 and s 16. The things which may be prescribed include the following as set out in s 122(1)(d):

> "(d) particular circumstances under which the engagement or authorisation may or may not be terminated … despite anything in the engagement or authorisation or in another agreement or arrangement."

[78] The relevant module, which is the 2008 Accommodation Module, makes provision for these matters in Chapter 6, Part 5. In the first of

those provisions, s 126 of the module provides as follows:

> "126 Purpose of pt 5 [SM, s 128]
>
> This part provides for—
>
> (a) the grounds on which the body corporate may terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent; and
> (b) the steps the body corporate must follow to terminate the engagement or authorisation."

[79] Section 127(1) of the Module provides that a person's engagement or authorisation may be terminated by the body corporate:

> "(a) under the Act; or
> (b) by agreement; or
> (c) under the engagement or authorisation."

Section 127(2) provides that "[t]he body corporate may act under subsection (1) only if the termination is approved by an ordinary resolution of the body corporate".

[80] Section 128 of the Module identifies certain circumstances as justifying a termination of an engagement or authorisation of a service contractor or letting agent. For the most part they involve some element of illegality on the part of the contractor/agent and they are not relevant here. What is perhaps relevant is that s 128(2) provides that the body corporate may act under this section only with the approval of an ordinary resolution of the body corporate, and for a caretaking service contractor or a letting agent, where the motion to approve the termination is decided by secret ballot. This provision is relevant because it differs from s 127(2), thereby indicating that the circumstances for termination under s 128 do not overlap with those for s 127.

[81] Then there is s 129, which is headed "Termination for failure to comply with remedial action notice [SM, s 131]". This section relevantly provides as follows:

"(1) The body corporate may terminate a person's engagement as a body corporate manager or service contractor if the person (including, if the person is a corporation, a director of the corporation)—

(a) engages in misconduct, or is grossly negligent, in carrying out functions required under the engagement; or
(b) fails to carry out duties under the engagement; or
(c) contravenes—

(i) …
(ii) for a service contractor who is a caretaking service contractor — the code of conduct for body corporate managers and caretaking service contractors, or the code of conduct for letting agents; or

…

(2) Also, the body corporate may terminate a person's authorisation as a letting agent if the person (including, if the person is a corporation, a director of the corporation)—

(a) engages in misconduct, or is grossly negligent, in carrying out obligations, if any, under the authorisation; or
(b) fails to carry out duties under the authorisation; or
(c) contravenes the code of conduct for letting agents or, for a caretaking service contractor, the code of conduct for body corporate managers and caretaking service contractors; or

…

(3) The body corporate may act under subsection (1) or (2) only if—

(a) the body corporate has given the person a remedial action notice in accordance with subsection (4); and
(b) the person fails to comply with the remedial action notice within the period stated in the notice; and
(c) the termination is approved by ordinary resolution of the body corporate; and
(d) for the termination of a person's engagement as a service contractor if the person is a caretaking service contractor, or the termination of a person's authorisation as a letting agent — the motion to approve the termination is decided by secret ballot.

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(4) For subsection (3), a remedial action notice is a written notice stating each of the following—

(a) that the body corporate believes the person has acted—

(i) for a body corporate manager or a service contractor–in a way mentioned in subsection (1)(a) to (e); or
(ii) for a letting agent — in a way mentioned in subsection (2)(a) to (d);

(b) details of the action sufficient to identify—

(i) the misconduct or gross negligence the body corporate believes has happened; or
(ii) the duties the body corporate believes have not been carried out; or
(iii) the provision of the code of conduct or this regulation the body corporate believes has been contravened;

(c) that the person must, within the period stated in the notice but not less than 14 days after the notice is given to the person—

(i) remedy the misconduct or gross negligence; or
(ii) carry out the duties; or
(iii) remedy the contravention;

(d) that if the person does not comply with the notice in the period stated, the body corporate may terminate the engagement or authorisation.

(5) Despite subsection (3)(a), if the person is a body corporate manager acting under a chapter 3, part 5 engagement, the owners of at least one-half of the lots included in the community titles scheme may, on behalf of the body corporate, give the person a remedial action notice."

[82] The plaintiffs submit that any termination of the Caretaking Agreement had to be according to s 129. The defendant submits that s 129 provided one way of terminating the Caretaking Agreement, but that it did not affect the defendant's right under the general law to terminate for repudiatory conduct or for a breach of contract. In the case of the Caretaking Agreement, a document purporting to be a remedial action notice was given and I go now to its terms.

The remedial action notice in this case

[83] The notice began with a statement that it was given pursuant to s 129 and that the plaintiffs were required to remedy the matters which were referred to in the notice within 21 days, failing which the Caretaking Agreement might be terminated.[71] There followed a table containing three columns, headed "Contravention", "Details of conduct" and "Remedy required". There were four alleged contraventions, to which the parties have referred here as allegations 1 to 4.

[84] The first was that the plaintiffs had engaged in fraudulent or misleading conduct, in breach of the Code of Conduct as set out in Schedule 2 of the Act ("the Code"). It was alleged that this same conduct also breached cl 5(c) of the Caretaking Agreement, which provided as follows:

"c The Manager will check and verify accounts for goods or services payable by the Body Corporate relative to matters which are the responsibility of the Manager under this Agreement and notify the representative of the Body Corporate that they are in order for payment."

By reference to what appeared in the second and third columns against this allegation, and in further particulars provided within the notice, it can be seen that the complaint was one of overcharging. It was said that the plaintiffs had charged separately for work and materials which were within the scope of that which they were to provide under the Caretaking Agreement for the consideration fixed by it. In addition to the remuneration payable and paid under that agreement for the year ending 31 July 2009, the plaintiffs were said to have charged, in total, a further $3,971.87. Ultimately, the defendant did not rely upon this ground at the trial.

[85] Therefore, the relevant allegations are 2, 3 and 4. Allegation 2 was expressed in the notice as follows:

"By Section 118 [of the Act] the caretaking agreement includes a provision that the manager must take reasonable steps to

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ensure goods and services supplied to the body corporate are supplied at competitive prices (Schedule 2, Clause 10)."[72]

Section 118(2) of the Act provides that the provisions of the Code in Schedule 2 of the Act are taken to be included in the terms of any contract for the engagement of a caretaking service contractor. Clause 10 of that Code provides that a caretaking service contractor "… must take reasonable steps to ensure goods and services the person obtains for or supplies to the body corporate are obtained or supplied at competitive prices".

[86] The conduct relied upon for this allegation concerned the LMA. The notice set out the agreed remuneration under the LMA, which for the year ending 31 July 2009 was $42,996 or $3,583.03 per month. The notice then contended that "[s]ince terminating the [LMA] the body corporate has procured the same work for the year ended 31 July 2010 for $11,700 or $975 per month representing a saving to the body corporate of at least $31,296 per annum or approximately $391,200 over the alleged 12 years remaining term of the [LMA] …".[73] Under the hearing "Remedy required", the defendant said that the plaintiffs should "provide the body corporate with details of what steps were taken and by whom and when to ensure landscaping maintenance goods and services provided pursuant to the landscaping agreement were provided to the body corporate at competitive prices". It added that "the body corporate reserves its rights to recover damages for the goods and services supplied at less than competitive prices".

[87] As I have said, the Code including its cl 10 was part of the Caretaking Agreement. But the suggestion that cl 10 obliged the plaintiffs to surrender their contractual rights under the LMA cannot be accepted. The plaintiffs became parties to the LMA by a permitted assignment. The remuneration under the LMA had been negotiated by their predecessors. The plaintiffs had paid a substantial sum for the rights under the LMA and the Caretaking Agreement. Yet it is alleged that having done so, they were obliged to give up the benefit of the LMA. This was not what cl 10 of the Code required. The taking of *reasonable* steps according to cl 10 did not require the plaintiffs to surrender an existing contract. The general obligation under cl 10 of the Code was subject to the specific agreement constituted by the LMA. And it was not said in the remedial action notice that simply by becoming parties to the LMA as varied, the plaintiffs breached cl 10. It follows that the second ground set out in the notice had no foundation.

[88] The third ground again relied upon the Code and related to the LMA. There are two complaints made under the heading "Details of conduct" in relation to this ground. The first was that the plaintiffs provided services under the LMA within individual lots "without knowing or understanding that the body corporate could not pay for work within the lots of individual members of the body corporate".[74] That was said to have breached cl 1 of the Code, by which a caretaking service contractor must have a good working knowledge and understanding of the Act relevant to the contractor's functions. The allegation was that the plaintiffs did not have a good working knowledge and understanding of the Act because they believed that the LMA was valid. According to this judgment, it was valid. But if I am wrong about that, it does not follow that the plaintiffs were in breach of cl 1 of the Code. On any view, it was at least arguable that the LMA was valid, and failing to say otherwise did not demonstrate an ignorance or sufficient misunderstanding of the Act as to constitute a breach of the Code and thereby a breach of the Caretaking Agreement.

[89] The other complaint referred to in relation to this third ground was expressed as follows:

> "Further, and in the alternative, if (which is denied) the [LMA] was within the power of the body corporate, then the manager has failed to advise the body corporate that the body corporate could recover the cost of the work done within the lots from the individual owners for whom that work was done."[75]

In that respect, under the heading "Remedy required", this was set out:

> "The manager must advise the body corporate what work was done to which lot pursuant to the [LMA] and the reasonable cost of this work for each lot. The body
>
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>
> corporate reserves its right to take action to recover the amount of body corporate funds paid to the manager for work outside of the power of the body corporate."[76]

[90] In addition to cl 1 of the Code, the defendant referred to clauses 3(a), 3(f), 3(i) and 5(c) of the Caretaking Agreement. Clause 3(a) obliged the plaintiffs to use their best endeavours to see that the development was kept in good order and repair and maintained as a first class residential complex. The matters alleged do not seem to have involved a breach of that clause.

[91] Clause 3(f) required the plaintiffs to "[a]rrange maintenance contracts as required by the Body Corporate and ensure that any such contracts in force are carried out in accordance with their terms". But the relevant maintenance contract here was the LMA, which had already been "arranged". At least in this third ground, there was no allegation that the LMA had not been performed according to its terms.

[92] Clause 3(i) required the plaintiffs to manage the development and endeavour to ensure that it was kept in first class order and repair and "… to protect the interest in the said development of the Body Corporate and of the owners of units therein". Again, this provision was not breached by the conduct as alleged. In particular, there was no suggestion that the grounds were not kept in a proper condition.

[93] I have discussed cl 5(c) above in relation to (the now abandoned) first ground.[77] The alleged breach here is that the plaintiffs should have given legal advice to the defendant, more particularly advice that the body corporate could recover the cost of work from individual lot owners. But cl 5(c) imposed a duty to check and verify accounts for payment from the defendant's funds, rather than to advise on how funds might be collected by the defendant. The failure to provide that advice was also said to have involved a breach of

cl 1 of the Code. But that clause did not require the plaintiffs, as caretakers, to be legal advisers. Rather, it required them to have a proper knowledge and understanding of the Act so as to properly discharge their duties as caretakers. It follows that there was no act or omission which provided a basis for this third ground within the remedial action notice.

[94] Allegation number 4 was expressed as follows:

> "Honesty, fairness and professionalism
>
> By Section 118 BCCMA the caretaking agreement is taken to include a [clause] that the manager must act honestly, fairly and professionally in performing the person's function. By clause 3(f) of the caretaking agreement the manager must arrange maintenance contracts as required by the body corporate and ensure such contracts are in force and carried out according to their terms. The caretaker undertook landscape maintenance services for the body corporate under the landscaping agreement."[78]

[95] The conduct here was detailed as follows:

> "The manager was required by the landscaping agreement to perform work within the lots of each of the member[s] of the body corporate. A number of the lots are fenced precluding access and the manager did not do work on those lots as required. The manager has presented accounts to the body corporate for payment that do not take account of work that could not be and was not done. The manager failed to alert the body corporate to the access problem in a timely way to enable the body corporate to secure access to enable the work to be done as required by the contract."[79]

[96] As I have held, the plaintiffs' obligations under the LMA, so far as lots were concerned, was to work on lots only as individual lot owners or occupiers permitted them to do so.[80] The LMA did not require the gardeners to be unlawful entrants onto the lots of unwilling owners or occupiers. The consideration under the LMA was a fixed sum, rather than an amount per lot. It was not dishonest, unfair or unprofessional to charge and receive the agreed monthly consideration under the LMA although some owners or occupiers had refused access, or not to "alert" the defendant that the plaintiffs were being denied access to some lots. Accordingly, this fourth ground had no basis.

[97] It follows that none of the allegations set out in the remedial action notice provided a basis for terminating the Caretaking Agreement.

[140398]

Other grounds for terminating the Caretaking Agreement?

[98] As already noted, the defendant contends that it can justify its termination of the Caretaking Agreement upon grounds which were not alleged in the remedial action notice. I reject that submission. To the extent that there are other alleged grounds, they are allegations that the plaintiffs breached the Caretaking Agreement, so that the plaintiffs either failed "to carry out duties under the engagement" (s 129(1)(b)) or contravened the Code (s 129(1)(c)(ii)). A termination for conduct of the kind which is within s 129(1) must be made as prescribed by s 129, because otherwise s 129 would have little or no effect. In particular, an important purpose of s 129, which is to provide the manager or contractor with an opportunity to remedy its default, would be defeated. Another important requirement, which is that the engagement be terminated only with the support of a majority of lot owners, voting by a secret ballot, could also be disregarded. But in case this argument about s 129 should ultimately prevail, it is necessary to say something about such further allegations as were not in the notice.

[99] The identification of those allegations is not a straightforward exercise. The defendant's argument refers to paragraphs 21 through 25 of its Counterclaim. But as it concedes, some of those allegations "overlap" with the third and fourth allegations of the remedial action notice.

[100] It is said that paragraphs 21(c) and 23 raise a ground which was not within the notice. The former alleges that not until at least 21 March 2009 did the plaintiffs "inform, suggest to or warn" the defendant that they were not undertaking work on all individual lots pursuant to the LMA. But I have discussed that case already in relation to ground 4 of the notice.

[101] Paragraph 23 of the Counterclaim complains that the plaintiffs accepted payment under the LMA without performing all of the work which the LMA required and that the plaintiffs failed to bring that to the defendant's attention. Again, that case has been discussed already and I have rejected it as a breach of the Caretaking Agreement.[81] Paragraph 23 contains further allegations that this conduct was misleading and unconscionable, contrary to what was s 38 and s 39 of the *Fair Trading Act 1989* (Qld). Neither of those allegations can be accepted. There was no representation by the plaintiffs that they were in fact mowing each and every lot. To the extent that some lots (small in number) were not being mown because access was denied to the plaintiffs, there was no misleading conduct by not informing the defendant of that matter. In particular, that information would not have affected the entitlement of the plaintiffs to be paid the fixed sum under the LMA. Nor does the pleading explain how this conduct was unconscionable. Again, the plaintiffs were not overcharging for the fact that a small number of lots did not require mowing. Assuming that the defendant was unaware of that matter, it is not demonstrated how its position would have been different had it known of it.

[102] Paragraph 24 of the Counterclaim alleges that the plaintiffs engaged in conduct from 14 August 2009 to 19 January 2010 which was dishonest, unfair and unprofessional, was not in the best interests of the defendant, and was misleading and unconscionable. The particulars of this conduct are matters involving the plaintiffs' attempts to gain support from a sufficient number of committee members of the body corporate as well as from lot owners, in their dispute or disputes which are the subject of this litigation.

[103] One such complaint is that they sent letters and emails to members of the committee and owners of individual lots, contrary to a purported direction from the body corporate manager that they cease communicating directly with committee members. On 4 September 2009, Ms Hunter sent an email to the plaintiffs, making a request, on behalf of the committee, that "all communication pertaining to the [LMA] be in writing and submitted to [her] office, so that it would then be forwarded to the committee". She advised that neither the committee members nor her office would take any telephone calls. A similar email was sent by her to Mr and Mrs Henderson on 16 September 2009. But neither Ms Hunter nor the committee had some power to restrain communications of that kind. It was not in any sense wrongful for the plaintiffs to communicate by letters and emails to members of the committee or lot

[140399]

owners, as distinct from saying the same thing through the body corporate manager.

[104] Then there is a complaint that the plaintiffs were "[c]anvassing the support of individual lot holders for a motion to remove the current committee of the Body Corporate" and "[c]anvassing, approaching and otherwise seeking to induce individual lot holder investors in the Scheme to seek election on a proposed new committee once the current committee had been removed".[82] There is the further particular that the plaintiffs served a notice to requisition an extraordinary general meeting of members of the body corporate to remove the current committee and elect a new committee. Undoubtedly, this conduct occurred and the plaintiffs were motivated by a concern for their position under their two contracts. It may be accepted that they wished to bring about a change in the membership of the committee, so that the body corporate would be controlled by persons who were less hostile to their position.

[105] The defendant's submissions complain that the plaintiffs sent a circular to lot owners which was "intemperate and a personal attack on the integrity of the body corporate committee". It was there said that the committee had acted "illegally", that they were perpetrating a "vendetta", that they were using "unprecedented standover tactics" and were acting "unethically". However, I am unable to accept that any of this conduct involved a breach of their duties under the Caretaking Agreement or the relevant Code. Further, although the language was colourful, it was not misleading. It was plainly the language of someone in strong disagreement with the committee, and deeply resentful of the committee's actions in repudiating one agreement and taking steps to terminate the other. Particularly in the circumstance where the defendant had no entitlement to terminate either agreement, it is difficult to characterise this reaction by the plaintiffs as unconscionable or otherwise wrongful.

[106] It follows that there is nothing in these other allegations, which were not set out in the remedial action notice, which assists the defendant's case. As should already appear, the counterclaim for relief for contraventions of s 38 and s 39 of the *Fair Trading Act* has no foundation.

Jurisdiction

[107] The dispute between the parties, insofar as it involves the enforceability of the LMA, is a "dispute" as defined in s 227(1) of the Act, at least because it is a dispute between a body corporate and an owner of a lot included in the scheme: s 227(1)(b).[83] The plaintiffs are also a "caretaking service contractor for the scheme", because the Caretaking Agreement permits them to carry on the business of letting agents from within the complex.[84] Schedule 6 of the Act defines "caretaking service contractor" to mean a service contractor for the scheme who is also "a letting agent for the scheme". A "service contractor" is defined by s 15 of the Act to be a person engaged by the body corporate (other than as an employee) for a term of at least one year to supply services (other than administrative services) to the body corporate for the benefit of common property or lots included in the scheme. A "letting agent" is defined by s 16 of the Act to be a person authorised by the body corporate to conduct a business of acting as the agent of owners of lots who choose to use the person's services for securing, negotiating or enforcing leases or other occupancies of lots. Accordingly, there is also a dispute here within s 227(1)(d), in that it is between the body corporate and a caretaking service contractor for the scheme. Further, there is a dispute within s 227(1)(f), in that the body corporate is in dispute with the letting agent from the scheme.

[108] The term "complex dispute" is defined in Schedule 6 of the Act to include a dispute mentioned in, amongst other provisions, s 149B, which provides as follows:

> "149B Specialist adjudication or QCAT jurisdiction
>
> (1) This section applies to a dispute a claimed or anticipated contractual matter about—
>
> (a) the engagement of a person as a … caretaking service contractor for a community titles scheme; or
> (b) the authorisation of a person as a letting agent for a community titles scheme."

[140400]

The term "contractual matter" is defined in Schedule 6 as follows:

> "*Contractual matter* about an engagement or authorisation of a body corporate manager, service contractor or letting agent, means—
>
> (a) a contravention of the terms of the engagement or authorisation; or
> (b) the termination of the engagement or authorisation; or
> (c) …
> (d) the performance of duties under the terms of the engagement or authorisation."

[109] Section 149B provides that a party to a dispute within that provision may apply under Chapter 6 for an order of a specialist adjudicator to resolve the dispute or for an order of the QCAT exercising the tribunal's original jurisdiction.

[110] By s 229(2) of the Act, the only remedy for a complex dispute (including a dispute within s 149B) is by an order of a specialist adjudicator under Chapter 6 or an order of the QCAT exercising its original jurisdiction. Section 229(3) provides that the only remedy for a dispute that is not a complex dispute is through the so-called "dispute resolution process" or by an order of the appeal tribunal on appeal from the adjudicator on a question of law. The "dispute resolution process" is defined to mean one of the processes, including specialist adjudication, which are set out in Chapter 6. They do not include resolution of the dispute by a court.

[111] As I have discussed, before commencing the first of these two proceedings in the Court (BS 14479 of 2009), the plaintiffs made an adjudication application seeking orders which were limited to the LMA. The plaintiffs then had to specify the capacity in which they were applying for an adjudication. They marked the relevant box on the application form to show that they were applying as caretaking service contractors rather than as owners.[85] The Commissioner for Body Corporate and Community Management dismissed that application upon the basis that it should be dealt with by a court.[86] Accordingly, s 229(2) and (3) do not apply to the dispute the subject of that application to the Commissioner: s 229(4).

[112] Save for the operation of s 229(4), this Court does not have jurisdiction to resolve the dispute or disputes within this litigation. That is because the only remedy for that dispute or disputes is one which can be granted under subsections (2) and (3) of s 229. In *James* v *Body Corporate Aarons Community Titles Scheme 11476*,[87] Holmes J (as she then was) construed the then equivalent provision of s 229(2), which was s 184 of the Act. Her Honour said of that provision:

> "The wording of the section itself is unusual: rather than providing for exclusive jurisdiction in so many words, s 184(2) speaks in terms of 'the only remedy' being the order of an adjudicator or that of a District Court on appeal on a question of law. But those words 'the only remedy' are not ambiguous; it is difficult to see what meaning they can have other than that in the circumstances to which s 184(2) applies, the only manner in which the dispute itself can be resolved is by the means prescribed: the adjudicator's order or that of the District Court on appeal."[88]

That view was confirmed on appeal, where Davies JA said:

> "[11] This was plainly a dispute in respect of which an adjudicator may make an order under ch 6 within the meaning of s 184. It was, at the very least, both a dispute between the body corporate and the owner of a lot included in the scheme and a dispute between the body corporate and a letting agent for the scheme. In the end, the only questions in issue in this appeal are whether the order which an adjudicator may make to resolve this dispute is one pursuant to s 223 or one pursuant to s 227; or whether the adjudicator may make such an order under either section.
> [12] Section 184 does not speak in terms, specifically, of jurisdiction to hear and decide but in terms of providing a remedy. However I think its plain intention is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes, relevantly in s 223 and s 227, in disputes of the kind to which s 182 refers,
>
> [140401]
>
> subject to any statutory exception or limitation. Mr Savage SC, for the appellants did not argue to the contrary."[89]

[113] For the plaintiffs it is argued that s 229 is a similar, but relevantly different provision. Their argument seems to be based upon the jurisdiction which s 229 now confers upon the QCAT, together with its power to transfer matters to a court. In particular, s 52 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), provides, in part, as follows:

> "52 Transfer to more appropriate forum
>
> (1) If the tribunal considers the subject matter of a proceeding or a part of a proceeding would be more appropriately dealt with by another tribunal, a court or another entity, the tribunal may, by order, transfer the matter to which the proceeding or part relates to the other tribunal, the court or the other entity.
> …
> (4) If the tribunal transfers a matter to another tribunal, a court or another entity (the *relevant entity*) under this section—
>
> (a) a proceeding for the matter is taken to have been started before the relevant entity when it was started before the tribunal …"

I do not accept that submission of the plaintiffs. The power of the QCAT to transfer a matter to a court exists only where the Tribunal considers that the subject matter of the proceeding (or a part of that proceeding) would be more appropriately dealt with by that court. That could not be the case where the court lacked any jurisdiction to deal with the proceeding. Section 52 does not confer jurisdiction upon other courts or tribunals. Rather, it permits a transfer to a court or tribunal where that entity has jurisdiction to determine the proceeding. This is confirmed by the explanatory note to the Queensland Civil and Administrative Tribunal Bill 2009 (Qld), which said this of what is now s 52:

> "This provision does not confer any additional jurisdiction on the courts or other tribunals or entities and cannot be utilised if the tribunal has exclusive jurisdiction for the matter. An example of when it may be more appropriate for a court to hear a matter and for the tribunal to make a transfer order

is where a related cause of action is on foot in the court, the issues in dispute in the court and the tribunal matters are intertwined and the tribunal did not have the jurisdiction to make all the orders being sought in the matter."[90]

[114] The exclusivity of the jurisdiction conferred by s 229 is confirmed by subsections (4) and (5). The latter provides for the jurisdiction of the Court of Appeal to be exercisable in any of the circumstances there specified. But it further indicates that the legislative intention was to otherwise remove a court's jurisdiction to resolve such a dispute. A transfer under s 229(5)(a)(ii) could be made only in the context where the QCAT was exercising its appellate jurisdiction under s 144 of its statute.

[115] Ultimately the plaintiffs' argument recognised that s 52 could not be the source of this court's jurisdiction. Its argument came down to a suggested interpretation of s 229, under which it would operate as if s 229(2) was in these terms:

> "(2) The only remedy for a complex dispute is—
>
> (a) the resolution of the dispute by—
>
> (i) …
> (ii) an order of QCAT exercising the Tribunal's original jurisdiction under the QCAT Act [*or by an order of a court or a tribunal to which QCAT had transferred a proceeding for the resolution of that dispute*]."

That involves a substantial addition to the words of s 229 and such an interpretation cannot be accepted.

[116] The question therefore turns upon the operation of s 229(4) in this case. In particular, it turns upon whether all of the matters presently in issue are within the dispute which was the subject of the plaintiffs' application to the Commissioner. The plaintiffs argue that there is one dispute with many elements. The defendant argues that issues involving the enforceability of the Caretaking Agreement constitute a dispute, distinctly from that which was the subject of the application to the Commissioner.

[117]

[140402]

It is possible to say that there are distinct claims, and thereby distinct disputes, in relation to, respectively, the LMA and the Caretaking Agreement. There is a considerable overlap of factual issues but they are not identical. It can be said that success for the plaintiffs in relation to one agreement need not have resulted in success for them on the other.

[118] Commonly there are many issues or things in dispute which are to be resolved in the determination of a piece of litigation. For example, in respect of the LMA, there is (or was) a dispute as to its terms, a dispute as to its validity, a dispute or disputes as to the plaintiffs' performance, a dispute as to whether it has been abandoned or terminated and a dispute as to the extent of the plaintiffs' loss from not being able to perform the agreement. But each of those issues could also be fairly described as elements of the dispute between the parties which is resolved by this judgment. This illustrates that the word "dispute" can be used with varying degrees of generality, according to the context.

[119] The question here involves the meaning of "dispute" in a particular statutory context. The evident intent of Chapter 6 of the Act is to facilitate the resolution of controversies. It would be inconsistent with that purpose if Chapter 6, and in particular s 229, promoted rather than resolved controversies, by giving rise to unproductive jurisdictional arguments. It would also be detrimental to the operation of Chapter 6 to unduly confine the boundaries of a "dispute", because that could prevent the one body resolving the entire controversy between the parties with disadvantages of extra cost, delay and the possibility of inconsistent findings.

[120] If the defendant's argument is correct, the QCAT had jurisdiction to determine the proceeding concerning the Caretaking Agreement but it may not have had jurisdiction to resolve the proceeding concerning the LMA. That is because although the plaintiffs are "a caretaking service contractor", they have that status from the Caretaking Agreement (including as it does the power to conduct a letting agency). Their claim to enforce the LMA, at least upon one view, is not made by them as a caretaking service contractor. Upon that view, what is said to be the distinct dispute concerning the LMA would not be a "complex dispute",

so that it would not be within the jurisdiction of the QCAT. Therefore, no single entity, including the QCAT, could have resolved what is now the subject of this litigation. The potential for that consequence indicates the risk in adopting too narrow an understanding of what is a "dispute".

[121] The notion of a dispute in this context should be one which promotes the whole of the controversy between the parties being able to be resolved within the one process. In this respect, assistance can be found in the body of case law dealing with accrued federal jurisdiction.[91] There are three principles affecting accrued jurisdiction which are relevant here in assessing what constitutes the "dispute". First, the identification of the relevant controversy between the parties is not to be determined only by a consideration that there are separate proceedings which were commenced.[92] Secondly, the identification of the controversy involves "a matter of impression and of practical judgment".[93] And thirdly, if proceedings were to be tried in different courts, with conflicting findings made on one or more issues common to two proceedings, this will indicate that there is but a single controversy.[94]

[122] As should be apparent from this judgment, the issues concerning the enforceability of the Caretaking Agreement are ones which almost entirely concern the enforceability and particular effect of the LMA. The possible exceptions are the complaints that the plaintiffs acted wrongly in endeavouring to change the membership of the committee of the body corporate, or more generally in their lobbying of owners for support against the existing committee. Yet even those matters have a connection with the enforceability and effects of the LMA, because the plaintiffs' conduct, the subject of those complaints, has to be considered by reference to whether they had been wrongly excluded under the LMA.

[123] In substance, this controversy concerned the respective positions of the parties under the LMA, with consequences for their respective positions under the Caretaking Agreement. All of the matters in issue in this litigation should be understood as elements of

the one controversy or dispute. In consequence of s 229(4), subsections (2) and (3) do not apply in any respect to this litigation, and this court has jurisdiction in all respects.

Outcome

[124] It will be declared that the document described as the Landscape Maintenance Agreement, originally made in writing and dated 26 October 2005, is valid and enforceable as a contract between the plaintiffs and the defendant for a term expiring on 14 April 2022.

[125] It will be further declared that the document described as a Caretaking Agreement, originally made in writing and dated 24 October 2001, is valid and enforceable as a contract between the plaintiffs and the defendant for a term expiring on 14 April 2022.

[126] There will be judgment for the plaintiffs against the defendant in the sum of $59,200.

[127] I will hear the parties as to costs and any other orders.

Footnotes

1 T 6-41 and Exhibit 1, Vol 1, p 42.
2 Exhibit 1, Vol 1, p 44.
3 Ibid, pp 120–123.
4 Ibid, pp 307–314.
5 Ibid, p 215.
6 Ibid, pp 120–123.
7 Ibid, p 122.
8 There is no issue here as to the meaning of this provision.
9 Exhibit 1, Vol 1, pp 213–233.

10 Ibid, p 219.
11 Ibid, pp 304–306.
12 Ibid, p 307–304.
13 Ibid, pp 338–344.
14 Ibid, p 339.
15 Exhibit 1, Vol 2, p 435.
16 Defendant's written submissions, p 43, para 36.
17 (1994) 179 CLR 597.
18 Ibid at 602.
19 Ibid at 602–603.
20 Exhibit 1, Vol 2, pp 439–442.
21 Ibid, p 445.
22 Ibid, p 448.
23 Ibid, pp 476–481.
24 Ibid, p 485.
25 Ibid.
26 Ibid, pp 497–503.
27 Ibid, p 503.
28 Ibid, p 504.
29 Ibid, p 505.
30 Ibid, p 514.
31 Ibid, p 515.
32 Ibid, p 518.
33 Ibid, p 521.
34 Ibid, p 523.
35 Ibid, p 544.
36 Ibid, p 545.
37 Ibid, pp 578–581.
38 Ibid, pp 583–606.
39 Ibid, pp 624–633
40 Ibid, p 638.
41 Ibid, pp 640–644.
42 Ibid, p 645–649.
43 Ibid, p 673.
44 Ibid, pp 713–725.
45 Exhibit 1, Vol 3, pp 764–786.
46 Ibid, pp 805–809.
47 Ibid, p 808.
48 Ibid, p 831.
49 See [29]–[34] above.
50 Defendant's written argument, para 12(a).
51 (1956) 95 CLR 420 at 432.
52 *Wallera Pty Ltd* v *CGM Investments Pty Ltd* [2003] FCAFC 279 at [2], [30]–[32] and [57]; *Marminta Pty Ltd* v *French* [2003] QCA 541 at [22].

53 Exhibit 1, Vol 2, p 512.

54 Although, so the defendant alleges, with some instances of non-performance.

55 (2007) 233 CLR 115 at 135.

56 Ibid per Gleeson CJ, Gummow, Heydon and Crennan JJ citing *Laurinda Pty Ltd* v *Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 634.

57 Exhibit 1, Vol 2, p 485.

58 The defence pleads the letter of 26 February 2009 as one of "2 February 2009" but no letter of that date is in evidence and this is an apparent reference to the letter of 26 February 2009.

59 Amended Defence filed 24 September 2010.

60 T 2-59.

61 T 6-63.

62 T 6-48.

63 Exhibit 1, Vol 1, p 122.

64 Exhibit 16, paragraph 25.

65 Exhibit 21, pp 9–10.

66 Ibid, p 5.

67 Ibid, p 6.

68 Ibid, p 5,

69 s 227(1).

70 Schedule 6.

71 Exhibit 1, Vol 2, pp 645–649.

72 Ibid, p 646.

73 Ibid.

74 Ibid, p 647.

75 Ibid.

76 Ibid.

77 See [84] above.

78 Exhibit 1, Vol 2, p 649.

79 Ibid.

80 At [69] above.

81 At [96] above.

82 Sub-paragraphs 24iii and iv.

83 The plaintiffs being the owners of the lot from which the caretaking business is conducted.

84 s 227(1)(d).

85 Exhibit 1, Vol 2, p 583.

86 Ibid, p 673.

87 [2002] QSC 386.

88 Ibid at [14].

89 *James* v *Body Corporate for Aarons Community Titles Scheme 11476* [2004] 1 Qd R 386 at 390.

90 p 41.

91 *Fencott* v *Muller* (1983) 152 CLR 570; *Stack* v *Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Re Wakim*; *ex parte McNally* (1999) 198 CLR 511.

92 *Re Wakim*; *ex parte McNally* (1999) 198 CLR 511 at 585 per Gummow and Hayne JJ.

93 *Fencott* v *Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

94 *Re Wakim*; *ex parte McNally* (1999) 198 CLR 511 at 586 per Gummow and Hayne JJ.

WILSON v MIRVAC QUEENSLAND PTY LTD

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(2010) LQCS ¶90-157; Court citation: [2010] QSC 87

Supreme Court of Queensland

Judgment delivered on 26 March 2010

Community schemes — Off-the-plan contract dispute — Staged development — Original Disclosure Statement provided to purchaser — Further Statement to correct inaccuracies in original Disclosure Statement provided after Stage 1 completion — Purchaser cancelled contract within 14 days due to changes in Further Statement — Whether purchaser would be materially prejudiced if compelled to complete contract in light of changes to original Disclosure Statement — Purchaser validly cancelled contract under Body Corporate and Community Management Act 1997, s 214(4).

The developer (respondent) built a staged residential community scheme known as Tennyson Reach Development. The purchaser (applicant) entered into a contract for sale of proposed residential lot in stage 2 of that development. The developer gave the purchaser a Disclosure Statement in fulfilment of its obligations under s 213 of the Body Corporate and Community Management Act.

After stage 1 of the development had been completed, the developer provided the purchaser with a Further Statement pursuant to s 214 of the Act, explaining how the first statement was or had become inaccurate and how the inaccuracies were being rectified, together with a substitute Disclosure Statement incorporating the changes. The substitute Disclosure Statement differed from the first Disclosure Statement in that the following was missing from the Asset Register and the Equipment Schedule intended for the Body Corporate:

- CCTV, cameras and security monitoring equipment
- BBQ, outdoor tables and chairs
- artworks and loose decorative items within lift foyer and common areas, and
- six lift curtains.

On receipt of the Further Statement, the purchaser purported to exercise its right to cancel the contract under the Act. She argued that she would be materially prejudiced if compelled to complete, given the extent to which the first Disclosure Statement had become inaccurate. The inaccuracies which she complained of in a letter to the developer were as follows:

> "Security is and was a very important consideration for my husband and myself, given our personal circumstances, and the proximity of the Farringford building to the State Tennis Centre and proposed public parklands. Further if the fee to the caretaker was based, even in part, on the security monitoring function, and that function does not have to be performed, the fee paid is accordingly inflated.
>
> To a lesser extent, but still importantly, the absence of artworks, decorative items and a BBQ and tables and chairs detracts from the amenity of the development, and the Seller's unwillingness to supply these items marks an unwarranted departure from the initial Disclosure Statement. if the Body Corporate has to acquire these items it will put all unit-holders to expense.
>
> [140202]
>
> The provision of lift curtains is necessary to prevent damage occurring if items are being moved in or out of the building, and to minimise the expense that would be incurred by the body corporate if that were to occur.
>
> I regard the amendment to clause 4.4, the inclusion of the Body Corporate Assent Register, the omission of the assets to which I have referred, and the provision of the Caretaking Agreement to be that I would be materially prejudiced if compelled to complete the contract. Accordingly I cancel the contract pursuant to s 214(4) of the Act".

The developer responded to the purchaser that by oversight, some of the items which have already been provided by the Seller upon completion of Stage 1 were not listed on the Body Corporate Assets Register in the Further Statement. The developer enclosed a Further Statement confirming the Seller's original undertaking to provide the assets listed in the original Disclosure Statement and annexing a copy of the amended Body Corporate Assets Register to the purchaser.

Counsel for the developer submitted that the purchaser was not entitled to cancel the contract because the original Disclosure Statement never became inaccurate; the inaccuracy was in the Further Statement. Counsel also submitted that the purchaser could not be materially prejudiced by the omission of the property from the Further Statement because it was not property which the developer had contracted to provide the purchaser; rather it was to be property of a third party, the Body Corporate.

Held: purchaser validly cancelled contract.

1. The purchaser was entitled to cancel the contract and she validly did so.

2. The purchaser had only 14 days in which to cancel the contract. The error in the Further Statement was not brought to her attention or corrected in that time. She was entitled to rely on the assumption that the information in the Further Statement was accurate.

3. The Body Corporate was to come into existence on the establishment of the scheme and the purchaser as the owner of a lot would be one of its members. Under the original Disclosure Statement the developer undertook to provide at its costs, items of

property which, upon establishment of the Body Corporate, would become Body Corporate Assets. The Body Corporate would administer those assets for the benefit of lot owners including the purchaser. In these circumstances, it does not follow that because the property was to be Body Corporate Assets, the purchaser could not be materially prejudiced by its omission.

4. It was enough for the purchaser to establish that she would be disadvantaged in a substantial way if she were obliged to complete the contract on the premise that the Body Corporate would not have the CCTV security system and other items of property which had been included in the original Disclosure Statement and omitted from the Further Statement.

5. Viewed objectively, a person in the purchaser's circumstances would be disadvantaged in a substantial way by the omission of the security system and arrangements for its management.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

S R Lumb (instructed by Van de Graaff Lawyers) for the applicant (purchaser).

M D Martin (instructed by ClarkeKann Lawyers) for the respondent (developer).

Before: Wilson J.

Editorial comment: Her Honour mentioned that the test for determining whether "the buyer would be materially prejudiced if compelled to complete the contract" within the meaning of s 214(4)(b) has not ben authoritatively determined. In her opinion some matters are clear [32]:

[140203]

- The focus is on the buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?
- Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away (as it was in this case), material prejudice must be assessed in the light of the buyer's circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.
- There must be a causal relationship between the inaccuracy and the prejudice.
- There must be proportionality between the inaccuracy and the prejudice.
- Because this is a consumer protection legislation (Body Corporate and Community Management Act), it should be construed beneficially.

The result of this case and her Honour's comments will be useful to practitioners when it comes to determining whether "material prejudice" can be relied on in a vendor/purchaser off-the-plan contract dispute.

Margaret Wilson J: The applicant agreed to purchase a residential apartment in a proposed community titles scheme from the respondent.

2. The respondent provided a disclosure statement under s 213 of the *Body Corporate and Community Management Act* 1997, and subsequently a further statement under s 214.

3. Asserting that she would be materially prejudiced if compelled to complete the contract, the applicant purported to cancel it under s 214(4) of the Act.

4. In this proceeding the applicant seeks a declaration that she validly cancelled the contract. Further or alternatively, she seeks a declaration that she validly rescinded it pursuant to s 421(3) of the *Environmental Protection Act* 1994.

5. The originating application came before the Court on the Applications List. Counsel for the applicant asked the Court to determine only the lawfulness of the cancellation under the *Body Corporate and Community Management Act*, on the basis that if that issue were determined against his client, the matter should proceed to trial on the issue of rescission under the *Environmental Protection Act*.

6. Counsel for the respondent submitted that the matters in issue should be the subject of pleadings and determination at trial. However, the respondent failed to satisfy the evidentiary onus it bore to persuade the Court there were relevant disputes of fact which should go to trial. Accordingly, whether the applicant validly cancelled the contract under s 214 of the *Body Corporate and Community Management Act* is an appropriate issue for separate summary determination.

BCCM Act ss 213 and 214

7. The Act draws a distinction between sales of existing lots and sales of proposed lots (ie. sales "off the plan"). Under s 213, before a contract for the sale of a proposed lot is made, the vendor must give the

purchaser a statement disclosing various matters reasonably expected or proposed to be in place when the community titles scheme is established. Under s 214 it must give the purchaser a "further statement" if, before settlement of the contract, it becomes aware that information in the first statement was inaccurate at the date of the contract or if the first statement would not be accurate if now given. The first statement and the further statement are part of the contract[1] and the purchaser may rely on them as if the vendor had warranted their accuracy.[2] The purchaser has certain rights to "cancel" the contract in the event of the vendor's non-compliance with these obligations or inaccuracy in the statements.[3]

8. Sections 213 and 214 provide:-

> "**213 Information to be given by seller to buyer**
>
> (1) Before a contract (the *contract*) is entered into by a person (the *seller*) with another person (the *buyer*) for the sale to the buyer of a lot (the *proposed lot*) intended to come into existence as a lot included in a community titles scheme
>
> [140204]
>
> when the scheme is established or changed, the seller must give the buyer a disclosure statement.
> (2) The disclosure statement—
>
> (a) must state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and
> (b) must include, for any engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed—
>
> (i) the terms of the engagement, other than any provisions of the code of conduct that are taken to be included in the terms under section 118; and
> (ii) the estimated cost of the engagement to the body corporate; and
> (iii) the proportion of the cost to be borne by the owner of the proposed lot; and
>
> (c) must include, for any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or given after the scheme is changed, the terms of the authorisation; and
> (d) must include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme; and
> (e) must be accompanied by—
>
> (i) the proposed community management statement; and
> (ii) if the scheme to be established or changed is proposed to be established as a subsidiary scheme—the existing or proposed community management statement of each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary; and
>
> (f) must identify the regulation module proposed to apply to the scheme; and
> (g) must include other matters prescribed under the regulation module applying to the scheme.
> (3) The disclosure statement must be signed by the seller or a person authorised by the seller.

(4) The disclosure statement must be substantially complete.
(5) If the proposed lot the subject of the contract is not residential property, the seller must give the buyer an information sheet (the *information sheet*) in the approved form with the contract in a way mentioned in section 213A.
(5A) If the proposed lot the subject of the contract is residential property, the seller must ensure that an information sheet (the *information sheet*) in the approved form and a warning statement are given as required under the *Property Agents and Motor Dealers Act 2000*, section 366, 366A or 366B.
(6) If the contract has not already been settled, the buyer may cancel the contract if —

(a) the seller has not complied with subsection (1); or
(b) the seller has not complied with subsection (5) or (5A), whichever is applicable.

(7) The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

214 Variation of disclosure statement by further statement

(1) This section applies if the contract has not been settled, and—

(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or

[140205]

(b) the disclosure statement would not be accurate if now given as a disclosure statement.

(2) The seller must, within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply, give the buyer a further statement (the *further statement*) rectifying the inaccuracies in the disclosure statement.
(3) The further statement must be endorsed with a date (the *further statement date*), and must be signed, by the seller or a person authorised by the seller.
(4) The buyer may cancel the contract if—

(a) it has not already been settled; and
(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement.

(5) Subsections (1) to (4) continue to apply after the further statement is given, on the basis that the disclosure statement is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date."

The Facts

9. The respondent is the developer of a staged development known as Tennyson Reach Development. By a contract dated 4 December 2007 the applicant agreed to purchase a proposed residential lot in stage 2 of that development, described as Lot 5111 "Farringdon".

10. The respondent gave the applicant a Disclosure Statement dated 3 December 2007 in fulfilment of its obligations under s 213. The Disclosure Statement had a table of contents, listing 11 chapters, namely:-

"CHAPTER 1	–	Information Disclosure
CHAPTER 2	–	New Community Management Statement
CHAPTER 3	–	Schedule of Finishes
CHAPTER 4	–	Plans

CHAPTER 5	–	Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements
CHAPTER 6	–	Caretaking Agreement
CHAPTER 7	–	Letting Agreement
CHAPTER 8	–	Administration Agreement
CHAPTER 9	–	Draft Site Management Plan
CHAPTER 10	–	Power of Attorney Extract
CHAPTER 11	–	FIRB Approval"

(a) The following appeared in chapter 1 –

"4.4 **Proposed Assets of the Body Corporate**

The Seller proposes to provide, at its cost, the following items of equipment and furnishings which will become Body Corporate Assets upon establishment of the Body Corporate, namely:

Gymnasium/Lap Pool

(a) pool cleaning equipment;
(b) pool furniture;
(c) tables and chairs for meeting room use;
(d) fitness equipment;
(e) AV equipment.

Other Recreational Pools

(a) pool cleaning equipment;
(b) outdoor pool furniture;
(c) BBQ, outdoor tables and chairs.

General

(a) artworks and loose decorative items within lift foyer and common areas;
(b) CCTV, cameras and security monitoring equipment;
(c) Caretakers' office equipment;
(d) Caretakers' gardening equipment;

[140206]

(e) Caretakers' vehicle for transport of refuse containers to compactor; and
(f) 6 lift curtains.

It is not proposed that the Body Corporate acquire any other assets after establishment of the Scheme, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme."

(b) By-law 29 of schedule C to the proposed Community Management Statement contained in chapter 2 empowered the Body Corporate to operate a security system for the Scheme Land, including implementing security procedures and security equipment designed to prevent unauthorised entry to the Scheme Land.

(c) Clause 3.4 of chapter 1 provided that details of the finishes for the lot were incorporated in chapter 3, which provided, inter alia, that CCTV would be "provided to select locations within the common property".
(d) A copy of the proposed Caretaking Agreement was set out in chapter 6. Schedule 3 to the agreement listed the caretaking duties, including:-

(i) By clause 1.1:-

"The Caretaker must within a reasonable time after the Commencement Date become familiar, and maintain that familiarity, with:

…
(e) the security devices and systems used in the Development

…"

(ii) By clause 3.1 (under the heading "Daily Requirements"):

"Security: check for any security breaches, vandalism, broken glass and ensure all fire doors are secured according to the code requirements and monitor (if installed) any close circuit security television cameras and keep daily video tapes for at least seven days".

11. After stage one of the development had been completed, the respondent's solicitors wrote to the applicant's husband on 6 August 2009. They said:-

"**Mirvac Queensland Pty Limited ("Seller") sale to Catherine Frances Wilson ("Buyer") – Lot 5111 Tennyson Reach, Stage 2**

By way of update, the Tennyson Reach Community Titles Scheme 39925 was established on 27 April 2009 upon completion of Stage 1 of the Development. As a consequence of requirements of the Brisbane City Council as part of the process of establishment of the Scheme and subsequent events (such as the Body Corporate adopting a Budget and entering into Body Corporate Agreements as contemplated by the first Disclosure Statement), a number of changes have been made to, or are proposed in respect of, the Scheme.

We **enclose** a Further Statement pursuant to s.214 of the *Body Corporate and Community Management Act* which details all the changes made or proposed to the Scheme and to the information contained in the first Disclosure Statement given to the Buyer."

12. The applicant received the Further Statement on 11 August 2009. It consisted of a five page document headed "Further Statement" explaining how the first statement was or had become inaccurate and how the inaccuracies were being rectified, together with a substitute Disclosure Statement dated 6 August 2009 incorporating the changes. The five page document made no mention of any change to cl 4.4 of chapter 1.

13. The substitute Disclosure Statement had a table of contents – 11 chapters described as in the first Disclosure Statement, except for chapter 5 which was:-

"CHAPTER 5 – Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements and Schedule of Body Corporate Assets"

[140207]

Chapter 5 included a two page Body Corporate Asset Register and a four page Initial Body Corporate Equipment Schedule. Neither the Asset Register nor the Equipment Schedule contained any reference to:-

(a) CCTV, cameras and security monitoring equipment;
(b) BBQ, outdoor tables and chairs;
(c) artworks and loose decorative items within lift foyer and common areas: or
(d) six lift curtains.

But the other provisions to which I have referred (the by-law, the finishes, and the caretaking duties) were unaltered.

14. By s 214(4)(c) of the *Body Corporate and Community Management Act* the applicant had 14 days from receipt of the Further Statement in which to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the first Disclosure Statement had become inaccurate. She purported to do so by letter to the respondent's solicitors dated 24 August 2009. (She relied, as well, on other grounds for terminating the contract, but they are not presently relevant.)

15. The applicant wrote:-

> "Security is and was a very important consideration for my husband and myself, given our personal circumstances, and the proximity of the Farrringford building to the State Tennis Centre and proposed public parklands. Further, if the fee to the caretaker was based, even in part, on the security monitoring function, and that function does not have to be performed, the fee paid is accordingly inflated.
>
> To a lesser extent, but still importantly, the absence of artworks, decorative items and a BBQ and tables and chairs detracts from the amenity of the development, and the Seller's unwillingness to supply these items marks an unwarranted departure from the initial Disclosure Statement. If the Body Corporate has to acquire these items it will put all unit-holders to expense.
>
> The provision of lift curtains is necessary to prevent damage occurring if items are being moved in or out of the building, and to minimise the expense that would be incurred by the body corporate if that were to occur.
>
> I regard the amendment to clause 4.4, the inclusion of the Body Corporate Asset Register, the omission of the assets to which I have referred, and the provisions of the Caretaking Agreement to be such that I would be materially prejudiced if compelled to complete the contract. Accordingly, I cancel the contract, pursuant to s. 214(4) of the Act."

16. On 9 September 2009 the respondent's solicitors replied:-

> "**1. Body Corporate Assets**
>
> The BCCM Act only requires a seller to disclose 'details of all Body Corporate Assets proposed to be acquired by the Body Corporate after the establishment or change of the Scheme'.
>
> Neither the original Disclosure Statement nor the Further Statement suggested that it was proposed that the Body Corporate would be required to acquire any Body Corporate Assets. All assets that the Seller proposes will become Body Corporate Assets as listed in the original Disclosure Statement will be provided by the Seller at its cost and the Seller confirms that all the items of equipment and furnishings listed in the original Disclosure Statement have or will be provided by the Seller at its cost. It is noted that some items will be progressively provided by the Seller upon completion of each Stage of the Development. By oversight, some of those items which have already been provided by the Seller upon completion of Stage 1 were not listed on the Body Corporate Assets Register in the Further Statement. We **enclose** a Further Statement confirming the Seller's original undertaking to provide the assets listed in the original Disclosure Statement and annexing a copy of the amended Body Corporate Assets Register."

17. Counsel for the respondent submitted that the applicant was not entitled to cancel the contract because the original Disclosure Statement never became inaccurate: the inaccuracy was in the Further Statement.

18. Of course, the original Disclosure Statement did become inaccurate in other

respects, necessitating the provision of the Further Statement.

Effect of the Legislation

19. Both the original Disclosure Statement and the Further Statement had contractual effect[4] and the applicant was entitled to rely on the information in both as if the respondent warranted its accuracy.[5]

20. The primary object of the *Body Corporate and Community Management Act* is:-

> "…to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects."[6]

21. Its secondary objects are:-

> "(a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;
> (b) to promote economic development by establishing sufficiently flexible administrative and management arrangements for community titles schemes;
> (c) to encourage the tourism potential of community titles schemes without diminishing the rights and responsibilities of owners, and intending buyers, of lots in community titles schemes;
> (d) to provide a legislative framework accommodating future trends in community titling;
> (e) to ensure that bodies corporate for community titles schemes have control of the common property and body corporate assets they are responsible for managing on behalf of owners of lots included in the schemes;
> (f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
> (g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;
> (h) to ensure accessibility to information about community titles scheme issues;
> (i) to provide an efficient and effective dispute resolution process."[7]

22. In construing the Act, the interpretation which best achieves these objects is to be preferred to any other.[8] Sections 213 – 219 are consumer protection provisions. As such, they should be construed beneficially, resolving any ambiguity in favour of the consumer.

23. By s 216 the applicant could rely on the information in the original Disclosure Statement and that in the Further Statement as if the respondent had warranted its accuracy. I do not accept the submission of counsel for the respondent that s 216 has no application to this case.

24. In providing the Further Statement, from which these items of Body Corporate property had been omitted, the respondent warranted that they would not be provided. The applicant had only 14 days in which to cancel the contract under s 214(4). The legislation did not cast any obligation on the applicant to ensure the information in the Further Statement was accurate before acting on it. I accept the submission of her counsel that the statutory right of cancellation is dependent on the content of the Disclosure Statement and Further Statement, and not on other facts unknown to the buyer, but known the seller.

25. The applicant was entitled to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the original Disclosure Statement was, or had become, inaccurate.

26. The test for determining whether "the buyer would be materially prejudiced if compelled to complete the contract" within the meaning of s 214(4)(b) has not been authoritatively determined.

27. In *Celik Developments Pty Ltd* v *Mayes*[9] White J held that a requirement that a buyer purchase a furniture package for $41,900.00 in order to be part of the letting pool in an apartment complex constituted material prejudice under s 217. In *Lee* v *Surfers Paradise Beach Resort Pty Ltd*[10] Dutney J, as a member of the Court of Appeal, discussed in *obiter dicta* whether certain changes might constitute material prejudice. However, material prejudice was not relied on in that case and his

[140209]

Honour did not discuss the test for its determination.

28. Counsel referred to a number of decisions on s 49 of the *Building Units and Group Titles Act* 1980. In case of a contract for the purchase of a proposed lot "off the plan", the original proprietor or vendor was obliged to give the purchaser a statement in writing containing particulars of various matters such as lot entitlements, by-laws, management and maintenance agreements. The purchaser was then given a right to avoid the contract if his rights would be "materially affected" by a change in the information. In *Bassingthwaighte* v *Butt*[11] McPherson J said[12] :-

> "My conclusion is that the rights of the plaintiff as purchaser were undoubtedly affected by the change or alteration in aggregate lot entitlement between contract and registration of the building units plan. The question is whether they were altered or affected 'materially'. On the meaning of 'material' I was referred to *Simons* v *Herald & Weekly Times Ltd*,[13] where 'material' was treated as connoting 'of consequence'. Among the meanings given in the Shorter O.E.D. is '5. Of much consequence; important'. It is clear that much depends on the context in which the word is used. It is implicit in s. 49(4) that it is not any or every alteration in aggregated lot entitlement that is to be regarded as giving rise to a right of avoidance but only such as 'materially affect' the rights of the purchaser."

His Honour also considered that the issue was to be determined by an objective test – whether the possibility that the purchaser might not have purchased was a reasonable supposition.[14] His Honour's approach was doubted by Wilson J in *Deming No. 456 Pty Ltd & Ors* v *Brisbane Unit Development Corporation Pty Ltd*.[15] Wilson J dissented in the outcome of that case, but none of the other members of the Court disagreed with what he said in this regard:-

> "In an earlier case, *Bassingthwaighte* v *Butt*,[16] McPherson J offers an objective test of materiality, namely, whether the possibility that the purchaser might not have purchased is a reasonable supposition. His Honour refers to Stonham, Vendor and Purchaser, pars. 373 and 374. If that is an appropriate test, then I would agree with his Honour that the possibility that Deming might not have purchased the property had its lot entitlement been represented as 1/37 instead of 1/41 is not a reasonable supposition. However, we are not applying equitable doctrines. We are construing a statute which reflects a firm resolve on the part of the legislature to protect the purchasers of home units with quite specific statutory remedies. Section 49(4) contemplates that there will be circumstances which are capable of materially affecting the rights of purchasers. These circumstances encompass the entry into or variation of a management agreement or service agreement, the making or variation of a by-law or a change in the lot entitlement of any lot or the aggregate lot entitlement. Of course, it would be quite unjust if minor changes or adjustments in these areas were to entitle a purchaser to avoid a contract. On the other hand, if the changes are not insignificant and have the effect of changing the substance of that contracted for, the intention of the legislature would seem to be plain."

29. Then in *Gold Coast Carlton Pty Ltd* v *Wilson*[17] the question was considered by the Full Court of the Supreme Court of Queensland. Andrews SPJ said that it was a question a fact, not meaning other than to affect rights deleteriously in some way.[18]

30. Section 49 of the *Building Units and Group Titles Act* was subsequently amended. Sub-section (4) was omitted and a new sub-section was substituted. The new sub-section introduced concepts of inaccuracy and "material prejudice". In *Sommer* v *Abatti Holdings Pty Ltd*[19] Derrington J considered the meaning of "material prejudice" in the context of the new s 49(4) of the *Building Units and Group Titles Act* (and s 22 of the *Land Sales Act* 1984). His Honour said -[20]

> "The words 'material prejudice' in the section relate to the concepts of material disparity or material and substantial misdescription referred to in the general principle first laid down in *Flight* v *Booth*[21] that where a misdescription is in a material and substantial point, so far affecting the

> subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, the contract is avoided altogether. In such

case the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

31. With respect, I do not consider that the approach of Derrington J is applicable to the construction of s 214 of the *Body Corporate and Community Management Act*.

32. Some matters are clear.

(a) The focus is on ***the*** buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?
(b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away (as it was in this case), material prejudice must be assessed in the light of the buyer's circumstances when the Further Statement is received or at the latest at the expiration of 14 days from its receipt.
(c) There must be a causal relationship between the inaccuracy and the prejudice.
(d) There must be proportionality between the inaccuracy and the prejudice.
(e) Because this is consumer protection legislation, it should be construed beneficially.

33. In *Chancellor Park Retirement Village Pty Ltd* v *Retirement Village Tribunal*[22] Chesterman J considered the jurisdiction of a Retirement Village Tribunal constituted under the *Retirement Villages Act* 1999. The scheme operator of a retirement village applied for judicial review of a decision of the Tribunal setting aside residence contracts between it and a number of former residents of the village. Jurisdiction turned on whether the applicant had contravened a provision of the legislation by giving the residents a document containing information which it knew to be false or misleading and if it had, whether the residents were "materially prejudiced by the contravention". The applicant gave the residents a statement of receipts and payments for the year ended 30 June 2000. The accounts had been audited, but nevertheless contained an error. The amount appearing for common lighting included an amount expended on electricity for a nursery (also owned by the applicant) which adjoined the retirement village. An offsetting reimbursement was omitted form the accounts. This led to an inflated impression of the amount the residents had to pay for common area lighting. However, the budget was prepared on the basis of the reimbursement, and was not affected by the erroneous inflated expenditure item in the accounts. The residents were not in fact overcharged. Both the audited statement of account and the budget were supplied to the residents. His Honour said –[23]

"…… The term 'material prejudice' has no special meaning. Prejudice in this context means disadvantage. It is material if it is substantial or of much consequence. The misstatement in question was the omission in the accounts of the receipt of income which would have entirely offset an item of expenditure which, on the face of the accounts, the residents would have to meet. There was no error in the actual amounts received and spent. The residents did not pay out more than they should have. The accounts did, however, wrongly, give rise to the belief that the residents had paid or were obliged to pay more than they were legally obliged to pay. However, a belief inculcated by a misstatement does not ordinarily cause disadvantage or prejudice, let alone of a substantial sort, unless it is acted on to one's detriment."

34. In the present case the applicant had only 14 days in which to cancel the contract. The error in the Further Statement was not brought to her attention or corrected in that time. She was entitled to act on the assumption that the information in the Further Statement was accurate. What Chesterman J said about the meaning of "material prejudice" is of assistance in determining its meaning in s 214 of the *Body Corporate and Community Management Act*, but what he said about a belief inculcated by misstatement is not.

35. In my view it would be enough for the applicant to establish that she would be

disadvantaged in some substantial way if she were obliged to complete the contract on the premise that the Body Corporate would not have the CCTV security system and other items of property which had been included in the first Disclosure Statement and omitted from the Further Statement. I note that the applicant's assertion of material prejudice was based principally on the omission of the CCTV security system. She relied on the other omissions as compounding the prejudice.

36. In an affidavit sworn on 10 December 2009 the applicant deposed:-

> "14. At the date of the Contract, the issue of security was very important to me. My residence, both at the time and presently, has a security system with 24 hour base monitoring and Crimsafe screens on the windows.
> 15. The Lot is to be situated in the 'Farringford' building which forms part of the Development.
> 16. At the date of the Contract, the issue of security for the (proposed) Lot (including security for the 'Farringford' building) was very important to me.
> 17. The Lot was proposed to be purchased as the principal place of residence for me, my husband and 2 of my 3 children who reside with me (aged 13 and 18 respectively).
> 18. My husband is, and has been since 14 August 2006, a Federal Magistrate based in Brisbane. My husband and I were married prior to that date. My husband presides over various matters including family law matters.
> 19. At the date of the Contract the Queensland Tennis Centre was planned to be (and is now) situated adjacent to the 'Farringford' building. The Queensland Tennis Centre was opened before 24 August 2009. The 'Farringford' building is positioned adjacent to what appears to be a public thoroughfare, King Arthur Terrace (and this was the case as at 24 August 2009).
> 20. The 'Farrington' building appears to be a stage near to, or at, completion."

In an affidavit sworn on 11 December 2009 her husband deposed:-

> "9. At the time my wife entered into the Contract (and before), the issue of security was very important to me. I was appointed as a Federal Magistrate on 14 August 2006. I am based in Brisbane. My wife and I were married prior to my appointment. In my position as a Federal Magistrate, I am provided by the Commonwealth with a monitored security system, a panic button and Crimsafe security screens at the residence of my wife and me. As a Federal Magistrate many of the cases heard by me involve family law disputes."

37. Counsel for the respondent submitted that the applicant could not be materially prejudiced by the omission of the property from the Further Statement because it was not property which the respondent had contracted to provide the applicant: rather it was to be property of a third party, the Body Corporate. However, the Body Corporate was to come into existence on the establishment of the scheme,[24] and the applicant as the owner of a lot would be one of its members.[25] Under cl 4.4 of chapter 1 of the Original Disclosure Statement the respondent undertook to provide, at its cost, items of property which, upon the establishment of the Body Corporate, would become Body Corporate Assets. The Body Corporate would then be obliged to administer those assets for the benefit of lot owners, including the applicant.[26] In these circumstances, it does not follow that because the property was to be Body Corporate Assets, the applicant could not be materially prejudiced by its omission.

38. Counsel for the respondent submitted that the matter should go to trial, because his client might wish to lead evidence of the limited nature of the security afforded by a CCTV system such that the applicant would not be materially prejudiced by its omission. One aspect of the submission was that the CCTV system would not provide the level of security apparently provided to the applicant's husband by the Commonwealth Government because of his position as a Federal Magistrate. But I understood the submission to go further and, superficially at least, to suggest that the respondent might wish to establish at trial that the CCTV system did not in fact provide much security at all. This was a curious submission in light of the respondent's having used the

installation of such a system as a positive marketing tool in promoting the development. Be that as it may, while the applicant bore the onus of satisfying the Court of material prejudice, given the nature of the application, the respondent bore an evidentiary onus to raise the issue if it wished to rely on it. It failed to do so.

39. The apartment was to be the principal place of residence for the applicant, her husband, and two teenage children. It was adjacent to the Queensland Tennis Centre (a major public facility) and a busy public thoroughfare. At the time the applicant's husband's occupation was such that the whole family

might reasonably have a heightened sense of vulnerability to unlawful attack. The security system had been promoted as an integral feature of the development and arrangements for its management. Viewed objectively, a person in the applicant's circumstances in August 2009 would be disadvantaged in a substantial way by its omission. That disadvantage was compounded by the omission of other items of property which would have enhanced the amenity of the apartment.

40. In short, I am persuaded that the applicant was entitled to cancel the contract, and that she validly did so. There should be a declaration accordingly.

Footnotes

1 *Body Corporate and Community Management Act* 1997 (Qld), s 215.
2 *Body Corporate and Community Management Act* 1997 (Qld), s 216.
3 *Body Corporate and Community Management Act* 1997 (Qld) ss 214(b) and 217(b)(iv).
4 *Body Corporate and Community Management Act* 1997 (Qld), s 215.
5 *Body Corporate and Community Management Act* 1997 (Qld), s 216.
6 Body Corporate and Community Management Act 1997 (Qld), s 2.
7 Body Corporate and Community Management Act 1997 (Qld), s 4.
8 *Acts Interpretation Act* 1954, s 14A(1).
9 [2005] QSC 224.
10 [2008] 2 Qd R 249 (see A).
11 [1982] Qd R 670.
12 [1982] Qd R 670 at 680.
13 [1970] V.R. 131, 138.
14 [1982] Qd R 670 at 680 – 681.
15 (1984) 155 CLR 129 at 168 – 169.
16 [1982] Qd R 670 at 680 – 681.
17 [1985] 1 Qd R 182.
18 [1985] 1 Qd R 182 at 189.
19 [1992] 1 Qd R 300.
20 [1992] 1 Qd R 300 at 302.
21 (1834) 1 Bing. (N.C.) 370; 131 E.R. 1160.
22 [2004] 1 Qd R 346.
23 [2004] 1 Qd R 346 at [66].
24 *Body Corporate and Community Management Act* 1997 (Qld), s 30.
25 *Body Corporate and Community Management Act* 1997 (Qld), s 31.
26 *Body Corporate and Community Management Act* 1997 (Qld), ss 94(1), 152(1)(a).

MIRVAC QUEENSLAND PTY LTD v BEIOLEY & ANOR

(2010) LQCS ¶90-158; Court citation: [2010] QSC 113

Supreme Court of Queensland

Judgment delivered on 20 April 2010

Community schemes — Off-the-plan contract for sale of a lot in a proposed residential community title scheme — Defendants did not settle after registration of proposed scheme — Defendants terminated contract based on alleged failure to comply with s 22 of Land Sales Act by plaintiff — Balconies forming part of the Lot changed by over 5% in area — Further disclosure statement was provided by plaintiff under the Body Corporate and Community Management Act — Defendants argued a further statement should also have been provided under s 22 of the Land Sales Act after the scheme had been registered as the identification of the Lot was inaccurate — Whether change should be further disclosed under s 22 of the Land Sales Act after the scheme had been registered — Developer found to have complied with Land Sales Act — Balconies were within the proposed Lot and the area must be considered as a whole for the purposes of s 21 of the Land Sales Act — Discrepancy in the proposed Lot area over 5% was not breach of contract — Section 22 of the Land Sales Act was not engaged due to changes to the area of the proposed Lot — No material prejudice argument was put forward under the Body Corporate and Community Management Act — Defendant must specifically perform the contract.

The plaintiff (Mirvac) agreed to sell to the defendants (Beioleys) an apartment in the building to be constructed known as Tennyson, a proposed residential community title scheme. The contract had to be settled within 14 days after notice from Mirvac that the proposed community title scheme had been established. The scheme was registered on 28 April 2009 and Mirvac called for settlement on 12 May 2009. The Beioleys did not attend at settlement and subsequently purported to terminate the contract on the basis of an alleged non-compliance by Mirvac with s 22 of the Land Sales Act.

The relevant provisions of the Land Sales Act at the centre of this dispute are:

> • "Section 21(1)(a) requiring that the vendor provide the purchaser a statement which clearly identifies the lot to be purchased; and
> • Section 22(1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1)—
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> > (a) is not accurate at the time it is given; or
> > (b) contains information that subsequently to the time it is given becomes inaccurate in any respect;
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> it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot."

The Beioleys resisted specific performance of the contract on three bases:

> • Mirvac's non-compliance with s 22 of the Land Sales Act
> • Mirvac's insistence upon settlement in disregard of its obligations under s 22 is a repudiation of the contract by Mirvac which entitled the Beioleys to terminate it
> • the constructed apartment does not correspond with that which Mirvac contracted to build and to sell.

Each of the above grounds arose from the fact that the sizes of the balconies within the apartment were less than Mirvac had represented that it would build in the off-the-plan

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contract. The area of each of the balconies varied from what was shown within the original drawing by, in one case, 10.35% and in the other by 15.30%. Clause 6.3(a) of the proposed (and actual) contract permitted a change up to 5% to the "size of the Lot or any part of the Lot".

It was argued by the Beioleys that these changes made the actual Lot different from the proposed Lot as originally identified under s 21. Hence, the statement given under s 21 contained information which subsequently became inaccurate. The inaccuracy was in the identification of the lot to be purchased as its total area and the respective areas of its internal space and balconies had changed. Mirvac was bound to give a further statement identifying the Lot by reference to those areas of the apartment as constructed.

Mirvac had provided a further disclosure statement to the Beioleys under section 214 of the Body Corporate and Community Management Act regarding the changes to the area of the Lot, however, the Beioleys argued that this did not suffice for the purposes of s 22 of the Land Sales Act because the information had to be provided "after the proposed Lot became a registered Lot". Mirvac disputed Beioleys' arguments and sought an order for the contract to be specifically performed.

Held: contract be specifically performed by defendant.

1. The defendant's argument proceeds upon an incorrect construction of cl 6.1 and 6.3 of the contract. The apparent purpose of cl 6.3(a) is to qualify that the plaintiff would not be in breach of contract if Lot 1 was constructed within that 5% tolerance. It is a different matter to say that cl 6.3(a) by implication deems the plaintiff to be in breach if the Lot or any part of the Lot was outside that range. There is no necessity for such an implied term, to be superimposed upon express obligations as to the construction of the Lot within cl 6.1.

2. The balcony was within the Lot and for the purposes of identification of the proposed Lot under s 21 of the Land Sales Act, it is the area of that Lot as a whole. There is no statutory requirement for a registered plan in this context to delineate and quantify the area of a balcony within a lot. The proposed Lot was identified for the purposes of s 21 by reference to the relevant drawing, but subject to such variations as would be consistent with the due performance of the proposed contract. The proposed Lot was identified as "substantially as shown or described in the Disclosure Statement".

3. Section 22 of the Land Sales Act was not engaged. The first and second of the defendant's grounds were not established. The defendant's third ground failed as there was no breach of contract by constructing the balconies outside the 5% tolerance within cl 6.3(a) of the contract. The defendants must perform the contract.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M D Martin (instructed by ClarkeKann) for the plaintiff (Mirvac).

P D Dunning SC and C Jennings (instructed by Broadley Rees Hogan) for the defendants (Beioleys).

Before: McMurdo J.

McMurdo J: By a contract of sale dated 2 July 2007, the plaintiff agreed to sell to the defendants an apartment in a building to be constructed near the Brisbane River at Tennyson. The price was $1,542,000 with a deposit of 10 per cent. The contract was to be settled within 14 days after notice from the plaintiff that the proposed community title scheme had been established. The scheme was registered on 28 April 2009 and the plaintiff called for settlement on 12 May 2009. But the defendants did not attend at settlement. Subsequently they purported to terminate the contract on the basis of an alleged non-compliance with s 22 of the *Land Sales Act 1984* (Qld) ("the LSA").

2. The plaintiff seeks specific performance, which the defendants resist upon essentially three bases. The first is that they were entitled to terminate for non-compliance with s 22. The second is that by insisting upon settlement in

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disregard of the plaintiff's alleged obligations under s 22, the plaintiff repudiated the contract which entitled the defendants to terminate it. The third is that the apartment which has been constructed does not correspond in certain respects with that which the plaintiff contracted to build and to sell. As I will discuss, each of those grounds arises from the fact that the sizes of the balconies within this apartment are less than the plaintiff had represented that it would build.

3. Prior to the contract, the plaintiff provided to the defendant a disclosure statement pursuant to s 213 of the *Body Corporate and Community Management Act 1997* (Qld) ("the BCCM Act"). Within that document was included a statement as required by s 21 of the LSA.[1] In the disclosure statement the proposed apartment was described as Lot No 3105. The disclosure statement contained a clause 1.6 as follows:

> "1.6 Plans
>
> Chapter 4 of this Disclosure Statement incorporates copies of the initial plan of subdivision SP 195275 and draft Building Format Plan SP 195376 for Stage 1 identifying the Lot as described in item 3 of this Chapter and subject to the provisions of the Contract."

4. The plans within Chapter 4 depicted two apartment buildings, described as Tower A and Tower B or the Softstone and Lushington buildings. The proposed Lot 3105 was shown at the western end of Tower A, two levels above the ground floor. One of these plans was a drawing showing the rooms within each apartment upon that floor. Another showed the boundaries of each of the lots, and the balcony or balconies for each apartment, specifying the amount of internal floor space and that of the balcony or balconies. In particular, this proposed Lot 3105 was shown as having an internal area of 173 m^2, an area for its north facing balcony of 29 m^2, an area for its south facing balcony of 13 m^2 and a total area of 215 m^2.

5. The statement expressed to be under s 21 of the LSA, the validity of which is not challenged, was as follows:

"Pursuant to Section 21 of the *Land Sales Act 1984* (Qld) neither the Seller not the Seller's agent (including by any employee), has made or offered to the prospective Buyer or his agent any representation, promise or term with respect to the provision to the Buyer of a Certificate of Title that relates to the Lot in question only except that a separate indefeasible freehold title pursuant to the *Land Title Act 1994* (Qld) will be available on settlement of the Contract in accordance with the terms of the Contract."

6. In the contract of sale, clause 6 provided for the development to be undertaken by the plaintiff as follows:

"6. CONSTRUCTION OF THE LOT, ETC

6.1 Subject to this Contract, the Seller must cause Stage 1 and the Lot to be constructed:-

(a) in a good and tradesman-like manner; and
(b) substantially as shown or described in the Disclosure Statement.

6.2 The Seller may make the following changes to Stage 1 and any other aspect of the Tennyson Reach Development:-

(a) any changes (provided that the Buyer is not materially prejudiced by the change);
(b) change the number of Stage 1 Lots and the design of the Stage 1 Lots (this Clause 6.2(b) does not apply to the Lot);
(c) change the design or any other aspect of Stage 1 or the Tennyson Reach Development (provided that the Buyer is not materially prejudiced by the change);
(d) make a change in Stage 1 or any other aspect of the Tennyson Reach Development if the Council or any other Authority requires it even if the Buyer is materially prejudiced;
(e) alter the area or configuration of the Scheme Land (or the Base Parcels) in accordance with any approval of the Council or any other Authority;
(f) alter the Common Property or any facilities or rights in relation to use of same;

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(g) change anything in any Body Corporate Agreements;
(h) construct any services on or under the Scheme Land (and register any easements required in connection with such services);
(i) grant any exclusive use, special privileges or occupation authorities over or in respect of any Common Property areas;
(j) include any Additional Land in the Scheme Land (whether before or after settlement);
(k) exclude or remove from the Scheme any part of the Base Parcel originally intended to be included in the Scheme Land; and
(l) any change contemplated in the Disclosure Statement.

6.3 The Seller may make the following changes to the Lot:-

(a) the size of the Lot or any part of the Lot may be up to 5% different (more or less) from that shown in the Disclosure Statement; …"

The "Stage 1" referred to in that clause was defined within the contract to mean the first stage of the Tennyson Reach Development which had been detailed in the disclosure statement.

7. It can be seen then that clause 6 imposed requirements both for the construction of Stage 1 and specifically for the construction of the apartment the subject of the contract. Clause 6.1 obliged the plaintiff to cause Stage 1, including the Lot, to be constructed "substantially as shown or described in the Disclosure Statement". That was qualified by clause 6.2 which permitted the plaintiff to make certain changes to Stage 1, although not to the design of the particular apartment being purchased by the defendants, as clause 6.2(b)

made clear. The plaintiff was permitted to make changes to this particular Lot by clause 6.3. The defendants argue that, upon the proper construction of clauses 6.1 and 6.3(a), changes to the size of the Lot or any part of the Lot in excess of five per cent were not permitted.

8. It is uncontroversial that as constructed, this apartment had a total area and areas of specific parts, which differed from what had been represented in the original disclosure statement as follows:

	Disclosure Statement	**As Built**
Total area	215 m^2	209 m^2
Interior	173 m^2	172 m^2
North balcony	29 m^2	26 m^2
South balcony	13 m^2	11 m^2

Accordingly there was a reduction in size of 10.35 per cent in the case of the northern balcony and 15.38 per cent in the case of the southern balcony.

9. On 9 November 2007 and 20 February 2009, the plaintiff sent further statements pursuant to the BCCM Act about which there is no issue. Then on 27 March 2009, the plaintiff provided a further disclosure statement which, by an attached plan, clearly advised that the total area of this Lot and the areas of the internal space and the respective balconies had been built as I have set out above. The defendants accept that this further statement met the requirements of s 214 of the BCCM Act.

10. Section 214(4) of the BCCM Act is as follows:

> "(4) The buyer may cancel the contract if –
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> (a) it has not already been settled; and
> (b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
> (c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."

Accordingly, the defendants were entitled to cancel the contract if the results of those changes were that they would be materially prejudiced if compelled to complete.

11. On 8 April 2009, the solicitors for the defendants requested further information in

relation to the proposed changes and an extension of the 14 day period within s 214(4)(c). By a letter of the same date, the plaintiff by its solicitors agreed to provide the information requested and agreed to the extension of that period until 14 days after its provision. That information was provided on 14 April 2009, so that the period for s 214(4) expired on 28 April 2009, during which there was no purported cancellation of the contract. By a letter of that date, the solicitors for the plaintiff informed the solicitors for the defendants that the Tennyson Reach Community Title Scheme had been established so that the contract was due for settlement on 12 May 2009.

12. Clause 3.3 of the contract provided as follows:

> "… [i]f the Buyer's Solicitors give the Seller's Solicitors an undertaking to use the Transfer Documents for stamping purposes only and to hold them complying with the directions of the Seller pending settlement then the Seller will cause the Seller's Solicitors to forward the Transfer Documents to the Buyer's Solicitors before the Settlement Date."

An undertaking according to clause 3.3 was provided by the defendants' solicitors in their letter of 5 May 2009 which was as follows:

> "We refer to the above and to your facsimile to us dated 28 April 2009.
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> In accordance with clause 3.3 of the Sale Contract, we request that you provide us with signed transfer documents as soon as possible on our undertaking to use them for stamping purposes prior

to Settlement. Please do no crease or fold the Form 1 or Form 24 as this may lead to rejection by the Department of Natural Resources and Water.

Please ensure that Part B of the Form 24 is completed in full, in particular a street address for the Transferor (Item 3), Safety Switch (Item 5(f)) and Smoke Alarms (Item 5(g)).

We will require a Declaration of Non-Revocation of the Power of Attorney to be returned with the documents if they are to be signed under Power of Attorney."

13. On 12 May 2009 the solicitors for the plaintiff advised that their client was ready, willing and able to settle on that day. The defendants did not respond and did not attend at the appointed time for settlement. On 25 May 2009 the plaintiff commenced these proceedings.

14. On 12 June 2009 the defendants' solicitors wrote to the plaintiff's solicitors saying that the defendants did not intend to settle the contract. On 23 June 2009 they again wrote, for the first time suggesting that there had been a non-compliance with s 22 of the LSA. It was also asserted that the plaintiff had repudiated the contract by refusing to provide a statement under s 22. The third argument which is now advanced, which is that the apartment did not correspond with that which the plaintiff had agreed to build because of the differences in the areas of the balconies, was not then advanced. By that letter the defendants purported to terminate the contract. The third ground was not raised until a letter from the defendants' solicitors of 3 September 2009, in which there was a (further) purported termination of the contract.

15. Section 21(1) of the LSA provides as follows:

"Before a person enters upon a purchase of a proposed lot there shall be given to the person (or to the person's agent) a statement in writing, signed by the person who is to become the person's vendor or that person's agent, that –

(a) clearly identifies the lot to be purchased; and
(b) states the names and addresses of the prospective vendor and the prospective purchaser; and
(c) clearly states whether the prospective vendor or the prospective vendor's agent (whether personally or by any employee) has made or offered to the prospective purchaser or the prospective purchaser's agent any representation, promise or term with respect to the provision to the purchaser of a certificate of title that relates to the lot in question only; and
(d) if any representation, promise or term, such as is referred to in paragraph (c) has

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been made of offered, clearly states the particulars thereof; and
(e) states the date on which it is signed."

16. Section 22 of the LSA provides, in part, as follows:

"**22 Rectification of statement under s 21**

(1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1) -

(a) is not accurate at the time it is given; or
(b) contains information that subsequently to the time it is given becomes inaccurate in any respect;

it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot.

(2) Subsection (1) applies whether the statement in writing is given in due time in accordance with section 21 or at a later time.

(3) …"

Section 25 of the LSA provides:

"**25 Avoidance of instrument for breach of s 21(1)**

(1) Where in respect of a purchase to which section 21(1) relates -

(a) there has not been given to the purchaser or the purchaser's agent a statement in writing in accordance with, or that pursuant to section 21(4) or (6) sufficiently complies with, section 21(1); or
(b) there has not been given to the purchaser or the purchaser's agent when required by section 22(1) a statement in writing in accordance with that section; or
(c) a statement in writing in accordance with, or that pursuant to section 21(4) or (6) sufficiently complies with, section 21(1) (whether given in due time in accordance with that section or at a later time) and a statement in writing in accordance with section 22(1), have been given to the purchaser or the purchaser's agent;

the purchaser may avoid the instrument made in respect of the purchase of the proposed lot by notice in writing given to the vendor or the vendor's agent if the purchaser has been materially prejudiced by the failure to give a statement in writing referred to in paragraph (a) or (b) or, in the case referred to in paragraph (c), by the inaccuracy of any particular in the statement in writing first mentioned in that paragraph.
(2) A notice of avoidance under subsection (1), if it is to be effectual, shall be given -

(a) before a registrable instrument of transfer that relates to the lot in question has been delivered by the vendor or the vendor's agent to the purchaser or the purchaser's agent; or
(b) where the purchaser seeks to avoid the instrument in question by reason of the inaccuracy of any particular in the statement in writing given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1) –

(i) before the expiration of a period of 30 days after the receipt by the purchaser or the purchaser's agent of the statement in writing given in accordance with section 22(1); or
(ii) before the delivery of a registrable instrument of transfer as aforesaid;

whichever occurs sooner."

17. The defendants argue that the statement given under s 21 contained information which subsequently became inaccurate. The inaccuracy is said to have been in the identification of the lot to be purchased. It is argued that the Lot had been identified originally by reference to, amongst other things,

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its total area and the respective areas of its internal space and balconies. Because those areas changed, it is argued, the original identification of the Lot became inaccurate. Accordingly, the plaintiff was bound to give a further statement identifying the Lot by reference to those areas of the apartment as constructed. Of course the plaintiff did provide that information to the defendants, by the further disclosure statement under BCCM Act dated 27 March 2009. However it is said that this did not suffice for the purposes of s 22 of the LSA, because the information had to be provided "*after* the proposed Lot [became] a registered Lot": s 22(1).

18. A similar argument was rejected by Applegarth J in *Mirvac Queensland Pty Ltd* v *Horne & Ors*,[2] a case concerning another apartment within this development. It was shown in the (original) drawing within the s 213 disclosure statement as having a total area of 177 m^2, comprising 162 m^2 of internal space and 15 m^2 of balcony. As constructed, the Lot had a floor area of 176 m^2, of which the balcony consisted of 14 m^2. Applegarth J accepted that the specification of the floor area of the lot served "to clearly identify the lot in conjunction with other matters such as the Lot number, the floor on which it is located and its position in the building".[3] However, the specification of the floor area had to be considered in the context of the term of the proposed contract which was identical to clause 6.3(a) in the present case. Consequently, the specification of the total area of 177 m^2 was to be understood as a specification of a total area within five per cent of that figure.[4] Because the total area varied by less than five per cent, the information originally provided in that respect had not become inaccurate so as to engage s 22 of the LSA.

19. I respectfully agree with that reasoning. But the present argument was not put to His Honour and therefore was not considered. It is that the area of a *part* of the actual Lot varies by more than five per cent from the area depicted upon the drawing for that part. In this case the area of each of the balconies varies from what was shown within the original drawing by, in one case, 10.35 per cent and in the other by 15.30 per cent. Because clause 6.3(a) of the proposed (and actual) contract permitted a change up to five per cent to the "size of the Lot or any part of the Lot" it is argued that these changes made the actual Lot different from the proposed Lot as originally identified.

20. I do not accept this argument essentially for two reasons. The first is that the balcony was within the Lot and the relevant area insofar as the identification of the proposed Lot under s 21 was concerned, was the area of that Lot as a whole. Had there been no specification of the size of the balconies and the size of the internal space, but simply a specification of the area of the Lot as a whole, still the lot to be purchased would have been clearly identified in compliance with s 21. The fact that the area of the balcony was almost certainly of interest to the defendants as prospective purchasers does not mean that it was part of the information which had to be provided under s 21. A similar view was expressed by McPherson J in *Sunbird Plaza Pty Ltd* v *Boheto Pty Ltd*.[5] That case concerned the requirement of s 49 of the *Building Units and Group Titles Act 1980* (Qld), which required a purchaser of a lot or a proposed lot to be provided with a statement which, amongst other things, clearly identified the lot or proposed lot to which it related. The document there identified the proposed lot as "Unit A on the 14th Floor as identified in sketch plan in subject agreement (where Building Units Plan has been registered, Lot 52 in Registered Building Units Plan No …)". The contract identified the property to be sold as Lot 52 on the fourteenth floor and provided that the plan for that floor would be "in accordance substantially with the plan in the eighth schedule hereto. … The said plan is incorporated in this Agreement for identification only". It was argued that the lot was not identified because there was nothing which specified the location of the building in which this apartment would form a part, in relation to the land on which the building stood.[6] McPherson J said:[7]

> "However, there are, in the case of a building not yet constructed, obvious difficulties in describing and identifying the precise compartment of airspace into which the constructed unit will fit, and I am satisfied that by s 49(2)(a) the legislature does not require this to be done. The lot is
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> sufficiently identified by the unit number, lot number, the floor on which it is intended to be, and the detailed drawing contained in the eighth schedule. That is not to say that a purchaser has no need to be, or in the present case has not been, informed of the geographical aspect of the unit which he has agreed to buy. Ordinarily one would expect him before contract to make inquiries or perhaps ask to see a plan of the building to determine its location on the land. But it is quite a different matter to suggest that the incorporation of such information is required in order to 'identify' the lot."

21. There is no statutory requirement for a registered plan in this context to delineate and quantify the area of a balcony within a lot. The probable explanation for that being done in this case is that it is the practice of the Registrar of Titles to require such parts of a lot to be delineated and given a specific area within the registered plan.[8] It is apparently considered desirable for there to be the most precise definition

of the boundaries of a required lot. But it does not follow that such information is necessary for the clear identification of a proposed lot for the purposes of s 21, where the apparent concern of the legislature is that there should be no misunderstanding of the subject matter, not yet in existence, of a proposed contract of sale.

22. Secondly, the defendants' argument proceeds upon what I see as an incorrect construction of clauses 6.1 and 6.3 of the contract. The same difficulty underlies the third of the defendants' grounds for resisting this case. In the defendants' argument, clause 6.3 is to be interpreted as requiring the Lot to be constructed so that the size of the Lot or any part of the Lot was within five per cent of the figure shown in the Disclosure Statement. But clause 6.3(a) was not in terms of an obligation; rather, it was in permissive terms. It is to be read with clause 6.1 which did impose an express obligation in relation to the construction of the Lot. It obliged the plaintiff to cause both Stage 1 and (in particular) the Lot to be constructed "… substantially as shown or described in the Disclosure Statement". The apparent purpose of clause 6.3(a) is to qualify that obligation, so that the plaintiff would not be in breach of contract if Lot 1 was constructed within that five per cent tolerance. It is a different matter to say that clause 6.3(a), by implication, deems the plaintiff to be in breach if the Lot or any part of the Lot was outside that range. There is no necessity for such an implied term, to be superimposed upon the express obligations as to the construction of the Lot within clause 6.1. This contract would be efficacious without such an implied term. And the position of the purchasers was also protected by the requirements of the BCCM Act. In particular they contracted with the protection of s 214 of that Act, by which they were entitled to cancel the contract if they became materially prejudiced by some change which made the Disclosure Statement inaccurate.[9]

23. Accordingly the proposed Lot was identified for the purposes of s 21 by reference to, amongst other things, the respective areas of and within the Lot on the relevant drawing, but subject to such variations as would be consistent with the due performance of the proposed contract. In other words the proposed Lot was identified as "substantially as shown or described in the Disclosure Statement".

24. The unchallenged evidence of Mr Wallace, the Chief Executive Officer of the plaintiff, is that there is no difference to the function or amenity of this apartment in any respect from the changes to the dimensions of the balconies. This evidence was tendered over the objection of the defendants, for whom it was submitted that it was irrelevant because it was no part of their case that the value or amenity of the apartment was affected by these changes. I admitted the evidence in case it became relevant to a case of "material prejudice" under s 25 of the LSA, which at that point was foreshadowed but not pleaded by the defendants. I find that the plaintiff did cause the Lot to be constructed substantially as shown or disclosed in the Disclosure Statement in compliance with clause 6.1 and otherwise according to the contract of sale.

25. I should record that I was not persuaded by the submission for the plaintiff that the balconies did not constitute parts of the Lot for the purposes of clause 6.3(a). In my view "any part of the Lot" within that clause meant any

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part for which a size had been shown in the Disclosure Statement.

26. Because s 22 was not engaged, the first and second of the defendants' grounds are not established. And because there was no breach of contract by constructing the balconies outside the five per cent tolerance within clause 6.3(a), the defendants' third ground fails. There was no argument for the defendants that there was some substantial disparity between the property as described in the contract and the apartment as constructed, so as to provide a basis for refusing specific performance or, if that were to be decreed, for an order for compensation.[10] It follows that the defendants are obliged to perform the contract.

27. But should a different view be taken, it is necessary that I say something more about the facts and the arguments.

28. The plaintiff argued that if s 22 was engaged, its requirements were satisfied. It relied firstly upon the further Disclosure Statement of 27 March 2009, which as already noted, included a revised drawing showing the ultimate areas for the balconies and otherwise. On 8 April 2009 the defendants' solicitors wrote to the plaintiff's solicitors referring to "changes made to its [sic] Lot" and asking for copies of the original plans showing dimensions of the Lot including the balconies and "copies of new plans showing the dimensions of

the Lot including the balcony as now shown in the Further Statement." This suggests that the defendants had noticed the changes but for some reason wanted to see more detailed design or construction plans. On 14 April 2009, the plaintiff's solicitors replied, enclosing plans with more detailed information in relation to the sizes of the rooms within the apartment. On 20 April, there was an email from a solicitor for the defendants asking questions as to those internal measurements which was answered by the plaintiff's solicitor on the next day.

29. However, the relevant plan of survey was registered on 27 April 2009. It was upon that registration that the proposed Lot became a registered lot for the purposes of s 22(1) of the LSA. The plaintiff argues that the Lot became a registered lot on 16 April 2009 upon the basis of s 175 of the *Land Title Act 1994* (Qld) which provides that "[a] registered instrument forms part of the freehold land register from when it is lodged". In my view, however, that does not affect the date upon which a proposed lot becomes a registered lot for the purposes of s 22 of the LSA: otherwise the vendor would be at risk of breaching s 22 by the effective backdating of the commencement of the period in which the further statement is to be given. And this point would have assisted the plaintiff only with its alternative argument that it complied with s 22 by what occurred after 16 April 2009.

30. On any view, the disclosure statement of 27 March 2009 plainly was given prior to the proposed Lot becoming a registered lot. For whatever reason, a vendor's obligation under s 22 is expressed in terms which seem to require the required notice to be given after registration of the plan, so that this statement would not have sufficed. As to the plaintiff's alternative argument that it gave the necessary information on 21 April 2009, this information referred only to certain internal dimensions and said nothing as to the areas of the balconies. Of course the reason was that the changes in these respects had already been disclosed. In summary, had a statement under s 22 been required, none was given.

31. On the premise that s 22 required a further statement, the plaintiff was not to deliver to the defendants a "registrable instrument of transfer" and the defendants were not required to pay the outstanding purchase monies until 30 days had expired after the receipt of a statement in accordance with s 22(1) (if later than the time agreed for settlement): s 22(4). Again upon that premise, the settlement was effectively postponed until there was compliance with s 22. Section 25 permits a purchaser to avoid the contract where there has not been given a statement as required by s 22, if the purchaser is materially prejudiced by the failure to give such a statement: s 25(1). The defendants plead that the plaintiff's refusal to give a statement under s 22 has had a "serious effect" upon them in that the defendants have:

> "(a) lost their ability to consider whether the changes made to the Lot are such as to give them a right to avoid the Contract;
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> (b) lost their ability to exercise the rights granted to them under the LSA;
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> …
> (d) lost their ability to consider (during the 30 day period provided) whether they have been materially prejudiced by the Plaintiff's failure to give a statement under s 22;
>
> (e) lost their ability to check the title as registered."[11]

But there appears to be ultimately no pleaded case that the defendants were materially prejudiced, for the purposes of s 25, by the absence of a s 22 statement. There is a plea of material prejudice upon the alternative premise that the letter from the plaintiff's solicitors of 21 April 2009 was a s 22 notice. The defendants pleaded that they were materially prejudiced for the purposes of s 25 by inaccuracies in that statement because it said nothing about the variations to the areas of the balconies. In all of this, there is no demonstrated material prejudice from which the defendants could have avoided the contract. Had such a statement been required and duly provided, it would have informed them of changes to the dimensions of the balconies, which they do not suggest had any significance for the enjoyment or value of the apartment.

32. The plaintiff argued that any right to avoid the contract was lost by the defendants electing to call for the performance of the contract by a letter from their solicitors of 5 May 2009. By that letter, they required the plaintiff to immediately deliver an executed transfer pursuant to clause 3.3 of the contract. On behalf of the defendants, it was argued that they were not put to an election as at 5 May 2009, so that they should not be

regarded as having elected by that correspondence. The first of those matters might be accepted. But if they were not bound to then elect, it does not follow that there was in fact no election.

33. In *Agricultural and Rural Finance Pty Ltd* v *Gardiner*,[12] Gummow, Hayne and Kiefel JJ held that "the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot." In this case there was no issue as to the defendants' knowledge of the relevant facts because at least by 5 May 2009 they knew that the building which had been constructed had balconies of these different areas and they knew what they had or had not received insofar as s 22 was concerned. The defendants argued that they did no more than keep open the possibility of settlement, by calling for the transfer to be provided for stamping. But in doing so they invoked clause 3.3 of the contract and thereby required the plaintiff to perform the contract. That was a right only available to them whilst the contract subsisted and in my view would have constituted an election to affirm the contract had I concluded that the defendants had a right to avoid it.

Conclusion

34. The plaintiff has established its right to specific performance. It will be ordered that the contract between the plaintiff and the defendants dated 2 July 2007 be specifically performed. I will hear the parties as to other orders, including costs.

Footnotes

1 Which was able to be included within the statement under the BCCM Act by s 21(5), (6) of the LSA.

2 [2009] QSC 269.

3 [2009] QSC 269, [35].

4 [2009] QSC 269, [35].

5 [1983] 1 Qd R 248, 258.

6 The same point could not be made in the present case where the location of the building within the site was depicted.

7 [1983] 1 Qd R 248, 258.

8 See Direction 9 of Directions for the Preparation of Plans isused by the Registrar of Titles under s 10(1)(b) of the *Land Title Act 1994* (Qld).

9 Section 214(4).

10 *Flight* v *Booth* (1834) 1 BING NC 370, 377; 131 ER 1160, 1162-1163.

11 Paragraph 25 of the Second Further Amended Defence.

12 (2008) 238 CLR 570, 589.

VENNARD v DELORAIN PTY LTD AS TRUSTEE FOR THE DELORAIN TRUST (ACN 125 370 461)

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(2010) LQCS ¶90-159; Court citation: [2010] QSC 190

Supreme Court of Queensland

Judgment delivered on 2 June 2010

Community schemes — Off-the-plan purchase of lot within a residential community scheme — Applicant purchaser subsequently alleged breaches of s 365 of the Property Agents and Motor Dealers Act — Failure to direct applicant's attention to warning statement — Failure to provide substantially complete disclosure statement under s 213 of the Body Corporate and Community Management Act — Failure to properly identify the lot to be purchased under s 21 of the Land Sales Act — Failures leading to the contract being uncertain — Applicant purported to terminate the contract — Applicant sought order that she was entitled to the termination of contract — Court decided that the applicant was not entitled to termination of contract.

The applicant (purchaser) contracted to purchase an apartment in a building known as Delor Vue Apartments, a proposed lot in a residential community title scheme with the respondent (Delorain). However, subsequently after entering the contract, the applicant argued that the contract was void for uncertainty and that it had been terminated for the respondent's failure to comply with s 365(3) of the *Property Agents and Motor Dealers Act 2000*. The applicant also argued that she was entitled to avoid the contract, or not complete it or cancel it for the respondent's non-compliance with s 21 of the Land Sales Act or s 212 or s 213 of the Body Corporate and Community Management Act.

In particular the applicant claimed:

- the respondent did not direct the applicant's attention to the warning statement, information sheet and contract required by legislation, and
- it should be allowed to terminate the contract because:

  – the respondent failed to provide a substantially complete disclosure statement as the services location diagrams and exclusive use plan for lots allocated exclusive use areas of common property were not provided
  – the respondent failed to clearly identify the lot to be purchased as it incorrectly referred to the lot in the contract as Lot 51 on proposed SP 207070 which is a non-existent strata plant
  – the respondent was guilty of misrepresentation and misleading or deceptive conduct
  – the contract was uncertain in the absence of a building format plan in relation to the particulars of the lot and common property.

Based on the above, the applicant sought an order from the court that she was entitled to terminate the contract.

Held: applicant was not entitled to terminate the contract.

1. Based on the established facts, there had been compliance with s 365(2A)(c) of the Property Agents and Motor Dealers Act as there was a letter accompanying the contract which directed the applicant's attention to the appropriate information and the letter was probably delivered to the applicant's solicitors in such a form as to direct their attention to the information effectively because, when it was delivered, it was on top of the bundle.

[140224]

2. The disclosure statement was substantially complete as at the day the contract was entered into and the applicant was not able to cancel the contract in reliance on s 213. The omission of the services location diagram at the time of entry into the contract was not shown to be a highly significant part of the disclosure required in this case, which was evidenced by the lack of any material prejudice claimed on behalf of the applicant.

3. The mistake in the reference to "proposed SP 207070" was irrelevant as it should not have confused the applicant and there was no evidence that it had. If the applicant wished to examine floor plans of the unit, the disclosure statement contained instructions as to how to obtain that information from the respondent.

4. On a proper reading of the contract it seemed clear that lot 51 always included the car park as part of the lot and that it was sold on that basis. That was why the diagram identified the car park with the lot number. Any omission of exclusive use areas related to other lots was irrelevant to the disclosure required to be made to the applicant. There was no evidence of material prejudice, nor was there evidence of any attempt by the applicant to terminate the contract on that basis.

5. The description of lot 51 that was supplied in the contract was sufficient. It detailed, the unit number including the fact that a car park was allocated as part of the lot, the lot number, the building number and the location in which the unit was intended to be, the floor on which the unit was intended to be located, and the concept plans and elevations contained in the disclosure statement. That information clearly identified the lot to be purchased.

6. There was no suggestion that the applicant was misled or mistaken in fact by the form of the contract or that she was ignorant of the nature and dimensions of the unit or that it was to be conveyed to her including a car park. Accordingly there has been

no failure by the respondent to clearly identify the lot to be purchased and no breach of s 21(1)(a) of the Land Sales Act. That conclusion also supports the view that the contract was certain.

7. The applicant was not entitled to terminate the contract on any of the grounds advanced and the application was dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R W Morgan (instructed by Macrossan & Amiet) for the applicant.

G J Handran (instructed by Hickey Lawyers) for the respondent.

Before: Douglas J.

Douglas J: The applicant was the purchaser of an apartment in a building called "Delor Vue Apartments" built by the respondent Delorain Pty Ltd. The contract, made in September 2007, was for the sale of unit 51 in the apartments which was described as "Proposed Lot 51 on proposed SP 207070, as highlighted on the Identification Plan contained in the Disclosure Documents".

2. The applicant seeks declarations that the contract is void for uncertainty and that it has been terminated for failure to comply with s 365(3) of the *Property Agents and Motor Dealers Act* 2000 ("PAMDA"). As the case was argued, however, the applicant relied not on an alleged breach of s 365(3) of PAMDA but on an alleged breach of s 365(2A)(c) of that Act. She also argued that she was entitled to avoid it or not complete it or cancel it for non-compliance with s 21 of the *Land Sales Act* 1984 ("LSA") or s 212 or s 213 of the *Body Corporate and Community Management Act* 1997 ("BCCMA").

The facts

3. The contract was accompanied by an identification plan contained in disclosure documents annexed to it and signed by the applicant which identified lot 51 as part of stage 3 of the development envisaged on the proposed community titles scheme land. There was no proposed "SP 207070" then in existence. There was a "proposed building plan" attached which included documents that would more properly be described as a concept plan "intended only to represent an indicative development plan for the scheme land … annexed for illustrative purposes only" and

[140225]

which did not "accurately fix or specify the location of buildings or the boundaries of buildings, all of the same being subject to a final survey being undertaken after the completion of all relevant civil works and landscaping works to be progressively undertaken on the scheme land and as each stage is completed." [1]

4. It was intended, apparently, that there be a concept plan set out as annexure × to schedule B of the contract but the building format plan that was annexed was not labelled with the letter "X". Nonetheless it can be described as a concept plan and was said by the respondent to be a community management statement pursuant to s 66(1)(f) of the BCCMA illustrating the proposed development by concept drawings. It included illustrative diagrams highlighting lot 51 as part of "Building J" and associated with concept drawings showing the number "51" in two rectangles admittedly referable to the proposed unit and an associated car park. One significant criticism made of it was that it was insufficiently detailed for the purposes of the Act.

5. A preliminary issue was whether a first attempt by the applicant to terminate the contract in reliance on s 365 of PAMDA was effective. Then there was some criticism made of the plan scheduled to the contract that it failed to identify whether the car park was part of the title to the lot or the subject of an exclusive use agreement. Another criticism was that the community management statement did not include services location diagrams. The documentation was said to be inadequate in failing to inform the proposed lot holder properly of the details of the exclusive use areas of the common property. These issues were said to result in the contract being uncertain. A final issue related to the applicability of s 212 of the BCCMA.

The first attempt at termination of the contract pursuant to s 365 of PAMDA

6. The applicant purported to terminate the contract at first on 24 November 2008 for the respondent's alleged failure to comply with s 365(2A)(c) of PAMDA by not directing the applicant's attention to the warning statement, information sheet and contract required by that legislation. That can be done by including a paragraph in an accompanying letter giving the appropriate direction. There was an accompanying letter including the appropriate direction in a bundle of documents delivered in an envelope to the applicant's

solicitors on 20 September 2007. The probabilities are that the accompanying letter was the first document, on top of the others or included behind a clear plastic cover sheet and enclosing the contract. That was how Ms Danielle Cairns, the lady who prepared the documents, normally organised them and she was aware of the importance of providing that document. The document was headed “Cover Page Statement” and the vendor’s copy was received by it in that form and in that order.

7. The envelope was delivered to the reception of the applicant’s solicitors but by the time the documents were handed to Ms Davies, the relevant solicitor, it is likely that the covering letter had been inserted loosely into the middle of the bound contract. Ms Davies did not see it until she took a photocopy of the contract on 16 November 2008 when she found it in that position. It seems likely that the receptionist may have placed the letter in that position. No receptionist was called on behalf of the applicant to contradict that view of what probably occurred.

8. Accordingly, it is my view that there has been compliance with s 365(2A)(c) of PAMDA as there was a letter accompanying the contract which directed the applicant’s attention to the appropriate information and, if it matters, the letter was probably delivered to the applicant’s solicitors in such a form as to direct their attention to the information effectively because, when it was delivered, it was on top of the bundle.

The second attempt at termination of the contract

9. The attempt to terminate the contract by the letter of 24 November 2008 was rejected by the respondent’s solicitors on 2 December 2008. On 28 January 2009 the applicant’s solicitors sent a further letter purporting to terminate the contract on a number of other grounds, namely:

[140226]

- failure to provide a substantially complete disclosure statement as required pursuant to s 213 of the BCCMA;
- failure to clearly identify the lot to be purchased contrary to s 21 of the LSA permitting the contract to be avoided pursuant to s 25 of that Act;
- misrepresentation and/or misleading or deceptive conduct;
- uncertainty in the absence of the building format plan in relation to the particulars of the lot and common property.

10. On 10 February 2009 the respondent’s then solicitors, who acted in the transaction but not in this litigation, sent a further disclosure statement to the applicant’s solicitors. The previous concept drawings attached to the contract had shown lot 51 in building “J”. The building in the new drawings was labelled “H” but was in a similar position on the diagram. The drawings attached were more detailed scale drawings than the earlier concept drawings, identified areas of common property and again identified the lot’s garage area by reference to the lot number 51.[2] The area of lot 51 was also detailed on a scale drawing.[3] The lot proposed to be conveyed included the garage as part of the lot.

Section 213 of the BCCMA

Services location diagrams

11. Section 66(1)(d) of the BCCMA requires the community management statement envisaged by that legislation to include, among other things, one or more services location diagrams for all service easements for the standard format lots included in the scheme and for the common property for the standard form lots. That was not done in the disclosure documents originally provided in this case but they did appear in the further disclosure statements.[4]

12. Section 66(1)(f) also requires the community management statement to explain the proposed development and illustrate it by concept drawings. That seems to me to have been done here in the annexures in the disclosure statements.

13. Section 213 of the BCCMA also requires the disclosure statement to be given by the seller to the buyer to be accompanied by the proposed community management statement and to be substantially complete.[5] Section 214 permits variation of a disclosure statement by the giving of a further statement with a right in the

buyer to cancel the contract if he or she is materially prejudiced. Section 217 also permits a buyer to cancel a contract if materially prejudiced because of a difference or inaccuracy in the information disclosed in the disclosure statement. There was no suggestion in this case that the applicant was materially prejudiced by the omission to include the relevant service location diagrams.

14. The issue, therefore, appears to be whether the omission of the services location diagrams prevented the disclosure statement from being substantially complete in the context where the concept plan was intended expressly to represent only an indicative development plan and to be subject to a final survey and no material prejudice has been shown. It also seems likely that a services location diagram was not then required by s 66(1)(b) of the BCCMA as the scheme was not one for which development approval had been given after the commencement of that paragraph.

15. In my view the disclosure statement was substantially complete and did not permit the applicant to cancel the contract. Section 213(7) is also important in this context. Section 213(6) permits a buyer to cancel a contract not already settled if there has not been compliance with s 213(1) requiring the seller to give the buyer a disclosure statement. Section 213(7) then provides:

> "The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day of the contract was entered into, contains inaccuracies."

16. In my view this disclosure statement was substantially complete as at the day the contract was entered into and the applicant was not able to cancel the contract in reliance on s 213. The omission of the services location diagram at the time of entry into the contract was not shown to be a highly significant part of the disclosure required in this case, which was evidenced by the lack of any material prejudice claimed on behalf of the applicant.

[140227]

Lack of exclusive use plan

17. Another complaint of the applicant was that there was no exclusive use plan for lots allocated exclusive use areas of common property. That was so in that that part of the disclosure statement said "nil" but that was said to be deliberate because no such plan had then been prepared and it was anticipated that there would be no exclusive use areas. That view had changed by the time the further disclosure statements were sent and they included an exclusive use plan for the common property.[6]

18. In further written submissions made after the hearing the applicant argued that the disclosure statement did not adequately "identify the lot to be purchased" (within the meaning of s 21 of the LSA) because it did not state whether the car park allocation for proposed lot 51 was freehold or the subject of an exclusive use by-law (applicable to common property); whereas the contract provided that the applicant had the "exclusive use and enjoyment" of the car park shown in the disclosure plan.

19. Further or in the alternative, the applicant submitted that the disclosure statement was not "substantially complete" because it failed to contain a by-law concerning the exclusive use of common property pertaining to car parks contrary to s. 213 of the BCCMA. The further argument was made that the disclosure statement was non-compliant unless it accurately depicted, by floor plan, the area of the lot to be purchased as against the common property of the scheme land.

20. It is convenient to deal with those further submissions when I consider whether the contract was certain.

Section 21 of the LSA and certainty of the contract

21. Section 21(1)(a) of the LSA requires a written statement to be given to a person entering upon a purchase of a proposed lot clearly identifying the lot to be purchased. A statement is also required to be given by a prospective vendor under s 213 of the BCCMA and if it incorporates the matters prescribed by s 21(1)(a) to (d) of the LSA then there is sufficient compliance with s 21(1); see s 21(6).

The misdescription of "proposed SP 207070"

22. The misdescription of the proposed lot 51 as being on "proposed SP 207070" was criticised for the applicant as a failure to identify clearly the lot to be purchased because of the reference to a non-existent plan, as was the failure to include the services location diagrams to which I have already referred.

23. That there was a mistake in the reference to "proposed SP 207070" seems to me to be irrelevant as it should not have confused the applicant and there was no evidence that it had. If the applicant wished to examine floor plans of the unit, the disclosure statement contained instructions as to how to obtain that information from the respondent.[7]

Was the car park identified as part of the lot conveyed?

24. The concept plan included in the disclosure statement clearly identified lot 51 and its location in the development whose address also appeared on the contract. As the respondent submitted, the lot to be purchased was identified on p 3 of the disclosure statement. It was, by reference to the cover page, "proposed lot 51" in Delor Vue Apartments, which the contract relevantly identified as including a car park. The concept plans enclosed identified the car park as being situated in the same building, depicted by a smaller rectangle. The concept plans accompanying the disclosure statement identified the location of apartment 51 in Building J and car park 51 as situated on the ground floor (or basement) of the apartment building housing apartment 51. The basement of that building contained a car park for each of the apartments. All apartments in the scheme, except for units 7, 9, 10, 11, 12, 15, 16, 17 and 20, had car parks situated under their respective buildings; whereas apartments 7, 9, 10, 11, 12, 15, 16, 17 and 20 each had exclusive use areas.

25. The applicant's further written submission under the BCCMA appears to be that the contract did not make it clear that the car park was freehold and that, if it was not freehold, it must have been an allocation of common property for exclusive use and therefore should have been disclosed in, and should have been subject to a by-law under the disclosure statement to comply with s 213 of

[140228]

the BCCMA. The respondent submitted, however, that the car park was part of the lot to be purchased, as evinced by the allocation of lot 51, so that the applicant's submission was incorrect. The respondent submitted that the car park for proposed lot 51 was not an exclusive use area. It was part of lot 51.

26. The respondent also submitted that, therefore, the exclusive use areas referred to by applicant in her further written submissions, at by-law 44 (Sch C) and in Sch E, as being omitted are irrelevant because they did not apply to lot 51. The exclusive use areas contained in Schedule E to the further disclosure statement, it was submitted, were self-evidently areas allocated for "car parking" entitlements for units which did not have basement allocations, being apartments 7, 9, 10, 11, 12, 15, 16, 17 and 20.

27. The respondent also submitted that this aspect of the applicant's argument proceeded on the fallacy that a developer is required to disclose both exclusive use areas which have not yet been ascertained and by-laws intended to apply to such areas whether or not they come into existence and that nothing in the BCCMA or the applicable regulations required exclusive use areas to be identified and applicable by-laws to be included in relation to areas which have not yet been ascertained. Accordingly, Mr Handran for the respondent submitted that it did not follow that, because the further disclosure statement made provision for exclusive use areas of common property for car parking entitlements for apartments 7, 9, 10, 11, 12, 15, 16, 17 and 20, that the original disclosure was inaccurate.

28. On a proper reading of the contract it seems clear to me that lot 51 always included the car park as part of the lot and that it was sold on that basis. That was why the diagram identified the car park with the lot number. Accordingly, I agree with the respondent's submissions that any omission of exclusive use areas related to other lots was irrelevant to the disclosure required to be made to the applicant. Those submissions included an argument that the contention advanced by the applicant would, if accepted, have the consequence that a developer could not, following the original disclosure, allocate exclusive use areas of common property without the risk of vitiating any contracts previously procured. The respondent submitted that the better view, and the one more consistent with the consumer protection objects of the BCCMA, was that such exclusive use areas may be allocated subsequently and disclosed by a further disclosure statement, which, upon receipt, entitles the buyer to vitiate the contract only in the event of "material

prejudice". Here, the respondent submitted accurately that there was no evidence of material prejudice, nor was there evidence of any attempt by the applicant to terminate the contract on that basis.

Is a building format plan required at the stage of initial disclosure?

29. The applicant also relied on directions for the preparation of building format plans prepared by the registrar of titles for a specification of what should be done to identify lot numbers and common property and argued that it was essential to delineate the common property at the stage of entry into the contract. Mr Morgan, for the applicant, submitted that the concept plans in the first disclosure statement annexed to the contract did not delineate the common property. He argued, by reference to a text book that the common property should be defined with certainty in the contract by reference to a draft of the full survey plan prepared from the proposed building plans.[8] The author recognises, however, that in many cases draft floor plans are all that are available.[9]

30. The applicant's argument that the identification of the lot required the contract to refer to a building format plan in the disclosure statement in the form required at the time of registration of a plan of subdivision does not appeal. The form of the plan required for registration of the plan of subdivision is that required when the lot defined in the plan is created. It is not required for the recording of the community management scheme which is a distinct step apparently performed in practice immediately upon registration of the relevant plan.[10]

31. The decisions referred to in the applicant's further written submissions of *Mirvac Queensland Pty Ltd* v *Horne*[11] and *Hudpac Corporation Pty Ltd* v *Voros Investments Pty Ltd*[12] do not require a different conclusion. In *Mirvac*, Applegarth J said:[13]

> "[34] The defendants rely on the floor area of the lot as recorded on Sheet 10 as something that identified the lot to be purchased. There is a compelling argument that the floor area of the unit is part of 'describing and identifying the precise compartment of air space into which the constructed unit will fit'. The competing argument is that the Disclosure Statement sufficiently and clearly identified the lot without reference to its floor area and that the lot was clearly identified by its lot number, the floor on which it was intended to be and the marking on the drawing that indicated its location on that floor and its shape.
> [35] Although it may be possible to clearly identify a lot to be purchased without recording its total floor area in a statement provided under s 21 (a matter which I am not required to decide in order to determine this application) in a case such as this where the floor area is included on the plan, the better view is that the description of its floor area serves to clearly identify the lot in conjunction with other matters such as the lot number, the floor on which it is located and its position in the building."

[140229]

32. Although there was no floor plan here disclosing the detail provided in *Mirvac,* it seems to me that the description of lot 51 that was supplied in this contract was sufficient, a possibility that Applegarth J recognised. It detailed, as the respondent submitted, the unit number including the fact that a car park was allocated as part of the lot, the lot number, the building number and the location in which the unit was intended to be, the floor on which the unit was intended to be located, and the concept plans and elevations contained in the disclosure statement. In my view, that information clearly identified the lot to be purchased.

33. In this context the applicant also submitted that the absence of a floor plan made it impossible to determine what the relationship of the lot was with the common property. The submission was that a disclosure statement was non-compliant unless it accurately depicted, by floor plan, the area of the lot to be purchased as against the common property of the scheme land. Attention was paid to the absence of plans depicting details such as stairwells and common walls.

34. The respondent's submission to the contrary was that there was nothing in the BCCMA or the LSA which necessitated detailed survey plans being incorporated at the initial disclosure stage or any other plans showing the internal structures of the building in which the proposed apartment is to be built such as common walls or stairwells. That seems to me to be correct and consistent with the fact that the Act

envisages that units such as these may be sold “off the plan” with purchasers’ rights protected by provisions such as s 214 of the BCCMA.

Has there been any relevant misrepresentation?

35. Under the general law relating to any innocent misrepresentation such as may have occurred here either in respect of the reference to “proposed SP 207070” or in respect of any omission of the details of exclusive areas related to other units, it is necessary to consider whether, if the truth had been made known to the applicant, it would have caused her not to enter into the contract. There is no evidence before me that these matters would have caused the applicant to take such a course.

36. It is also important to bear in mind that, as the respondent argued, all that is required to be clearly identified by s 21(1)(a) of the LSA is the lot to be purchased. The rights and obligations in respect of common property are delineated to some extent in the community management statement required by s 66 of the BCCMA. There was no suggestion that the applicant was misled or mistaken in fact by the form of the contract or that she was ignorant of the nature and dimensions of the unit or that it was to be conveyed to her including a car park. Accordingly, in my view, there has been no failure by the respondent to clearly identify the lot to be purchased and no breach of s 21(1)(a) of the LSA. That conclusion also supports the view I take that the contract is certain.

Section 212 of the BCCMA

37. Section 212 of the BCCMA provided at the relevant time:

> “212 Cancellation for not complying with basic requirements
>
> [140230]
>
> (1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed *must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed*.
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
> (3) The buyer may cancel the contract if—
>
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled.” (Emphasis added.)

38. This contract did not contain a provision “that settlement must not take place earlier than 14 days after the seller gives advice to buyer that the scheme has been established or changed” but cl. 26.1 had a similar effect:[14]

> “26.1 When a separate title for the Lot has issued and the Seller is of the opinion that all other Conditions Precedent contained in clause 3.1 will be satisfied within fourteen (14) days, the Seller may give notice to the Buyer calling for settlement. Settlement is due fourteen (14) days after the Seller gives that notice.”

39. The possible draconian consequences that attended the right to cancel the contract for the omission of the provision required by s 212 in its form at the time of this contract were recognised by the Court of Appeal in *Bossichix Pty Ltd* v *Martinek Holdings Pty Ltd* where McMurdo J said:[15]

> “[21] The alternative submissions for the respondent were not persuasive. In my view s 212 does not require the employment of the very words of the section. It requires the contract to have the effect prescribed by the section. No purpose would be served by requiring the exact words to be used. The purpose of s 212 is not to inform the buyer of its legal rights. Rather the purpose is to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches

> and enquiries. (It must be said that those purposes could have been just as well served by a provision which simply deemed every relevant contract to contain such a term, rather than providing a right of cancellation where the relevant term is not drafted according to the statute. In the present case, for example, there would seem to be no prospect that the buyer could have been prejudiced by the non-compliance with the statute such that it should be necessary to make the contract voidable by one side)."

40. Parliament acted swiftly to remedy the possible problems suggested by the unsuccessful argument in that case by legislating on 22 June 2009 in the form suggested by his Honour to deem such a term to be included in such contracts and to have retrospective effect applying to legal proceedings started but not decided before the commencement of the amending legislation unless the contract had been lawfully cancelled before 5 June 2009 for failure to make provision as required by the then existing s 212(1).[16]

41. In this case, the originating application sought a declaration that the applicant was entitled to cancel the contract by reason of non-compliance with s 212 of the BCCMA but no attempt to cancel the contract on that basis was made until after 5 June 2009 by a facsimile from the applicant's solicitors dated 12 June 2009 but received by the respondent's then solicitors on 16 June 2009.

42. Accordingly the contract was not cancelled before 5 June 2009. Even had there been a purported cancellation before that date it would not have been effective legally because cl. 26.1 of the contract had the effect prescribed by the section.[17]

Conclusion and orders

43. Consequently, it is my view that the applicant was not entitled to terminate the contract on any of the grounds advanced and her application should be dismissed with costs.

[140231]

Footnotes

1 See schedule B cl. 16 of the contract at p. 37 of the exhibits to the affidavit of K J Davies filed 14 April 2009.

2 See p. 71 of the exhibits attached to the affidavit of DE Hodgson filed 13 August 2009.

3 See p. 72 of the same exhibits.

4 See pp. 29-30 of the same exhibits.

5 See s 213(2)(e)(i) and s 213(4).

6 See pp. 31-32 of the same exhibits.

7 See p 138 of the exhibits attached to the affidavit of KG Davies filed 14 April 2009.

8 See G. Bugden, Queensland Community Schemes Law and Practice para 23-650 at p. 21, 601.

9 Op. cit. at p. 21,502.

10 See the useful discussion by Mackenzie J in *Bossichix Pty Ltd* v *Martinek Holdings Pty Ltd* [2008] QSC 278 at [10] – [15] and [22] and, on appeal, in *Bossichix Pty Ltd* v *Martinek Holdings Pty Ltd* [2009] QCA 154 per McMurdo J at [8] – [16].

11 [2009] QSC 269.

12 [2009] QSC 275.

13 [2009] QSC 269 at [34]-[35].

14 See p. 17 of the exhibits annexed to the affidavit of KG Davies filed 14 April 2009.

15 [2009] QCA 154 at [21].

16 See the *Body Corporate and Community Management Amendment Act* 2009, Act No. 20 of 2009.

17 See *Bossichix Pty Ltd* v *Martinek Holdings Pty Ltd* [2009] QCA 154 at [1], [21] and [25].

VIDLER v COMMISSIONER OF TAXATION

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(2010) LQCS ¶90-160; Court citation: [2010] FCAFC 59

Federal Court of Australia (Full Court)

Judgment delivered on 1 June 2010

Community schemes — Vendor sold two blocks of vacant land — Vendor did not pay GST on either sale — Whether vacant land can be input taxed as sales of "residential premises" under GST Act — Meaning of "residential premises" — Whether land intended to be occupied, and capable of being occupied, as a residence or for residential accommodation — A New Tax System (Goods and Services Tax) Act 1999, s 40-65(1), 195-1.

This was an appeal from a decision of the Federal Court (Stone J) in *Vidler* v *Commissioner of Taxation* [2009] FCA 1426.

The registered proprietor (Vidler) sold two blocks of vacant land. Both blocks of the vacant land were zoned by the council as residential. Vidler did not account for GST in respect of either of the sale because in his view, they were input taxed as sales of residential properties.

The Commissioner of Taxation subsequently issued assessments to Vidler imposing GST in respect of both sales. Vidler's objections were disallowed by the Commisioner, and the Administrative Appeals Tribunal affirmed the Commissioner's objection decision (*Vidler* v *Commissioner of Taxation* (2009) 74 ATR 520). Vidler then appealed to the Federal Court claiming that both the properties were "residential premises" as defined in s 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* as they were "intended to be occupied, and [were] capable of being occupied, as a residence for residential accommodation".

At first instance, Stone J applied her own reasoning in *South Steyne Hotel Pty Ltd* v *Federal Commisioner of Taxation* (2009) 71 ATR 228 at [31] that the blocks of vacant land did not satisfy the definition of "residential premises" as each lacked the necessary element

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of shelter and basic living facilities. Stone J dismissed Vidler's appeal on the ground that the "capable of being occupied" limb of the definition [of residential premises] was not satisfied and, accordingly, did not need to address the "intended to be occupied" limb.

Vidler appealed against this decision claiming that the primary judge erred in holding that land was not "residential premises" unless erected on that land were some shelter and basic living facilities.

Held: appeal dismissed, vacant land not residential premises under GST Act.

1. The Full Court agreed with Stone J's conclusion; the properties here were vacant land and at the time of the sales, no shelter or basic living facilities were present on the land. Neither parcel of land was "residential premises" within the meaning of s 40-65(1) of the GST Act because it was not capable of being occupied as a residence or for residential accommodation.

2. As was the case at first instance, the Full Court concluded that it need not determine whether, at the time of sale, the properties were "intended to be occupied, as a residence or for residential accommodation".

[Headnote by the CCH CONVEYANCING LAW EDITORS]

I S Young (instructed by Robert Richards & Associates) for the appellant (Vidler).

D F C Thomas (instructed by Australian Taxation Office Legal Services) for the respondent (Commissioner of Taxation).

Before: Sundberg, Bennett and Nicholas JJ.

Editorial Comment: The Full Court in this case concluded that the definition of "residence" connoted a dwelling, abode or house in which a person may reside (irrelevant as to the permanent or long term element of the residence). The word "occupied" in the phrase "capable of being occupied" connoted living within or inhabiting a structure. It is quite artificial to speak of someone "occupying" vacant land "as residence or for residential accommodation". Further, the word "capable" in the expression "capable of being occupied, as a residence or for residential accommodation" must involve more than an ability in the future (ie after the supply) to make the land or building suitable for occupation as a residence or for residential accommodation. It is suggested that there is a requirement of more than utilities to be connected on the land to satisfy the Court that the land is "capable" of being occupied. The Full Court agreed with the Commissioner's contention "that it would be absurd if the mere existence of a tap in the middle of an acre of vacant land transforms the land into 'residential premises' for the purposes of the GST Act".

In the case of South Steyne Hotel, Stone J concluded (with which Edmonds J, Emmett J and Finn J in the Full Court agreed in the appeal of the case) that:

> *"… it is not difficult to see why the Full Court [in Marana Holdings Pty Ltd v Federal Commissioner of Taxation (2004) 141 FCR 299] reached the conclusion that an element of permanent or long term occupation was necessary before premises could be described as residential premises. As indicated above, however, the definition of "residential premises" in the GST Act now required the term of the occupation or intended occupation to be*

disregarded. In my view, that leaves as necessary only the element of shelter and basic living facilities such as are provided by a bedroom and bathroom".

Sundberg, Bennett and Nicholas JJ:

Background

1. The appellant purchased land at Gledston Street, North Booval in Ipswich in August 2004 for $1,000,000 and sold it in December 2004 for $2,350,000. The land comprised 2.7 hectares of vacant land and was zoned residential low density. It was connected to the electricity supply but not to the gas, water or sewerage, although access to these services was available at the boundaries of the land.

2. The appellant purchased land at Gladstone Road, Sadliers Crossing in Ipswich in May 2004 for $175,000 and sold it in April 2005 for

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$285,900. Access to electricity, water and sewerage was available, but the services were not in fact connected.

3. The appellant did not pay goods and services tax (GST) in relation to either sale because, in his opinion, they were input taxed as sales of residential premises. On 30 June 2006 the respondent (the Commissioner) issued notices of assessment of GST for each sale: $122,727 on Gledston Street and $10,081 on Gladstone Road. The appellant's notices of objection were disallowed, and the Administrative Appeals Tribunal affirmed the Commissioner's objection decisions. The appellant's appeal to this Court was dismissed: *Vidler* v *Commissioner of Taxation* (2009) 74 ATR 520. The present appeal is from that decision.

Legislation

4. The question before the Tribunal and later the primary judge was whether vacant land, such as the Gledston Street and Gladstone Road land, is "residential premises" for the purposes of s 40-65(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act).

5. Section 40-65(1) of the GST Act provides in part that:

> "A sale of real property is **input taxed**, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)."

6. The expression "residential premises" is defined in s 195-1 as:

> "land or a building that:
>
> (a) is occupied as a residence or for residential accommodation; or
> (b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;
>
> (regardless of the term of the occupation or intended occupation) and includes a floating home."

7. The context in which the above provisions operate is as follows. The GST Act distinguishes between taxable supplies and those that are not taxable: s 9-5. A person who makes a taxable supply is liable for GST in respect of that supply: s 9-40. The person may be entitled to input tax credits for things acquired or imported to make the supply: Divs 11 and 15. Supplies that are GST-free or input taxed are not taxable supplies and GST is not payable on them: s 9-5. If a supply is GST-free, any entitlement to an input tax credit for things acquired or imported to make the supply is not affected: s 38-1. However, if a supply is input taxed, there is no entitlement to an input tax credit for things that are acquired or imported to make the supply: ss 11-15 and 15-10.

8. The circumstances in which a supply is GST-free or input taxed are found in Divs 38 and 40 respectively. Under s 9-30(1):

> "A supply is GST-free if:

(a) it is GST-free under Division 38 or under a provision of another Act; or
(b) it is a supply of a right to receive a supply that would be GST-free under paragraph (a)."

9. Under s 9-30(2):

"A supply is input taxed if:

(a) it is input taxed under Division 40 or under a provision of another Act; or
(b) it is a supply of a right to receive a supply that would be input taxed under paragraph (a)."

10. Section 40-65(1), which is set out at [5], is an example of a supply that is input taxed under Div 40.

Primary judge

11. The question before the primary judge was whether the two properties were "intended to be occupied, and [were] capable of being occupied, as a residence or for residential accommodation" within par (b) of the definition of "residential premises". In holding that they were not capable of being so occupied, her Honour applied what she had said about par (b) in *South Steyne Hotel Pty Ltd* v *Federal Commissioner of Taxation* (2009) 71 ATR 228 (*South Steyne*) at [31]:

"With these [dictionary] meanings in mind it is not difficult to see why the full court [in *Marana Holdings Pty Ltd* v *Federal Commissioner of Taxation* (2004) 141 FCR 299] reached the conclusion that an element of permanent or long-term occupation was necessary before premises could be

[140234]

described as residential premises. As indicated above, however, the definition of 'residential premises' in the GST Act now requires the term of the occupation or intended occupation to be disregarded. In my view, that leaves as necessary only the element of shelter and basic living facilities such as are provided by a bedroom and bathroom."

12. The primary judge said that on appeal (*South Steyne Hotel Pty Ltd* v *Commissioner of Taxation* (2009) 180 FCR 409) all members of the Court agreed with the conclusion expressed in the above passage.

13. The primary judge applied *South Steyne* to the facts as follows at [13]:

"Given that the Gledson Street and the Gladstone Road land were not occupied at the time of sale, if they are to fall within the definition of residential premises they must, at that time, have been capable of providing some shelter and basic living facilities. In terms of the facilities available there was no material difference between the two properties; both were vacant land; electricity, water and sewerage services were available in both cases even if not actually connected at the time. With minor differences that are presently irrelevant, both properties were zoned 'residential'. It may well be that zoning permitting residential occupation is necessary for land or a building to be capable of providing shelter and basic living facilities but it is not sufficient. Neither the Gledson Street land nor the Gladstone Road land provided any element of shelter and basic living facilities."

Her Honour dismissed the application on the ground that the "capable of being occupied" limb of the definition was not satisfied, and accordingly did not need to address the "intended to be occupied" limb.

The appeal

14. The sole ground of appeal is that the primary judge erred in holding that land is not "residential premises" as defined unless erected on that land is some shelter and basic living facilities.

15. In *Marana Holdings Pty Ltd* v *Commissioner of Taxation* (2004) 141 FCR 299 (*Marana*) the appellants had purchased a motel in 2002. Soon after settlement they obtained council approval to use the premises as residential apartments and applied to convert the motel to strata title lots. The former motel rooms were converted into apartments. After the strata title conversion was approved, one of the apartments was sold. The Commissioner regarded the sale as a taxable supply. The appellants challenged this on the ground that the sale should be regarded as input taxed under s 40-65 of the GST Act. At the relevant time the section was as follows:

"(1) A sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation.
(2) However, the sale is not input taxed to the extent that the residential premises are:

(a) commercial residential premises; or
(b) new residential premises other than those used for residential accommodation before 2 December 1998."

The expression "residential premises" was defined as

"land or a building that:

(a) is occupied as a residence; or
(b) is intended to be occupied, and is capable of being occupied, as a residence;

and includes a floating home."

It is not necessary to set out the definition of "new residential premises".

16. The Full Court examined numerous dictionary definitions of "reside", "residence" and "residential". At [26] their Honours said that both "reside" and "residence" have the connotation of permanent, or at least long-term commitment to dwelling in a particular place. At [31] they said that the Macquarie Dictionary's three meanings of "residential" stress the relationship between "residential" and "residence", suggesting the aspect of permanent or long-term occupation. At [57] the Court stated its conclusion as to the meaning of "residential premises" in s 40-65:

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"Nothing in the GST Act suggests that the expression 'residential premises' should have any meaning other than that adopted by Beaumont J at first instance. It includes premises which are occupied as a residence, or intended to be, and capable of being so occupied. In that context the word 'residence' has the meaning attributed to it by the various dictionary references, involving a degree of permanent or long-term commitment to the occupation of the premises in question."

17. At [44]-[51] the Court examined several decisions of courts in England to the effect that "residential accommodation" encompassed lodging, sleeping or overnight accommodation irrespective of the duration of the occupation. The Court rejected this more ample understanding of the word "residence" in s 40-65.

18. As a result of the Full Court's decision in *Marana*, s 40-65 was amended so as to assume its present form. Two changes were made to the definition of "residential premises". The first was to insert the expression "regardless of the term of the occupation or intended occupation" after pars (a) and (b). The second was to add the words "or for residential accommodation" in pars (a) and (b).

19. The effect of these amendments on what had been said in *Marana* was examined by Stone J at first instance in *South Steyne*. The description of "residential rent" that was in question in *South Steyne* (s 40-35) is in part as follows:

"(1) A supply of premises that is by way of lease, hire or licence … is **input taxed** if:

(a) the supply is of residential premises (other than a supply of commercial residential premises …)."

Stone J held that the supply was of residential premises and not of commercial residential premises, and thus was input taxed.

20. After observing that it was plain from the amendments themselves and from the explanatory memorandum to the bill effecting them that the amendments were designed to displace the *Marana* holding that the words "residential" and "residence" were limited to extended or permanent occupation, Stone J went on at [29] to say:

"While the *Marana* amendments remove the particular difficulty that confronted the taxpayer in *Marana*, the necessity for some degree of permanence or long-term commitment to the occupation of

premises was only one aspect of the concept of residential premises. There is nothing in the *Marana* amendments that detracts from other aspects of the court's reasoning in that case. In particular, it is still helpful to consider the meanings of the words 'reside' and 'residence', disregarding however the need for any element of permanence or long-term occupation. The question is, taking out those elements, what is left of the concepts."

21. Having reviewed the dictionary definitions summarised in *Marana* at [20]-[30], Stone J said that what was left after the excision was "only the element of shelter and basic living facilities such as are provided by a bedroom and bathroom": at [31]. Her Honour went on to say at [35] that the amendment of the definition to include "residential accommodation" picked up the effect of the English decisions that had been rejected in *Marana*. We need not pursue this issue because, although important in *South Steyne*, it is not significant to the outcome of the present case.

On appeal Edmonds J expressly approved Stone J's approach recorded at [20]-[21]: 180 FCR 409 at [82], [84] and [85]. Emmett J, with whom Finn J agreed, said at [30] that Stone J made no error in the conclusion she reached.

22. The appellant submitted that the Full Court "have not necessarily accepted her Honour's dictum" that the element of shelter and basic living facilities survived the post-*Marana* amendments. We do not agree. Edmonds J explicitly agreed with Stone J on this point. At [82] his Honour paraphrased her process of reasoning. This included:

> "(1) The definition of 'residential premises' now requires the term of the occupation or intended occupation to be disregarded: [31].
> (2) That leaves as necessary only the element of shelter and basic living facilities
>
> [140236]
>
> such as are provided by a bedroom and bathroom: [31]."

His Honour then described Stone J's process of reasoning on whether the residential premises were "commercial residential premises": [83].

23. Edmonds J said at [84]-[86]:

> "It followed from the reasoning processes in [82] and [83] above that the primary judge concluded that, for the purposes of the GST Act, the apartments in the Hotel were 'residential premises' to be used predominantly for residential accommodation and not 'commercial residential premises' and that, in consequence, their supply 'by way of lease' attracted the operation of s 40-35 and such supplies were input taxed.
>
> I agree with her Honour's conclusion, generally for the reasons she has given. I hesitate to go as far as her Honour and conclude that the apartments are 'residential premises', 'even without regard to the inclusion of "residential accommodation" ': [34]. In my view, whether accommodation is 'settled' or 'established' involves elements which go beyond mere duration of occupation. Nevertheless, I totally agree with her Honour that the inclusion of 'residential accommodation' puts the matter beyond doubt: [35].
>
> In my view, there is no error in the primary judge's characterisation of the first category of supply."

24. To reach the conclusion that the supply of each apartment was input taxed, Stone J had to decide that the supply was of residential premises and was not a supply of commercial residential premises. Emmett J agreed with her Honour on both issues. What his Honour regarded himself as deciding is made clear at [16]:

> • if an apartment is not residential premises as defined in the Dictionary in s 195-1, the supply is taxable;
> • if the apartment is residential premises but is commercial residential premises, the supply is also taxable;
> • if the apartment is residential premises but is not commercial residential premises, then the supply is input taxed.

Thus, said his Honour, "the categorisation of the Grant Category depends upon the definitions of residential premises and commercial residential premises".

25. Emmett J then recorded that Stone J concluded that the apartments were residential premises to be used predominantly for residential accommodation and were not commercial residential premises, with the consequence that their supply by way of lease attracted the operation of s 40-35 so that the supply was input taxed. Having set out the definition of "residential premises", and noting the post *Marana* amendments, his Honour said at [21]:

> "The term of occupation is to be disregarded. However, the requirement as to the purpose of the occupation must still be satisfied. Thus, there must still be occupation *as a residence* or an intention to occupy *as a residence*. Similarly, there must be occupation *for residential accommodation* or an intention to occupy *for residential accommodation*."

This is only a partial rendering of the definition of "residential premises", which his Honour set out in full at [18].

26. His Honour disposed of the positive requirement in s 40-35 at [22] by saying:

> "Whether or not the apartments are occupied as a residence, they are occupied for residential accommodation, particularly when one is to disregard the term of the occupation or intended occupation."

He then dealt with the negative requirement of s 40-35, and concluded that the apartments were not commercial premises. It was in that context that his Honour said at [30] that Stone J made no error in concluding as she did, and that the supply of each apartment was input taxed. In other words his Honour agreed with Stone J's conclusion on "residential premises" and "commercial residential premises". If Emmett J had not agreed with her Honour's *reasons* for reaching her conclusion on those two issues, he would have said so.

27. If, as we think is the case, Emmett and Finn JJ approved of Stone J's view of the continuing relevance of *Marana* (as Edmonds J did), we should follow that approach. If only

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Edmonds J did, we should express our own view, which is that we agree with Stone J's conclusion as to the continuing relevance of *Marana* recorded at [20]-[21] for the reasons her Honour gave at [29]-[31].

28. The properties here in question were vacant land. At the time of the sales no shelter or basic living facilities were present on the land. As appears from the definitions collected in *Marana* at [21] and [23], "residence" connotes a dwelling, abode or house in which a person may reside. The permanent or long term element was a superadded requirement found in the dictionaries. The removal of that element by the post-*Marana* amendments undoubtedly left standing the requirement of "residence", namely a dwelling, abode or house in which a person may reside. That was what Emmett J was saying in the passage quoted at [25]. It is clear from par 15.2 of the Explanatory Memorandum that accompanied the amendments that the legislature was unhappy only with those elements of *Marana* which it identified as the decisions that:

> • the sale of a unit, which was previously a room in a motel, was the sale of 'new residential premises' and therefore subject to the goods and services tax (GST); and
> • the terms 'reside' and 'residence' connoted a permanent, or at least long-term, commitment to dwelling in a particular place.

The post-*Marana* amendments were designed to remove those aspects of the Full Court's decision. There is no indication in the amendments or in the explanatory memorandum of an intention to remove the requirement of residence identified by the Full Court, namely the notion of a dwelling, abode or house in which a person may reside, other than the superadded element of permanent, or at least long term, commitment to dwelling in a particular place.

29. In *Re Alcan Australia Ltd*; *Ex parte Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107 the High Court affirmed the proposition that where Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already judicially attributed to them. The Court said that the presumption was considerably strengthened in that case by the legislative history of the Act in question there. See also *Electrolux Home Products Pty Ltd* v *Australian*

Workers' Union (2004) 221 CLR 309 at [81]. In the present case, by analogy, in disagreeing with some aspects of *Marana* but not with others, the Parliament is to be taken to have approved the latter.

30. The expression "residential accommodation", added by the post-*Marana* amendments, connotes "lodging, sleeping or overnight accommodation": *South Steyne* at [37]. Each of the English cases this amendment was designed to pick up involved premises in which lodging, sleeping or overnight accommodation took place – a study bedroom at a residential college, a building to accommodate students for short term courses and "living accommodation".

31. In our view the word "occupied" in the phrase "capable of being occupied" connotes living within or inhabiting a structure. It is, we think, quite artificial to speak of someone "occupying" vacant land "as a residence or for residential accommodation".

32. *Marana* at [63] makes clear what is obvious in any event, that land or a building must be capable of being occupied as a residence or for residential accommodation at the time of supply. The appellant's submission that par (b) of the definition is "apt to deal with future use of land", that is to say where the construction of shelter or living facilities is to occur in the future, is at odds with the requirement that land or a building have the required character at the time of supply, in this case the date of sale. Conformably with this, the word "capable" in the expression "capable of being occupied, as a residence or for residential accommodation" must involve more than an ability in the future (ie after the supply) to make the land or building suitable for occupation as a residence or for residential accommodation. Thus in *Marana* it was held that a motel was not capable of being occupied as a residence at the time of supply because it lacked the qualities necessary for such occupation and had to be modified so as to be suitable for use as a residence.

33.

[140238]

In support of his contention that vacant land can be "residential premises", the appellant stressed the introductory words of the definition – "land or a building". He submitted that in view of the disjunctive "or", there is no warrant to:

- read "land" to mean land with a building on it because a building is separately mentioned;
- read "land or a building" as if it was "land with a building"; or
- read "land … that is intended to be occupied and is [so] capable" as requiring existing shelter or living facilities.

34. It is common ground that "land", as defined in s 22(1)(c) of the *Acts Interpretation Act 1901* (Cth), includes vacant land. However we do not agree that the appellant's exposition recorded at [33] is a fair reading of the definition as a whole. The definition is not concerned with "land" in the abstract, but with "land that …is capable of being occupied as a residence or for residential accommodation". Thus the meaning of "land", which in the abstract or in other contexts will include vacant land, may be modified by its context. See for example *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. For the reasons already given, vacant land is not land that is capable of being occupied as a residence or for residential accommodation.

35. The appellant placed reliance on the explanatory memorandum which accompanied the bill that amended the definition of "residential premises" to require that land or a building be "capable of being occupied, as a residence". Paragraphs 1.167 and 1.168 of the memorandum state:

> "1.167 … The new definition requires that for land to be considered **residential premises** it must be intended to be occupied, and capable of being occupied, as a residence. That is, it is permissible to use the land for residential purposes and the land has some facilities ordinarily associated with residences (i.e. water and sewerage).
> 1.168 The amendment ensures that the sales of vacant residential land will not be input taxed under section 40-65. The supply of land is not input taxed where it is:
>
> - vacant residential land;
> - commercial land; or
> - new residential premises."

36. The appellant sought to derive from these paragraphs that land is “capable” of being occupied as a residence, even if it is vacant, if it is able to be connected to water and sewerage facilities. He submitted that the word “permissible” in par 1.167 should be understood as referring to “intended to be occupied” in par (b) of the definition; in the sense that if land is permitted to be used for a residence, it is “intended” to be so used. He contended that par 1.168 refers to “bare” vacant land, while par 1.167 refers to “serviced” vacant land.

37. This is a very strained reading of the paragraphs. In the definition’s original form it required only that the land or building be “occupied or intended to be occupied as a residence”. The amendment requiring that the land or building be “capable” of being occupied is an additional requirement. The second sentence of par 1.167 is explaining that additional requirement. Two elements are mentioned: it must be permissible (ie lawful) to use the land for residential purposes, and the land must have some facilities ordinarily associated with residency. However, par 1.167 does not mention vacant land, and the paragraph provides no foundation for a distinction between “bare” vacant land and “serviced” vacant land. The context shows that the memorandum’s use of the word “land” is shorthand for “land or a building”. Furthermore, in our view par 1.168 shows that vacant land (even with such services laid on) does not come within the definition. Reading pars 1.167 and 1.168 together, we regard the memorandum’s reference to the two facilities (water and sewerage) ordinarily associated with residences, as contemplating the existence on the land of structures serviced by water and sewerage, and not, as the appellant would have it, merely the ability to connect vacant land to such services. We agree with the Commissioner’s contention that it would be absurd if the mere existence of a tap in the middle of an acre of vacant land transforms the land into “residential premises” for the purposes of the GST Act. We note in passing

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that it was common ground that “(ie water and sewerage)” in par 1.167 of the memorandum should be understood as examples of “facilities”, and that “utilities” is a more apt description of the provision of water and sewerage.

Conclusion

38. The properties here in question were vacant land. At the time of the sales no shelter or basic living facilities were present on the land. No error has been shown in the primary judge’s conclusion that at the time of sale neither parcel of land was “residential premises” within the meaning of s 40-65(1) of the GST Act because it was not capable of being occupied as a residence or for residential accommodation. As was the case at first instance, we need not determine whether, at the time of sale, the properties were “intended to be occupied, as a residence or for residential accommodation”.

DOOLAN v ROTHMONT PROJECTS PTY LTD

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(2010) LQCS ¶90-161; Court citation: [2010] QSC 193

Supreme Court of Queensland

Judgment delivered on 4 June 2010

Community schemes — Contract for sale — Where a purchaser signed a contract to purchase a residential property — Where the purchaser signed a warning statement before the offer was signed in accordance with the Property Agents and Motor Dealers Act 2000 — Where the vendor subsequently amended the special conditions in the offer — Whether the amendments amounted to a counter-offer — Whether the purchaser had to sign a new warning statement before signing the amended contract — Property Agents and Motor Dealers Act 2000, s 365, 366D, 367.

The applicant (purchaser), wishing to purchase a residential property from the respondents (vendor), signed an offer to purchase in the form of an REIQ contract. Attached to the proposed contract as its first pages was a *Property Agents and Motor Dealers Act 2000* (the Act) warning statement. The warning statement was signed by the purchaser before the offer was signed, in accordance with the Act.

The vendor negotiated some significant amendments to the contract and a second proposed contract was subsequently handed to the purchaser for execution. However, the purchaser did not sign a new warning statement before signing the contract. Instead, the warning statement from the first contract was attached as the first pages to the second contract. The purchaser duly paid the requisite deposit.

The purchaser later delivered notice withdrawing the offer made by the contract under s 365(3) of the Act. The purchaser then gave notice under s 367 of the Act to terminate the contract. The vendor subsequently elected and purported to terminate the contract.

The vendor filed an originating application seeking declarations that the sale agreement had been validly terminated. In these proceedings, the purchaser sought, among other things, orders that the vendor's originating application be dismissed and that it be entitled to recover the deposit. The purchaser argued that it was entitled to do so because:

- after being handed the second contract, it did not sign the warning statement (contrary to s 366D of the Act)
- the copy of the second contract given to it did not have attached to it a warning statement which complied with the Act (contrary to s 365(2) of the Act).

The vendor countered that s 366D of the Act did not apply, noting that the section only applies where the proposed relevant contract is given to a buyer for signing. The vendor submitted that their agent handed the second contract to the purchaser "for initialling changes" as opposed to "for signing". The vendor also argued that there was only a "single evolving offer which morphed into the relevant contract".

Held: for the purchaser.

1. Even though the proposed relevant contracts were similar, the vendor's required changes to the first contract were significant to the extent that this constituted a separate contract. The initial special conditions were not accepted by the vendor and acceptance must be unqualified. The changes to the special conditions and the inclusion of new terms constituted a counter-offer. In other words, the proper characterisation of the second contract was that it was a new offer made in light of the vendor's counter-offer and thus was a different contract.

2. The warning statement "is intended to be a warning applicable to the proposed relevant contract then under consideration" (as per Wall DCJ in *Rice* v *Ray* [2009] QDC 275). The proposed relevant contract under consideration was the second contract.

3. The provisions of s 366D(3) of the Act therefore applied to the second contract, requiring the purchaser, once handed the documentation, to sign the warning statement before signing the contract. The omission to do that was a breach of s 366D(3) and, therefore, the warning statement attached to the second contract was of no effect. Consequently, the purchaser had a right to terminate the contract at any time before it settled and was entitled to a refund of the deposit paid.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

G Handran (instructed by Hickey Lawyers) for the applicant.

J B Sweeney (instructed by Michael Sing Lawyers) for the respondents.

Before: Martin J.

Editorial comment: Although this case does not involve a purchase of a residential lot in a community scheme, it is still relevant to practitioners in terms of preparation of contracts for sale. It highlights the importance of strict adherence to procedures required under the Property Agents and Motor Dealers Act (PAMDA) when it comes to providing a contract for sale to a potential purchaser. Here the court has taken the view that changes to the contract required by the vendor

constituted a separate contract altogether and as such required the vendor to reissue a further warning statement to the purchaser to comply with PAMDA.

Martin J: On 9 March 2009 Gary Doolan and Leigh Doolan ("the Doolans") filed an originating application in which they sought, among other things, declarations:

> (a) that the written agreement of 10 October 2007 for the sale of property at Hope Island ("the property") from them to Rothmont Projects Pty Ltd ("Rothmont") had been validly terminated by them; and
> (b) that they were entitled to forfeit the deposit of $330,000.

2. The application before the Court, though, is by Rothmont in which it seeks, among other things, orders that the Doolans' originating application be dismissed and that it be entitled to recover the deposit.

Background

3. The facts in this dispute (apart from a question relating to one aspect of the conduct of the Doolans' real estate agent) are non-contentious. The chronology of the relevant events is as follows:

6 October 2007	Rothmont signed an offer to purchase the property in the form of an REIQ contract. It was created by the seller's agent. It contained special conditions. It had a *Property Agents and Motor Dealers Act 2000* ("PAMD Act") warning statement attached to it as the first pages. The warning statement had been signed by Rothmont before the offer was signed.
9 October 2007	The Doolans responded to the proposed contract with some amendments to the special conditions. Rothmont agreed to some of the proposed amendments.
10 October 2007	A second proposed contract, containing the amended special conditions, was given to the Doolans for signing. Rothmont did not sign a new warning statement before it signed the contract. The warning statement which had been attached to the 6 October documents was attached as the first pages of this set of documents. Rothmont and the Doolans signed the second proposed contract. The Doolan's real estate agent left a copy of those documents for Rothmont. Rothmont paid a deposit of $165,000. The Settlement Date was set for 1 October 2008.
16 October 2007	The Doolans' agent sent a copy of the executed contract to Rothmont's solicitor.
8 April 2008	Rothmont paid the balance deposit of $165,000, bringing the total deposit paid to $330,000.
1 October 2008	Rothmont delivered notice withdrawing the offer made by the contract under s 365(3) of the PAMD Act. The Doolans said that the contract was "still on foot". No election was made by the Doolans to terminate the contract under cl 9.1 of the terms of the contract.
2 October 2008	Rothmont gave notice under s 367 of the PAMD Act terminating the contract.
3 October 2008	The Doolans elected and purported to terminate the contract.

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The applicant's case

4. It was argued on behalf of the applicant that it was entitled to judgment because, on the uncontested facts:

> (a) Rothmont did not sign the warning statement attached to the contract after being handed that document on 10 October 2007 for signing (contrary to s 366D of the PAMD Act); and
> (b) The copy of the executed contract given to Rothmont on 10 October 2007 did not have attached to it a warning statement which complied with the PAMD Act (contrary to s 365(2) of the Act).

Summary judgment

5. In order that judgment can be given under r 293 of the *Uniform Civil Procedure Rules* the applicant must establish that the plaintiff has no real prospects of success. While the interests of justice usually require that the real issues be investigated at trial (*Gray* v *Morris* [2004] 2 Qd R 118), that interest will be satisfied where the court is persuaded that there is no need for a trial or that the plaintiff has no real prospect of succeeding. In this case, says the applicant,

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where there is no dispute as to facts and the rights of the parties turn on questions of law, the court is in a position where it is able to give judgment without the need for a trial provided the appropriate test is satisfied.

Property Agents and Motor Dealers Act 2000

6. The applicant relies upon the technical and confusing provisions of Chapter 11 of the PAMD Act. The PAMD Act regulates wide areas of activity. Its long title is: "An Act to comprehensively provide for the regulation of the activities, licensing and conduct of resident letting agents, real estate agents, pastoral houses, auctioneers, property developers, motor dealers and commercial agents and their employees, to protect consumers against particular undesirable practices, and for other purposes."

7. The sections relevant to this application are to be found in Chapter 11 "Residential property sales". This part of the PAMD Act has been the subject of criticism (much of it deserved) since it was first enacted in 2000. It has been the subject of amendments and is also the subject of the *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010* in which it is proposed that more changes be made to Chapter 11. In *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd* [2008] QSC 261, Fryberg J referred to one part of Chapter 11 — s 365 — as a confused mess. He said, at [83]: "No construction of it can be devised which conforms with the canons of interpretation and the accepted theory of the law of contract." I agree.

8. It is impossible to define the statutory intent with any sense of confidence. A reader's understanding of this part of the PAMD Act is not assisted by the organisation of Chapter 11 itself.

9. For reasons which are not immediately apparent the provisions of Chapter 11 deal with events in an order which is the reverse of that which would ordinarily apply in dealings between prospective vendors and purchasers.

10. I will, in an attempt to decipher the requirements of this legislation, consider the sections of Chapter 11 out of the order in which they appear so that they might better be applied to the facts of this case.

11. First, though, it is important to note the purposes of Chapter 11 which are set out in s 363:

> **"363 Purposes of Ch 11**
>
> The purposes of this chapter are—
>
> (a) to give persons who enter into relevant contracts a cooling-off period; and
> (b) **to require all proposed relevant contracts or relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that a relevant contract is subject to a cooling-off period**; and
> (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers; and
> (d) to impose obligations on seller's agents, under part 5, about the advertising and availability of information on sustainable housing measures for the sale of particular residential property." (emphasis added)

12. In s 364:

> (a) a "relevant contract" is defined as a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction. (A "proposed relevant contract" is not defined.)
> (b) a "warning statement" is defined as a statement in the approved form that includes the information mentioned in section 366D(1).

13. A warning statement is required to be given. The manner in which it is to be given depends upon the manner in which a proposed relevant contract is given. In this case, s 366B applies and it provides:

"366B Warning statement if proposed relevant contract is given in another way

(1) This section **applies if a proposed relevant contract is given to a proposed buyer** or the proposed buyer's agent for signing **in a way other than by electronic communication**.
(2) **The seller or the seller's agent must ensure that the proposed relevant contract has attached a warning statement** and, if the proposed relevant

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contract relates to a unit sale, an information sheet **with the warning statement appearing as its first or top page** and any information sheet appearing immediately after the warning statement.
(3) If the proposed relevant contract does not comply with subsection (2)—

(a) if the seller gave the proposed relevant contract — the seller; or
(b) if the seller's agent gave the proposed relevant contract — the seller's agent;

commits an offence.

Maximum penalty — 200 penalty units.
(4) **If the seller or the seller's agent hands the proposed relevant contract to the proposed buyer, the seller or the seller's agent must direct the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement**.

Note—

A contravention of this subsection is not an offence. Under section 366D(3), in the circumstances of this subsection a warning statement is of no effect unless it is signed by the buyer.
(5) Subsection (6) applies if the seller or the seller's agent gives the proposed relevant contract to the proposed buyer or the proposed buyer's agent in a way other than by handing the proposed contract to the proposed buyer or the proposed buyer's agent.
(6) The seller or the seller's agent must include with the proposed relevant contract a statement directing the proposed buyer's attention to the warning statement and, if the proposed relevant contract relates to a unit sale, the information sheet and any disclosure statement.

Maximum penalty — 200 penalty units.
(7) It is a defence to a prosecution for an offence against subsection (3) or (6) for the seller or the seller's agent to prove that the seller or the seller's agent gave notice to the proposed buyer or the proposed buyer's agent under section 366C." (emphasis added)

14. The contents of a warning statement and the prerequisites for its effectiveness are set out in s 366D:

"366D Content and effectiveness of warning statements

(1) The warning statement for a proposed relevant contract or relevant contract must include the following information—

(a) the relevant contract is subject to a cooling-off period;
(b) when the cooling-off period starts and ends;
(c) a recommendation that the buyer or proposed buyer seek independent legal advice about the proposed relevant contract or relevant contract before the cooling-off period ends;
(d) what will happen if the buyer terminates the relevant contract before the cooling-off period ends;

(e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the relevant contract is terminated before the cooling-off period ends;
(f) a recommendation that the buyer or proposed buyer seek an independent valuation of the property before the cooling-off period ends;
(g) if the seller under the proposed relevant contract or relevant contract is a property developer, that a person who suffers financial loss because of, or arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund.

(2) A statement purporting to be a warning statement is of no effect unless the words on the statement are presented in substantially the same way as the words are presented on the approved form.

Example—

If words on the approved form are presented in 14 point font, the words on the warning statement must also be presented in 14 point font.

(3) If the seller or the seller's agent **hands** a proposed relevant contract to the buyer for

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signing, **a warning statement is of no effect unless the buyer signs the warning statement before signing the proposed relevant contract**.

(4) If a proposed relevant contract is given to the buyer for signing and subsection (3) does not apply, a warning statement is of no effect unless the buyer signs the warning statement.

(5) For subsection (3), the buyer's signature on the warning statement is taken to be proof that the buyer signed the warning statement before signing the proposed relevant contract unless the contrary is proved." (emphasis added)

15. It is appropriate to deal with the requirements of s 366D now. Section 366D(3) deals with a situation where the seller or seller's agent is in physical proximity to the proposed buyer — the seller "hands" the proposed relevant contract to the buyer for signing. This is to be contrasted with the requirements of s 366D(4) which covers all other circumstances such as the mailing or faxing of the documents. It is only when the proposed relevant contract is "handed" to the buyer that the buyer must sign the warning statement **before** signing the proposed relevant contract. This can be contrasted with s 366D(4) which only requires that the proposed relevant contract be signed. The use of the word "before" is not to establish some time limit (such as "immediately before") but to emphasise that the purpose of the warning statement is to warn the buyer before the contract is signed, not after.

16. If the warning statement is not given or if it does not comply with s 366D then the buyer's rights are provided for in s 367:

"367 Buyer's rights if a warning statement is not given or is not effective

(1) This section applies if—

(a) a warning statement requirement for a proposed relevant contract is not complied with and notice is not given under section 366C; or
(b) a warning statement is of no effect under section 366D(2), (3) or (4).

(2) **The buyer under a relevant contract may terminate the relevant contract at any time before the relevant contract settles by giving signed, dated notice of termination to the seller or the seller's agent**.

(3) The notice of termination must state that the relevant contract is terminated under this section.

(4) If the relevant contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the relevant contract to the buyer.

Maximum penalty — 200 penalty units.
(5) If the seller, acting under subsection (4), instructs a licensee acting for the seller to refund the deposit paid under the relevant contract to the buyer, the licensee must immediately refund the deposit to the buyer.
(6) If the relevant contract is terminated, the seller and the person acting for the seller who prepared the relevant contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the relevant contract after the buyer signed the relevant contract.
(7) If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.
(8) An amount payable to the buyer under this section is recoverable as a debt.
(9) In this section—

warning statement requirement, for a proposed relevant contract, means—

(a) if the proposed relevant contract is sent by fax — a requirement to comply with section 366(2) or (3); or
(b) if the proposed relevant contract is given by electronic communication other than fax — a requirement to comply with section 366A(2) or (3); or
(c) if the proposed relevant contract is given in a way other than by electronic communication — a requirement to comply with section 366B(2), (4) or (6)." (emphasis added)

17. Section 365 sets out the circumstances in which the parties to a relevant contract will be bound. It relevantly provides:

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"365 When parties are bound under a relevant contract

(1) The buyer and the seller under a relevant contract are bound by the relevant contract when—

(a) for a relevant contract, other than a relevant contract relating to a unit sale — the buyer or the buyer's agent receives the warning statement and the relevant contract from the seller or the seller's agent in a way mentioned in subsection (2); or

…
(2) For a relevant contract, other than a relevant contract relating to a unit sale, the ways are —

…

(c) by being handed or otherwise receiving the documents mentioned in paragraph (a)(ii) and (iii) other than by electronic communication, if—

(i) the warning statement is attached to the relevant contract and appears as the first or top page; and
(ii) the seller or the seller's agent directs the attention of the buyer or the buyer's agent to the warning statement and the relevant contract.

Example of receipt other than by electronic communication—

• post

Examples of how attention may be directed—

• by oral advice

• by including a paragraph in an accompanying letter

…
(3) Without limiting how the buyer may withdraw the offer to purchase made in the contract form, the buyer may withdraw the offer at any time before being bound by the relevant contract under subsection (1) by giving written notice of withdrawal, including notice by fax, to the seller or the seller's agent.

…
(5) If a dispute arises about when the buyer and the seller are bound by the relevant contract, the onus is on the seller to prove when the parties were bound by the relevant contract.
(6) In this section—

buyer's agent includes a lawyer or licensee acting for the buyer and a person authorised by the buyer or by law to sign the relevant contract on the buyer's behalf."

18. At common law, a purchaser who had signed the proposed contract would be bound once the vendor had signed the contract. Section 365 imposes more requirements. Notwithstanding that the purchaser has already signed the warning statement and the contract, the purchaser is not bound unless:

(a) the warning statement (which has already been signed) is attached to the relevant contract as the first or top page; and
(b) his or her attention is directed to the warning statement (which has already been signed).

19. I have referred above to the *Property Agents and Motor Dealers and Other Legislation Amendment Bill 2010*. That Bill was introduced in March this year and, it appears from the Bill, that it is intended that the Act commence on 1 October this year. The objectives of the Bill are to amend Chapter 11 of the PAMD Act and make parallel amendments to the *Body Corporate and Community Management Act 1997* in order to simplify the processes for the delivery and presentation of contracts for the sale of residential property. In the Explanatory Note accompanying the Bill the following appears:

"The PAMD Act requires sellers to continuously draw a buyer's attention to the warning statement, and the information sheet and disclosure statement if a unit sale, and to attach those documents to the proposed contract in a strict order. The documents must be delivered in that same order every time the buyer receives a copy of the proposed contract during the negotiation process. Different delivery methods for electronic or facsimile transmissions are prescribed and different processes must be followed. If not followed exactly by the seller, a right to terminate

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arises for the buyer at any time before settlement. The courts have confirmed this interpretation.

Once the contract is signed by the seller, the buyer is only bound by the contract when the documents are delivered to the buyer in the same strict order. Buyers can therefore claim they are not bound by a contract simply because it was not delivered in a particular way, although under contract law principles, the concept of offer, acceptance and communication of the acceptance is enough to bind parties to the contract. The cooling-off period commences when the parties become bound by the contract."

20. Of course, it is not a legitimate method of interpreting an Act to simply adopt what is effectively said by a legislature about a statute in a later enactment. Although the *Acts Interpretation Act 1954* allows reference to a wide range of material in order to interpret a statute, an Act of Parliament which amends an earlier Act in order to achieve the purpose which was always intended does not require that Parliament's interpretation of the earlier Act be applied. Parliament "does not alter the law by merely betraying an erroneous opinion of it". (See *Deputy Federal Commissioner of Taxation (SA)* v *Elder's Trustee and Executive Co Ltd* (1936) 57 CLR 610 at 625–6.) This must apply with greater force to an Explanatory Note to a Bill which has not yet become law. Until the Bill is passed, the will of Parliament is not known. I have referred to the construction of the

current Act referred to in the explanatory note for the Amendment Bill of 2010 because it is, in my opinion, correct.

21. The PAMD Act is highly technical and prescriptive in this area. The result of its faithful application may require actions which appear to be impractical. But, the practical consequences of the legislation have been recognised in *MNM Developments Pty Ltd* v *Gerrard* [2005] 2 Qd R 515 where de Jersey CJ said:

> "[16] The context of the requirement set up by s 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is 'to protect consumers against particular undesirable practices'. That protection extends, in cases like these, to giving a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s 366(4)(a), s 366(4)(b) (including the example) and s 367(2)."

22. The result, then, is that there is an unnecessary complexity and technicality to these provisions, but while that construction might make negotiations somewhat more complicated, it does not frustrate them to such an extent that another interpretation should be found. In the words of de Jersey CJ in *MNM Developments*:

> "[20] It would be an exaggeration to suggest that construction would frustrate commercial dealings. In the first place, the convenience of commercial dealings is, implicitly, only subsidiary. Of primary importance is the protection of purchasers of residential property."

The "contracts"

23. In the circumstances of this matter the PAMD Act requires that the relevant contract/s (or proposed relevant contract/s) be identified and characterised. In order to do that it is necessary to return to the events of early October 2007.

24. On 6 October 2007 the seller's agent handed Rothmont a proposed contract for signing. It had, as its first page, the necessary warning statement. Rothmont signed the warning statement first and then the proposed contract. The documents were submitted to the Doolans but they did not accept the offer. Through their agent, the Doolans proposed some changes to the special conditions contained within the offer document.

25. The proposed changes were significant. The Doolans requested substantial amendments to the special conditions. They included:

- Clause 1 (Settlement) of the 6 October 2007 contract was removed;

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- Clause 1.3 was inserted, which provided that the deposit would be non-refundable and the Buyer would have no claim against the Seller or Deposit Holder;
- Clause 2.1(a) (Buyer's right to assign) was substantially amended;
- Clause 3.4 (Buyer causing damage to the property before settlement) was inserted;
- Clause 7 (Deletion of parts of Terms of Contract) was added, and removed Terms of Contract as to matters of inspection, inquiry and surveying;
- Clause 8 (Confidentiality) was amended;
- Clause 10 (No Representations) was added;
- Clause 11 (Caveat) was added; and
- Clause 12 (Guarantee) was added.

26. Rothmont submitted that this constituted a separate contract as the initial special conditions were not accepted by the Doolans and acceptance must be unqualified (*Hyde* v *Wrench* (1840) 49 ER 132). Consequently, Rothmont argued, these changes to the special conditions and the inclusion of new terms constituted a counter-offer. In my opinion, this case falls within the description given by Bray CJ in *Armour Coatings (Marketing) Pty Ltd* v *General Credits (Finance) Pty Ltd* (1978) 17 SASR 259 where, at 277, he said: "[t]he signatory may be regarded as offering to treat on the basis of what he has signed and any additional particulars subsequently attached may amount to a counter offer by the other party needing acceptance by the first before any contract comes into existence."

27. Rothmont agreed to some of the proposed changes and, on 10 October, a new proposed contract was presented to it. In those circumstances s 366D(3) applied:

> "If the seller or the seller's agent **hands** a proposed relevant contract to the buyer for signing, **a warning statement is of no effect unless the buyer signs the warning statement before signing the proposed relevant contract**." (emphasis added)

28. There was a warning statement attached to the proposed contract in compliance with s 366B. It was the same warning statement which had been attached to the 6 October offer and which had been signed by Rothmont then. The Doolans argued that the section only applied where the proposed relevant contract is given to a buyer for signing and that, therefore, there was a triable issue as to whether the Doolan's agent handed it to Rothmont "for signing" as against "for initialling changes". I do not agree. The proper characterisation of the 10 October document is that it was a new offer made in the light of the counter-offer made by the Doolans and, thus, was a different "relevant proposed contract".

29. It was the Doolan's contention that there was only a "single evolving offer which morphed into the relevant contract" — a description used by Wall DCJ in *Rice* v *Ray* [2009] QDC 275. That cannot be accepted. While there may be situations in which it will be difficult to determine whether there has been a refusal of an offer constituted by a request for a change in the terms of an offer — for example, where only a minor and essentially irrelevant change is sought — this was not such a case. The Rothmont offer was unacceptable to the Doolans. They proposed a changed set of special conditions which were, in large part, adopted by Rothmont in the offer it made on 10 October.

30. Rothmont submitted that the warning statement referred to in s 366D(4) does not refer to a warning statement attached to an earlier proposed contract, that is, the warning statement attached to the October 6 proposed contract (see *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd* [2008] QSC 261 at [63]–[64] and *Rice* v *Ray* [2009] QDC 275 at 8). I agree with what Wall DCJ said in *Rice* v *Ray* that the warning statement "is intended to be a warning applicable to the proposed relevant contract then under consideration". Rothmont submitted, correctly I think, that this could only mean the contract given to it for signing on 10 October 2007.

31. Although the proposed relevant contract of 6 October was similar to that of 10 October, the former had not been accepted. There were two separate, albeit related, contractual situations involving the first offer, and later, the second offer. The requirements of s 366D(3) applied to both.

32.

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A somewhat similar situation arose in *Hedley Commercial Property Services Pty Ltd* v *BRCP Oasis Land Pty Ltd* [2008] QSC 261. A submission was made to the effect that when a proposed relevant contract is given to a buyer more than once, it is sufficient if the buyer's attention is directed to the warning statement on the first occasion this occurs. I agree with the observations of Fryberg J with respect to that submission:

> "[63] … Section 366A(2) should not be construed as requiring a direction already given once to be given each time a further copy of the contract is given. Such an interpretation would be capable of producing a multitude of absurd results. The same applied where an amended copy of the contract was given to the buyer, at least where the amendments were minor and were given within a short time of each other. The proposed contract was the same proposed relevant contract.
> [64] I cannot accept that submission. While (if accepted) it may produce a sensible result in cases where only a short time elapses between the occasions on which the proposed relevant contract is given to a buyer, it might not do so in other cases. A test dependent upon the length of time between occasions when the buyer was given a proposed relevant contract would result in considerable uncertainty as to the existence of a right of termination in many cases. If such a doctrine were to be extended to cases where the contract document had undergone even minor amendment in the meantime, even greater uncertainty would result. Moreover that interpretation does not sit comfortably with the words of the section. It could hardly be suggested that if the section be complied with once, it is sufficient thereafter to ignore it. Finally, it must be remembered that the section applies only where the proposed

> relevant contract is given to the buyer for signature. It does not have to be complied with where there is an exchange of drafts in the course of negotiations. When this is borne in mind some of the absurd results postulated on behalf of BRCP disappear into the realm of the improbable."

33. It follows, then, that for the purposes of this case, Chapter 11 required Rothmont to sign a warning statement (whether the one it had previously signed or another) prior to signing the proposed contract of 10 October. The omission to do that is a breach of s 366D(3) and, therefore, the warning statement attached to the 10 October contract is of no effect. A consequence of this is that Rothmont was provided with the right to terminate the contract at any time before it settled. Section 367(4) provides that if such a contract is terminated then the seller must, within 14 days after the termination, refund any deposit paid under the relevant contract to the buyer.

34. This is a conclusion I reach reluctantly. Rothmont suffered no material disadvantage by not signing the warning statement attached to the 10 October proposed contract.

35. Rothmont gave notice on 2 October 2008 and submitted that it did terminate within the time allowed in s 367(4). The Doolans argue that, as settlement had been fixed at 5.00 pm on 1 October 2008, no effective termination could take place after that time. But the contract did not settle at that time. The section refers to the time when "the relevant contract settles" not the time when it is supposed to settle. It is well known that extensions can be given to the time of settlement and the purpose of s 367(4) is, among other things, to provide that termination on this ground cannot occur after settlement. The notice of termination was given within time.

36. Other arguments were advanced by Rothmont but I need not consider them in the light of my findings above.

37. The result of Rothmont's application is that the application by the Doolans is dismissed. The deposit should be returned to Rothmont. I will hear the parties on costs and the appropriate form of orders.

HANNAH & ORS v TW HEDLEY (INVESTMENTS) PTY LTD & ORS

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(2010) LQCS ¶90-162; Court citation: [2010] QCA 256

Queensland Court of Appeal

Judgment delivered on 24 September 2010

Community schemes — Contract for sale of lots within community titles scheme — Buyers purported to terminate the contracts prior to settlement — Non-compliance of Body Corporate and Community Management Act 1997, s 212(1) — Buyers complained that the contract did not use the exact wording to inform buyers that the community titles scheme "had been established" — Seller argued that exact wording of the Act is not required to be used in the contract to comply with the Act — Primary judge agreed with seller — The seller informed the buyer of the events that cover the constituent steps for establishment of the community titles scheme and that is sufficient to comply with the Act — Buyers appealed the primary decision submitting that strict compliance with the consumer protection provisions of the Act was necessary — Court of Appeal applied the Bossichix decision and held that primary decision was correct — Advice about the dual elements of a community titles scheme (ie registration of the plan and recording of the community management statement with the Registrar) operated to inform the buyer that a scheme had been established and complied with the Act — Not necessary to use exact wording of the Act in the contract for sale — Appeal dismissed.

The appellants (a group of buyers) entered into contracts for sale of lots within a community titles scheme to be established. Pursuant to clause 8.1 of each of the contracts:

> "You must settle this contract in Cairns 14 days after the day we notify you that all of the Conditions Precedent are satisfied and you must not settle before those 14 days expire. Settlement must occur at or before 4.00pm on the fourteenth day at the place we notify, or in the absence of that notification:
>
> (a) at the Cairns office of any first mortgagee, or
> (b) if there is no mortgagee, at the office of the Seller's Solicitor."

The seller's solicitor in accordance with clause 8.1 notified each of the buyers that the Conditions Precedent of the contract had been satisfied and that settlement was due on 27 May 2008. According to the buyers, clause 8.1 did not comply with s 212(1) of the Body Corporate and Community Management Act as the clause did not use the exact words used in s 212 to inform the buyers that they were not required to settle the contract until 14 days after notification by the seller that the community titles scheme had been established.

Section 212 was amended on 5 June 2009; however the amendments did not have retrospective effect in this case and the contracts were subject to the provisions of the Act prior to those amendments:

> "212 Cancellation for not complying with basic requirements
>
> (1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
>
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
>
> [140250]
>
> (3) The buyer may cancel the contract if —
>
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled."

The buyers purported to terminate the contracts prior to settlement and commenced proceedings seeking a declaration that pursuant to s 212 of the Act each of them had validly cancelled the contracts. Each also sought return of the deposit paid to the seller. The seller (respondent) submitted that as it was decided in *Bossichix*, the section at the time did not require the words of the section to be replicated within the contents of the contract to be compliant and it was sufficient if the contract provided to the effect required by the section. The primary judge at first instance agreed with the seller and held that the seller had notified the buyers of the events that cover the constituent steps for the establishment of the community titles scheme. This was sufficient to comply with s 212(1) of the Act.

The buyers appealed that the primary judge had erred in his decision as strict compliance with a consumer protection provision such as s 212 is required and if it is not expressly stated in the exact words in the contract, the consumer protection would be meaningless.

Held: Appeal dismissed, s 212 is not required to be replicated within the contract.

Applegarth J (with McMurdo P and White JA agreeing)

1. The relevant Conditions Precedent identified the dual elements for the establishment of a community titles scheme. The contract operated to inform the buyer of the matter about which s 212(1) required advice to be given prior to settlement. Advice about the dual elements of a community titles scheme operated to inform the buyer that a scheme had been established. The primary judge was correct to conclude that the contracts complied with s 212 of the Act.

2. Appeal dismissed and the appellants to pay the respondents costs of the appeal.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M M Stewart SC and S T Carius (instructed by Slater & Gordon) for the appellants.

M A Jonsson (instructed by Property Law Solutions) for the respondent.

Before: McMurdo P, White JA and Applegarth J.

McMurdo P: This appeal should be dismissed with costs for the reasons given by Applegarth J.

White JA: I agree with Applegarth J that s 212(1) of the *Body Corporate and Community Management Act* 1997 (Qld) does not require the exact words of the statute to be in the contract to achieve its purpose.

3. As was recognised in *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*,[1] the purpose of s 212 is not to inform the buyer of its legal rights — they have been settled — but to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches and enquiries. This construction is strengthened by the consequence of non compliance with s 212(1), namely, the right of the buyer to cancel the contract, even when there has been no prejudice.[2]

4. I agree with the orders proposed by his Honour.

Applegarth J: Each appellant agreed to buy a lot in a unit development "off the plan". The contract provided that the buyer must not settle before the expiry of 14 days after "we notify you that all of the Conditions Precedent are satisfied". The Conditions Precedent included "registration of the Building Plan and Community Management Statement by the registrar".

6. Section 212(1) of the *Body Corporate and Community Management Act* 1997 (Qld) ("the Act") at the relevant time required each contract to provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the community titles

[140251]

scheme in which the lot was to be included had been established. Section 24 of the Act provides that a community titles scheme is established by, firstly, the registration of a plan of subdivision for identifying the scheme land and, secondly, the recording by the registrar of the first community management statement for the scheme. A community titles scheme is established when the first community management statement for the scheme is recorded.

7. The appellants contend that their contracts did not comply with s 212(1) of the Act. The primary judge concluded that they did because the contract fixed the time for the settlement based on notification of events that cover the constituent steps for the establishment of a community titles scheme. The contract did not need to provide for advice to be given in the express terms that "the community titles scheme has been established" in order to satisfy the requirements of s 212(1) of the Act. The appellants submit that the primary judge erred in the construction and application of s 212.

Facts

8. Each of the appellants entered into a contract to purchase a lot intended to come into existence as a lot included in a community titles scheme when the scheme was established. Therefore s 212 of the Act applied to it.

9. The contract contained definitions of "Building Plan" and "Community Management Statement" and other terms. Clause 3.1 of the contract terms provided:

> "This contract is conditional on the following Conditions Precedent being satisfied on or before the Sunset Date:
>
> (a) completion of the Building;

(b) registration of the Building Plan and Community Management Statement by the registrar; and
(d)(*sic*) issue of a certificate of classification under the *Building Act* 1975 for the Building."

10. Clause 8.1 of the contract terms governed the time for settlement. It provided:

> "8.1 You must settle this contract in Cairns 14 days after the day we notify you that all of the Conditions Precedent are satisfied and you must not settle before those 14 days expire. Settlement must occur at or before 4.00pm on the fourteenth day at the place we notify, or in the absence of that notification:
>
> (a) at the Cairns office of any first mortgagee; or
> (b) if there is no mortgagee, at the office of the Seller's Solicitor."

11. By letter dated 13 May 2008 the solicitors for the seller notified each buyer that the Conditions Precedent of the contract had been satisfied and that settlement was due on 27 May 2008. Prior to settlement each of the buyers purported to terminate the contract. The buyers commenced proceedings seeking declaratory and other relief. They sought a declaration that pursuant to s 212 of the Act each of them had validly cancelled the contracts. Each sought an order pursuant to s 218 of the Act that the seller repay the deposit paid to the seller's agent towards the purchase of the proposed lots. An order was made for the separate determination of the following issues:

> (a) Were the plaintiffs at liberty to rescind their contract of sale with the first defendants by reason that the terms of the said contract failed to comply with section 212 of the *Body Corporate and Community Management Act* 1997 (the Act)?
> (b) Should the first defendants return to the plaintiffs the deposit paid upon entering the said contract of sale pursuant to s 218 of the Act?

The legislation

12. Section 212 of the Act was in the following terms at the relevant time:[3]

> "**212 Cancellation for not complying with basic requirements**
>
> (1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
>
> [140252]
>
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
> (3) The buyer may cancel the contract if —
>
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled."

The reference in s 212(1) to the establishment of the community titles scheme directs attention to s 24 of the Act. Section 24 provides:

> "**24 Establishment of community titles scheme**
>
> (1) A community titles scheme is established by —
>
> (a) firstly, the registration, under the Land Title Act, of a plan of subdivision for identifying the scheme land for the scheme; and
> (b) secondly, the recording by the registrar of the first community management statement for the scheme.

(2) A community titles scheme is established when the first community management statement for the scheme is recorded."

A "community titles scheme" is defined by s 10(1) of the Act to mean:

(a) a single community management statement recorded by the registrar identifying land (the ***scheme land***); and
(b) the scheme land.

A "community management statement" is defined by s 12(2) of the Act as a document that identifies land and otherwise complies with the requirements of the Act for a community management statement.

13. The provisions of the *Land Title Act* 1994 (Qld) governing the procedures by which a community management statement is recorded were considered in *Bossichix Pty Ltd v Martinek Holdings Pty Ltd*..[4] In summary, the registration of a plan of subdivision has the effect of creating the lots defined in the plan but of itself does not have the effect of creating the common property depicted in the plan. That occurs only once the plan is registered and the community management statement is recorded. Section 115K of the *Land Title Act* 1994 (Qld) permits the registrar to record a community management statement if, amongst other things, a request to record the statement is lodged. Section 115L(3) of the *Land Title Act* provides that the community management statement takes effect when it is recorded by the registrar as the community management statement for the scheme. As McMurdo J stated in *Bossichix*, the recording of the statement is an act which has distinct legal consequences.[5]

14. Although there is no express requirement for the registrar to record a statement immediately upon registering the relevant plan, this was said in *Bossichix* to be the practice of the registrar and there was good reason for this practice. Nevertheless, the two steps of registering the relevant plan and recording the community management statement are distinct. The Court in *Bossichix* observed that it was possible that at least by an oversight the recording of the statement might not immediately follow the registration of the plan and that a notice of registration of the plan was not the equivalent of a notice of the establishment of the scheme. This feature was critical to the decision in *Bossichix* in which the contract fixed the settlement date by reference to the date the seller notified the buyer that the "Building Format Plan" had been registered. The relevant clause of the contract did not have the same effect as the provision required by s 212(1), and the respondent in that case was entitled to cancel the contract.

15. The contract in this case is in different terms, but the interpretation of s 212 in *Bossichix* is relevant to the determination of this appeal. After concluding that the respondent was entitled to cancel the contract, McMurdo J considered and rejected an alternative submission for the respondent, and in doing so explained the purpose of s 212:

> "In my view s 212 does not require the employment of the very words of the section. It requires the contract to have the effect prescribed by the section. No purpose would be served by requiring the exact words to be used. The purpose of s 212 is not to inform the buyer of its legal rights.
>
> [140253]
>
> Rather the purpose is to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches and enquiries."[6]

Holmes JA and A Lyons J agreed with the reasons of McMurdo J and each expressly agreed that compliance with s 212(1) did not necessitate the use of the precise words of the section: it would suffice if the relevant clause had the effect required by the section.[7]

The decision of the primary judge

16. After outlining the submissions of the parties, the primary judge in this case identified the issue as whether each of the contracts had the effect prescribed by s 212(1) of the Act. It was relevant that s 212(1) had a consumer protection purpose, but the primary judge observed that the manner in which that purpose had been expressed in s 212(1) was less prescriptive than other consumer protection provisions within the Act, such as those regulating disclosure statements.

17. The contractual provision in this case was unlike the provision in *Bossichix* that allowed the seller to fix the settlement date by reference to the registration of the relevant plan, rather than the establishment of the community titles scheme. Notice of the settlement date given under clause 8.1 of the contract in this case was on satisfaction of the Conditions Precedent which covered the registration of both the Building Plan and Community Management Statement. Technically, a community management statement is "recorded" rather than "registered", but the use of the expression "registration" instead of "recording" in clause 3.1(b) was said by the primary judge to not alter the nature of the Conditions Precedent under the contract.

18. Clause 8.1 of the contract was said to fix the time for settlement "based on notification of events that cover the constituent steps for the establishment of the community titles scheme". This was sufficient to comply with s 212(1) of the Act. It was not necessary that the notice provision in the contract require advice to be given in the express terms that "the community titles scheme has been established".

19. The conclusion reached in relation to the construction of s 212(1) of the Act meant that it was unnecessary for the primary judge to consider an additional argument of the seller that applied to some of the buyers about the content of letters of termination that made no reference to the termination of the contract being on the basis of a contravention of s 212(1). The questions posed for separate determination were each answered "no".

The appellant's submissions

20. The appellants submit that strict compliance with a consumer protection provision such as s 212 is required, and that the 14 day restriction on settlement is largely meaningless unless the consumer is expressly informed that the scheme has been established. They submit: "Only then is he or she apprised of the pertinent fact that will prompt the necessary searches and inquiries prior to settlement". The appellants concede, in the light of *Bossichix*, that compliance does not require the words of s 212 of the Act to be included in the contract verbatim. They submit that "some minimal and immaterial variation of the words of the statute is permissible but anything beyond this is a contravention." A substantial departure from the words of the statute was submitted to undermine the consumer protection objective of the provision.

21. The appellants further submit that the primary judge erred in concluding that it was sufficient for the contract to fix a date for settlement based on notification of events that cover the constituent steps for the establishment of the community titles scheme. For a consumer to be cognisant of the establishment of the scheme it would be necessary, at a minimum, to read clauses 8.1 and 3.1 of the contract and then move beyond the contract to consider the meaning of s 24 of the Act. The appellant submitted that the contract's compliance with s 212 should be apparent on the face of the contract without the consumer being expected to refer to s 24 of the Act so as to ascertain that the relevant conditions precedent effect the establishment of a community titles scheme.

The respondent's submissions

22. The respondent submits that the appellants' arguments overlook the fact that this Court in *Bossichix* has determined that the section in the form it took at the relevant time did not require the words of the section to be

[140254]

replicated within the contents of the contract, and that it was sufficient if the contract provided to the effect required by the section. The section did not require a contract to "state" or "specify" a particular thing, or to use a particular form of words. The section, instead, required a contract to which it applied to "provide" that settlement not take place earlier than 14 days after the seller had given advice to the buyer that the scheme had been established or changed, as the case may be. The section's purpose was submitted to be "functional rather than informational."

23. It was sufficient to satisfy s 212(1) that the clause in the contract was based on notification of all of the events that were necessary for establishment of the community titles scheme. The "functional effect" of clause 8.1 was to require that settlement not occur before the expiration of 14 days after notification was given that each of the constituent elements necessary for establishment of the relevant community titles scheme had occurred.

Did the contracts comply with s 212(1) of the Act?

24. The appellants correctly submit that the requirements of s 212(1) must be interpreted having regard to the fact that s 212 has a consumer protection purpose, and that such provisions demand strict compliance.[8] One of the Act's secondary objects is to provide "an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes".[9] Provisions that are intended to protect consumers, like any other statutory provisions, should be construed according to their text and their context.[10] An interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[11] An interpretation that advances the section's purpose should be adopted even if the result is to give a buyer a right to terminate a contract for what appears to be a technical contravention that did not occasion the buyer any material disadvantage.[12]

25. The text of s 212(1) at the relevant date did not require the contract to "state" or "specify" any particular matter, unlike other provisions, for example, s 213(2) which requires a disclosure statement to "state" specified matters. Section 212(1) required the contract to "provide" that settlement must not take place earlier than a certain date, and that date was fixed by reference to the date "the seller gives advice to the buyer that the scheme has been established or changed." The statute did not require the advice to be in a particular form of words. Compliance with the statute depended upon whether the provision fixed the settlement date by reference to an event, namely the establishment of a community titles scheme. The terms of the section did not require the clause to use the expression "the establishment of the community titles scheme".

26. An interpretation that requires the contract to employ the words of the section is not necessary to achieve the purpose of the section, or the consumer protection purpose of the Act. As McMurdo J stated in *Bossichix*:[13]

> "No purpose would be served by requiring the exact words to be used."

27. The submission of the respondent that the section's purpose was "functional, rather than informational" over-simplifies matters. It is true that the purpose of s 212 is not to inform the buyer of its legal rights. However, the section has a purpose of providing information. As stated in *Bossichix*[14] :

> "the purpose is to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches and enquiries."

The statute requires the settlement date to be fixed after the seller gives advice to the buyer that the community titles scheme has been established, but does not require that advice to use the words "community titles scheme". *Bossichix* is authority for the proposition that s 212 does not require those precise words to be used, and the appellants did not submit that it was wrongly decided.

28. The issue then is whether the terms of the statute and its purpose of informing the buyer that the scheme has been established are satisfied when a contract provides for settlement to not occur until 14 days after the events that constitute establishment of the community titles scheme.

29.

[140255]

In circumstances in which neither the text of s 212(1) nor its purpose requires a contract to refer in terms to the "establishment of a community titles scheme", I consider that reference to the constituent elements of registration of the relevant plan and the recording of the community management statement complies with the terms and purpose of the section. A contract that refers to the matters that, in law, establish a community titles scheme, namely the registration of the relevant plan and the recording of the community management statement, is likely to be no less informative than one that refers simply to "the establishment of the community titles scheme". Each operates to inform the buyer of an event. That event may have implications for the buyer's rights, and notification of it may encourage a buyer to make necessary searches and inquiries. Simply informing a buyer that a "community titles scheme has been established" does not inform the buyer of the practical implications of that fact (other than it being an event that governs the date for settlement) or what constitutes a "community titles scheme".

30. The section does not require the contract to spell out what a “community titles scheme” is or to outline the buyer’s legal rights. The section has the effect that a contract that complies with it will have a term that provides for settlement not to occur for at least 14 days after the buyer is advised that the community titles scheme has been established. The statute is complied with by a contract that provides for this in terms of “the establishment of a community titles scheme” or by reference to the two matters by which a community titles scheme is established.

31. Having regard to the purpose of consumer protection that is a secondary purpose of the Act and the specific purpose of s 212(1) in the form it appeared at the relevant time, a contract that serves to inform a buyer of the establishment of a community titles scheme by reference to the two matters that constitute such a scheme may be said to advance the purpose of the section. The section is concerned with the substance of the advice that the scheme has been established, not the form of words used to give that advice.

32. The appellants’ submission that a contract in a form that advises of the constituent elements for the establishment of a community titles scheme is not self-contained, requires a consumer to consider s 24 of the Act and therefore does not comply with s 212(1) is unpersuasive. It might be said with equal force that a contract that simply uses the words “community titles scheme” would require a consumer to go outside the contract and find s 24 of the Act in order to be informed about what a community titles scheme is.

33. The alternative submission of the appellants that the contract’s reference to the “registration of the Building Plan and Community Management Statement by the registrar” rather than to the “registration of the Building Plan and recording of the Community Management Statement by the registrar” is answered by the reasons of the primary judge. The use of the expression “registration” instead of “recording” in respect of the community management statement was of no consequence. The shorthand reference is clause 3.1(b) to the process of registration and recording did not alter the obvious meaning of the Conditions Precedent. The relevant Conditions Precedent identified the dual elements for the establishment of a community titles scheme. The contract operated to inform the buyer of the matter about which s 212(1) required advice to be given prior to settlement. Advice about the dual elements of a community titles scheme operated to inform the buyer that a scheme had been established. The primary judge was correct to conclude that the contracts complied with s 212 of the Act.

Conclusion

34. Contrary to the appellants’ written submissions, the primary judge did not hold that “substantial compliance” with s 212 was sufficient. The primary judge considered whether a contract that fixed the time for settlement based on notification of events that covered the constituent steps for the establishment of a community titles scheme complied with the Act. I agree with her Honour’s conclusion that it did. That conclusion had regard to the terms of s 212(1) in the form that it then appeared, which was less prescriptive than other consumer protection

[140256]

provisions. The primary judge’s conclusion also had regard to the purpose of s 212(1) as discussed by this Court in *Bossichix*. That purpose was achieved by a contract that fixed the time for settlement by reference to advice that the constituent elements for the establishment of a community titles scheme had occurred. The Act did not require additional legal advice that these matters constituted the establishment of a community titles scheme. Advice that the relevant plan had been registered and the community management statement had been recorded was effective to inform a buyer that the scheme had been established.

35. It is unnecessary to consider the respondent’s additional argument advanced by a Notice of Contention concerning the content of certain letters of termination.

36. I would order that the appeal be dismissed and that the appellants pay the respondent’s costs of and incidental to the appeal.

Footnotes

1 [2009] QCA 154.

2 Ibid at [21] per McMurdo J.

3 Reprint No 3D. Section 212 was amended in June 2009. However, the amendments did not have retrospective effect in this case which relates to the lawfulness of a purported cancellation before 5 June 2009: *Body Corporate and Community Management Amendment Act* 2009, s 4.

4 [2009] QCA 154.

5 Ibid at [14].

6 *Bossichix* at [21].

7 Ibid at [1] per Holmes JA; at [25] per A Lyons J.

8 *Celik Developments Pty Ltd* v *Mayes* [2005] QSC 224 at [24].

9 The Act, s 4(f).

10 *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

11 *Acts Interpretation Act* 1954 (Qld), s 14A(1).

12 *MNM Developments Pty Ltd* v *Gerrard* [2005] 2 Qd R 515 at 519 [16]–[17].

13 (Supra) at [21].

14 Ibid.

SUNBAY PROJECTS PTY LTD v NAUGHTON

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(2010) LQCS ¶90-163; Court citation: [2010] QCA 247

Queensland Court of Appeal

Judgment delivered on 10 September 2010

Community schemes — Contract for sale of lot within a community titles scheme to be established — Buyer alleged the contract does not comply with the Body Corporate and Community Management Act 1997, s 212 — Contract Completion Date provides for two possible dates for settlement — Primary decision construction of definition of Completion Date as cumulative and not alternative — Buyer appealed decision — Court of Appeal dismissed appeal — Court to give business efficacy to construction of completion date — Contract complies with s 212 of the Act — Appeal dismissed.

The buyer (appellant) entered into a contract for the sale of a lot within a community titles scheme to be established at Airlie Beach with the developer (respondent). A year later, the plan was registered and notice was given to the buyer for settlement of the contract. The notice called for settlement on a date that was 14 days after notice had been given to the buyer that the scheme had been registered. The buyer did not complete the contract but purported to terminate it on the ground that it did not comply with s 212(1) of the Act.

[140257]

Section 212 was amended on 5 June 2009; however the amendments did not have retrospective effect in this case and the contracts were subject to the provisions of the Act prior to those amendments:

> "212 Cancellation for not complying with basic requirements
>
> (1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
>
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
>
> (3) The buyer may cancel the contract if —
>
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled."

The relevant clauses which, according to the buyer, did not comply with s 212(1) of the Act were as follows:

Clause 7.2 provided that the conveyance of the lot and payment of the purchase price was on the "Completion Date", which was defined as:

> "Completion Date: means not less than:
>
> (a) 14 days from the Seller giving written notice to the Buyer under clause 8; *or [emphasis added]*
> (b) 30 days after the Contract Date."

Clause 8 was in the following terms:

> "8 COMPLETION DATE
>
> 8.1 The Seller must give the Buyer written notice within 28 days after the Seller becomes aware that the Plan and CMS have registered and a separate title for the Lot has been created.
>
> 8.2 …"

The seller refused to accept the buyer's purported cancellation of the contract and issued proceedings for specific performance. The primary judge agreed with the seller and gave summary judgment against the buyer. The buyer appealed against the primary decision submitting that the contract clause 8 and the definition of "Completion Date" provided for two alternatives for fixing the date for settlement. Only the first complied with the requirements of s 212 of the Act but not the other. Therefore it did not comply with s 212 of the Act as the provision requires that settlement must not take place earlier than 14 days after the buyer is notified of the registration of the plan and community management statement and the scheme is established. The primary judge construed the "or" in the definition of "Completion Date" as meaning "and" so that the two elements of the definition were cumulative and not alternative.

Held: Appeal dismissed, contract complies with s 212.

Chesterman JA (with McMurdo P and Mullins J agreeing)

1. The primary judge was correct to prefer the respondent's approach. There are three reasons, the first is it gives business efficacy to the contract and harmonises the definition of "Completion Date" in clause 8 to construe "or" as meaning "and". If the

appellant's construction is adopted, it can be any date after (in this case) 30 May 2008. It would leave an important date such as the date for settlement of the contract to be determined by the general

[140258]

law for reasonable notice to prevent the contract becoming uncertain and it is not a likely construction that a settlement date should be left to be fixed by such means.

2. The second objection to the appellant's construction of the definition of Completion Date is that it does not take into account of the fact that when the contract was entered into, the lot was still to be developed and community titles scheme to be established. On the appellant's construction of the contract, the purchaser could have called on settlement before title was issued as long as she waited one month after the contract date. It is not a likely construction of the contract that the parties intended that settlement could occur before registration of the scheme.

3. The third objection is that the appellant's construction would have invalidated the contract because the completion date would offend s 212 of the Act. The appellant is attracted to that result now but when construing the contract, the assumption is that the parties intended to be bound by their bargain, and the court endeavours where possible to construe a contract so as to validate it, not render it void. The respondent's construction, which the primary judge favoured, should be adopted.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

J B Sweeney (instructed by Hickey Lawyers) for the appellant.

P J Roney (instructed by Macrossan & Amiet) for the respondent.

Before: McMurdo P, Chesterman JA and Mullins J.

McMurdo P: I agree with my colleagues that this appeal should be dismissed with costs.

2. The construction given by Chesterman JA to "Completion Date" in s 1 of the contract between the parties, with which I agree, is also supported by the preamble to s 1:

> "In this Contract, words marked in bold have the meanings given in the particulars opposite the Items in the Reference Schedule and unless the contrary intention appears have the following meaning:"

3. It is clear when the contract is looked at as whole, as Chesterman JA explains, that "or" in the definition of "Completion Date" is not intended to have its ordinary meaning. It should be construed as "and". The primary judge's construction of the contract was plainly correct.

4. I agree with the orders proposed by Chesterman JA.

Chesterman JA: The respondent is the developer of residential land at Airlie Beach. By a written contract dated 30 April 2008 the respondent as vendor and the appellant as purchaser agreed upon the sale and purchase of proposed lot 39 in the development for a price of $654,500. The survey plan, CTS 39517, which created lot 39 was registered about a year later and notice that the plan had registered was given to the appellant on 23 March 2009.

6. Clause 7.2 of the contract provided for conveyance of the land and payment to be on "the Completion Date" which, by clause 1, was defined as follows:

> "Completion Date: means not less than:
>
> (a) 14 days from the Seller giving written notice to the Buyer under clause 8; or
> (b) 30 days after the Contract Date."

7. Clause 8 was in these terms:

> "8 COMPLETION DATE
>
> 8.1 The Seller must give the Buyer written notice within 28 days after the Seller becomes aware that the Plan and CMS have registered and a separate title for the Lot has been created.
> 8.2 …"

"CMS" is a reference to the "Community Management Scheme" which gave effect to the subdivision by the registration of lots pursuant to the *Body Corporate and Community Management Act* 1997 ("the Act"). The notice given by the respondent to the appellant called for completion on 7 April 2009 which was a date more than 14 days after notice had been given to the appellant that the scheme had been registered. The appellant did not complete the contract but purported to terminate it on the ground that it did not comply with s 212(1) of the Act.

8.

[140259]

That section provided:

> "212 Cancellation for not complying with basic requirements
>
> (1) A contract entered into by a person (the *seller*) with another person (the *buyer*) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed."

The section was changed by the *Body Corporate and Community Management Amendment Act* 2009 and the point raised in this appeal is unlikely to arise again.

9. The respondent refused to accept the appellant's purported cancellation of the contract and issued proceedings for specific performance. It applied for, and was successful in obtaining, summary judgment. The appellant's point before the learned primary judge and on appeal was that the contract by clause 8 and the definition of "Completion Date" provided two alternatives for fixing the date for completion. Only the first complied with the requirements of s 212 of the Act. The consequence was that the contract did not provide that settlement:

> "must not take place earlier than 14 days after the seller gives advice … that the scheme has been established …"

and was accordingly void for illegality.

10. The primary judge met the appellant's objection by construing, in effect, "or" as meaning "and" in the definition of "Completion Date" so that the two elements of the definition were cumulative and not alternative. On this reading of the contract the completion date was that date fixed by not less than 14 days notice and which must be a date more than 30 days after the contract date.

11. His Honour said:

> "If that definition (of completion date) were to be construed according to its grammatical structure and the frequent sense of the word "or" as separating alternatives, the contract might be thought to accommodate the possibility that the vendor could insist on completion once 30 days had elapsed after the contract date. But the contract cannot mean that.
>
> The vendor cannot insist on completion without giving the notice for which clause 8.1 provides.
>
> The heading to clause 8 and the reference in the definition of 'completion date' to a date not less than 14 days from the clause 8.1 written notice signify that, to call for completion, the vendor must give a written notice that specifies a date for completion that meets two requirements: It must be given within 28 days after the vendor becomes aware that the relevant community title scheme is established. It must also nominate a date for completion that is not less than 14 days from the giving of that notice.
>
> On this view, the reference in paragraph (b) of the completion date definition to '30 days after the contract date' does not express an alternative. Rather, it conveys a cumulative requirement that is designed to ensure that in no circumstance will a purchaser be obliged to complete until 30 days after the contract date. It caters for such a contingency as the plan and CMS might be registered very soon after the contract is made and confers an additional measure of protection against requiring a purchaser to complete too hurriedly.
>
> In other words, in the definition of 'completion date', or, in effect, means 'and'."

12. The appellant submits that the judgment is affected by two errors. The first is that there was no evidence from the terms of the contract itself or the circumstances surrounding its making which might indicate that the parties were mistaken in the choice of words and that when they used "or" in the critical definition they did not intend it to have its ordinary meaning. There was, says the appellant, "no warrant to construe 'or' as 'and' and the contract did not comply with s. 212(1)." The appellant stresses that the contract is a pro-forma agreement for the sale of proposed lots in a development, and in the task of construction:

[140260]

> "The court is … left with the words of the document. If … plain and unambiguous the court must give effect to them even though the result may appear one sided or even unreasonable."

13. This general proposition may be accepted. The appellant, however, necessarily and correctly accepts that one can find many cases in which in both contracts and statutes "or" and "and" have been given interchangeable meanings, or one is read as meaning the other.

14. The appellant refers to the judgment of Blackburn J in *Re The Licensing Ordinance* (1968) 13 FLR 143 in which his Honour (146–7) determined that those cases fall into two categories. In fact the cases discussed by his Honour were not those where the two words are interchanged but cases in which "and" has been read as meaning "or". His Honour said:

> "The first category is that of cases where, if 'and' was given its natural meaning, the result was so extraordinary … 'an absurdity or unintelligibility' … that in order to make sense of the provision the court was obliged to say that it must read the word 'and' as if it had been 'or'. The cases in the second category were those in which there was a list of items, the items being joined by 'and' and the list being governed or affected by words which showed that the list was a list of alternatives."

The case has no particular relevance to the present appeal.

15. Of more relevance is the judgment of Lord Salmon in *Federal Steam Navigation Co* v *Department of Trade and Industry* [1974] 1 WLR 505 at 523–4. His Lordship said:

> "… I do not suppose that any two words in the English language have more often been used interchangeably than 'and' and 'or'. However unfortunate or incorrect this practice may be, many examples of it are to be found in all manner of documents and statutes. There are many reported cases which turn upon whether, in its particular context, the word 'or' is to be read conjunctively or the word 'and' disjunctively.
>
> There is high authority for the view that the word 'or' can never mean 'and' although it is sometimes used by mistake when 'and' is intended: see Sir George Jessel MR in *Morgan v Thomas* and MacKinnon J in *Brown & Co v T & J Harrison*. On the other hand, there is also the high authority of Bankes and Atkin LJJ, on appeal in *Brown & Co v T & J Harrison*, that 'or' is quite commonly and grammatically used in a conjunctive sense. In *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* MacKinnon LJ was able pungently to restate the contrary view which he had expressed 11 years previously. The Oxford Dictionary seems to support Sir George Jessel MR and MacKinnon LJ.
>
> I do not, however, attach any real importance as to whether the one school of thought or the other is right on this interesting grammatical point. In *Brown & Co v T & J Harrison*, the Court of Appeal agreed with MacKinnon J as to the effect of the relevant statutory provision. MacKinnon J reached his conclusion by holding that the word 'or' should be substituted for the word 'and'. The Court of Appeal reached their conclusion by holding that the word 'or,' on its true construction, meant 'and.' The result was the same.
>
> There is certainly no doubt that generally it is assumed that 'or' is intended to be used disjunctively and the word 'and' conjunctively. Nevertheless, it is equally well settled that if so to construe those words leads to an unintelligible or absurd result, the courts will read the word 'or' conjunctively and 'and' disjunctively, as the case may be; or, to put it another way, substitute the one word for the other. This principle has been applied time and again even in penal statutes …." (citations omitted)

16. The principles which govern the construction of contracts are well known and it is not necessary to repeat them. In arriving at the objective intention of the parties the court will look at the words they chose to record their bargain and the commercial object they meant to achieve by it. If it is apparent that the particular words of the contract will not achieve

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what one can confidently conclude was the objective intended then the words can be modified to achieve the result. All depends upon the particular words in question and the contractual context. As Lord Salmon's judgment demonstrates there is no particular objection to reading "or" conjunctively. It remains a canon of

construction that a contract should be construed so as to give it efficacy and, if possible, a construction which would destroy the bargain is to be avoided.

17. The construction for which the respondent contended, and which the primary judge accepted, gives to the definition of completion date a compendious meaning which consists of two elements but results in the fixing of one date. It treats the completion date as being that fixed by at least 14 days written notice required by clause 8, and is not earlier than 30 days after the contract date.

18. One can achieve that construction by:

(i) substituting "and" for "or";
(ii) replacing the words "not less than" with the words "the later of";
(iii) substituting for the word "or" the phrase "such notice not to expire earlier than"

in the definition of "completion date".

19. The most economical means of achieving the construction is the first. It does the least violence to the language of the contract. It should be adopted if it is clear that it was this construction the parties intended by their contract.

20. The contest between the parties is whether the definition of "completion date" is to be read as a composite phrase producing one date or whether it is to be read distributively as producing two dates either of which may, depending on the parties' choice, be the completion date.

21. In my opinion the primary judge was right to prefer the first approach. There are a number of reasons for the conclusion.

22. The first is that it gives business efficacy to the contract and harmonises the definition of "completion date" with clause 8. The date for settlement is fixed by giving notice, the timing of which is fixed by the terms of the definition and of clause 8. By complying with those provisions, a fixed and certain completion date is determined and communicated. There can be no scope for disagreement between seller and buyer as to when payment and conveyance have to occur.

23. It is otherwise if the appellant's construction is adopted. In that case, the alternative completion date is left at large. It can be any date after (in this case) 30 May 2008. The contract provides no mechanism for determining the date whether by notice or otherwise. No doubt the general law would prevent the contract becoming uncertain by the implication of terms as to reasonable notice but it is not, I think, a likely construction of the contract that such an important occurrence as the date for settlement of the contract should be left to be fixed by such means.

24. A second objection to the appellant's construction is that the alternative definition takes no account of the fact that when a contract was executed the land was undeveloped and the respondent as seller could not convey any title to it. In fact about a year went by before the community title scheme was registered and title to lot 39 issued. On the appellant's construction of the contract the purchaser could have called for settlement before title issued as long as she waited a month after the contract date. The parties both knew that title to the lot would issue subsequent to the execution of the contract. It is not, I think, a likely construction of the contract that the parties intended that settlement could occur before registration of the scheme. To avoid this consequence of the appellant's construction one must imply into the definition of "completion date" the substantial requirement that it occurs subsequent to registration of the plan. That implication is not necessary if one adopts the respondent's "compendious" construction of the definition.

25. The third objection is that the adoption of the appellant's construction would invalidate the contract because a completion date so defined would offend s 212 of the Act. The appellant is now attracted to that result but when construing the contract from the orthodox assumption that the parties intended to be bound by their bargain, the court endeavours, where possible, to construe a contract so as to validate it, not render it void. The fact that the

appellant's construction would destroy the contract is a good reason for adopting an alternative construction if one is available.

26. The consequence is that the respondent's construction, which the primary judge favoured, should be adopted.

27. The appellant's second point is that the contract requires "a lengthy and torturous construction" to understand it, and for that reason does not comply with s 212, which the appellant asserts has a consumer protection purpose. The argument is that it should be apparent at first sight whether a contract does, or does not, provide that settlement is not to take place earlier than 14 days after advice that the scheme has been established. One has to tease out the meaning of this contract, so the argument runs, with the consequence that the section has not been obeyed. In any case, the consumer protection purpose of s 212 is to ensure that the purchaser is informed that the scheme has been established and to allow sufficient time prior to settlement for the purchaser to make any necessary searches or enquiries about that: *Bossichix P/L* v *Martinek Holdings P/L* [2009] QCA 154 at [21].

28. The short answer to the point is that the question whether the contract complies with s 212 only arises after the court has ascertained its meaning. Once construed, the contract means what the court has ruled. The point is established by *Upper Hunter County District Council* v *Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436–7. The question is whether the contract, as construed by the court, complies with s 212. Any difficulty in construction is irrelevant to this second task.

29. Some changes to the orders made by the primary judge are necessary because the time fixed by his Honour for performing the contract has passed. I would vary orders 1 and 3(b) of the orders made on 18 February 2010 by deleting the date "19 March 2010" and substituting therefor the day which is 30 days after the delivery of judgment in the appeal. The appeal should otherwise be dismissed with costs.

Mullins J: I agree with Chesterman JA.

LATITUDE DEVELOPMENTS PTY LTD v HASWELL

(2010) LQCS ¶90-164; Court citation: [2010] QSC 346

Supreme Court of Queensland

Judgment delivered on 15 September 2010

Community schemes — Developer and purchaser entered into off-the-plan contract for proposed lot in community titles scheme resort — Developer gave notice of changes to the project shortly before the settlement date — Where those changes affected the creation of common property — Defendant gave notice of termination of the contract — Developer sued the defendant for specific performance of the contract — Whether the defendant can seek summary judgment — Whether the defendant can rely on any rights said to accrue under the Land Sales Act 1984 (Qld) s 21 and s 22, and the Body Corporate and Community Management Act 1997 (Qld) s 214 and s 217 — Whether there was material prejudice established by the defendant because of the decision to stage the development — Whether the notice of termination was valid — Summary judgment granted against developer.

The plaintiff (developer) entered into a contract for sale with the defendant (purchaser) for the sale of a proposed lot within a resort which would be a community titles scheme to be established at Airlie Beach. The parties entered into the contract on 7 December 2005 but it was clear that before the project was completed, the statutory right to terminate the contract if the plan was not registered within three years of the contract would arise under the Land Title Act. Accordingly, the parties entered into a new contract under the same terms in 2008.

By April 2009 there appeared to be difficulties in completing the development. The developer made an application to council to reconfigure the land to create four lots and one area of common property. This allowed the developer to stage the development. On 27 May

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2009, the developer's solicitors wrote to the defendant's solicitor advising that it had decided to stage completion of the lots in the resort. It stated that the defendant's lot was in stage 1 and that the plan would be lodged for registration by that week. It also stated that the second and final stage, the land for which was identified as lot 20 was expected to be completed by the end of June. The letter enclosed a revised Community Management Statement (CMS) and a revised budget. The letter expressly stated that it was intended to be served as a further statement under s 214 of the Body Corporate and Community Management Act.

On 28 May 2009, the survey plan was registered. On 1 June 2009 the developer's solicitors gave notice that a separate certificate of title was issued for lot 713 (the lot being the subject of the contract) and that settlement was to occur on 15 June 2009.

The defendant purported to terminate the contract on 11 June 2009 on a number of grounds. The developer's solicitors rejected the termination on 12 June 2009 and again called for settlement on 15 June 2009. The developer sued the defendant for specific performance of the contract and the defendant sought summary judgment against the developer.

Contentions under s 21 Land Sales Act

The defendant argued that the events that occurred in 2009 (the reconfiguration of lots and staging of the development) gave rise to a requirement under s 22 of the Land Sales Act that the developer give a rectification notice once the survey plan was registered as the identity of the lot had changed. As such the developer could not call for settlement on 15 June 2009 and the defendant's termination letter was effective to terminate the contract. The basis for the defendant's argument was under s 35 of the Body Corporate and Community Management Act, common property for a community titles scheme is owned by the owners of the lots included in the scheme as tenants in common and that an owner's interest in a lot is inseparable from the owner's interest in common property. Accordingly the changes to the scheme's common property by the reconfiguration and staging of the development has also changed the identity of Lot 713 being purchased by the defendant. The defendant suggested that the change in the identity of the lot triggered the provisions of s 22 of the Land Sales Act.

Contentions under the Body Corporate and Community Management Act

The defendant argued that the letter of 27 May 2009 from the developer's solicitor enclosing a revised CMS did not satisfy the requirement of s 214 to provide a statement "rectifying the inaccuracies" in the earlier statement. The notice identified matters which were changed, but otherwise did not include information which had previously been given.

The defendant also submitted that he was extremely concerned about the suggestion in a letter from the developer that the development would not be completely finished when he was required to settle. He is prejudiced by the fact that the decision to stage the development meant that he would not be receiving a unit in a completed resort. If he were compelled to complete the contract on 15 June 2009, he would be prejudiced because the units were not suitable for investment purposes as they were not capable of producing any investment return. The defendant argued that the availability of the swimming pool was also important to him.

The defendant argued that the staging of the development gave rise to an obligation on the seller to provide a further statement under s 214 of the Body Corporate and Community Management Act and the defendant had a right to cancel the contract. The developer argued that although the staging did give rise to an obligation to give a notice under s 214, the defendant would not

have suffered any material prejudice if compelled to complete the contract and in any event the defendant did not exercise the right conferred by s 214(4) of the Act.

Held: Summary judgment against developer granted.

Contentions under s 21 Land Sales Act

1.

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The term "lot" is defined in the Body Corporate and Community Management Act to mean a lot under the Land Title Act. The term "lot" is defined in the Land Title Act to mean a separate, distinct parcel of land created on the registration of a plan of subdivision. The Body Corporate and Community Management Act by reference to which the term "proposed lot" is defined in the Land Sales Act, clearly distinguishes between lots and common property. In the context of the legislative framework of which the obligations of s 21(1) forms part, the requirement to identify the "lot to be purchased" is a requirement to identify a lot rather than common property. The requirement in s 21(1) of the Land Sales Act directs attention to the subject matter of the contract, that being expressly confirmed as Lot 713. The defendant would derive an interest in the common property, not as a result of a transfer of common property, but because of the transfer of Lot 713 and the effect of s 35 of the Body Corporate and Community Management Act. Therefore, a change to common property does not change the identity of "the lot to be purchased" referred to in s 21(1) of the Land Sales Act so as to bring into operation the provisions of s 22 of that Act.

Contentions under the Body Corporate and Community Management Act

2. In relation to the notice provided under s 214, a notice which retains information which remains correct and includes information which is now correct in place of information which has ceased to be so, is a statement which rectifies the inaccuracies in the earlier statement. Section 214 contains no express requirement specifically to identify or otherwise draw attention to the changes in the disclosure statement.

3. In relation to the argument of material prejudice suffered by the defendant, it is apparent that if the defendant were compelled to complete the contract, the title in exchange for which he would pay the purchase price would not carry with it an interest in not insignificant areas within Lot 20 which previously had been identified as common property, including the pool. Moreover, title to the lot obviously intended to be made available to Peppers (resort management) to conduct the resort operation would not be created at that time; nor would areas of common property to be made available for resort facilities, and nor would the use of those areas be regulated by by-laws.

4. Further, at the date of the termination letter, the defendant had no binding assurance about the date by which stage 2 would be completed. Moreover, the developer had reserved the right to change the form of the development on Lot 20. It would have appeared to the defendant to be likely that a resort could not commence to operate from the date when he would otherwise have been required to complete his contract, a situation which may be contrasted with the position if the development had not been staged. The defendant had demonstrated, to a sufficient high degree of certainty, that the changes which resulted from the decision to stage the development resulted in prejudice to him which was substantial, or of much consequence.

5. The defendant's termination letter referred to statutory provisions other than s 214, but did not refer to s 214 as a source of the right to terminate. A mistake in the identification of the legal authority for the termination of the contract was not material. Since s 214 does not require the identification of the statutory provision in the notice it seems unlikely that a reference to another section of the Body Corporate and Community Management Act would make the notice ineffective. The termination letter was an effective exercise on behalf of the defendant of the right conferred on him by s 214 of the Body Corporate and Community Management Act to terminate the contract.

6. The defendant's summary judgment against the developer should be granted.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

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B O'Donnell QC (instructed by Gadens Lawyers) for the plaintiff.

P Roney (instructed by Macrossan & Amiet Solicitors) for the defendant.

Before: Lyons J.

Peter Lyons J: The plaintiff (*Latitude Developments*) has carried out the development of a resort at Airlie Beach, creating a number of lots and common property for which there is a community titles scheme under the *Body Corporate and Community Management Act* 1997 (Qld) (*BCCM Act*). The defendant (*Mr Haswell*) entered into a contract to purchase one of the units. Shortly before the settlement date, Latitude Developments gave notice of changes to the project, which affected the creation of common property. Mr Haswell then gave a notice of termination of the contract. Latitude Developments has sued Mr Haswell for specific performance of the contract. Mr Haswell seeks summary judgment against Latitude Developments. He relies principally on rights said to accrue under the *Land Sales Act* 1984 (Qld) (*LS Act*) and the *BCCM Act*.

Background

2. The resort was intended to be known as the Peppers Coral Coast Resort, Airlie Beach. Mr Haswell had earlier entered into a contract dated 7 December 2005 to purchase a unit then described as proposed Lot Number 77 in Building F in the resort (*the 2005 contract*). The 2005 contract envisaged the creation of the lot by the registration of a subdivision plan under the *Land Title Act* 1994 (Qld) (*LT Act*). It also provided that the contract might be terminated if the subdivision plan was not registered three years after the date of the contract.

3. It became apparent that the right to terminate the 2005 contract would accrue, before the project was completed and the subdivision plan was registered. As a result, the parties entered into another contract for the sale of the unit, dated 15 May 2008 (*the 2008 contract*). It retained most of the provisions 2005 contract, though, not surprisingly, it included a change to the date by which the contract might be terminated if the subdivision plan was not registered. Under the 2008 contract, this date was 30 June 2010. In the 2008 contract, the description of the lot was changed. It was now identified as proposed Lot 713 in Peppers Coral Coast Resort, Airlie Beach.

4. The documents constituting the 2008 contract included a single signed sheet which made applicable the 2005 contract and identified the variations; and a copy of the 2005 contract, which itself included contract terms, a subdivision plan, a Product Disclosure Statement under the *Corporations Act* 2001 (Cth), and a "BCCM Act disclosure statement" (given under the *BCCM Act*) attached to which was a proposed community management statement. The contract terms expressly stated that the contract included the product disclosure statement and the *BCCM Act* Disclosure Statement "which accompanied this Contract". A further Product Disclosure Statement dated 21 February 2008 (*the PDS*) was provided to Mr Haswell at about the time the contract was executed. A further BCCM Act disclosure statement (*the BCCM DS*) was provided to Mr Haswell and signed by him on 1 May 2008, again accompanied by a Proposed Community Management Statement (*the CMS*). The CMS included plans showing the location of the proposed buildings and lots. It is likely that the PDS and the BCCM DS, including the CMS, formed part of the 2008 contract. I understood that to be the basis on which the parties proceeded.

5. It is necessary to make reference to what the plans included in the CMS identified in relation to a building towards the southern end of the resort. It was referred to as Building A, and consisted of two towers, Tower A and Tower B. Within Building A, at level B, the plans identified a lot, Lot 101; as well as some areas of common property; and within the common property, some exclusive use areas, one for a porte-cochere, one for services or utilities associated with the proposed day spa, and others described as "Special Rights Areas".

6. The 2008 contract included a subdivision plan, SP184771 (annexed to the 2005 contract). With respect to Building A, it shows that at level B, Building A contained a single lot, there identified as Lot 1, with the balance of the

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building at this level (at least half of the floor space) being common property. There was also an area of common property external to the building. At level C, there were relatively large areas of common property adjacent to Tower A and Tower B, as well as what appeared to be common property external to the building. At Level D and above, there were also areas of common property, internal to the building, and servicing individual units within the two towers.

7. The PDS confirmed that the community titles scheme was to be in accordance with the subdivision plan attached to the contract of sale. It noted that there would be common property, which would include shared facilities. One of the shared facilities was the resort swimming pool. It also recorded that a day spa, conference centre and restaurant were to be constructed within "the facilities complex". These were to be owned by an entity described as "the operator", said initially to be intended to be Latitude Developments or a related entity. However, the PDS recorded that a management agreement had been entered into with Peppers Leisure Limited (*Peppers*), under which Peppers agreed to carry out the on-site manager's duties under a caretaking and letting agreement, and to run the business of letting apartments in the development for those owners who appointed the on-site manager as their letting agent. The PDS stated that the day spa, conference centre and restaurant were to be available to unit owners and resort guests (as well as members of the public) at commercial rates. It is plain from the PDS that what was envisaged was the on-site operation of the resort, with lot owners having the opportunity to make their units available as part of the pool of units

used in the resort; and that the resort would have facilities which would be available to owners and their guests.

8. The BCCM DS identified the lot sold to Mr Haswell as Lot 713 in the community titles scheme identified on certain plans. The CMS described the scheme as “a basic community titles scheme”. It stated that the common property for the scheme included common facilities, one of which was a swimming pool. It also stated that the scheme would not be further developed. It made provision for an on-site manager, who would own a lot, and whose lot might be used for resort management and letting of lots, and the operation of a restaurant or café and day spa.

9. The BCCM DS also included proposed bylaws. One of the bylaws provided that the swimming pool and associated facilities might only be used by occupiers, or people accompanied by occupiers of a lot; and within certain hours. The bylaws also regulated the use of the areas of common property nominated for the day spa services, and the porte-cochere, identified on the plans as exclusive use areas; as well as the areas identified as special rights areas, intended as outdoor dining areas.[1]

10. By April 2009, difficulties had been experienced with completing the development. Latitude Developments made an application to Whitsunday Regional Council to reconfigure the land on which the development was being carried out, to create four lots and one area of common property. The evidence seemed to proceed on the basis that it was this application, and its approval, which put Latitude Developments into a position where it could decide to stage the development, although the development application itself refers to an earlier approval of a staged development. However, no point was made about this, and I shall ignore it.

11. On 27 May 2009, Latitude Developments’ solicitors wrote to Mr Haswell’s solicitors. The letter advised that Latitude Developments had “decided to stage completion of the lots in the Peppers Coral Coast Resort”. It stated that Mr Haswell’s lot was in stage 1, and that the plan would be “lodged for registration this week”. It also stated that the second and final stage, the land for which was identified as Lot 20, is “expected to be completed by the end of June”. The letter enclosed a revised CMS, and a revised budget. The letter expressly stated that it was intended to serve as a further statement under s 214 of the *BCCM Act*.

12. The revised CMS confirmed that the scheme would include Lot 20 on SP184771. It stated that the common property for the scheme included, amongst other things, the swimming pool. That statement appears to be incorrect, at least for stage 1 of the scheme. The swimming pool, under construction at this time, was

located in proposed Lot 20. The revised CMS made reference to the use of “lot 101” for management of the resort, although Lot 101 was not identified as part of the scheme land, and was not created in stage 1. The revised CMS stated that the scheme was intended to be “developed progressively in stages”. However, it described the scheme as “a basic scheme initially made up of 81 housing and duplex allotments and units (it then identified the lots comprising stage 1), common property and a lot comprising stage 2 of the scheme (Lot 20 on SP184771).” The revised CMS continued, “The facilities complex including a day spa, conference centre, and restaurant will be completed as part of stage 1, but will be separately titled as part of stage 2”. Reference was made to plans, included with the revised CMS, and described as a Concept Plan of Future Development, which showed what apparently is the footprint of Building A, in Lot 20, designated on the plan as stage 2.

13. The revised CMS included revised bylaws. The bylaws relating to the exclusive use areas and the special use areas were not retained. Somewhat curiously, under the heading “USE OF COMMON PROPERTY”, the bylaw relating to the use of the pool was retained.

14. The revised CMS made reference to stage 2, stating the number of units (it would appear inaccurately), and that it included a lot for the central facilities, and additional common property. With respect to some of the stage 2 land, there were proposed additional bylaws, relating to the exclusive use areas (day spa utilities and porte-cochere) and the special rights areas (outdoor dining areas). Plans were included relating to stage 2, which showed Level B for Building A. They appear to include some variations from the plans in the CMS

which was included with the contract. The revised CMS made clear the indicative nature of the Concept Plans, said to have been provided for illustrative purposes only.

15. On 28 May 2009, Survey Plan 184771 was registered. It included variations from earlier plans identified by the same number. On its face, it was described as a building format plan. Under this plan, the area of land which previously included Building A was created as a separate lot (Lot 20) in the southern portion of the site. Lot 20 was not shown as including any building. For the balance of the site, the plan made provision for other buildings in the development, and their subdivision into lots, and for common property. One of the lots created by registration of this plan was Lot 713 (in Building F).

16. On 1 June 2009 the solicitors for Latitude Developments gave notice that a separate certificate of title had issued for Lot 713, and that settlement was to occur on 15 June 2009.

17. Mr Haswell's solicitors replied to the letter of 27 May 2009 in a letter sent by facsimile transmission to the solicitors for Latitude Developments on 11 June 2009 (*the termination letter*). The termination letter contested a number of matters raised by the letter of 27 May 2009; and terminated the contract on a number of grounds. The letter is considered in greater detail, later in these reasons.

18. The solicitors for Latitude Developments responded on 12 June 2009, rejecting the termination of the contract. The letter took issue with a number of statements in the termination letter. It also stated that the construction of the swimming pool had been completed, and that the developer had granted a licence to the body corporate to enable all owners and occupiers to have full use of the pool from settlement (that being a matter about which the termination letter complained). The letter also stated that registration of the stage 2 plan was expected to occur within the next few weeks, and again called for settlement on 15 June 2009. The licence referred to in the letter is in evidence. It is a deed dated 11 June 2009, taking effect the following day.

19. There is a body of evidence, including photographs, identifying the extent to which work associated with the development had been carried out at various times in June 2009.

20. The survey plan for stage 2 was registered at about the end of July 2009.[2]

Summary judgment

21. A defendant's application for summary judgment should only be granted where there is no real prospect that the plaintiff will succeed in its action.[3] A real prospect of success may be

contrasted with a prospect of success which is only fanciful.[4] Nevertheless, in determining whether to grant summary judgment, a court must consider whether there is a need for trial, and keep in mind the reasons why the interests of justice usually require issues to be investigated at a trial.[5] It has been authoritatively stated the propositions derived from *Dey v Victorian Railway Commissioners*[6] and *General Steel Industries Inc v Commissioner for Railways (NSW)*[7] are applicable to applications for summary judgment under the *UCPR*.[8] The effect of those statements is that summary judgment may only be granted in a case where there is a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

Land Sales Act

22. On behalf of Mr Haswell, it is submitted that the events which occurred early in 2009 gave rise to a requirement under s 22 of the *LS Act* that Latitude Developments give what is referred to as a rectification notice, once SP184771 was registered, and accordingly, it could not call for settlement on 15 June 2009; and on that basis, the termination letter effectively terminated the contract.

23. The relevant provisions of the *LS Act* apply to the sale or purchase of a lot resulting from the registration of a plan and the recording of a community management statement for a community titles scheme under the *BCCM Act*.[9] Section 21 of the *LS Act* requires the giving to a person who is considering entering "upon a purchase" of a proposed lot of this kind, a statement which, amongst other things, "clearly identifies the

lot to be purchased". Where a statement given under s 21 is not accurate at the time it is given, or contains information that subsequently becomes inaccurate, the vendor is required by s 22 to give the purchaser a statement of the particulars required under s 21, "as soon as is reasonably practicable after the proposed lot has become a registered lot". Section 22(4) then contains provisions, the effect of which is that settlement is not to occur until the expiration of 30 days after the receipt by the purchaser of a notice given under s 22(1) (unless the contract of sale provides for a later settlement date, or the parties reach some other agreement after the purchaser has received a notice under s 22(1)). Where there has been a failure to give a notice required by s 22(1), s 25 provides that the purchaser may avoid the contract, if materially prejudiced by the failure to give the notice. The same section provides that, where a notice has been given under s 22(1) which is inaccurate, the purchaser may avoid the instrument if "materially prejudiced …by the inaccuracy of any particular …" in the notice given under s 22(1).

24. It should also be noted that s 21(6) provides that where a prospective vendor is required to give a notice under s 213 of the *BCCM Act*, and the prospective vendor includes in that notice the matters of which it was required to give notice under s 21(1), that is sufficient compliance with the requirements of s 21.

25. In essence, it is submitted on behalf of Mr Haswell that the result of the events associated with the staging of the development in the early part of 2009 was that the identity of the lot changed, so that it was necessary for notice to be given under s 22; and that that did not occur.

26. The submission that the identity of Lot 713 changed as a result of the staging of the development is based upon s 35 of the *BCCM Act*. That section provides that common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common; and that an owner's interest in a lot is inseparable from the owner's interest in common property. The section includes, as an example, a statement that a dealing affecting a lot, affects, without express mention, the interest which the owner of the lot has in the common property; and, as another example, a statement that an owner cannot separately deal with or dispose of the owner's interest in the common property. It is argued on this basis, that the identity of the lot being sold had changed; and that accordingly, the provisions of s 22 of the *LS Act* applied.

27. The submission makes it necessary to focus on the provisions of the *LS Act*, and the contract. The obligation imposed by s 21(1) is to provide a statement in writing which "clearly identifies the lot to be purchased". The expression "lot" is defined to include both

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a registered lot and a proposed lot.[10] A proposed lot is defined to include a lot that will become a registered lot upon registration of a plan and the recording of a community management statement for a community titles scheme, under the *BCCM Act*.[11] A registered lot is defined to include a lot included in a community titles scheme registered under the *BCCM Act*. The term "lot" is defined in the *BCCM Act* to mean a lot under the *LT Act*.[12] The term "lot" is defined in the *LT Act* to mean a separate, distinct parcel of land created on the registration of a plan of subdivision. Such a plan may include a plan which identifies lots by reference to structural elements of a building, although such a plan must also identify common property.[13] The *BCCM Act*, by reference to which the term "proposed lot" is relevantly defined in the *LS Act*, clearly distinguishes between lots and common property.[14] In the context of the legislative framework of which the obligations of s 21(1) forms part, the requirement to identify the "lot to be purchased" is a requirement to identify a lot, rather than common property.

28. Moreover, the requirement in s 21(1) of the *LS Act* directs attention to the subject matter of the contract. The contract was a contract to sell Lot 713. So much is clear from its express terms. The express provisions of the contract relating to settlement required the giving of vacant possession of the lot, and a form of transfer, required to transfer the title in the lot to Mr Haswell. The contract required no action in respect of the common property. That is not surprising, in view of the provisions of s 35 of the *BCCM Act*, to which reference has already been made. An examination of the contract confirms that "the lot to be purchased" as a result of the transaction is Lot 713. Mr Haswell would derive an interest in the common property, not as a result of a transfer of common property, but because of the transfer of Lot 713 and the effect of s 35 of the *BCCM Act*.

29. In my view, therefore, a change to common property does not change the identity of "the lot to be purchased" referred to in s 21(1) of the *LS Act*, so as to bring into operation the provisions of s 22 of that Act.

30. A somewhat similar question was considered in *Harris v Prigg*.[15] The question considered in that case was whether an encroachment from common property of land the subject of a community titles scheme was an encroachment from the lot which was the subject of the contract. Reliance was placed on s 35 of the *BCCM Act* for a submission that that was so. The reasoning in *Harris*, in my view, provides support for the conclusion which I have reached about the effect of s 21 and the present contract.

31. I am therefore not prepared to grant summary judgment in favour of Mr Haswell by reason of the provisions of the *LS Act* on which he has relied.

Contentions relating to BCCM Act

32. Prior to entering into a contract for the purchase and sale of a proposed lot to be included in a community titles scheme, s 213 of the *BCCM Act* requires the seller to give the buyer a disclosure statement. It also requires the disclosure statement to be accompanied by the proposed community management statement. Under s 66 of the *BCCM Act*, the community management statement must identify the scheme land; it must include bylaws (unless the bylaws are those in Schedule 4 of the *BCCM Act*); and, if the scheme is intended to be developed progressively, it must explain the proposed development and be illustrated by concept drawings, and state the purpose of any future allocations of common property or a body corporate asset under an exclusive use bylaw for the scheme, and the stages in which the future allocations are to be made. Further, the disclosure statement must include the terms of any authorisation of a person as a letting agent proposed to be given after the establishment of the scheme. Section 214 then requires, in a case where the contract has not been settled, and a point is reached at which it can be said that a disclosure statement previously given would not be accurate if given at that point, that a further statement be given "rectifying the inaccuracies in the disclosure statement". Section 214(4) gives the buyer the right to cancel a contract which has not settled if the buyer would be materially prejudiced, if compelled to complete the contract, "given the extent to which the disclosure statement was, or has become, inaccurate", and allows 14 days for the exercise of this right.

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On Mr Haswell's behalf, it was submitted that the staging of the development brought the provisions of s 214 into operation, giving Mr Haswell the right to cancel the contract, which had been exercised.

34. For Latitude Developments, it was accepted that the staging of the development in 2009 gave rise to an obligation to give a notice under s 214. However, it was submitted that Mr Haswell would not have been materially prejudiced if compelled to complete the contract, having regard to the extent to which the disclosure statement was no longer accurate; and that in any event he did not exercise the right conferred by s 214(4) of the *BCCM Act*. However, it was accepted that if the notice were otherwise in accordance with s 214, it was given in time.

35. For Mr Haswell, some reliance appears also to have been placed on s 217 of the *BCCM Act*, although detailed submissions were not provided in support of this. It is convenient to deal with this matter at the outset.

Termination under s 217 of the BCCM Act?

36. This section creates a right to cancel a contract if the community management statement recorded for the scheme on its establishment, is different from the proposed community management statement most recently advised to the buyer; or the information disclosed in the disclosure statement is inaccurate; or, in a case where there was a requirement to provide an explanation for inequalities in contribution schedule lot entitlements, that explanation was not provided; and because of the difference, or inaccuracy, or lack of explanation, a buyer would be materially prejudiced if compelled to complete the contract.

37. It has not been argued that the community management statement recorded for the Scheme is different from that most recently advised to Mr Haswell, nor has it been argued that the revised CMS in accurate. Nor

has there been any submission based on the need to explain inequalities in the contribution schedule lot entitlements, and a failure to provide an explanation. There is no obvious difference between the community management statement recorded on 28 May 2009, and the version of it sent to Mr Haswell under cover of letter of 27 May 2009. The revised CMS included an explanation of the inequalities in the contribution schedule lot entitlements. No relevant inaccuracy (potentially giving rise to material prejudice) in the information in the disclosure statement, as revised by the letter of 27 May 2009, has been identified.

38. In those circumstances, I would not be prepared to grant the defendant's application for summary judgment on the basis of a right to cancel the contract, said to have accrued under s 217 of the *BCCM Act*.

Did Latitude Holdings comply with s 214 of the BCCM Act?

39. The submissions made on behalf of Mr Haswell focused on the requirement in s 214 that the seller give the buyer "a further statement … rectifying the inaccuracies in the disclosure statement". It was submitted that the letter of 27 May 2009, in providing a revised CMS, did not satisfy the requirement of s 214 to provide a statement "rectifying the inaccuracies" in the earlier statement.

40. In support of that submission, reference was made to *Sommer v Abatti Holdings Pty Ltd*.[16] That was a case where a notice given under s 21 contained information that subsequently became inaccurate. The vendor was required by s 22 to give to the purchaser a statement of "particulars required to be included in the statement given for the purposes of section 21(1) on registration of the plan creating the lot." The notice identified matters which were changed, but otherwise did not include information which had previously been given. Derrington J held nevertheless, the requirements of s 22 had been satisfied. His Honour observed:[17]

> "The point of the section is obviously directed to the correction of the inaccuracy, and on the understanding that a considerable body of correct information may well have been given, the expression, 'particulars required to be included', refers to the true information which was required to be given but which was missing from the original statement … the purpose of s 22 is obviously to bring the correct information to the mind of a purchaser and providing it does that in substance in a reasonable way that purpose is fulfilled."

41.

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A finding that a notice which identifies only the changes, without repeating information provided earlier and which remains correct, is sufficient to satisfy s 22, says nothing about whether the provision of the entire corrected disclosure statement does or does not satisfy the requirements of s 214 of the *BCCM Act*. It seems to me that a notice which retains information which remains correct, and includes information which is now correct in place of information which has ceased to be so, is a statement which rectifies the inaccuracies in the earlier statement. Although s 214 contains some formal requirements (the date of the statement, and the signature of the seller or the seller's agent), it contains no express requirement specifically to identify or otherwise draw attention to the changes in the disclosure statement. In respect of this matter, I am not satisfied that Latitude Developments has no real prospect of success in respect of its claim, by reason of this alleged failure to comply with s 214.

42. I should add that the submissions made on behalf of Mr Haswell did not place reliance upon specific matters set out in the material provided on 27 May 2009 which may be incorrect, (for example, that the common property included a swimming pool). Accordingly, it is unnecessary for me to consider that question further.

Material prejudice

43. The effect of the information communicated in the revised CMS sent to Mr Haswell's solicitors on 27 May 2009 was that on registration of SP184771, Lot 20 would be a lot in the scheme, and areas within it which had previously been identified as common property would not have that character as a result of the registration of SP184771. A consequence of that was identified in the revised CMS. It was, in effect, that title for what was referred to as the facilities complex (associated with the operation of the proposed resort), would not become available until completion of stage 2.

44. The fact that that part of the resort located within Lot 20 would not contain any common property when SP184771 was registered, meant that a person such as Mr Haswell, if he completed the purchase of a lot prior to the registration of a subdivision plan for stage 2, would not have any interest in areas which had been shown as common property within what was to be Lot 20 on completion of the contract.

45. That area included the swimming pool. In the CMS, it had been considered to be of sufficient importance to be specifically identified as part of the common property for the scheme. The evidence included photographs of the resort, including the pool, taken on 5, 11, 14 and 20 June 2009. It is apparent that it was being constructed as an attractive facility, one likely not to be unimportant to residents. If that had not been identified by earlier dealings between the parties, it would have become increasingly obvious in late May and early June 2009. The fact that Latitude Developments went to the trouble of entering into the Licence Deed on 11 June 2009 supports that conclusion.

46. The area within Lot 20 also had been identified as including facilities to be located within the "facilities complex".

47. The CMS had identified areas of common property as exclusive use areas for the day spa utilities, port-cochere, and an outdoor dining area, and included proposed bylaws regulating the use of these areas. The day spa utilities were obviously intended to be associated with a day spa to be operated by Peppers, as the resort operator. The other areas for which Peppers, under the bylaws, was to have exclusive use or other special rights were intended to be available to guests and visitors. The effect of staging the development was that the common property, of which these areas would form part, would not be created in stage 1.

48. The revised CMS included a statement that "Lot 101 … is used for management of the resort and commercial purposes expected to be used predominantly by guests in the resort". However, registration of SP184771 was not intended to create Lot 101.

49. The revised CMS dealt with the future subdivision of Lot 20, including changes to the bylaws to deal with the exclusive use areas and the special rights area. The bylaws included with the revised CMS, and which were intended to take effect on registration on SP184771, did not contain these provisions.

50.

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It is necessary to bear in mind that the contract required settlement within 14 days of registration of the subdivision plan. Latitude Development, in giving notice on 1 June 2009 that settlement was due on 15 June 2009, apparently relied upon this provision, and the registration of SP184771. Clause 4.2 of the contract permitted Latitude Developments (subject to the *BCCM Act*) to alter the common property or any facilities or rights in relation to their use; and to change anything in the CMS.

51. It is apparent, therefore, that if Mr Haswell were compelled to complete the contract, the title in exchange for which he would pay the purchase price would not carry with it an interest in not insignificant areas within Lot 20 which previously had been identified as common property, including the pool. Moreover, title to the lot obviously intended to be made available to Peppers to conduct the resort operation would not be created at that time; nor would areas of common property which were to be made available to Peppers in connection with the provision of resort facilities become available, and nor would the use of those areas be regulated by bylaws.

52. Latitude Developments, however, points to the Licence Deed of 11 June 2009. It also points to the statements in the revised CMS relating to stage 2, which are indicative of an intention to produce the development identified in the CMS. It relies on the advanced stage of the development in late May and the first half of June 2009. It relies on the fact that the subdivision plan for stage 2 was registered by the end of July 2009. It refers to s 215 of the *BCCM Act* which provides that the disclosure statement, and any material accompanying it, and each further statement and any material accompanying such a statement, form part of the provisions of the contract. It points to cl 4.2 of the contract. It submits that, having regard to these matters, Mr Haswell would not have been materially prejudiced, if compelled to complete the contract.

53. It is convenient first to deal with clause 4.2 of the contract. The power which it conferred on Latitude Developments to make changes to the common property, facilities and associated rights was expressly stated to be subject to the *BCCM Act*, with an express reference to the right conferred to cancel a contract if

the purchaser was materially prejudiced by the changes. That reference no doubt includes s 214. Because clause 4.2 expressly recognises that a purchaser would have the right to terminate a contract if materially prejudiced by the change, the power conferred by clause 4.2 to make changes is of no assistance in determining whether a particular change results in material prejudice to a purchaser.

54. A question arises in relation to the determination of the issue of material prejudice. It is whether the question of material prejudice is to be assessed as at the date the further statement was given under s 214, that is, 27 May 2009; or at the date on which Mr Haswell's solicitors wrote to the solicitors for Latitude Developments, with a view to terminating the contract; or at some later date. This issue assumes that it is relevant to consider facts other than those apparent from the BCCM DS and the further statement.

55. The test stated in s 214(4)(d) is whether "the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement … has become … inaccurate". On its face, this provision suggests that what is required is a comparison between the information communicated by the disclosure statement, and that communicated by the further statement. On that basis, attempts made by Latitude Developments to mitigate the consequences of staging the development, which were not recorded in the further statement, would be irrelevant.

56. There is some merit in this approach. A buyer is allowed only 14 days within which to cancel the contract. The buyer may be located somewhere remote from the development. Verification of matters said to mitigate the effect of changes may require access to information not readily available to a buyer. However, neither party relied on this approach to s 214.

57. Similar considerations suggest that the date at which the question of material prejudice is to be determined is the date when the buyer receives the further statement. In my view, the

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short period within which the right to cancel a contract is to be exercised, and the likely need to obtain professional advice, support that conclusion. However, it seems to me that the latest date of which, on any view of s 214, the question is to be determined is the day on which a buyer gives a notice exercising the right.

58. Moreover, it seems to me that the question of material prejudice cannot be determined by reference to facts which might have existed at the relevant date, but which were not known to the buyer, or of which it cannot at least be said that the buyer should have known them. The exercise of such a right is an important matter, and it seems to me that it is quite unlikely that the legislature intended that an attempt to exercise the right created by s 214 to cancel a contract would turn out to be ineffective, by reason of matters unknown to the person on whom the right is conferred, at the time when the right is being exercised; or of which it cannot be said that the person should have known them.

59. Since writing what has been set out above, I have become aware of the decision at first instance in *Wilson v Mirvac Queensland Pty Ltd.*[18] There Margaret Wilson J has helpfully reviewed cases dealing with the test for material prejudice in s 214 of the *BCCM Act*, and analogous provisions. Her Honour rejected the view in *Sommer*[19] that the question is to be answered by reference to the principle stated in *Flight v Booth*[20] that the change must be in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into it at all; it being a case where it may be considered that the purchaser has not really purchased that which was proffered at settlement. The test applied by her Honour was that a purchaser would be materially prejudiced if compelled to complete, if the purchaser would be disadvantaged in some substantial way if obliged to do so.[21]

60. Her Honour derived some support for this approach from the reasons for judgment of Sir Ronald Wilson in *Deming No 456 Pty Ltd & Ors v Brisbane Unity Development Corporation Pty Ltd*,[22] which, although given in dissent, did not, as her Honour noted, result in disagreement from the other members of the Court.[23] Indeed, it seems to me that, on analysis, his Honour's approach seems consistent with the approach taken by the majority. It might be noted that the test applied by her Honour in *Wilson*, in this respect, accords with the formulation applied by Chesterman J (as his Honour then was) in *Chancellor Park Retirement Village*

Pty Ltd v Retirement Village Tribunal,[24] where his Honour with reference to material prejudice, said that it is material "if it is substantial or of much consequence".

61. Her Honour determined the existence of material prejudice by reference to the buyer's knowledge of the effects of the change, as a result of the information in the further statement, and not by reference to corrections of errors in the further statement, communicated to the buyer after she had written a letter terminating the contract. That conclusion has the consequence, consistent with what has been stated earlier in these reasons, that material prejudice is not to be judged by reference to facts not known to the purchaser at the time when it gives a notice of termination.

62. On 11 June 2009, when the termination letter was sent, Mr Haswell knew of the proposal to stage the development. He knew that meant that on settlement, he would not receive any interest in areas within Lot 20, which had previously been identified as common property. I have previously referred to the significance of these areas. Moreover, he knew that registration of SP 184771 would not result in the creation of the lot which was to be made available to Peppers. He knew that the arrangements relating to exclusive use areas and special rights areas, as identified in the CMS, were not intended to be implemented at the time of registration of SP184771. However, there is no reason to think he had any knowledge of the effect of these matters on Peppers.

63. Submissions made on behalf of Latitude Developments point out that some of the facilities (conference centre, restaurant and day spa) were to be initially owned by the resort operator (as identified in the PDS); whereas the submissions made on behalf of Mr Haswell seem to proceed on the basis that these facilities were intended to be within common property, in which Mr Haswell was to acquire an interest.

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The factual basis for the submissions made on behalf of Latitude Developments appears to be correct; and it is correct to say that the submissions made on behalf of Mr Haswell refer to the dining and spa areas as being within areas previously intended to be common property. That mistake, however, reflects the fact that Mr Haswell's concern was not simply with an interest in common property. It was with an interest in common property to be used by a resort operator, together with other facilities, to conduct a resort. It is clear the termination letter expressed concern, not simply about the fact that common property would not be the same as was previously represented, but also about the benefits which were to be made available by the commencement of the Peppers resort consequent on the completion of the entire development, including the resort facilities, simultaneously with the creation of Lot 713. While the error made in the submissions on behalf of Mr Haswell has some effect on the strength of his case, those submissions point to matters which, in my view, are relevant for determining the material prejudice question.

64. Finally, the photographs taken on 11 June 2009 demonstrate the not insignificant work remained to be done to complete the resort on that date.

65. It seems to me that these considerations lead to the conclusion that by reference to the facts known on 11 June 2009, Mr Haswell could have been materially prejudiced, if compelled to complete the contract, given the extent to which the disclosure statement by then had become inaccurate.

66. That conclusion has to be weighed against the matters raised on behalf of Latitude Developments.

67. The licence deed is dated 11 June 2009. There is no suggestion Mr Haswell had any knowledge of it prior to the termination letter. It seems to me, therefore, that regard may not be had to it, in determining whether Mr Haswell would be materially prejudiced if compelled to complete the contract.

68. The development, and in particular the development of the building on Lot 20, was well advanced. However, that seems to me to be quite a different situation from one where the development had been completed, and title had issued in respect of that part of it intended to be contained within Lot 20, by the time settlement was to occur. While the development on Lot 20 was at that stage, there was a risk that for some reason it would not proceed, or would not proceed promptly, to completion. There was also a risk, at least based on the facts so far as they were known to Mr Haswell, of some issue in relation to Peppers commencing to operate the resort. Underlying these matters is the fact that, because the development was not complete, and was to proceed in stages, on settlement Mr Haswell would not receive the bundle of rights

in relation to the development which he would have received, if the development had proceeded in a single stage.

69. On behalf of Latitude Developments, it is submitted that at all times from 27 May 2009, there was no significant risk that Stage 2 of the development would not proceed. It may well be true to say that the probability that the development would not proceed to the completion of Stage 2 and the subsequent issue of titles was, objectively speaking, not high, and in that sense the risk was not significant. However, if for any reason the development was not completed, the consequences for Mr Haswell could potentially have been significant. The resort might not have commenced to operate; or it might not have commenced to operate for a substantial period.

70. In support of the proposition that there was no significant risk that Stage 2 of the development would not proceed, Latitude Developments points out that its contractor was obliged to complete the development; and Latitude Developments had in place financial arrangements necessary to pay for completion of the work. However, while it is likely that Mr Haswell would have assumed the existence of a contract with a builder, and that it was probable that financial arrangements had been made in the past to meet the expected costs of completion, there is no suggestion that he had any knowledge of the contractual position as between the builder and Latitude Developments at the end of May and in the first part of June 2009. Equally, there is no suggestion that he had any knowledge of the financial arrangements for the completion of Stage 2, as they stood in late May and early June 2009,

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after the decision had been made to stage the development, with delay in completing Stage 2.

71. Section 215 has the effect that the further statement (and any material accompanying it) formed part of the provisions of the contract. Section 216 entitled Mr Haswell to rely on information in the further statement as if Latitude Developments had warranted its accuracy. On its behalf, it is submitted that Latitude Developments had as a result binding obligations arising from the further statement. These sections make it necessary to pay careful attention to the content of the further statement, particularly in relation to Stage 2.

72. As mentioned, it stated that Lot 20 was intended to be subdivided into 16 lots for units, one lot for the central facilities, and additional common property. It identified exclusive use areas (day spa utilities and port-cochere) and the special rights area (outdoor dining area). Plans showing the proposed development for Stage 2 were described as “Concept Plans”, of which it was said:-

> “The attached concept drawings are intended only to represent an indicative development plan for the 9A Heritage Drive Community Titles Scheme when completed.
>
> Accordingly, they have been annexed for illustrative purposes only. The contract drawings do not accurately fix or specify the location of boundaries of any lots or buildings which are subject to final survey being undertaken.
>
> The original owner may make amendments to or add further service location diagrams and/or exclusive use plans as required to permit the progressive development and reconfiguration of the Scheme land.”

The letter of 27 May 2009 also stated that, “(t)he second and final stage is expected to be completed by the end of June (2009)”.

73. While s 215 of the *BCCM Act* has the effect that the further statement and accompanying material form part of the provisions of the contract, it seems to me that that does not result in a binding promise as to the timing for completion or ultimate form of Stage 2. Express rights to vary the form of Stage 2 were reserved by Latitude Developments. No more was warranted than that Latitude Developments had an expectation that Stage 2 would be completed by the end of June 2009. To the extent that that might refer to the registration of title, it is clear that that expectation proved to be wrong.

74. In summary, at the date of the termination letter, Mr Haswell had no binding assurance about the date by which Stage 2 would be completed. Moreover, Latitude Developments had reserved the right to change the form of the development on Lot 20. Nor did Mr Haswell know whether the staging had any effect on Latitude Developments relationship with its builder, its financier, or Peppers. It would have appeared to him to be likely that a resort could not commence to operate from the date when he would otherwise have been

required to complete his contract, a situation which may be contrasted with the position if the development had not been staged. He was entitled to assume that the swimming pool would not, at the date nominated for completion, be on common property, and he had no knowledge of any arrangement to make it available to occupiers of Lot 713. The question is whether Mr Haswell has demonstrated, to a sufficiently high degree of certainty, that the changes which resulted from the decision to stage the development resulted in prejudice to him which was substantial, or of much consequence.

75. I am satisfied that he has done so. On completion, he would not have been in a position immediately to re-sell the unit, as part of an operating resort, and with the benefit of an interest in common property available for use by the resort operator. He would not have been in a position, had he chosen to do so, immediately to place the unit in a letting pool. There would not have been available to the occupants of Lot 713 the facilities which were intended to be provided by the resort operator; nor would the swimming pool be available to them. Moreover, Latitude Developments had reserved the right to change the form of the development in Stage 2, a position which would not have obtained but for the decision to stage the development; and it had not undertaken a binding obligation to complete Stage 2 by a fixed date in the near future. It is inherently likely that these matters would be important to a purchaser, and the changes accordingly would

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result in prejudice to a purchaser which is substantial, or of some consequence.

76. Some support for this conclusion may be found in the letter which Latitude Developments sent Latitude Development Group sent on behalf of Latitude Developments to Mr Haswell in about April 2008, and relied upon on behalf of Mr Haswell in support of the proposition that he suffered material prejudice as a result of the changes notified in May 2009. By April 2008 it had become apparent that Latitude Developments could not complete the development by 7 December 2008 (then referred to as the "sunset date"). The letter stated that the alternative was "to put the central facilities on hold" until the other units were completed, with the result that "we would move to settlements on time and before any of the sunset dates expire as the apartment will be fit for occupation, but the main resort facilities area will not be complete for some months afterward which would hinder operation of the resort". The letter later stated that the extension of the sunset date would avoid "the issue where you have a completed apartment, which you have paid for but minimal ability to generate income for some time".

77. Of this letter, Mr Haswell said that he "was extremely concerned about the suggestion in the letter that the development would not be completely finished when I was required to settle", resulting in a telephone call to a representative of Latitude Developments, who assured him that if he signed the 2008 contract, "the resort would be fully finished in every detail" (no doubt by the time he was required to complete the 2008 contract).

78. Moreover, Mr Haswell deposes to the fact that the availability of the swimming pool was important to him. He deposes that he is prejudiced by the fact that the decision to stage the development meant that he "would not be receiving a unit in a completed resort". He also deposes to a fact that he would have been prejudiced, if required to complete on 15 June 2009, because "the units were not suitable for investment purposes as they were not capable of producing any investment return". No attempt was made to cross-examine Mr Haswell, to demonstrate that there was any reason to think that these matters were not of substantial concern to him. Nor has any reason been identified for doubting this evidence from Mr Haswell. Latitude Developments has not identified facts sufficient to entitle it to contest whether Mr Haswell was materially prejudiced as a result of the changes.[25]

79. I am therefore satisfied that, were the matter to proceed to trial in the ordinary way, Latitude Developments has no real prospect of successfully controverting Mr Haswell's contention that he suffered material prejudice as a result of the changes notified in May 2009.

Effective termination

80. At this point, it is convenient to set out s 214(4) of the *BCCM Act*, which confers a right of termination on a buyer. It is in the following terms:

"(4) The buyer may cancel the contract if—

(a) it has not already been settled; and
(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."

81. It will be apparent that this provision confers on a buyer a right to cancel a contract if certain conditions are satisfied. The conditions stated in paragraphs (a) and (b) of sub-section (4) do not require further consideration. Paragraph (c), however, is intended to identify the mechanism by which the cancellation is effected. This is done by notice. The only requirement as to form is that the notice be in writing. As to content, there is no expressly stated requirement, though it is obvious that the notice must convey that the contract is cancelled. In particular, there is no stated requirement to identify the statutory provision on which the cancellation is based, nor the fact or facts which give the buyer the right or power to cancel the contract under s 314(4).

82. The term "cancel" is not defined in the *BCCM Act*. In some contexts, it conveys the notion of depriving a document or instrument of any effect, by some act done in relation to it

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(tearing the document up, or ruling lines through it). However, its dictionary meanings[26] include "… to decide not to proceed with (a previously arranged appointment, meeting, event, etc.); … to make void, annul …". It is apparent from the sub-section that those meanings, rather than some physical act in relation to the contractual document, is intended, for the effect is to be achieved by written notice to the seller.

83. Section 214(4) may be contrasted with s 367 of the *Property Agents and Motor Dealers Act* 2000 (Qld), a provision conferring a right of termination on purchasers of land. Section 367(3) requires that the notice of termination state "that the contract is terminated under this section".[27] Also, s 209(1)(c) of the *BCCM Act* requires the identification of a particular factual basis for exercising the right of termination conferred by that section. On the other-hand, s 212 confers a right of termination, but says nothing about its mode of exercise. It would seem broad enough to encompass any act manifesting an intention not to bound by the contract. A similar right is conferred by s 213(6).

84. A somewhat analogous right to terminate a contract was conferred in rather similar terms by s 49(5) of the *Building Units and Group Titles Act* 1980 (Qld). In *Deming*, it was held that a purchaser who gave a notice under s 49(5), which did not specify any ground, was able to rely on any ground of which the purchaser became aware.[28] However, three members of the Court (Mason, Deane and Dawson JJ) reserved the question whether a purchaser who has given a notice under s 49(5), and has notified a particular ground which ultimately is not made out, may nevertheless rely upon some other factual basis to support the termination[29] .

85. The notice requirement found in s 49 of the *Building Units Group Title Act* was also considered in *Clegmere Pty Ltd v Samspring Pty Ltd.*[30] In that case, a notice had been given, which nominated a particular basis for terminating the contract under s 49. The basis was not made out, but a different basis was later identified. At first instance it was held that a purchaser was not entitled to rely upon grounds for exercising the power to terminate found in s 49, of which it had not given notice.[31] In the result, the decision was upheld on appeal, though not on this basis. The case was there decided because the notice was out of time. Two members of the court (Connolly and Carter JJ) made no reference to the issue concerning reliance on a ground different to that stated in the notice. That, and the fact that they decided the case on the basis that the notice was out of time, rather indicates that their Honours did not support the finding at first instance on this issue. GN Williams J (as he then was) referred to the issue, and expressly reserved this question for further consideration. The same occurred in *Silverton Ltd v Shearer*.[32]

86. Against that background, it is necessary to give further consideration to the termination letter. It expressed concerns in a number of places about the effect of the decision to stage the development. One change was that, at settlement, Mr Haswell would not receive an interest in what had been proposed as common property but was now included in Lot 20. However, the letter also expressed concern that the development would no longer be built in one stage; and that the common property would not include the swimming pool area, (and, mistakenly, outdoor dining areas, and other facilities within the facilities complex). It also complained that Latitude Development was "demonstrably incapable of fulfilling its obligations to convey title to fulfil the very subject matter of a contract", and continued with the statement that the resort was by no means complete. Elsewhere, with reference to allegations of breaches of ss 52 and 53A of the Trade Practices Act 1974 (Cth), reference was made to the fact that the resort was marketed as an investment opportunity, and the unit to be purchased by Mr Haswell was to be part of a pool of units available to be let as part of the Peppers Resort. In the same context reference was made to representations (probably a reference to the letter of April 2008) that if the 2008 contract were entered into, Latitude Developments would achieve the completion of the entire resort at the one time, avoiding the risk associated with a reduced ability to generate income from the unit.

87. The termination letter gave notice of termination on a number of grounds. One was based on alleged repudiation of the contract,

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primarily in reliance on the fact that title in what was proposed to be common property would not pass at settlement, as a result of the staging proposal. Another was on the basis of representations, referred to in the context of the *Trade Practices Act.* Another made reference to allegations that Latitude Developments had not complied with s 214 of the *BCCM Act* and s 22 of the *LS Act*, and continued:-

> "Further, even if your client has complied with its requirements under s. 22 of the (*LS Act*) and s. 214 of the *BCCM Act*, our client is entitled to avoid, and terminate the Contract of Sale pursuant to s. 25 of the (*LS Act*) and s. 217 of the *BCCM Act* and our client elects to do so."

88. As discussed earlier, s 217 confers a right to cancel a contract which depends upon the fulfilment of one of a number of conditions. The final condition in this group depends upon the inaccuracy of the information disclosed in the disclosure statement. The others are of no relevance: there was no reference in the termination letter to the community management statement as registered, nor any suggestion that it was different to what had been notified; nor could there have been any suggestion of a failure to explain inequalities in the contribution schedule lot entitlements.

89. The passage set out above from the termination letter is based on the proposition that s 214 is complied with. That carries with it the notion that inaccuracies which have arisen in the information contained in the previous disclosure statement have been rectified. It seems to me that a notice of termination given on the basis that s 214 of the *BCCM Act* had been complied with could not, in the circumstances of this case, have been based on s 217, and the reference to that section was an error.

90. It seems to me that that conclusion is reinforced by complaints about the changes resulting from the staging of the development, and in particular, the delay in the completion of the resort facilities and the commencement of the operation of the resort. As I have indicated, those matters provide the factual basis for establishing prejudice which entitled Mr Haswell to cancel the contract under s 214.

91. As has been mentioned, s 214 contains no express requirement that the notice of cancellation refer to that section, or identify the basis for ending the contract. It appears in legislation intended to provide a remedy in circumstances identified in the section. The section itself is intended to identify what is to be done by a purchaser who exercises the right conferred by it. It is difficult by implication to conclude that more is required than the section states. Both the language of the section, and the brief period within which the right might be exercised, suggest that a technical approach should not be taken to the notice provision in the section. It seems to me that a written notice, given to the seller within the stated time, which makes clear that the purchaser is ending the contract, is sufficient. This conclusion, in my view, finds some support in the broad principle adopted in *Minion v Graystone Pty Ltd*[33] that, where a legal justification in fact exists for a course taken, it will suffice to support its validity, that a parties or one of them acted for other reasons and in ignorance of its existence. In *Minion*, the principle was restated as follows:[34]

"… (the principle) is that the action taken must be capable of being justified at law, but that the grounds of justification, although they must have existed, need not have been known or relied upon at the time the action was taken."

92. Counsel for Latitude Developments referred to *Bankmist Holdings Pty Ltd v Azina Holdings Pty Ltd.*[35] That case was concerned with a notice of termination given under s 69D of the *Strata Titles Act* 1985 (WA). The notice was held to be defective because it did not rely on a failure to provide relevant information, made no assertion that the conduct of the party to whom the notice was given was deficient in any way, and did not allege a breach of any statutory provision.[36] It should be noted that the legislation on which this decision is based is by no means identical with s 214 of the *BCCM Act*. For that reason, and because I regard the considerations discussed a little earlier in these reasons as quite significant, I do not propose to follow it.

93.

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The termination letter referred to statutory provisions other than s 214, but did not refer to s 214 as a source of the right to terminate. I do not consider that a mistake in the identification of the legal authority for the termination of the contract to be material. Since s 214 does not require the identification of the statutory provision in the notice, it seems unlikely that a reference to another section of the *BCCM Act* would make the notice ineffective. In other contexts it has been said that a mistake in the identification of the source of a statutory power does not make an act done pursuant to the power invalid.[37] It seems to me that there is a strong analogy between the exercise of a statutory power, and the exercise of a statutory right to terminate a contract. The statute confers a right to terminate, which carries with it a power; that is to say, it attaches legal effect to an action performed by the person on whom the right is conferred. In my view, this provides an additional basis for concluding that a mistaken reference to the statutory provision which enables a purchaser to terminate a contract does not, of itself, affect the validity of the notice of termination.

94. While the termination letter complained of a number of matters, one was the fact that the development would be staged, and resort facilities were not included in the first stage of the development, the resort not being complete. It was amongst the factual matters relied upon for the termination of the contract. If I am wrong in holding that it is not necessary that a notice given under s 214 identify the ground on which the termination is based, it seems to me that the termination letter included in the matters relied upon the changes which would justify termination under s 214.

95. The general tenor of the termination letter is that Mr Haswell intended to terminate the contract on any basis available to him. It included an express reservation of rights "in all relevant respects". To the extent it might otherwise have been argued that, by nominating other grounds and other statutory provisions Mr Haswell was intending to abandon such right to terminate the contract as s 214 might afford him, the reservation made clear that that was not the case.

96. As this issue depends entirely on the construction of statutory provisions, and the effect of the termination letter, and there have been extensive written and oral submissions from both parties, it seems to me that this question can be dealt with appropriately on an application for summary judgment. In my view, the termination letter was an effective exercise on behalf of Mr Haswell of the right conferred on him by s 214 of the BCCM Act to terminate the contract.

Conclusion

97. The matters to which I have referred are sufficient to dispose of this application. I consider that the application for summary judgment should be granted.

Footnotes

1 See s 170 of the *BCCM Act*.

2 Mr Thompson, a director of Latitude Developments, deposes that the plan was registered on 30 July 2009, although the copy of the plan which he exhibits has on it a "Recorded Date" of 27 July 2009. The difference in these dates does not appear to be material.

3 See r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*).

4 *Deputy Commissioner of Taxation* v *Salcedo* [2005] 2 Qd R 232, 234–235.

5 *Gray* v *Morris* [2004] 2 Qd R 118, 133, cited in *Salcedo* at 236.

6 (1949) 78 CLR 62, 91.

7 (1964) 112 CLR 125, 130.

8 See *Neumann Contractors Pty Ltd* v *Traspunt No 5 Pty Ltd* [2010] QCA 119 at [81].

9 See ss 20 and 21(1) of the *LS Act*, and the definition of "proposed lot" in s 6 of that Act.

10 See s 6 of the *LS Act.*

11 Again, see the definition in s 6.

12 See Schedule of the *BCCM Act.*

13 See s 48C, 49C of the *LT Act*.

14 See the definition of these terms in Schedule 6 to the *BCCM Act*, and note s 10 of that Act.

15 [2009] QCA 47.

16 [1992] 1 Qd R 300, a case concerned with s 22 of the *LS Act*.

17 At p 305.

18 [2010] QSC 87.

19 See *Sommer* at p 302.

20 (1834) 1 Bing (NC) 370; 131 ER 1160.

21 See *Wilson* at [35].

22 (1983) 155 CLR 129, 168–169.

23 *Wilson* at [28].

24 [2004] 1 Qd R 346 at [66], referred to in *Wilson* [33].

25 *Wallingford* v *Mutual Society* (1880) 5 App Cas 685, 704.

26 See the Macquarie dictionary, 3rd ed.

27 On the other-hand, s 368(2) of the same Act does not include a requirement to identify the section, when the right conferred by it to terminate a contract is exercised.

28 See p 143.

29 See p 144.

30 [1983] 2 Qd R 399.

31 See p 406.

32 [1983] 2 Qd R 411, 414.

33 [1990] 1 Qd R 157, 164.

34 At p 164.

35 [2009] WASC 230.

36 See *Bankmist* at [38].

37 *Johns* v *Australian Securities Commission & Ors* (1993) 178 CLR 408, 426, 469; *Minister for Urban Affairs & Planning* v *Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 85, 86; *Brown* v *West & Anor* (1990) 169 CLR 195, 203.

VENNARD v DELORAIN PTY LTD AS TRUSTEE FOR THE DELORAIN TRUST

(2010) LQCS ¶90-165; Court citation: [2010] QCA 309

Queensland Court of Appeal

Judgment delivered on 5 November 2010

Community schemes — Appeal by purchaser — Off-the-plan purchase of lot within a residential community scheme — Failure to properly identify the lot to be purchased under s 21 of the Land Sales Act — Failure to comply with s 212 of the Body Corporate and Community Management Act — Disclosure Statement substantially incomplete — Primary judge held in favour of developer — Purchaser alleged primary judge erred in conclusions — Purchaser's submissions mostly not established — Contract complies with Land Sales Act — Disclosure Statement complies with new s 212 of Body Corporate and Community Management Act — Appeal dismissed.

This was an appeal from the decision *Vennard* v *Delorain Pty Ltd* (2010) LQCS ¶90-159.

The appellant (purchaser) contracted to purchase an apartment in a building known as Delor Vue Apartments, a proposed lot in a residential community title scheme with the respondent (Delorain). However, subsequently after entering the contract, the appellant argued that the contract was void for uncertainty and that it had been terminated for the respondent's failure to comply with s 365(3) of the *Property Agents and Motor Dealers Act*

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2000. The appellant also argued that she was entitled to avoid the contract, or not complete it or cancel it for the respondent's non-compliance with s 21 of the Land Sales Act (LSA) or s 212 or s 213 of the Body Corporate and Community Management Act (BCCM Act).

Original claims

In particular the appellant claimed:

- the respondent did not direct the appellant's attention to the warning statement, information sheet and contract required by legislation, and
- it should be allowed to terminate the contract because:

  – the respondent failed to provide a substantially complete disclosure statement as the services location diagrams and exclusive use plan for lots allocated exclusive use areas of common property were not provided
  – the respondent failed to clearly identify the lot to be purchased as it incorrectly referred to the lot in the contract as Lot 51 on proposed SP 207070 which is a non-existent strata plan
  – the respondent was guilty of misrepresentation and misleading or deceptive conduct
  – the contract was uncertain in the absence of a building format plan in relation to the particulars of the lot and common property.

The appellant sought an order from the court that she was entitled to terminate the contract.

Primary decision

Douglas J, the primary judge, disagreed and held that the appellant was not entitled to terminate the contract. Douglas J concluded:

- Based on the facts, the letter accompanying the contract delivered to the applicant's solicitors was in such a form as to direct their attention to the information effectively because, when it was delivered, it was on top of the bundle.
- The disclosure statement was substantially complete as at the day the contract was entered into and the applicant was not able to cancel the contract in reliance on s 213. The omission of the services location diagram at the time of entry into the contract was not shown to be a highly significant part of the disclosure required in this case, which was evidenced by the lack of any material prejudice claimed on behalf of the applicant.
- The mistake in the reference to "proposed SP 207070" was irrelevant as it should not have confused the applicant and there was no evidence that it had.
- On a proper reading of the contract it seemed clear that lot 51 always included the car park as part of the lot and that it was sold on that basis. Any omission of exclusive use areas related to other lots was irrelevant to the disclosure required to be made to the applicant. There was no evidence of material prejudice, nor was there evidence of any attempt by the applicant to terminate the contract on that basis.
- The description of lot 51 that was supplied in the contract was sufficient. That information clearly identified the lot to be purchased.
- There was no suggestion that the applicant was misled or mistaken in fact by the form of the contract or that she was ignorant of the nature and dimensions of the unit or that it was to be conveyed to her including a car park.

Accordingly there has been no failure by the respondent to clearly identify the lot to be purchased and no breach of s 21(1)(a) of the Land Sales Act. That conclusion also supports the view that the contract was certain.

The submissions on appeal

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The appellant conceded that the primary judge was correct in holding that the contract was not void for uncertainty. However on appeal, the appellant challenged the primary judge's conclusion that it was not entitled to avoid the contract pursuant to s 25 of the Land Sales Act for non-compliance with s 21 of that Act and that she was not entitled to cancel the contract for non-compliance with s 212 or s 213 of the Body Corporate and Community Management Act.

Misdescription of plans confusing

The appellant argued that the contract and the disclosure statement did not clearly identify the lot to be purchased as there was no annexure labelled "X" as contemplated by the proposed community management statement and there was no plan marked "SP 207070" as contemplated by the contract description. The appellant also argued that there was no "Identification Plan" as per the contractual description and the primary judge erred by referring to the plans annexed to Sch B of "the contract" rather than the Sch B of the "proposed community management statement".

Identification of proposed lot did not comply with LSA

Further, the appellant argued that the identification of proposed lot 51 lacked clarity because there was no real property description of the land which was to be the subject of the scheme, the plans and elevations did not include dimension and they did not disclose which two apartments on the first floor of "Building J" was intended to comprise lot 51. The appellant argued that s 9 of the Land Sales Act supported the view that s 21 required a precise description of the proposed lot [15].

Material prejudice established under s 25 of LSA

The appellant argued that the non-compliance with s 21(1) of the Land Sales Act prevented her from adducing evidence to prove that she had been prejudiced but nevertheless she was prejudiced.

Disclosure statement substantially incomplete

The appellant argued that she validly cancelled the contract under s 213(6) of the Body Corporate and Community Management Act because the disclosure statement failed to identify exclusive use areas, it did not include a services location diagram and it failed to include a concept plan.

Non-compliance with s 212 BCCM Act

The appellant argued that the contract provision relating to settlement (at [38]–[39]) did not comply with s 212 of the Body Corporate and Community Management Act. The appellant submitted that the provisions of the contract did not inform the buyer that the scheme had been established and it had 14 days after the establishment of the scheme to settle the contract (at [41]). Further, the primary judge was incorrect to say that the amending provisions of the Body Corporate and Community Management Act introduced on 5 June 2009 applied retrospectively to the appellant's case rendering the original breach irrelevant because it complied with the amended s 212. The primary judge made a factual error in concluding that the contract had not been terminated by the appellant before the amendments were introduced. The appellant argued that the termination was effected at the time the appellant served her originating application in April 2009, before the introduction of the amending s 212 in June 2009.

Held: Appeal dismissed.

Fraser JA (with whom de Jersey CJ and Philippides J agrees)

Plans not confusing

1. Although there was no plan labelled "X" the annexed plans could appropriately be described as concept plans. The contract was accompanied by an "Identification Plan". Although the term "Identification Plan" was not printed on any plan, it is obvious that the

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plans were intended to identify the property to be purchased. So much clearly appears from the highlighting of the number 51 where it appeared on the plans and the appellant's signature on those particular plans. The primary judge concluded that the reference to "SP 207070" was an irrelevant mistake which should not have confused the appellant. The conclusion was correct. There was no such plan proposed, and there were annexed plans and elevations which did identify proposed lot 51, the reference to the survey plan should be disregarded. A reasonable person in the appellant's position would not have been confused by any of those matters.

Identification of proposed lot in accordance with LSA

2. Section 9 of the Land Sales Act applies to a proposed allotment rather than a proposed lot. The contrast between s 9 and s 21 suggests that s 21 does not require the precise description demanded by s 9. That is consistent with the nature of the "off the plan" unit sales to which s 21 applies. Section 21 does not require a clear description of the proposed lot, but merely that it be clearly "identified".

No evidence of material prejudice under s 25 of LSA

3. The onus lay with the appellant to prove that she was materially prejudiced by the alleged failure by the seller to comply with s 21 of the Land Sales Act and she failed to fulfil that onus. The appellant failed to establish that she was entitled to avoid the contract for the alleged non-compliance.

Disclosure statement was "substantially" complete

4. There was no services location diagram which identifies what was proposed in relation to service easements, which meant that the disclosure was not complete. However, it does not follow that it was not "substantially" complete. The provision of such a diagram is merely one of the numerous requirements for a community management statement specified in s 66, which is itself merely one of the matters required to be disclosed under s 213. The appellant did not provide evidence to suggest that the absence of the diagram was significant in relation to the proposed lot or common property. The primary judge's conclusion was correct. The appellant failed to fulfil its onus of proving that the incompleteness in the disclosure statement was substantial.

Non-compliance with s 212 BCCM Act

5. The contract clause relating to settlement did not comply with s 212 of the BCCM Act before it was amended on 5 June 2009. Whether the amending provisions applied to the contract retrospectively depends on when the appellant terminated the contract. If the contract was terminated before 5 June 2009, then the amending provisions would not have applied to the contract. The appellant's originating application sought an order from the court that she validly terminated the contract on grounds other than non-compliance with former s 212. Her originating application plainly did not constitute an election to cancel the contract because of non-compliance with s 212. It related only to the question whether an entitlement to cancel the contract had arisen. As a result the appellant could not rely upon former s 212 to justify her purported termination of the contract. The appellant had no entitlement to terminate the contract under the new s 212.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

P J Roney (instructed by Macrossan and Amiet Solicitors) for the appellant.

D A Skennar (instructed by Cronin Litigation Lawyers) for the respondent.

Before: de Jersey CJ, Fraser JA and Philippides J.

Chief Justice: I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the order proposed by His Honour, and with his reasons.

Fraser JA: By contract dated 19 September 2007 the appellant agreed to buy a proposed lot in a community title scheme to be established by the respondent for $350,000. In subsequent

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correspondence between the parties' solicitors the appellant purported to terminate the contract under various statutory provisions or for misrepresentation. She also contended that the contract was void for uncertainty. The respondent denied that the contract was void and that the appellant's purported terminations were effective. The respondent insisted that the appellant complete the contract.

3. On 14 April 2009 the appellant applied in the trial division for declarations that the contract was void for uncertainty or that, under various statutory provisions, the contract had been terminated or that, under other statutory provisions, the appellant was entitled to avoid it, not complete it or cancel it. The primary judge found in favour of the respondent and dismissed the appellant's application with costs.[1]

4. At the hearing of the appeal the appellant's counsel conceded that the primary judge was correct in holding that the contract was not void for uncertainty. The appellant also did not challenge the primary judge's rejection of her arguments that she had validly terminated the contract under the *Property Agents and Motor Dealers Act* 2000 (Qld) ("PAMDA").[2] The appeal was confined to challenges to the primary judge's conclusions that the appellant was not entitled to avoid or not complete the contract pursuant to s 25 of the *Land Sales Act* 1984 (Qld) ("LSA")[3] for non-compliance with s 21 of that Act and she was not entitled to cancel the contract for non-compliance with s 212 or s 213 of the *Body Corporate and Community Management Act* 1997 (Qld) ("BCCMA").[4]

Land Sales Act 1984 (Qld), ss 21 and 25

5. Section 21 of LSA applied because the contract was for the purchase of a "proposed lot" within the meaning of that term in s 6 (that which will become a registered lot upon registration of a plan and recording of a community management statement for a community titles scheme under BCCMA). Subsection 21(1) provides that before a person enters upon a purchase of a proposed lot there shall be given to the person, or to the person's agent, a statement in writing signed by the person who is to become the person's vendor or that person's agent, that (amongst other things), "clearly identifies the lot to be purchased". The effect of ss 21(5) and (6) is that s 21(1) is satisfied if a prospective vendor incorporates the prescribed matters in a first statement that the vendor is required to give under s 213 of BCCMA. Under s 25 of LSA a purchaser may avoid the instrument made in respect of the purchase of the proposed lot "if the purchaser has been materially prejudiced by" a failure to give to the purchaser or purchaser's agent a statement in accordance with, or that sufficiently complies with, s 21(1).

Identification of the proposed lot: s 21 of the Land Sales Act 1984 (Qld)

6. The contract identified the lot to be purchased as "Proposed Lot 51 on proposed SP 207070, as highlighted on the Identification Plan contained in the Disclosure Documents" at "Unit No. 51 in "Delor Vue Apartments" situated at 3 Deloraine Close, Cannonvale, Qld." The annexed "Disclosure Documents" were addressed to the appellant and included the sub-heading "Re: Sale of Proposed Lot No. 51 'Delor Vue Apartments'". The appellant signed the Disclosure Documents above an acknowledgment that she had received them on 14 September 2007. The Disclosure Documents included a "Statutory Disclosure Statement" which stated that it made disclosures pursuant to s 21 of LSA and s 213 of BCCMA.

7. In the disclosure under s 21 of LSA the respondent stated that the lot to be purchased was the "Proposed Lot described on the front page of this Document". That page described the property as "Proposed Lot No. 51 'Delor Vue Apartments'". In the disclosure under s 213 of BCCMA the respondent stated that the proposed community management statement was attached. The attached "Proposed Community Management Statement", which was also described as "First/New Community Management Statement", included in Schedule B an "explanation of the development of scheme land". It described a progressive development of the scheme land over five stages. Clause 8 of Schedule B provided that each stage "will be created by way of a building format plan and a new Community Management Statement" and clause 9 provided that the development of the scheme land was depicted on the "concept plan as set out in

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Annexure 'X' to this Schedule B". Clause 16 stated that the concept plan annexed was intended only to represent "an indicative development plan for the scheme land", it was annexed for "illustrative purposes only", and the concept drawing did not "accurately fix or specify the location of buildings or the boundaries of buildings, all of the same being subject to a final survey being undertaken after completion of all relevant civil works and landscaping works to be progressively undertaken on the scheme land as each stage is completed."

8. The Disclosure Documents included numerous plans under the heading "Proposed Building Format Plan". The plans included:

> (a) A schematic plan labelled "Delor Vue Apartments". It shows eleven rectangles of differing dimensions identified by letters from A to K as an "Apartment Building". The plan is marked with a scale and a North arrow. "Apartment Building J" appears near the eastern boundary between buildings "I" and "K" (which is near the southern boundary). "Deloraine Close" is printed below the western boundary.
> (b) A schematic plan divided over two consecutive pages. This includes much the same information and some additional information. Some of the "Buildings" include the words "No car park level". Those words are not in "Building J". Different segments of the plan, each including one or more buildings, are labelled with "stage" numbers from 1 to 5. Each "Building" includes two or three apartment numbers for each of the three or two floors of the building. The numbers range from 1 to 62. On the second page of the plan (which shows buildings D, G, J and K) buildings J and K are marked as being in "Stage 3". "Building J" includes the following text under the word "Apartments":

"55 56 Third", "53 54 Second", and "51 52 First". The number 51 is circled and highlighted. That page is signed by the appellant.
(c) A similar but more legible plan in two parts on consecutive pages. This plan substantially replicates the preceding plan except that it omits the references to stages. A legend on the second page refers to "62 Units 1 Deloraine CL Cannonvale". On the second page of this plan the number "51", within "Building J Apartments" is circled and highlighted. That page is signed by the appellant.
(d) A "Typical Building Setouts" plan. This includes a plan of a "Typical 2 Unit Block" and "Typical 2 Unit Carspace Floorplan".
(e) A "Typical Roof Plan". This shows such a plan for a 2 unit block and a 3 unit block.
(f) Elevations of all of the buildings. The elevations of "Block J" show a three storey building with two apartments on each floor.
(g) A "Ground Floor Part Plan South". The location of rectangles and smaller, adjacent squares marked with numbers from 51 to 56 corresponds with the location of "Apartment Building J" and "Building J" on earlier plans. The location of stairs on this plan also corresponds with the location of stairs on the "Typical 2 Unit Block Carspace Floorplan". A circle is drawn around a rectangle and smaller adjacent square, each of which is numbered 51 and highlighted. This plan is signed by the appellant.

9. Taken together, those plans and elevations describe proposed Lot 51 as comprising 1 of the 62 apartments to be constructed at 1 Deloraine Close, Cannonvale, being apartment 51 on the first floor of "Building J", and the carpark and adjacent space on the ground floor of the same building, as generally described on those plans and elevations.

10. The appellant argued that the contract and Disclosure Documents did not clearly identify the lot to be purchased because the purported identification was incomplete, ambiguous and confusing. The appellant emphasised that there was no annexure labelled "X" as contemplated by the proposed community management statement and there was no plan marked "SP 207070" as contemplated by the contractual description. The appellant also argued that there was no "Identification Plan" as contemplated by the contractual description and that the primary judge erred by referring to the plans annexed to Schedule B "of the contract", rather than

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Schedule B of the "proposed community management statement".

11. The primary judge held that although there was no plan labelled "X" the annexed plans could appropriately be described as concept plans. That was a correct characterisation of what I have called the "schematic plans". The primary judge held that the contract was accompanied by an "Identification Plan". I agree. The annexed plans fell within the description of the property in the contract's reference schedule as the proposed lot "highlighted on the Identification Plan contained in the Disclosure Documents". The contract defined "Identification Plan" as meaning "the plans contained in the Disclosure Documents used in order to identify the location and approximate size of the Lot in the Development". Although the term "Identification Plan" was not printed on any plan, it is obvious that the plans were intended to identify the property to be purchased. So much clearly appears from the highlighting of the number 51 where it appeared on the plans and the appellant's signature on those particular plans. The primary judge concluded that the reference to "proposed SP 207070" was an irrelevant mistake which should not have confused the appellant.[5] Again, I would affirm that conclusion. Because there was no such plan proposed, and because there were annexed plans and elevations which did identify proposed Lot 51, the reference to the survey plan should be disregarded. A reasonable person in the appellant's position would not have been confused by any of those matters.

12. The appellant argued that the identification of proposed Lot 51 lacked clarity because there was no real property description of the land which was to be the subject of the scheme, the plans and elevations did not include dimensions, and they did not disclose which of the two apartments on the first floor of "Building J" was intended to comprise Lot 51.

13. As to the first point, the land the subject of the proposed scheme was identified in the statement under s 213 of BCCMA and annexed plans by the residential address "Delor Vue Apartments" at "1 Deloraine Close, Cannonvale". The street number differed from that given in the cover page of the contract and the

reference schedule ("3 Deloraine Close, Cannonvale") but it is commonplace to find a street address which includes more than one number for a large allotment. There was no evidence that the use of the different street number in the Disclosure Documents rendered the description inaccurate, confusing, or incomplete.

14. The appellant argued that a requirement for a more precise description was suggested by the objects of LSA expressed in s 2 "to protect the interests of consumers in relation to property development" and "to ensure that proposed allotments and proposed lots are clearly identified". However another object expressed in s 2 is "to facilitate property development in Queensland". It is evident that there may be some tension between that object and the consumer protection objects upon which the appellant relied. The relevant question in the construction exercise is how far the legislation goes in pursuit of the relevant purpose or object.[6]

15. The appellant argued that s 9 of LSA supported the view that s 21 required a precise description of the proposed lot. Section 9, which applies in relation to a proposed allotment rather than a proposed lot, requires the vendor to supply a copy of the plan of survey and a copy of any plan for reconfiguring a lot, with a metes and bounds description and contour map. In my view, the contrast between the terms of s 9 and s 21 suggests that s 21 does not require the precise description demanded by s 9. That is consistent with the nature of the "off the plan" unit sales to which s 21 applies. Section 21 does not require a clear description of the proposed lot, but merely that it be clearly "identified".

16. The primary judge rejected the appellant's further argument that the contract did not make it clear that the carpark for Lot 51 was freehold. In fact the identified carpark was allocated as part of the title to the Lot which the respondent proposed to convey to the appellant, but that is not relevant to the present question. The appellant referred to the allocation of common property for the exclusive use as a carpark for some other owners, as reflected in a draft community management statement, but that is equally irrelevant to the present question.

17.

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The appellant referred to the requirements of BCCMA in s 66(1)(e) that the community management statement include bylaws, unless the bylaws are those in Schedule 4, and the requirements in s 171 in relation to "exclusive use by-law[s]". However the proposed community management statement attached to the disclosure statement under s 213 of BCCMA included the word "Nil" under the heading "Schedule E Description of Lots Allocated Exclusive Areas of Common Property". That clearly conveyed that the appellant's proposed lot was not to be allocated the exclusive use of any common property. For that reason, the primary judge concluded that there was no significance in the absence of any information about the exclusive use of common property in the Disclosure Documents.[7] The appellant argued that this conclusion was inconsistent with the contractual definition of "Carpark Plan". That term was defined to mean "the plan(s) attached to the Proposed Community Management Statement used to identify the location of carpark spaces to be allocated by the Seller in accordance with clause 49". Clause 49 provided that the buyer acknowledged that it should only be entitled to "the exclusive use and enjoyment of the carparking and/or storage space/s as shown in the disclosure plan". (Presumably the area adjacent to the carpark was a storage space.)

18. There is conflict between the general provision in clause 49.1 and both of Schedule E of the proposed community management and the contractual description of the property to be purchased in the reference schedule ("Proposed Lot 51 … as highlighted on the Identification Plan contained in the Disclosure Documents", read with the highlighting of the carpark and adjoining space, both numbered 51). The construction adopted by the primary judge appropriately applied the very specific and unambiguous provisions in Schedule E and the reference schedule rather than the general, standard form provision in clause 49.1.[8] The absence of by-laws about exclusive use of common property was irrelevant because no exclusive use was proposed.

19. The appellant criticised the primary judge's further observation that if the appellant had wished to examine floor plans of the unit, the disclosure statement contained instructions as to how to obtain that information from the respondent. However the primary judge's observation was accurate. The Disclosure Documents (in a "Disclosure Statement for Offer to Participate in Management Rights Scheme Pursuant to

Class Order 02/305") included the statement that floor plans could be obtained from the seller. Section 21 of LSA required a statement which itself clearly identified the lot to be purchased, but the primary judge's observation was relevant to the question of prejudice under s 25 and it did not detract from the force of the reasons for holding that there was a clear identification of the proposed lot.

20. The descriptions of the apartment, carpark, and adjacent space numbered 51 were imprecise because there were no dimensions and, more significantly, because the description of the proposed apartment did not indicate which of the two apartments intended for the first floor in "Building J" was apartment 51. That lack of precision might have produced some uncertainty about the quality and amenity of the property which the appellant contracted to purchase, but that does not mean that the lot to be purchased was not clearly identified. The lot to be purchased was clearly identified in the disclosure under s 21. It was the proposed lot which would be Lot 51 on the registered plan for the community management scheme established for Delor Vue Apartments at 1 Deloraine Close, Cannonvale, comprising apartment 51, being 1 of 62 apartments to be constructed in 11 buildings at that place, apartment 51 being adjacent to apartment 52 on the first floor of a building to be constructed in the location of "Building J", and the carpark and adjacent space on the ground floor of the same building, all as generally described on the plans and elevations annexed to the contract.

21. Decisions upon s 49 of the *Building Units and Group Titles Act* 1980 (Qld) support the conclusion that s 21 of LSA did not require any more elaborate or precise identification. In *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*[9] the question was whether a statement under s 49 clearly identified the lot or proposed lot to which the statement related. The proposed lot was identified as "Unit A on the 14th Floor as identified in sketch plan in subject agreement (where Building Units Plan has been registered.

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Lot 52 in Registered Building Units Plan No …)". The first page of the contract described the unit as "No. 14A" and as "Lot 52 on the building units plan, floor 14th" and referred to a floor plan "in accordance substantially with the plan in the eighth schedule hereto and edged in blue." The purchaser argued that the identification was insufficient because the plan did not indicate the location of the building in relation to the land on which the building was constructed.

22. McPherson J, with whose reasons Campbell CJ agreed, rejected the purchaser's argument in the following passage:[10]

> "However, there are, in the case of a building not yet constructed, obvious difficulties in describing and identifying the precise compartment of airspace into which the constructed unit will fit, and I am satisfied that by s. 49(2)(a) the legislature does not require this to be done. The lot is sufficiently identified by the unit number, lot number, the floor on which it is intended to be, and the detailed drawing contained in the eighth schedule. That is not to say that a purchaser has no need to be, or in the present case has not been, informed of the geographical aspect of the unit which he has agreed to buy. Ordinarily one would expect him before contract to make inquiries or perhaps ask to see a plan of the building to determine its location on the land. But it is quite a different matter to suggest that the incorporation of such information is required in order to 'identify' the lot. In my opinion, s. 49(2)(a) does not impose such a requirement."

23. The appellant argued that the decisions on s 49 should not be applied because the text and purpose of that section differed from the purposed underlying s 21 of LSA, but the differences are not significant for present purposes. In *Mirvac Queensland Pty Ltd v Beioley & Anor*[11] McMurdo J applied McPherson J's analysis in holding that s 21 of LSA did not require a statement of the area of a proposed lot. McPherson J's reasoning is equally applicable in relation to the appellant's arguments about the absence of precise dimensions, the doubt about the location of proposed Lot 51 within the first floor of the relevant building, and any imprecision in the description of the land by a street address rather than a real property description. The identification of property to be sold as a numbered lot that will bear that number in a described plan to be registered and with reference to a described scheme to be recorded was a "precise" identification which was "adequate and sufficient"[12] at the time of the contract. If further information was required to ensure a "clear" identification, sufficient information for that purpose was supplied in the plans and elevations annexed to the contract.

24. The primary judge was correct in holding that the respondent's statement clearly identified the lot to be purchased in conformity with s 21 of LSA.

Avoidance of the contract: s 25 of the *Land Sales Act* 1984 (Qld)

25. Section 25(1) of LSA conferred a right upon the appellant to avoid the contract for non-compliance with s 21(1) only if the appellant had been "materially prejudiced by the failure" to clearly identify the lot to be purchased. The appellant did not challenge the primary judge's finding that there was no evidence that the appellant was prejudiced by the failure.

26. The appellant argued that she was nevertheless prejudiced because the alleged non-compliance with s 21(1) practically prevented her from adducing evidence to prove that she had been prejudiced. That is plainly not so. If, contrary to my conclusion, s 21 required a more detailed description of the proposed lot, the appellant might have adduced evidence, for example, that (if it was the case) the absence of necessary details contributed to her misunderstanding of the nature of the property, she lacked an opportunity to take advantage of the invitation in the Disclosure Documents to view detailed floor plans, she was misled by those plans or the contract description, the amenity of Lot 51 was less desirable or it was worth less than would have been the case if it had been in a different location on the first floor of "Building J", or the Lot was worth less than the purchase price. The onus lay upon the appellant to prove that she was materially prejudiced by the failure and she failed to fulfil that onus.

27.

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Authorities upon similar provisions suggest that "materially prejudiced" in this context means disadvantaged in a way which is substantial or of much consequence,[13] but a different view on that issue would not assist the appellant. If there was a non-compliance with s 21(1)(a), the appellant did not establish that it caused her any prejudice at all. The appellant therefore failed to establish that she was entitled to avoid the contract for the alleged non-compliance.

***Body Corporate and Community Management Act* 1997 (Qld), s 213**

28. Subsection 213(1) of the BCCMA requires that the seller of a proposed lot must give the buyer a disclosure statement before the contract is entered into. One requirement for such a disclosure statement, in s 213(2)(e)(i), is that it be accompanied by the proposed community management statement. Subsection 213(4) provides that the disclosure statement must be "substantially complete". Subsection 213(6) provides that if the contract has not already been settled, the buyer may cancel the contract if the seller has not complied with subsection 213(1). Subsection 213(7) provides that the seller does not fail to comply with subsection 213(1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies.

29. The primary judge referred also to s 214, which permits variation of a disclosure statement by the giving of a further statement, and to s 217, which confers a right of the buyer to cancel the contract in specified circumstances. Those provisions are not relevant to the issues in the appeal. The appellant's only contention under this heading is that she validly cancelled the contract under s 213(6) on 28 January 2009. The appellant argued that s 213(6) entitled her to terminate the contract because the disclosure statement failed to identify exclusive use areas, it did not include a services location diagram, and it failed to include a concept plan. I have already explained why the failure to identify exclusive use areas was not significant.

Services location diagram

30. The appellant argued that the omission of location diagrams for service easements prevented the disclosure statement given under s 213(1) from being substantially complete. The appellant referred to s 66(1)(d) of BCCMA, which requires a community management statement to include one or more services location diagrams for all service easements for the standard format lots included in the scheme and for the common property for the standard format lots.

31. It was common ground that the disclosure statement did not include a services location diagram. The primary judge held that the disclosure statement was substantially complete as at the day the contract

was entered into so that the appellant was not able to cancel the contract in reliance on s 213. His Honour reasoned that the omission of the services location diagram was not shown to be a highly significant part of the disclosure it required, as was evidenced by the lack of any claim of material prejudice.[14] The primary judge referred also to the likelihood that, at the time of the contract, a services location diagram was not required by s 66(1)(d) because the scheme was not one for which development approval had been given after the commencement of that paragraph.[15]

32. As to the last point, in my respectful opinion the absence of development approval at the time of the contract did not render s 66(1)(d) irrelevant in relation to the obligations under ss 213(1) and 213(2)(e)(i) to give a "proposed" community management statement. The expressed premise of s 213(1) is that the proposed lot will be "included in a community title scheme when the scheme is established". The proposed community management statement should therefore include the provisions which, at the time that proposed statement is given, the seller proposes to include in the community management statement when it is recorded. Presumably a development approval for this proposed scheme had not been given before s 66(1)(d) commenced on 4 March 2003,[16] but if the approval had not been obtained before the contract was made the respondent must have intended to obtain it before the statement was recorded. That was reflected in the condition precedent in clause 3.1(a) of the contract that the appellant obtain all necessary local government approvals for the development.

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Section 213(2)(e)(i) therefore incorporated the requirements of s 66(1)(d) to the extent that those requirements would be applicable in a community management statement which would be recorded after the necessary approval had been obtained.

33. Accordingly, the proposed community management statement which accompanied the disclosure statement was incomplete because it did not include any proposed services location diagrams for any proposed service easements. There was no evidence about precisely what was proposed at the time of the contract in that respect, save perhaps what might be inferred from the services location diagrams subsequently included in the further statement given by the respondent on 10 February 2009, but it may be assumed that some such service easements were always intended to be included. The question is whether the absence from the original statement of any diagram showing those easements means that the statement was not "substantially complete" in terms of s 213(4).

34. Because there was no services location diagram which identified what was proposed the disclosure was not complete but it does not follow that it was not "substantially" complete. The provision of such a diagram is merely one of the numerous requirements for a community management statement specified in s 66, which is itself merely one of the matters required to be disclosed under s 213. The appellant did not adduce any evidence to suggest that the absence of the diagram was significant in relation to proposed Lot 51, the proposed common property, or in any respect. Nor did the appellant argue that any particular feature of the diagram that was subsequently supplied indicated that the omission from the original disclosure was significant. The appellant's argument was instead that the absence of disclosure about any one of the numerous matters required to be disclosed itself established a substantial deficiency in the disclosure. That requires a non-literal and unlikely construction of s 213(4), which simply provides that the disclosure statement must be substantially complete. It does not provide that every item required to be included in the disclosure statement must be substantially complete.

35. I would affirm the primary judge's decision that the appellant failed to fulfil its onus of proving that the incompleteness in the disclosure statement was substantial.

Concept plan

36. The appellant argued that the primary judge failed to deal with the argument at trial that the disclosure statement was not substantially complete because the accompanying, proposed community management statement did not include concept plans which illustrated the intended progressive development of the scheme as s 66(1)(f) required. That is not correct. The primary judge referred to s 66(1)(f) and held that the annexures in the disclosure statements complied with the requirements that the community management statement explain the proposed development and be illustrated by concept drawings.[17] I am not persuaded

that there was any error in that conclusion. It is therefore unnecessary to consider whether this scheme was intended "to be developed progressively" within the meaning of s 66(1)(f).

Former s 212 of BCCMA

37. At the time when the contract was made s 212 of BCCMA[18] ("former s 212") provided:

> "(1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
> (3) The buyer may cancel the contract if—
>
> > (a) there has been a contravention of subsection (1) or (2); and
> > (b) the contract has not already been settled."

38. The contract did not provide "that settlement must not take place earlier than 14 days after the seller gives advice to the buyer

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that the scheme has been established or changed". Clause 26.1 provided:

> "When a separate title for the Lot has issued and the Seller is of the opinion that all other Conditions Precedent contained in clause 3.1 will be satisfied within fourteen (14) days, the Seller may give notice to the Buyer calling for settlement. Settlement is due fourteen (14) days after the Seller gives that notice."

39. The Conditions Precedent in clause 3.1 were:

> "(a) the Seller obtaining all necessary Local Government approvals for the Stage and the Development generally;
> (b) construction of the Lot being substantially complete, except for minor omissions and defects in respect of which the Project Manager has certified that rectification will not prejudice the convenient use of the Lot;
> (c) registration of the Plan;
> (d) recording of the Community Management Statement establishing the Scheme under the BCCM Act; and
> (e) issue of a Certificate of Classification under the Building Act for the Stage."

40. The primary judge rejected the appellant's contention that she had validly cancelled the contract under former s 212 because clause 26.1 of the contract had the effect required by that section and, in any event, any right in the appellant to cancel the contract had been taken away by the replacement of former s 212 by the *Body Corporate and Community Management Amendment Act* 2009 (Qld)[19] with a new provision which applied in relation to the contract.[20]

Non-compliance with former s 212

41. The aim of former s 212 was to ensure that the buyer learned that the scheme had been established in sufficient time before settlement to make the necessary searches and enquiries.[21] The appellant argued that clause 26.1 did not fulfil that aim because it did not require the seller to inform the buyer that the scheme had been established. A notice merely calling for settlement in 14 days did not meet the statutory requirements. The respondent argued that it was not necessary for the contract to use the words of former s 212 and that clause 26.1 was to the effect required by that section.

42. Decisions of this Court establish that former s 212 was satisfied if the contract made provision to the effect stated in that section.[22] The contract need not require the settlement notice to state that the scheme

has been established if that was implicit in the notice.[23] The contract in *Bossichix* nevertheless did not comply with former s 212 because the contract permitted the seller to insist upon settlement 14 days after registration of the building format plan. The difficulty was that under the *Land Title Act* 1994 (Qld) the scheme was established upon the recording of the community management statement and that might not occur until after the lot was created by registration of the plan.[24]

43. Clause 11.1 of this contract provides that title to the Lot is under the *Land Title Act* 1994 (Qld) and the Scheme will be established under BCCMA. Although the contract describes the property contracted to be sold as "proposed Lot 51", under clause 26.1 the notice calling for settlement may not be given until after issue of a separate title for "the Lot". A certificate containing an indefeasible title for a lot may be issued by the registrar on request once the particulars of the lot have been recorded, but there is no requirement in the *Land Title Act* 1994 (Qld) for the "issue" of any document of title for a lot.[25] The statement in clause 26.1 that a separate title has issued presumably refers to the point in time at which the "the Lot" is created and indefeasible title is established by the contemporaneous recording of particulars of that lot in the freehold register.[26] "Lot" is defined by the contract to mean a "proposed Lot in the "Scheme"" which is to be sold under the contract. "Scheme" is defined to mean "the Community Title Scheme to be established upon recording of the Community Management Statement (for Stage 1 of the Development) and registration of the Plan (for Stage 1 of the Development)". Accordingly, although a lot is created immediately upon registration of the plan, the expression "the Lot" in clause 26.1 connotes both registration of the plan and the recording of the community management statement. The establishment of the scheme is not expressed as a condition precedent, but the scheme will be established

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upon satisfaction of both of the conditions precedent in clause 3.1(c) (registration of the Plan) and (d) (recording of the Community Management Statement establishing the Scheme). In that context, the provision in clause 26.1 which allows "other" conditions precedent to be satisfied within the 14 days refers to conditions precedent other than those in (c) and (d).

44. The appellant argued that a similar construction was rejected in *Bossichix*, but the settlement clause in that case unambiguously required settlement fourteen days after the plan was registered, even if the community management statement was not recorded at the same time.[27] In this case the parties' contractual intention, objectively ascertained, was that the respondent could give a settlement notice only after both events had occurred.

45. However clause 26.1 provided simply for fourteen days' notice calling upon the buyer to settle the contract at that time. The respondent did not argue that a requirement for advice to the effect that the scheme had been established should be implied in clause 26.1. The conclusion seems inevitable that the contract did not require the settlement notice to advise the appellant that the scheme had been established. Unlike the provision held to be sufficient in *Hannah & Ors v TW Hedley (Investments) & Ors*,[28] the contract did not even require the settlement notice to advise that the conditions constituting establishment of the scheme (registration of the plan and recording of the scheme) had been satisfied. Whilst it was implicit in the giving of a settlement notice under clause 26.1 of the contract that the scheme had been established, former s 212 literally required the contract to provide for the seller to give the buyer advice to that effect. Having regard to the aim and consumer protection purpose of former s 212, the rather surprising results that follow from that literal meaning do not justify departure from it.[29]

46. For these reasons the contract did not comply with former s 212(1).

The effect of the Amendment Act

47. Shortly after this Court's decision in *Bossichix* on 5 June 2009, BCCMA was amended by the *Body Corporate and Community Management Amendment Act* 2009 (Qld). The Amendment Act commenced on 22 June 2009. Section 3 of the Amendment Act replaced former s 212 with a new s 212 as follows:

"(1) This section applies to a contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed.
(2) The contract is taken to include a term (the ***deemed term***) providing that, despite any other term of the contract, settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
(3) The deemed term has priority over any other term of the contract relating to settlement.
(4) Without limiting subsection (3), any notice the seller gives to the buyer is void to the extent it is inconsistent with the deemed term."

48. Section 4 of the Amendment Act also inserted in BCCMA a new heading, Part 6A "Transitional provision for Body Corporate and Community Management Amendment Act 2009", and s 362A as follows:

"**362A Section 212 to have retrospective affect**

(1) Section 212, as inserted by the *Body Corporate and Community Management Amendment Act 2009*, (the ***inserted section***) applies, to the exclusion of existing section 212(1), to a contract mentioned in the inserted section whether entered into before or after the commencement.
(2) Subject to subsection (3), subsection (1) applies for all purposes (including a legal proceeding started but not decided before the commencement).
(3) Subsection (1)—

(a) does not apply for the purpose of a contract settled before 5 June 2009; and
(b) does not apply for the purpose of—

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(i) a contract that has, before 5 June 2009, been lawfully cancelled because the contract failed to make provision as required by existing section 212(1); or
(ii) a legal proceeding relating to the lawfulness of the cancellation; and

(c) does not apply for the purpose of a legal proceeding decided before the commencement.
(4) In this section—

commencement means the commencement of this section.

existing section 212(1) means section 212(1) as in force before the commencement.

legal proceeding, in susbsection (2), includes an appeal from a legal proceeding mentioned in subsection (3)(c)."

49. The primary judge held that the Amendment Act applied with retrospective effect in relation to the appellant's legal proceedings started but not decided before the commencement of the amending Act, unless the contract had been lawfully cancelled before 5 June 2009 under the former s 212(3). The primary judge concluded that the appellant had not attempted to cancel the contract because of non-compliance with s 212 until she purported to do so by facsimile from her solicitors dated 12 June 2009 and received by the respondent's then solicitors on 16 June 2009. By that time former s 212 had been replaced. The primary judge therefore held that the appellant had not validly cancelled the contract under former s 212.[30]

50. It was not contentious that the appellant's repudiations of the contract by her solicitor's letters sent before she commenced proceedings were expressed to be based upon grounds other than non-compliance with former s 212. The appellant first expressly purported to cancel the contract under former s 212 by letter

from the appellant's solicitors dated 12 June 2009, which seems to have been received by the respondent's solicitors on 16 June 2009. The appellant did not challenge the primary judge's conclusion that this letter was not relevant to the present issue because it was sent after 5 June 2009. The appellant argued, however, that the primary judge should have held that s 362A(3)(b)(i) and (ii) of the Amendment Act applied in relation to this contract because, before 5 June 2009, the contract had been "lawfully cancelled because the contract failed to make provision as required by existing s 212" and because her originating application was a legal proceeding "relating to the lawfulness of the cancellation".

51. The appellant argued that the primary judge's reasoning was founded upon a factual error that the appellant had not attempted to cancel the contract in reliance upon the former s 212 until after 5 June 2009. The appellant contended that she had cancelled the contract when she served her originating application in April 2009. The appellant argued that service of that application seeking a declaration that she had validly terminated the contract under s 212 amounted to communication of an election to terminate the contract on that basis. In an alternative argument, the appellant contended that she had effectively cancelled the contact under former s 212(3) by her solicitor's earlier letters even though those letters had not referred to non-compliance with or cancellation under s 212.

52. In relation to the latter argument the appellant relied upon *Shepherd v Felt & Textiles of Australia Ltd*[31] as it was explained in *Minion v Graystone Pty Ltd.*[32] In *Minion v Greystone*, McPherson J referred to Sir Owen Dixon's observation in *Williams v Frayne*,[33] in a passage cited with approval in this Court in *Landers v Schmidt*[34] that:[35]

> "… as a general rule, it is enough that upon true facts a party is entitled to act as he has done, and his justification is independent of his own knowledge of the facts (Cp. the cases mentioned in *Shepherd v Felt & Textiles of Australia Ltd*)."

McPherson J held that the authorities supported the broad principle that an "action taken must be capable of being justified at law, but that the grounds of justification, although they must have existed, need not have been known or relied upon at the time the action was taken."[36]

53.

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No authority was cited which directly concerned the requirements of an effective cancellation under former s 212(3) of BCCMA, but there is authority concerning the requirements for an effective cancellation under s 214. Section 214 applies in some circumstances where a disclosure statement is varied by a further statement. In the relevant cases s 214(4) empowers the buyer to cancel the contract if it has not been settled, if the buyer would be materially prejudiced if compelled to complete, and if the cancellation "is effected by written notice given to the seller" within a specified time. That provision was considered in *Latitude Developments Pty Ltd v Haswell.*[37] P Lyons J analysed authorities, including *Minion v Graystone*, and held that a notice of termination was an effective exercise of the right to cancel the contract under s 214(4) of BCCMA even though the notice instead invoked a right to terminate the contract under s 25 of LSA and s 217 of BCCMA.

54. As appears from P Lyons J's analysis, there are conflicting decisions relating to that question[38] and the question whether the principle expressed in *Shepherd v Felt & Textiles of Australia Ltd* applied in a similar statutory context, under s 49(5) of the *Building Units and Group Titles Act* 1980 (Qld), was expressly left open by Mason, Deane and Dawson JJ in *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd.*[39] I would add that *Minion v Graystone* and the decisions cited in that case concerned the exercise of common law and contractual powers rather than the exercise of statutory powers. The point is an important one and we heard only quite limited argument about it. In these circumstances I think it preferable to refrain from deciding whether a purported cancellation for an alleged non-compliance with a different statutory provision may be an effective cancellation of the contract under former s 212(3). It is not necessary to decide that question because of the effect of the Amendment Act, to which I now turn.

55. The appellant commenced her proceeding in the trial division by an originating application filed on 14 April 2009. The application sought declarations that the contract was void for uncertainty, that the contract was properly terminated by the appellant on the 24 November 2008 by reason of non-compliance with the provisions of s 365(3) of PAMDA, that the appellant was entitled to avoid or not complete the contract pursuant to s 25 of LSA for non-compliance with s 21 of that Act, that the appellant was, by reason of non-compliance with s 213 of BCCMA entitled to cancel a contract, or "that the [appellant] is, by reason of non-compliance with s 212 of the BCCMA entitled to cancel the Contract".

56. The appellant did not seek a declaration that she had validly terminated the contract because of non-compliance with former s 212. The contrast between the form of the claimed declaration concerning the alleged non-compliance with former s 212 and the form of the claimed declarations concerning uncertainty and s 365(3) of PAMDA emphasises the point. In relation to former s 212, the appellant sought only a declaration that she had an entitlement to cancel the contract because of the alleged non-compliance with that section. Although the appellant had repudiated the contract by refusing to settle and by purporting to terminate or cancel the contract on grounds other than non-compliance with former s 212, her originating application plainly did not constitute an election to cancel the contract because of non-compliance with s 212.[40]

57. It is clear enough that "the cancellation" in s 362A(3)(b)(ii) of BCCMA refers to a cancellation described in subparagraph (i). Accordingly the only legal proceeding which qualifies under s 362A(3)(b)(ii) is a proceeding which relates to the lawfulness of a purported cancellation before 5 June 2009. The application for a declaration concerning former s 212 did not fit that description because the claimed declaration did not relate to any purported cancellation. It related only to the question whether an entitlement to cancel the contract had arisen.

58. The remaining question is whether the exception to retrospectivity in s 362A(3)(b)(i) is applicable if the appellant's purported cancellation of the contract by her solicitor's letters before 5 June 2009 was effective under the principle explained by McPherson J in *Minion v Graystone*. In my opinion s 362A(3)(b)(i) was not applicable, even if the

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appellant's purported cancellation of the contract on other grounds should have been regarded as effective under former s 212 when it was in force.

59. The appellant argued that her cancellation of the contract amounted to a vested right and she invoked the presumption against imputing to the legislature an intention retrospectively to affect vested rights.[41] However there is no doubt that the Amendment Act was intended to affect vested rights. Section 362A(1) undoubtedly applies the new s 212 to contracts entered into before that section commenced. Under s 362A(2), that amendment also applies in relation to legal proceedings which were started before the commencement of the amendment, subject only to the effect of s 362A(3).

60. The issue concerns the breadth of the exception to retrospectivity in subsection (3). That exception applies only in relation to one category of lawful cancellations, namely, a cancellation because of non-compliance with the former s 212. Had it been intended that the exception would apply to any lawful cancellation the words "because the contract failed to make provision as required by existing section 212(1)" in s 362A(3)(b)(i) would have been unnecessary. Furthermore, the Amendment Act afforded to purchasers in the appellant's position the same right to fourteen days' notice of the establishment of the community management scheme which had been the object of former s 212. That fulfilled the underlying purpose of former s 212. In that context, it is not surprising that the Amendment Act narrowly confined the exception to the retrospective operation of the new provision.

61. I would hold that s 362A(3)(b)(i) does not comprehend a cancellation which was expressed to be made only under and for non-compliance with provisions other than former s 212. For the reasons I have given, that should not be regarded as a cancellation "because the contract failed to make provision as required by existing s 212". Upon that construction the new s 212 applied in relation to the contract to the exclusion of former s 212. The appellant had no entitlement to terminate the contract under the new s 212.

62. In the result, the appellant could not rely upon former s 212 to justify her purported termination of the contract.

Proposed order

63. I would dismiss the appeal with costs.

Philippides J: I have had the advantage of reading the reasons for judgment of Fraser JA. I agree with the reasons of his Honour and with the proposed order.

Footnotes

1 *Vennard* v *Delorain P/L* [2010] QSC 190.

2 Reprint No. 3A as in force from 1 July 2007.

3 Reprint No. 5A as in force from 1 July 2007.

4 Reprint No. 4 as in force from 1 July 2007.

5 *Vennard* v *Delorain P/L* [2010] QSC 190 at [22]–[23].

6 *Carr* v *Western Australia* (2007) 232 CLR 138 at 143, point [7].

7 *Vennard* v *Delorain P/L* [2010] QSC 190 at [28].

8 *Vennard* v *Delorain P/L* [2010] QSC 190 at [28].

9 *Sunbird Plaza Pty Ltd* v *Boheto Pty Ltd* [1983] 1 Qd R 248.

10 *Sunbird Plaza Pty Ltd* v *Boheto Pty Ltd* [1983] 1 Qd R 248 at [258].

11 [2010] QSC 113.

12 *Dainford Limited* v *Tari Nominees Pty Ltd & Ors*, unreported, Campbell CJ, Sheahan and McPherson JJ, Supreme Court of Queensland, No. 563 of 1983, 24 October 1984 per McPherson J (with whose reasons Campbell CJ agreed) at p 11.

13 *Chancellor Park Retirement Village Pty Ltd* v *Retirement Village Tribunal* [2004] 1 Qd R 346 per Chesterman J at [66]; *Wilson* v *Mirvac Queensland Pty Ltd* [2010] QSC 87 per Margaret Wilson J at [35]; *Latitude Developments Pty Ltd* v *Haswell* [2010] QSC 346 per Peter Lyons J at [59]–[60] referring to *Deming No 456 Pty Ltd* v *Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 per Wilson J at 168 to 169.

14 *Vennard* v *Delorain P/L* [2010] QSC 190 at [16].

15 *Vennard* v *Delorain P/L* [2010] QSC 190 at [14].

16 The date of assent of the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 (Qld), No. 6 of 2003: see s 24 (section 66(1)(d) was then s 57(1)(ca)).

17 *Vennard* v *Delorain P/L* [2010] QSC 190 at [12].

18 Reprint No. 4 as in force from 1 July 2007.

19 Act No. 20 of 2009.

20 *Vennard* v *Delorain P/L* [2010] QSC 190 at [40]–[42].

21 *Bossichix P/L* v *Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [21].

22 *Bossichix P/L* v *Martinek Holdings P/L* [2009] QCA 154 per Holmes JA at [1], per McMurdo J at [21], per A Lyons J at [25]; *Hannah & Ors* v *TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 at [3], [15], [18].

23 *Hannah & Ors* v *TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 at [34].

24 *Land Title Act* 1994 (Qld), s 49A. See *Bossichix P/L* v *Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [12]–[16].

25 *Land Title Act* 1994 (Qld), s 42.

26 *Land Title Act* 1994 (Qld), ss 37, 38, 49A, and 52. The reference in clause 26.1 to a separate title being "issued" may be an obsolete reference to the issue of "a separate certificate title for each lot" in s 8(5) of

the *Building Units and Group Titles Act* 1980 (Qld). (See also the transitional provision in s 202(4) of the *Land Title Act* 1994 (Qld), which applied in relation to contracts executed before 1 January 1995.)

27 *Bossichix P/L* v *Martinek Holdings P/L* [2009] QCA 154 per McMurdo J at [4], [17]–[18]

28 [2010] QCA 256.

29 See *Hannah & Ors* v *TW Hedley (Investments) Pty Ltd & Ors* [2010] QCA 256 per Applegarth J at [24]–[27].

30 *Vennard* v *Delorain P/L* [2010] QSC 190 at [41]–[43].

31 (1937) 45 CLR 359.

32 [1990] 1 Qd R 157.

33 (1937) 58 CLR 710 at 733.

34 [1983] 1 Qd R 188 at 196.

35 *Minion* v *Graystone* [1990] 1 Qd R 157 at 164.

36 [1990] 1 Qd R 157 at 164.

37 [2010] QSC 346 at [87]–[96].

38 In *Latitude Developments Pty Ltd* v *Haswell* [2010] QSC 346 at [85], P Lyons J referred to *Clegmere Pty Ltd* v *Samspring Pty Ltd* [1983] 2 Qd R 399 and *Silverton Ltd* v *Shearer* [1983] 2 Qd R 411 at 414; see also paragraph [92] and P Lyons J's reference to *Bankmist Holdings Pty Ltd* v *Azina Holdings Pty Ltd* [2009] WASC 230.

39 (1983) 155 CLR 129 at 143 to 144.

40 C.f. *Highmist P/L* v *Tricare Ltd* [2005] QCA 357 at [16], [57]–[58], [62].

41 The appellant cited *Cowan & Sons* v *Lockyer* (1984) 1 CLR 460 at 466; *Hough* v *Windus* (1884) 12 QBD 224 at 237; *Clifford* v *Ashburton Borough* [1969] NZLR 446 at 448; and *Mathieson* v *Burton* (1971) 124 CLR 1 at 22 citing Wright J in *In re Athlumney*; *Ex parte Wilson* [1898] 2 QB 547: "If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

MIRVAC QUEENSLAND PTY LTD v WILSON

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(2010) LQCS ¶90-166; Court citation: [2010] QCA 322

Queensland Court of Appeal

Judgment delivered on 19 November 2010

Community schemes — Appeal by the developer (appellant) from original decision — Further Statement to correct inaccuracies in original Disclosure Statement provided after Stage 1 completion — Purchaser cancelled contract within 14 days due to changes in Further Statement — Original decision held purchaser would be materially prejudiced if compelled to complete contract in light of changes to original Disclosure Statement — Purchaser validly cancelled contract under Body Corporate and Community Management Act 1997, s 214(4) — Developer argued there was in fact no material prejudice — Inconsistency was the result of an oversight which was corrected once it became known — Cancellation of contract by respondent based on confusion — Respondent buyer did not take time to make inquiries to resolve confusion — Appeal by developer dismissed — Onus not on buyer to make inquiries in relation to inaccuracies found between the two statements — Material prejudice was established on the evidence.

This was an appeal by the developer from the decision of Wilson J, *Wilson* v *Mirvac Queensland Pty Ltd* (2010) LQCS ¶90-157.

The developer (appellant) built a staged residential community scheme known as Tennyson Reach Development. The purchaser (respondent) entered into a contract for sale of proposed residential lot in stage 2 of that development. The developer gave the purchaser a Disclosure Statement in fulfilment of its obligations under s 213 of the Body Corporate and Community Management Act.

After stage 1 of the development had been completed, the developer provided the purchaser with a Further Statement pursuant to s 214 of the Act, explaining how the first statement was or had become inaccurate and how the inaccuracies were being rectified, together with a substitute Disclosure Statement incorporating the changes. The substitute Disclosure Statement differed from the first Disclosure Statement in that the following was missing from the Asset Register and the Equipment Schedule intended for the Body Corporate:

- CCTV, cameras and security monitoring equipment
- BBQ, outdoor tables and chairs
- artworks and loose decorative items within lift foyer and common areas, and
- six lift curtains.

Original claims

On receipt of the Further Statement, the purchaser purported to exercise its right to cancel the contract under the Act. She argued that she would be materially prejudiced if compelled to complete, given the extent to which the first Disclosure Statement had become inaccurate. The inaccuracies which she complained of in a letter to the developer were as follows:

> "Security is and was a very important consideration for my husband and myself, given our personal circumstances, and the proximity of the Farringford building to the State Tennis Centre and proposed public parklands. Further if the fee to the caretaker was based, even in part, on the security monitoring function, and that function does not have to be performed, the fee paid is accordingly inflated.
>
> To a lesser extent, but still importantly, the absence of artworks, decorative items and a BBQ and tables and chairs detracts from the amenity of the development, and the Seller's unwillingness to supply these items marks an unwarranted departure from the initial Disclosure Statement. If the Body Corporate has to acquire these items it will put all unit-holders to expense.
>
> [140298]
>
> The provision of lift curtains is necessary to prevent damage occurring if items are being moved in or out of the building, and to minimise the expense that would be incurred by the body corporate if that were to occur.
>
> I regard the amendment to clause 4.4, the inclusion of the Body Corporate Assent Register, the omission of the assets to which I have referred, and the provision of the Caretaking Agreement to be that I would be materially prejudiced if compelled to complete the contract. Accordingly I cancel the contract pursuant to s 214(4) of the Act".

The developer responded to the purchaser that by oversight, some of the items which have already been provided by the Seller upon completion of Stage 1 were not listed on the Body Corporate Assets Register in the Further Statement. The developer enclosed a Further Statement confirming the Seller's original undertaking to provide the assets listed in the original Disclosure Statement and annexing a copy of the amended Body Corporate Assets Register to the purchaser. The developer submitted that the purchaser was not entitled to cancel the contract because the original Disclosure Statement never became inaccurate; the inaccuracy was in the Further Statement. It also submitted that the purchaser could not be materially prejudiced by the omission of the property from the Further Statement because it was not property which the developer had contracted to provide the purchaser; rather it was to be property of a third party, the Body Corporate.

Original decision of Wilson J

The purchaser was entitled to cancel the contract and she validly did so. The Body Corporate was to come into existence on the establishment of the scheme and the purchaser as the owner of a lot would be one of its members. Under the original Disclosure Statement the developer undertook to provide at its costs, items of property which, upon establishment of the Body Corporate, would become Body Corporate Assets. The Body Corporate would administer those assets for the benefit of lot owners including the purchaser. In these circumstances, it does not follow that because the property was to be Body Corporate Assets, the purchaser could not be materially prejudiced by its omission.

In terms of material prejudice, it was enough for the purchaser to establish that she would be disadvantaged in a substantial way if she were obliged to complete the contract on the premise that the Body Corporate would not have the CCTV security system and other items of property which had been included in the original Disclosure Statement and omitted from the Further Statement. Viewed objectively, a person in the purchaser's circumstances would be disadvantaged in a substantial way by the omission of the security system and arrangements for its management.

The appeal

The developer submitted that the primary judge erred in finding that:

- that the Disclosure Statement was inaccurate
- that the purchaser was materially prejudiced when she was never told in clear terms that she would not receive the camera security system, and
- that the evidence was sufficient to establish material prejudice.

The developer's argument was that although there may have been some inconsistencies between the two statements, there was in fact no material prejudice because the inconsistency was the result of an oversight which was corrected once it became known. With or without that correction the original Disclosure Statement remained accurate.

The respondent did not suffer any material prejudice as the representations by the developer relating to the camera security system remained equivocal. Representations in Ch 3 of the Further Statement that the CCTV camera would be "provided to select locations" and the Ch 6 representation of the terms of the caretaking agreement which terms were at best

only suggestive of a security system being installed. The respondent's cancellation based on those inconsistencies in the two statements were described by the respondent as "confusing". However, if the respondent had taken the time to make an inquiry, she would have resolved her confusion as it would have been revealed that the omission from the assets register was just an inadvertent mistake and the fact is that the items had been provided for Stage 1 of the development. The respondent made no such inquiry and gave cancellation notice on the 13th day after receiving the Further Statement, the respondent gave no time to clear up any confusion.

The developer also submitted that the matter should go to trial because it might wish to lead evidence of the limited nature of the security afforded by the camera security system and because of the reduced benefit of the system the respondent would not result in material prejudice. The primary judge rejected this submission, on the basis that Mirvac failed to adduce any such evidence. The developer also argued that the benefits of the camera security system as set out in the first Disclosure Statement, could not reasonably provide the level of security which the respondent expected or which would be adequate for the protection of herself and her family. This was a reference to her husband being then a Federal Magistrate who had been provided by the Commonwealth of Australia with a security system at his residence which included a monitored security system, a panic button and Crim-safe screens.

Held: Appeal dismissed.

Fraser JA (with whom McMurdo P and Jones J agreed)

The Disclosure Statement was inaccurate

1. There was inconsistencies between the two statements. The buyer was entitled to regard the most recent statement (Further Statement) as the warranted information. This meant that the camera security system was not to be part of the assets of the Body Corporate and that the Body Corporate did not propose to acquire it. As such the Disclosure Statement information was no longer accurate and the finding of the learned primary judge to this effect was plainly correct.

Material prejudice was established

2. There is no statutory provision obliging the buyer to make inquiries to resolve any inaccuracy and there are good reasons why no such obligation should be inferred. A buyer in such circumstances is placed in the position of having to make an election to exercise alternative and inconsistent rights. The circumstance upon which the election arises — the existence of inaccuracy — stems from the documents and can be objectively determined. That is important in the interests of certainty because contracting parties ought to know where they stand. Imposing an obligation to inquire may well lead to uncertainty, either as to the facts upon which an election could be made or whether the right of election continues to exist. Mirvac's argument that there was an obligation on the respondent to resolve any sense of confusion which Mirvac documents gave rise to is rejected.

3. On the only evidence led below, there was no challenge to the fact that the presence of a security system was "a very important matter" for the respondent. Given the location of the Farringford building and the likely intrusion of non-residents, the presence

of a security system would, inherently, be important to residents generally. It was sufficiently important to be raised by the seller in its promotional material. The finding of the learned primary judge that "viewed objectively, a person in the respondent's circumstances in August 2009 would be disadvantaged in a substantial way" was clearly open on the evidence. Mirvac has not demonstrated any error in the finding of the learned primary judge that the respondent was materially prejudiced by the omission of the camera security system. The grounds of appeal were not made out and the appeal is dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

[140300]

M D Martin (instructed by Clarke Kann) for the appellant.

S Lumb (instructed by Van de Graaff Lawyers) for the respondent.

Before: McMurdo P, Fraser JA and Jones J.

Editorial comment: In Fraser JA's judgment, the correct test for material prejudice is derived directly from the terms of the legislation. In the context of s 214 (and also s 217), the question of prejudice depends upon the information which has come to the buyer's actual knowledge and whether the information on an objective basis is inaccurate. The prejudice for the purpose of s 214 flowing from the inaccuracy arises from some detriment or disadvantage to the buyer. In its ordinary meaning "prejudice" in this context means "to injury or to impair the validity (of a right, claim or interest) to damage". A person is "prejudiced" when affected disadvantageously or detrimentally. A person would be "materially prejudiced" if disadvantaged "substantially" or "to an important extent". It is this concept that requires a consideration of the personal circumstances of the buyer in what is otherwise a determination to be made objectively. The concept of using an objective standard but having regard to personal characteristics.

The material prejudice for the purpose of s 214 (and s 217), has to be assessed in the context of the buyer's personal circumstances being required to complete the contract on its changed terms. The evaluation of whether any disadvantage or detriment reaches the level of material prejudice such as to warrant cancellation of the contract must be objectively determined in accordance with community standards.

It is also an interesting point to practitioners that the buyer may rely on the disclosure statement and further statement on face value. It is not an obligation on the buyer to investigate or resolve any apparent inaccuracies between the two statements. In Fraser JA's judgment this is in keeping with the desirability of contractual certainty and with commercial realities. The right to elect to cancel the contract is based on the existence of inaccuracy and, assuming material prejudice, the buyer would have the right to cancel at any time within the 14-day period. But at any time prior to cancellation, the seller has the power to remove any inaccuracy. If the inaccuracy is removed by the giving of a rectifying statement, the statutory right to cancel would be lost. Once the contract is cancelled, there would be no further opportunity for compliance with the disclosure requirements. As a consequence, the period of uncertainty is limited to the time preceding the election to cancel but in any event, to a period of no longer than 14 days. Any further limitation on a buyer's right to cancel would result in a further prejudice to the buyer's interest.

Margaret McMurdo P: I agree with Jones J's reasons for dismissing this appeal with costs.

2. This case highlights the onerous nature of the requirements placed on vendors selling units "off the plan" by Ch 5 *Body Corporate and Community Management Act* 1997 (Qld) (the Act). The original disclosure statement of the appellant/vendor (Mirvac) of December 2007 was deemed under the Act to have become inaccurate once Mirvac sent the respondent/purchaser (Ms Wilson) the further disclosure statement provided in August 2009. This was because of the combined effect of s 214(1) and (5), s 215(1) and s 216 of the Act. It is true that Mirvac later assured Ms Wilson that, all respects relevant to this appeal, the further disclosure statement of 11 August 2009 was inaccurate and the original disclosure statement of 4 December 2007 was accurate. But this is of no assistance to Mirvac as, by the time it informed Ms Wilson of this, she had, as the trial judge and Jones J have explained, lawfully terminated the contract under s 214(4)(b).

3. Although this result may appear harsh to vendors, it is consistent with the scheme of Ch 5 of the Act, the terms of s 214 to s 216, and with the Act's primary object "to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects".[1]

The most relevant of those secondary objects for present purposes is "to provide an appropriate level of consumer protection for … intending buyers of lots included in community title schemes; …"[2]

4. I agree with the orders proposed by Jones J.

[140301]

Fraser JA: I have had the advantage of reading the reasons for judgment of Jones J. I agree with those reasons and the order proposed by his Honour.

Jones J: Mirvac Queensland Pty Ltd (hereinafter "Mirvac") appeals against a decision whereby the Court declared that the respondent, Catherine Frances Wilson, was entitled to cancel the contract which the parties had entered into on 4 December 2007. By that contract, the respondent had agreed to purchase a proposed lot in a staged community titled scheme development. As such, the contractual process was governed by the requirements of Chapter 5 Part 2 of the *Body Corporate and Community Management Act* 1997 ("BCCMA"). Those requirements included provisions for the giving of information by the seller and for cancellation of the contract by the buyer if the information was, or became, inaccurate.

7. The respondent cancelled the contract by notice dated 24 August 2009. In cancelling the contract the respondent asserted she had a statutory right to do so pursuant to s 214(4) of BCCMA because she would be materially prejudiced if compelled to complete the contract on the terms of changed information identified in the further statement. The learned summary judge found the respondent to have been materially prejudiced by the changes and declared that the contract was validly cancelled.

8. Mirvac challenges the findings of the learned primary judge, asserting that there was no inaccuracy in the disclosure statement, that the disclosure statement did not become inaccurate by reason of the contents of the further statement and also, that there was no material prejudice to the respondent. It contends that the statutory right to cancel the contract did not arise in this instance.

Background facts

9. The development project was to be conducted in five stages and it involved the construction of six luxury high rise residential unit buildings. The subject lot was to be included in the third such residential unit as part of Stage 2 of the development. The proposed building was identified by the name "Farringford".

10. The community title scheme was established upon the completion of Stage 1 on 27 April 2009 and was known as "*The Tennyson Reach Community Title Scheme No. 39925*".

11. The respondent has acknowledged that prior to the signing of the contract, she received various documents as required by the BCCMA. These documents included a disclosure statement dated 4 December 2007. This document, including its various schedules, contained some 215 pages and dealt with topics which are identified by the following chapter headings:-

Chapter 1:	Information Disclosure
Chapter 2:	New Community Management Statement
Chapter 3:	Schedule of Finishes
Chapter 4:	Plans
Chapter 5:	Body Corporate Budget and Schedule of Levy Calculations and Lot Entitlements
Chapter 6:	Caretaking Agreement
Chapter 7:	Letting Agreement
Chapter 8:	Administration Agreement
Chapter 9:	Draft Site Management Plan
Chapter 10:	Power of Attorney Extract
Chapter 11:	FIRB Approval

12.

[140302]

Of significance, the disclosure statement in Chapter 1 dealt with the setting up of a body corporate to which Mirvac would provide certain assets. Relevantly, these included:-

> "**4.4 Proposed Assets of the Body Corporate**
>
> The Seller proposes to provide at its cost the following items of equipment and furnishings which will become Body Corporate Assets upon establishment of the Body Corporate, namely:
>
> **Gymnasium/Lap Pool**

…

Other Recreational Pools…

…

(c) BBQ, outdoor tables and chairs

General

(a) artworks and loose decorative items within lift foyer and common areas;
(b) CCTV, cameras and security monitoring equipment;
(c) Caretakers' office equipment;
(d) Caretakers' gardening equipment;
(e) Caretaker's vehicle for transport of refuse containers to compactor; and
(f) 6 lift curtains.

It is not proposed that the Body Corporate acquire any other assets after establishment of the Scheme, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme.[3] "

13. In Chapter 3 of the disclosure statement, there is a schedule of standard inclusions and finishes for a typical apartment in the Farringford building containing the proposed lot. That schedule includes an entry as follows:-

"CCTV: Provided to select locations within the common property.[4] "

14. In Chapter 5 of the disclosure statement, are details of the body corporate contribution to be raised from the potential lot owners and a budget for the likely expenditure by the body corporate.

15. Chapter 6 of the disclosure statement sets out the terms of the proposed caretaker agreement which would impose on the caretaker the undertaking of a daily check "for any security breaches, vandalism, broken glass … and monitor (if installed) any close circuit security television cameras and keep daily video tapes for at least 7 days".[5]

16. On 6 August 2009, Mirvac provided a further statement as required by s 214 of the Act to rectify inaccuracies in the original disclosure statement. The letter enclosing the further statement was received by the respondent on 11 August 2009. The parties had agreed that the period for re-disclosure referred to in s 214(2) would be extended to the day on which the seller notified the buyer that the scheme had been established.[6]

17. On 24 August 2009, the respondent gave notice that she was cancelling the contract identifying eight grounds on which she claimed to be entitled so to do. They relate in particular to changes that were identified by the differences between the contents of the disclosure statement and the further statement referred to above. Only one such ground was sought to be litigated in the summary proceedings from which this appeal arises.

18. Foremost amongst the concerns raised by the respondent was the absence in the further statement of the provision of CCTV, cameras and security monitoring equipment to which reference had been made in clause 4.4 of the disclosure statement as set out in paragraph [13] above.

19. The further statement followed the same format as the disclosure statement using the same chapter headings but identifying changes chapter by chapter. In Chapter 1 of the further statement clause 4.4 was in the following terms:-

"4.4 **Assets of the Body Corporate**

> Details of the Body Corporate Assets are incorporated in Chapter 5 of this Disclosure Statement.
>
> It is not proposed that the Body Corporate acquire any other assets, however, the Body Corporate may acquire other assets if the Body Corporate considers the assets would be beneficial to the operation of the Scheme."[7]

20. The details of body corporate assets in Chapter 5 are in a list entitled "Body Corporate Asset Register"[8] and "Initial Body Corporate Equipment Schedule".[9] Neither of these lists

make any reference to the provision of CCTV, cameras security monitoring equipment, BBQ, outdoor tables and chairs, artworks and loose decorative items within lift foyer and common areas, or the six lift curtains. Nor were those assets thereafter referred to in the further statement other than in the repetitions of the terms in the Schedule of Finishes and the Caretaker's Agreement as set out in the original disclosure statement. In this sense there was some internal inconsistency in the further statement. But the substantial difference arises in the comparison of the respective clauses 4.4 in Chapter 1 and the lack of provision of the particular assets referred to in the disclosure statement.

21. That was the difference relied upon by the respondent to assert there was inaccuracy in the original statement such that she would be materially prejudiced if compelled to complete the contract. As the material prejudice relied upon relates to security, it will be sufficient to refer to the missing items simply as the camera security system.

22. After the respondent had given notice of cancellation, Mirvac's solicitors wrote on 9 September 2009 advising that all assets listed in the original disclosure statement will be provided and that it was "by oversight that some of the items were not listed in the asset register".[10] A copy of an amended asset register containing the admitted items was attached to the letter.[11]

Statutory scheme

23. The statutory scheme requiring the provision of these statements is found in Division 2 of Chapter 5 of the BCCMA. By s 213 a seller of a proposed lot must give to an intending buyer a signed disclosure statement. The contents of the statement must include certain prescribed information, be accompanied by prescribed documents and identify regulations applying to the scheme. Of particular note is the requirement "to include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme". For a proposed residential lot additional forms as required under the *Property Agents and Motor Dealers Act* 2000 must also be given. The disclosure statement must be substantially complete as at the day the contract is entered into. Compliance with this section does not fail if there are inaccuracies in the statement. The consequence of inaccuracies, however, becomes significant for the purpose of s 214 and the following sections whose terms I set out in full:-

> ***214 Variation of disclosure statement by further statement***
>
> *(1) This section applies if the contract has not been settled, and—*
>
> *(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or*
> *(b) the disclosure statement would not be accurate if now given as a disclosure statement.*
>
> *(2) The seller must, within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply, give the buyer a further statement (the further statement) rectifying the inaccuracies in the disclosure statement.*
> *(3) The further statement must be endorsed with a date (the further statement date), and must be signed, by the seller or a person authorised by the seller.*
> *(4) The buyer may terminate the contract if—*

(a) it has not already been settled; and

(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and

(c) the termination is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement.

(5) Subsections (1) to (4) continue to apply after the further statement is given, on the basis that the disclosure statement is taken to be constituted by the disclosure statement and any further

[140304]

statement, and the disclosure statement date is taken to be the most recent further statement date.

215 Statements and information sheet form part of contract

(1) The disclosure statement, and any material accompanying the disclosure statement, and each further statement and any material accompanying each further statement, form part of the provisions of the contract.

216 Buyer may rely on information

The buyer may rely on information in the disclosure statement and each further statement as if the seller had warranted its accuracy.

24. The terms of s 214(1) make it clear that a buyer can only become entitled to terminate the contract if firstly, there is an inaccuracy in the original disclosure statement or the disclosure statement becomes inaccurate. The inaccuracy must be "real or of substance as distinct from ephemeral or nominal"[12] such as to impact on the bargain. Secondly, by s 214(4) the buyer's right to cancel the contract arises only if the buyer is materially prejudiced given the extent of that inaccuracy. Thirdly, the right exists only for a limited time.

25. It is noted from the terms of s 215 that both the original document and the later statements have contractual effect. The respondent was entitled to rely upon the information in both as if Mirvac warranted their accuracy. These provisions highlight the level of consumer protection and disclosure that must be complied with. This is in keeping with the expressed secondary objects of the legislation set out in s 4(g) which provides:-

> *"(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;"*

26. In construing these sections little guidance can be gained from the decisions from other States because of the disparate terms of the legislative provisions — a point made by the authors of the article "Evaluating Information Disclosure to Buyers of Real Estate".[13] Consequently, close attention needs to be given to the decided cases on these sections and the equivalent provisions in the precursor legislation, the *Building Units and Group Titles Act* 1980.

The decision below

27. Having considered the statutory provisions, the terms of the disclosure statements and the circumstances on which material prejudice was based, the learned primary judge found:-

> "[24] In providing the Further Statement, from which these items of Body Corporate property had been omitted, the respondent warranted that they would not be provided. The applicant had only 14 days in which to cancel the contract under s 214(4). The legislation did not cast any obligation, on the applicant to ensure that information in the Further Statement was accurate before acting on it. I accept the submission of her counsel that the statutory right of

cancellation is dependent on the content of the Disclosure Statement and Further Statement and not on other facts unknown to the buyer, but known the seller.
[25] The applicant was entitled to cancel the contract if she would be materially prejudiced if compelled to complete, given the extent to which the original Disclosure Statement was, or had become, inaccurate.

…
[35] In my view it would be enough for the applicant to establish that she would be disadvantaged in some substantial way if she were obliged to complete the contract on the premise that the body corporate would not have the CCTV security system and other items of property which had been included in the first Disclosure Statement and omitted from the Further Statement. I note that the applicant's assertion of material prejudice was based principally on the omission of the CCTV security system. She relied on the other omissions as compounding the prejudice.

…
[39] The apartment was to be the principal place of residence for the applicant, her husband, and two teenage children. It was adjacent to the Queensland Tennis Centre (a major public facility) and a busy public thoroughfare. At the time the applicant's

[140305]

husband's occupation was such that the whole family might reasonably have a heightened sense of vulnerability to unlawful attack. The security system had been promoted as an integral feature of the development and arrangements for its management. Viewed objectively, a person in the applicant's circumstances in August 2009 would be disadvantaged in a substantial way by its omission. That disadvantage was compounded by the omission of other items of property which would have enhanced the amenity of the apartment."

The issues

28. Mirvac contends that the learned primary judge erred in finding:-

(i) That the disclosure statement was inaccurate;
(ii) That the respondent was materially prejudiced when she was never told in clear terms that she would not receive the camera security system; and
(iii) That the evidence was sufficient to establish material prejudice.

Was the disclosure statement inaccurate?

29. Mirvac argues on appeal, as it did below, that the original disclosure statement remained accurate such that if the contract settled on those terms the respondent would receive what she had bargained. Mirvac further contends that the disclosure statement itself never became inaccurate and so on a literal construction of s 214(4)(b) the circumstances to found a cancellation of contract did not arise.

30. To rebut these suggestions, the respondent points to the preamble of the further statement in which Mirvac states that the information "has become inaccurate" and that the statement "rectifies any such inaccuracies by making the Further Statement".[14] Primarily, the respondent points to the absence of the camera security system in the list of assets attached to the further disclosure statement as the source of inaccuracy.

31. The substance of Mirvac's argument on this point is that although there may have been some inconsistencies between the two statements, there was in fact no material prejudice because the inconsistency was the result of an oversight which was corrected once it became known. With or without that correction the original disclosure statement remained accurate.

32. In my view, that argument overlooks the standing and the effect of the disclosure statements as provided for in the legislation. Firstly, it is necessary to note that the disclosure statement and each further statement form part of the contract and the vendor warrants their contents to be accurate (ss 215 and 216). Secondly, the obligation to disclose any inaccuracy in the information provided in the original disclosure statement continues to apply until completion. Thirdly, the date of the later statement is the disclosure statement date. (s 214(5)) If the correction of any inaccuracy is made then the corrected information becomes the subject of the warranty to apply at completion. Where a further statement has been made, the disclosure statement cannot thereafter be looked at in isolation to determine whether there is any inaccuracy. The information which the seller now warrants will be the basis on which the buyer will be compelled to settle. The issue for the buyer is whether to accept the change in the warranted information or, if there is material prejudice, to cancel the contract. This is consistent, not only with the legislative terms, but with the clear purpose of the legislation to protect buyers against having to settle on the contract which would not have been entered into had the relevant information been known.

33. In this instance there was inconsistency in the information contained in the two statements. The buyer was entitled to regard the most recent statement as the warranted information. This meant that the camera security system was not to be part of the assets of the body corporate and that the body corporate did not propose to acquire it. As such, the disclosure statement information was no longer accurate and the finding of the learned primary judge to this effect was plainly correct.

Was there material prejudice?

34. Mirvac contends that the respondent has not shown material prejudice because firstly, she was never told in clear terms that she would not receive the camera security system and secondly, that the evidence failed to establish

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that there was, in fact, any material prejudice in the circumstances.

35. As to the first of these points, Mirvac argues that as the result of the further statement the information about the camera security system remained equivocal. It points to the repeated representations in Chapter 3 of the further statement that the CCTV camera would be "provided to select locations"[15] and the Chapter 6 representation of the terms of the caretaking agreement which terms were at best only suggestive of a security system being installed.[16]

36. In giving notice of cancellation the respondent referred to those inconsistencies between the two statements, describing them as "confusing".[17]

37. Mirvac argues that any inquiry by the respondent to resolve her confusion would have revealed the inadvertent omission from the assets register and the fact that the items had been provided for Stage 1. She made no such inquiry. Mirvac also suggests that by giving a cancellation notice on the 13th day after receiving the further notice, the respondent gave it no time to clear up any confusion.

38. The difficulty for Mirvac in this argument is in showing that there was any obligation on the respondent either to make such an inquiry and to give notice of intention to cancel the contract. The inaccuracy was a result of the seller's conduct. If the inaccuracy was attended by material prejudice a buyer was placed in the situation of having to elect, within a 14 day period, whether to continue with the contract or to cancel it. A failure to cancel in the knowledge of an inaccuracy would result in the buyer losing the right to do so, notwithstanding the existence of material prejudice.

39. The respondent argues that if such an obligation existed the result would be that a buyer could not take any further statement at face value. That clearly is not the intention of the statutory terms. Counsel for the respondent drew support for this contention from the remarks of Peter Lyons J in *Latitude Developments Pty Ltd v Haswell*[18] where he said:-

> "[55] The test stated in s 214(4)(d) is whether 'the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement … has become … inaccurate'. On its face, this provision suggests that what is required

> is a comparison between the information communicated by the disclosure statement, and that communicated by the further statement. On that basis, attempts made by Latitude Developments to mitigate the consequences of staging the development, which were not recorded in the further statement, would be irrelevant.
> [56] There is some merit in this approach. A buyer is allowed only 14 days within which to cancel the contract. The buyer may be located somewhere remote from the development. Verification of matters said to mitigate the effect of changes may require access to information not readily available to a buyer.
>
> …
> [58] Moreover, it seems to me that the question of material prejudice cannot be determined by reference to facts which might have existed at the relevant date, but which were not known to the buyer, or of which it cannot at least be said that the buyer should have known them."

40. Counsel for the respondent also pointed out that the seller is usually the sole repository of relevant knowledge and would be well aware of the limited time available for inquiries, such that it may not always be easy for a buyer to make inquiries within that time.

41. The short answer to this issue is that there is no statutory provision obliging the buyer to make inquiries to resolve any inaccuracy and there are good reasons why no such obligation should be inferred. A buyer in such circumstances is placed in the position of having to make an election to exercise alternative and inconsistent rights. The circumstance upon which the election arises — the existence of inaccuracy — stems from the documents and can be objectively determined. That is important in the interests of certainty because contracting parties ought to know where they stand: *Sargent v ASL Developments Limited*[19] . Imposing an obligation to inquire may well lead to uncertainty, either as to the

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facts upon which an election could be made or whether the right of election continues to exist. Doubt as to these matters is inimical to contractual certainty and would also have the tendency to provoke litigation.

42. The time within which the election must be made, if it is not to be lost, is relatively short. This again is in keeping with the desirability of contractual certainty and with commercial realities. The right to elect is based on the existence of inaccuracy and, assuming material prejudice, the buyer would have the right to cancel at any time within the 14 day period. But at any time prior to cancellation, the seller has the power to remove any inaccuracy. If the inaccuracy is removed by the giving of a rectifying statement, the statutory right to cancel would be lost. Once the contract is cancelled, there would be no further opportunity for compliance with the disclosure requirements. As a consequence, the period of uncertainty is limited to the time preceding the election to cancel but in any event, to a period of no longer than 14 days. Any further limitation on a buyer's right to cancel would result in a further prejudice to the buyer's interest: *Ferrcom Pty Ltd v Commercial Union Assurance Co of Australia Ltd.*[20]

43. In this instance the respondent was confronted by information about the camera security system which rendered the original disclosure statement as inaccurate. The oblique references to the security system in Chapter 3, Standard of Finishes, and in Chapter 6, the Caretaking Agreement, were not such as to alter what was the substantial difference between the two documents — the lack of provision of the camera security assets. I reject Mirvac's argument that there was an obligation on the respondent to resolve any sense of confusion which the Mirvac documents gave rise to.

44. The second issue of material prejudice relates to whether the evidence was sufficient for a conclusion of prejudice to be drawn and whether, as Mirvac contends, the issue ought not to have been determined in a summary way. At the hearing Mirvac submitted that the matter should go to trial because it might wish to lead evidence of the limited nature of the security afforded by the camera security system and because of the reduced benefit of the system the respondent would not result in material prejudice. The learned primary judge rejected this submission, principally on the basis that Mirvac bore an evidentiary onus to raise that issue if it wished to rely upon it and that it failed to adduce any such evidence.

45. The issue presented for determination by the Originating Application was the validity of the respondent's notice cancelling the contract pursuant to s 214(4). The respondent bore the onus of establishing her entitlement to do so. As has been shown above, the question of inaccuracy fell to be determined on a consideration of the content of the two statements. The question of material prejudice was considered in the context of the affidavits of the respondent and her husband who were not cross-examined and against whose evidence no contrary evidence was led. The only evidence adduced on behalf of Mirvac was the affidavit of Steven Cardell which did not challenge the respondent's claim of material prejudice which had been the subject of detailed evidence. The onus imposed on the respondent below was thus satisfied giving her a prima facie entitlement to judgment. Thereafter, Mirvac bore an evidentiary onus to at least raise a basis for challenging the claim of prejudice. See *Singh v Varinder Kaur*[21] ; *Hutchinson v Equititour Pty Ltd*[22] . In the absence of any such evidence, the learned primary judge was correct in determining the issue in a summary way.

46. I turn then to the evidence of prejudice and Mirvac's assertion that in the absence of any detail as to the benefit of the camera security system, the lack of equipment could not be said to constitute "material prejudice".

47. To this end, Mirvac contended that the benefits of the camera security system as set out in the first disclosure statement, could not reasonably provide the level of security which the respondent expected or which would be adequate for the protection of herself and her family. This was a reference to the fact that the respondent's husband was then a Federal Magistrate who had been provided by the Commonwealth of Australia with a security system at his residence. This included a monitored security system, a panic button and crim-safe security screens.[23]

48.

[140308]

The question of material prejudice was not in this instance to be determined by a comparison of what the respondent had at her existing residence. Rather, the removal of the camera security system from the statement of assets had to be seen in the circumstances in which the proposed lot was located. In that regard, the Farringford building was in close proximity to a public arena, parklands, car-parks and a transport hub. At times the area would be used by large numbers of non-residents. Such circumstances gave rise to an expectation that effective security would be provided. Moreover, Mirvac conceded that the security system was promoted as part of its marketing effort.[24]

49. The security of her residence was a very important matter for the respondent as was acknowledged by Mirvac in the course of argument.[25] The omission of the camera security system was properly found to be a significant disadvantage to the respondent.

The concept of "material prejudice"

50. The parties are in substantial agreement as to the tests by which "material prejudice" is to be assessed. The learned primary judge, conscious of the fact that there was no authoritative decision on the point for the purpose of this legislation, considered a number of cases where references had been made to terms "material prejudice" and "materially affect". Her analysis and ultimate conclusion on this point is not challenged on this appeal. However, it is appropriate to relate the test to give the framework in which her Honour's finding of prejudice was arrived at. She said:-

> "[32] Some matters are clear.
>
> > (a) The focus is on ***the*** buyer. This suggests that the test is objective having regard to the particular buyer's circumstances: would someone in those circumstances be materially prejudiced?
> > (b) Given that the buyer has only 14 days in which to cancel the contract, and the completion date may still be some months away (as it was in this case), material prejudice must be assessed in the light of the buyer's circumstances when the

Further Statement is received or at the latest at the expiration of 14 days from its receipt.
(c) There must be a causal relationship between the inaccuracy and the prejudice.
(d) There must be proportionality between the inaccuracy and the prejudice.
(e) Because this is consumer protection legislation, it should be construed beneficially."

Those conclusions are in accord with principle and the objects of the legislation.

51. Two passages relied upon by the learned primary judge were drawn from the decisions of the High Court of *Deming No. 456 Pty Ltd & Ors v Brisbane Unit Development Corporation Pty Ltd*[26] and of the Full Court of Queensland in *Gold Coast Carlton Pty Limited v Wilson*[27] where the Courts were concerned with the phrase "materially affect" as it applied to the interests of a buyer under s 49 of *Building Units and Group Titles Act* 1980 (Qld). In its terms, that section provided relief to the buyer the equivalent to that provided by s 214 of BCCMA.

52. In *Deming*, the buyer appealed a decision on a summary hearing ordering it to specifically perform a contract for the purchase of a lot notwithstanding that it had purported to cancel the contract for the seller's non-compliance with the statutory provisions. The High Court determined that the issues ought to have been determined on trial. Relevant to the test for deciding whether the buyer was "materially affected" Wilson J said (at p 168–9):-

> "In an earlier case, *Bassingthwaite v Butt*, McPherson J offers an objective test of materiality, namely, whether the possibility that the purchaser might not have purchased is a reasonable supposition. His Honour refers to Stonham, *Vendor and Purchaser*, pars. 373 and 374. If that is an appropriate test, then I would agree with his Honour that the possibility that Deming might not have purchased the property had its lot entitlement been represented as 1/37 instead of 1/41 is not a reasonable supposition. However, we are not applying equitable doctrines. We are construing a statute which reflects a firm resolve on the part of the legislature to protect the purchasers of home units with quite specific statutory remedies.
>
> [140309]
>
> Section 49(4) contemplates that there will be circumstances which are capable of materially affecting the rights of purchasers. These circumstances encompass the entry into or variation of a management agreement or service agreement, the making or variation of a by-law or a change in the lot entitlement of any lot or the aggregate lot entitlement. Of course, it would be quite unjust if minor changes or adjustments in these areas were to entitle a purchaser to avoid a contract. On the other hand, if the changes are not insignificant and have the effect of changing the substance of that contracted for, the intention of the legislature would seem to be plain."

The plural judgment (Mason, Deane, Dawson JJ) dealt with the point in a cursory way having also determined that the variation relied upon by the buyer was such as to require the question of "material affect" to be determined at trial.[28]

53. In *Gold Coast Carlton* the court was concerned with a minor variation in the annual cost of body corporate services. Highlighting the need for a purchaser to show a significant disadvantage, Andrews SPJ said (at p 189):-

> "The respondents argued that their rights were 'materially affected'. What this amounts to is that their share of the costs of the services of Body Corporate Services Pty Ltd was to be $63.00 for the first year, rising to $70.00 for the next year. Whether this amounts to material affectation of their rights is a question of fact … I cannot accept that 'materially affect' means other than to affect rights deleteriously in some way. I am by no means persuaded that to show that a purchaser is to pay what appears to be a rather modest sum for work of this kind is to show that his rights have been affected at all."

54. The term "material prejudice" was considered by Chesterman J in *Chancellor Park Retirement Village Pty Ltd v Retirement Village Tribunal*[29] he said (at para [66]):

"…The term 'material prejudice' has no special meaning. Prejudice in this context means disadvantage. It is material if it is substantial or of much consequence. The misstatement in question was the omission in the accounts of the receipt of income which would have entirely offset an item of expenditure which, on the face of the accounts, the residents would have had to meet. There was no error in the actual amounts received and spent. The residents did not pay out more than they should have. The accounts did, however, wrongly, give rise to the belief that the residents had paid or were obliged to pay more than they were legally obliged to pay. However, a belief inculcated by a misstatement does not ordinarily cause disadvantage or prejudice, let alone of a substantial sort, unless it is acted on to one's detriment."

That statement found favour with the learned primary judge, except for the view expressed about the relevance of a person's belief.

55. For the purpose of assessing material prejudice for the purpose of s 214 a person's belief would not ordinarily be relevant. The statutory right to cancel the contract depends upon the existence of the facts which trigger the right. Actual inaccuracy, rather than one's belief as to inaccuracy is what is required. Mirvac's contention that the respondent acted upon a mistaken belief does not accord with facts accepted below, and not varied here. There was, in fact, inaccuracy in the disclosure statements.

56. Mirvac argues here, as it did below, that the tests for determining material prejudice was the same as that enunciated by Derrington J for the purpose of s 49(4) of *Building Units and Group Titles Act* in *Sommer v Abatti Holdings Pty Ltd*[30] . In so doing his Honour was guided by earlier decisions on that section including a decision of the Full Court of Queensland in *Gold Coast Carlton Pty Ltd v Kamalesvaran*[31] . These decisions followed a test laid down in *Flight v Booth*[32] for determining entitlement to rescind a contract for the transfer of property on the basis of a misdescription of what the premises could be used for. The Court there was applying general principles of contract. The judgment of Tindall CJ states:-

"It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what misstatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only … But

[140310]

with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud will vitiate the contract of sale. In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."

57. It is difficult to see how that identification of a general principle can determine the test for a remedy provided by statute which must find its basis in the ordinary meaning of the words of the statute itself. The learned primary judge was, in my view, correct in rejecting the test referred to in *Sommer* and in adopting the approach derived directly from the terms of the legislation.

58. Turning then to the terms of the legislative provision. In the context of s 214 (and also s 217), the question of prejudice depends upon the information which has come to the buyer's actual knowledge and whether the information on an objective basis is inaccurate. As with the provision considered by Chesterman J above, the prejudice for the purpose of s 214 flowing from the inaccuracy arises from some detriment or disadvantage to the buyer. In its ordinary meaning "prejudice" in this context means "to injury or to impair the validity (of a right, claim or interest) to damage". A person is "prejudiced" when affected disadvantageously or detrimentally.[33]

59. A person would be “materially prejudiced” if disadvantaged “substantially” or “to an important extent”[34] . The Court of Appeal in *Vennard v Delorain Pty Ltd as Trustee for the Delorain Trust*[35] suggested, that in a similar context, the phrase meant “disadvantaged in a way which is substantial or of much consequence”[36] . It is this concept that requires a consideration of the personal circumstances of the buyer in what is otherwise a determination to be made objectively. The concept of using an objective standard but having regard to personal characteristics is not novel in law. It commonly finds expression in relation to personal self control in criminal law[37] and in relation to varying standard of care in “reasonable person” tests.[38] The material prejudice for the purpose of s 214 (and s 217), has to be assessed in the context of the buyer’s personal circumstances being required to complete the contract on its changed terms. The evaluation of whether any disadvantage or detriment reaches the level of material prejudice such as to warrant cancellation of the contract, must be objectively determined in accordance with community standards.

Conclusion

60. On the only evidence led below, there was no challenge to the fact that the presence of a security system was “a very important matter” for the respondent. Given the location of the Farringford building and the likely intrusion of non-residents, the presence of a security system would, inherently, be important to residents generally. It was sufficiently important to be raised by the seller in its promotional material. The finding of the learned primary judge that “viewed objectively, a person in the (respondent’s) circumstances in August 2009 would be disadvantaged in a substantial way” was clearly open on the evidence.

61. Mirvac has not, in my view, demonstrated any error in the finding of the learned primary judge that the respondent was materially prejudiced by the omission of the camera security system.

62. That being the case, Mirvac has not succeeded in any of its contentions. The grounds of appeal are not made out and the appeal should, in my view, be dismissed with costs.

[140311]

Footnotes

1 *Body Corporate and Community Management Act* 1997 (Qld), s 2.
2 Above, s 4(g).
3 Appeal Book p 78.
4 Appeal Book p 158.
5 Appeal Book p 249.
6 Sale Contract clause 15.24. Appeal Book p 58.
7 Appeal Book p 311.
8 Appeal Book p 491.
9 Appeal Book p 493–6.
10 Appeal Book p 563.
11 Appeal Book p 568.
12 *Tillmans Butcheries Pty Ltd* v *AMIEU* (1979) 42 FLR 331 at p 348.
13 [2007] *QUT Law and Justice Journal* 11.
14 Appeal Book p 293.
15 Appeal Book p 414.
16 Appeal Book p 512.
17 Appeal Book p 558.
18 [2010] QSC 346.
19 (1974) 131 CLR 634 at p 655–6.
20 (1993) 176 CLR 332 at p 342.

21 (1985) 61 ALR 720.
22 [2010] QCA 104.
23 Affidavit of Keith Neale Wilson sworn 11 December 2009 at para [9].
24 Appeal Book transcript 1-25/1-10.
25 Transcript 1-20/10-20.
26 (1984) 155 CLR 129.
27 [1985] 1 Qd R 182.
28 Ibid at p 152; see also per Gibbs CJ at p 139.
29 [2004] 1 Qd R 346.
30 [1992] 1 Qd R 300.
31 (1984) Q ConvR ¶54-144.
32 (1834) 1 Bing (NC) 370; 131 ER 1160.
33 Oxford English Dictionary 2nd Edition; Macquarie Dictionary 4th ed.
34 Oxford English Dictionary 2nd Edition — materially (4).
35 [2010] QCA 309.
36 Ibid at para [27].
37 *Stingel* v *The Queen* (1990) 171 CLR 312.
38 *McHale* v *Watson* (1966) 115 CLR 199.

BOSSICHIX PTY LTD v MARTINEK HOLDINGS PTY LTD

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(2008) LQCS ¶90-147; Court citation: [2008] QSC 278

Supreme Court of Queensland

Judgment delivered on 12 November 2008

Community schemes — Establishment of community title scheme — Off the plan contract of sale — Where contract provides that settlement date is 14 days after notification of registration of building format plan — Body Corporate and Community Management Act 1997, s 212 — Legislative requirement that settlement must not take place earlier than 14 days after the seller gives advice to buyer that the scheme has been established or changed — Where purchaser may cancel if contract does not comply with legislative requirement — Whether contract complies with legislative requirement — Whether purchaser entitled to cancel contract.

The purchaser (applicant) and developer (respondent) entered into an "off-the-plan" contract of sale for a building unit to be created within a residential community titles scheme.

Clause 14 of the contract provided that:

> "The settlement date is the later of —
>
> a) 14 days after the Seller notifies the Buyer that the Building Format Plan is registered; and
> b) Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building."

The purchaser notified the developer that cl 14 of the contract failed to comply with s 212 of the *Body Corporate and Community Management Act 1997* and the purchaser purported to terminate the contract pursuant to s 212(3).

Section 212(1) of the Act provides:

> "A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed."

Section 212(3) provides that the buyer may cancel the contract if there has been a contravention of s 212(1) and the contract has not already been settled.

The developer rejected the purchaser's purported termination and affirmed the contract. The developer notified the purchaser of registration of the building format plan and fixed the date for settlement of the contract. The purchaser failed to settle the contract. The developer terminated the contract on that basis and forfeited the deposit.

Submissions from the purchaser:

1. The contract did not expressly state that "settlement must not take place earlier than" 14 days after the vendor gave notice to the purchaser that, relevantly, the scheme has been established. The unambiguous grammatical meaning of s 212 was that the contract had to expressly so provide.

2. Section 212 required the plan of subdivision (building format plan) to be registered and the first Community Management Statement be recorded by the Registrar of Titles to

[140102]

establish a community title scheme. Notifying the purchaser of registration of the plan to trigger settlement did not comply with s 212.

3. The contract did not comply with s 212 and the purchaser is entitled to cancel the contract before settlement under s 213(3).

Submissions from the developer:

1. Clause 14 read together with the definitions in the contract meant there was substantial compliance with the requirements of s 212(1).

2. The creation of the scheme and the registration of the building format plan are "inextricably linked". By notifying the buyer of the registration of the building format plan, the seller was notifying the buyer that the scheme has been created.

Held: contract validly cancelled by purchaser.

1. The objective of s 212 is to ensure the buyer is aware that the buyer is protected against being forced to settle a sale before the scheme is fully established or at short notice once it is.

2. Clause 14 "… does not adequately convey to the buyer that more than registration of the building format plan is necessary to establish the community title scheme and trigger the fixing of a time for settlement". Although cl 14 refers to the building format plan, there is no reference to the Community Management Statement, "which is one of the essential elements of establishing a scheme".

3. The purchaser has validly cancelled the contract pursuant to s 212 and is entitled to the return of the deposit.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

SR Lumb (instructed by McKays Solicitors) for the purchaser.

RC Schulte (instructed by Griffin Solicitors) for the vendor.

Before: Mackenzie J.

Editorial comment: The developer has appealed this decision in the Court of Appeal.

Mackenzie J: This application is concerned with whether clause 14.1 of a contract for the sale of a building unit in a building called "Rivage" between the applicant purchaser and the respondent developer complies with s 212 of the *Body Corporate and Community Management Act* 1997 (Qld) (BCCM). According to it, settlement of the contract was subject to the registration of both the Building Format Plan by which the relevant lot would be created and the Certificate of Classification for the building, within three years of the date of the contract.

2. The contractual clause under consideration is as follows:

> "The settlement date is the later of —
>
> > (a) 14 days after the Seller notifies the Buyer that the Building Format Plan is registered; and
> > (b) Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building."

3. The term "Building Format Plan" is defined by clause 2.1 of the contract as meaning the Building Format Plan that is registered to create the lot. "Community Management Statement" is defined as meaning the Community Management Statement to be registered with the building format plan. The draft Community Management Statement, according to the definition, formed part of the Disclosure Statement. The term "lot" was defined as meaning a lot within the Scheme. "Scheme" was defined as meaning the community title scheme that would be created on registration of the building format plan.

4. "Certificate of Classification" is defined in clause 2.1 as the Certificate of Classification issued by the Authority (i.e. a body or person authorised by law to give an approval or certificate the seller must obtain to perform its obligations under the contract) that permits lawful occupation of the building for residential and/or other lawful purposes as contained in the Development Approval for Rivage. Although it

[140103]

is referred to in clause 14.1, this has no impact on the issues argued.

5. It is convenient to mention that there are proceedings (SC No 113/08) in the Mackay Registry of this court, commenced by the respondent against the applicant and Bonnie Dean claiming damages and declarations which, it is common ground, this application will resolve in some respects. Ms Dean is a director of the applicant and a guarantor of its obligations under the contract. She has agreed to be bound by the determination of these proceedings insofar as they are relevant to the Mackay proceedings.

6. By way of further background, the full deposit was eventually paid, but on 13 November 2007 the solicitors for the applicant wrote a letter to the respondent containing the following:

> "We note that the contract provides for settlement 14 days after registration of the plan but does not state 'settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed' in accordance with s 212(1) of the *Body Corporate and Community Management Act* 1997.
>
> We further note that s 212(3) states that where there has been a breach of s 212(1) the buyer may cancel the contract.
>
> Our client elects to cancel the contract pursuant to s 212 and requests that your client authorise the agent to release the deposit to our client."

7. On 23 November 2007 the respondent rejected the contention that the contract failed to comply with s 212 and elected to affirm the contract. On 31 March 2008 the respondent's solicitors wrote to the solicitors for the applicant enclosing copies of the Certificate of Classification and a registration confirmation statement confirming that the building format plan had registered, and fixed the settlement date as 14 April 2008. The applicant did not complete the contract on that date. The respondent's solicitors wrote to confirm that fact and terminated the contract on that basis.

8. It is said that there are three issues requiring analysis. The first is what s 212(1) BCCM requires. The second is whether the contract contravened that requirement. The third was whether the respondent was entitled to cancel the contract in reliance on s 212(3) of the Act.

9. Section 212 provides as follows:

> **"212 Cancellation for not complying with basic requirements**
>
> (1) A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
> (2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
> (3) The buyer may cancel the contract if —
>
> (a) there has been a contravention of subsection (1) or (2); and
> (b) the contract has not already been settled."

10. Clause 14.1 fixes one of the possible triggering events of the obligation to settle the contract as notification by the seller to the buyer that the Building Format Plan has registered. The meaning of "Building Format Plan" for the purposes of the contract is set out in paragraph [3] above. There is evidence in exhibit JM5 to Mr Martinek's affidavit that notification of the registration of the Building Format Plan and the issue of the certificate of classification under the *Building Act* 1975 (Qld) was sent to the applicant's solicitors at 4:55 pm on 31 March 2008. A copy of the registration confirmation statement extracted from the records of the Registrar of Titles earlier that afternoon was also sent at the same time. It contains a reference to the Community Management Statement relating to the lot.

11. Section 24 BCCM provides that the community titles scheme is established by:

> (a) Registration under the Land Titles Act 1994 (LTA) of the plan of survey for identifying the scheme land; and
>
> [140104]
>
> (b) Recording by the Registrar of the first community management statement for the scheme.

12. By s 115L LTA, a community management statement takes effect when recorded by the Registrar as a community management statement for the scheme (s 115L(3)). It is part of the recording process that the Registrar records a community management statement by recording a reference to it on the indefeasible title for each lot in the scheme and for the common property (s 115L(1)(b)). Complementary to that, s 59 BCCM says that a Community Management Statement takes effect under s 115L(3) LTA. For the purposes of LTA a "Building Format Plan" is one species of survey plans. As the name implies, it defines land by reference to structural elements of a building.

13. Section 9A LTA authorises the Registrar of Titles to keep a Manual of Land Title Practice. Amongst other things, it may include practices developed in the Land Registry before or after the commencement of s 9A for the depositing and lodging of instruments. Extracts from the Land Title Practice Manual (Queensland) were made available to me. Of most relevance for present purposes is a paragraph headed "Recording a First CMS Lodged with the Plan establishing a Community Titles Scheme". Since a Community Management Statement is not an instrument in its own right, it enters the registration system by means of a Form 14 — General Request. The Community Management Statement "must be lodged with every plan of subdivision that establishes a community titles scheme". It is said that the request and the plan are registered on the existing indefeasible title and the Community Management Statement is brought forward to the indefeasible

title created for the scheme common property. The titles created for the lots in the scheme are noted with a reference to the Community Management Statement (which includes a unique identifying number). No separate notation as to a first or subsequent Community Management Statement is made on the indefeasible titles for the lots in the scheme.

14. The applicant's case is that there was a failure in two respects to comply with the requirements of s 212. The first was that the contract did not expressly state that "settlement must not take place earlier than" 14 days after the vendor gave notice to the purchaser that, relevantly, the scheme had been established. The unambiguous grammatical meaning of s 212 was that the contract had to expressly so provide. Merely providing that settlement date was 14 days after the giving of advice that the scheme has been established was not sufficient compliance.

15. The second was that fixing a possible settlement date as 14 days after the date the vendor notified the purchaser that the Building Format Plan had been registered did not comply with s 212. The establishment of the Community Title Scheme required more than registration of the Building Format Plan. What was required by s 212 was that the plan of subdivision be registered under LTA and also that the first Community Management Statement be recorded by the Registrar of Titles. By setting the date for settlement in the terms used, clause 14.1 of the contract made no reference to the establishment of the Community Title Scheme or to the recording of the Community Management Statement.

16. The strict approach to provisions with evident consumer protection functions was emphasised by the applicant. The consequence that the protection may extend to giving the purchaser a right to terminate even for quite technical reasons and whether or not the purchaser has suffered any material disadvantage, was, it was said, well established. The applicant relied on a recent example of this approach in *MNM Developments Pty Ltd* v *Gerrard* (2005) Q ConvR ¶54-624; [2005] 2 Qd R 515 in which the *Property Agents and Motor Dealers Act* 2000 (Qld) was the relevant legislation (and the provision under consideration more directly prescriptive). This is not a novel proposition.

17. As evidence that history tends to repeat itself, *Deming No 456 Pty Ltd* v *Brisbane Unit Development Corporation Pty Ltd* (1983) Q ConvR ¶54-111; (1983) 155 CLR 129 is an earlier example of the proposition that where there is a provision requiring a document or warning to be given in the interests of consumer protection, there is a tendency to adopt a "lowest common denominator" approach. The

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relevant provision in s 49 of the *Building Units and Group Titles Act* 1980 had not been complied with in the way required by the Act but had substantially been complied with elsewhere in the contractual documents. Failure to give the statement required triggered a right to terminate the contract within thirty days after the purchaser became aware of the failure if his rights had been materially affected thereby. The fact of non-compliance with the precise requirements of the Act was held to be critical by the majority in the High Court. The substantial issue upon which the case turned was when the reluctant purchaser had knowledge of the failure to comply with the requirements.

18. In a later case, *Boheto Pty Ltd* v *Sunbird Plaza Pty Ltd* (1984) Q ConvR ¶54-134; [1984] 2 Qd R 9 at 13, the "surprising construction" by the High Court of the concept of when knowledge of the non-compliance was gained was commented on by Lord Templeman, delivering the opinion of the Privy Council. But the underlying approach to the effect and consequences of a provision requiring a consumer to be given notice of a matter pertaining to the consumer's rights remains operative. There is a premise that, at least in a case where the requirement is not patently and directly complied with elsewhere, it is not sufficient compliance with a statutory requirement of the kind in s 212 BCCM even if a consumer might, by a process of interpretation of the contract as a whole, and perhaps with knowledge the Registrar of Titles' practice, be able to discern what rights he, she or it had.

19. That is the kind of argument which the respondent seeks to rebut. The argument was prefaced by the observation that form had to prevail over substance for the applicant to succeed. It is said that, construing clause 14.1 in light of the definitions in clause 2.1, there was substantial compliance with the requirements of s 212(1). Reading the contract as a whole, the creation of the "scheme" and the registration of the Building Format Plan were inextricably linked. By notifying the buyer of the registration of the Building Format Plan, the seller was notifying the buyer that the scheme had been created. The philosophy in s 14A(1) of the *Acts*

Interpretation Act 1954 (Qld) that the Act should be given an interpretation that best achieves its purpose was also prayed in aid. Attention was drawn to s 2 BCCM which says that the primary object of the Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects.

20. A secondary object in s 4(f) BCCM of providing an appropriate level of consumer protection for owners and intending buyers of lots included in Community Title Schemes was relied on. Its relevance was said to lie in the concept that the "consumer protection" referred to reflected a balance between the rights of owners and intending buyers. It is not immediately obvious that the object is directed at some sort of relativity between sellers and intending buyers *inter se*, but in any event it is more an aspirational statement than a statement governing or shedding light on the issues to be decided. Reference was also made to s 4(c) BCCM which seems to have marginal relevance.

21. The respondent also relied on the inclusion of the term "basic limitation" in the heading to Division 1 Part 2 BCCM of which s 212 is the first section for the purpose of arguing that it was a mandatory minimum requirement that the contact "provide that" settlement not take place until 14 days after the seller advised that the scheme had been established. It was submitted that the contract did this, by referring to the registration of the Building Format Plan. Some stress was placed on the requirement that the contract "provide" that information. This was contrasted with what were, implicitly, more prescriptive formulations, not used, to convey what the requirement was, such as "a contract … must state" or "a contract … must express …".

22. It may be interpolated that although clause 14.1 refers to the Building Format Plan (defined in clause 2), there is no reference in clause 14.1 to the Community Management Statement, the recording of which is one of the essential elements of establishing a scheme. The definition refers to it being "registered" with the Building Format Plan, but it was not suggested that there was any statement elsewhere in the contract referring to its recording as one element of establishing the scheme. In that sense, clause 14.1 omits to

[140106]

mention it. Clause 14.1 fixes the date of settlement by reference to three events, the registration of the Building Format Plan, the issue of the Certificate of Classification and the elapsing of a relevant time calculated by reference to clause 14.1. The event that would trigger the obligation to settle does not equate to advice that, in all respects, the scheme has been established. Without determining at what point it is relevantly "recorded", it must be acknowledged that because of Registrar of Titles' practice, the Community Management Statement will have been recorded, at worst, virtually contemporaneously with registration of the plan of subdivision (which fits the description of Building Format Plan as defined in clause 2). However, there is no guarantee that that would be known to an average buyer and if it is accepted that the requirement in s 212 is essentially a consumer protection provision, it has not been complied with. It is not the fact that contemporaneous recording may occur that is decisive. It is the fact that clause 14(1) does not adequately convey to the buyer that more than registration of the Building Format Plan is necessary to establish the Community Title Scheme and trigger the fixing of a time for settlement.

23. With regard to an argument that the provision in s 212 is intended to achieve a balance between the seller and the buyer of a unit, principally because the obligation under s 212 is not placed on any particular person, the practical reality is that, because all the detriment that might flow from non-compliance lies with the seller, it would be imprudent for a seller to fail to ensure that the contract complies with any prescriptive requirements. If they are not complied with, it is difficult to see that the objective of s 212, of ensuring that a buyer is made aware of being protected against being forced to settle a unit sale before the scheme is fully established or at short notice once it is, is promoted by the kind of construction proposed by the respondent.

24. It is unnecessary to express any view on the question posed by the respondent as to what might or might not invalidate a contract which is subject to s 212 BCCM in the variant circumstances posed in argument. Nor is it necessary to express a conclusion on the applicant's argument summarised in paragraph [14] above. Each case will depend on its own facts. Nor is it necessary to say more about the issue of some sort of comity between the courts and Parliament raised in paragraph [39] of the respondent's written submissions, except to say that there may be different approaches to it (see eg. *Hall* v *Jones* (1942) 42 SR (NSW) 203 at 208 (Jordan CJ); *Petranker* v *Brown* [1984] 2 NSWLR 177 at 179 (Samuels JA)).

25. It follows from what has been said that the applicant is entitled to the relief sought. The formal orders are as follows:

> 1. It is declared that the applicant has validly cancelled, pursuant to s 212 of the *Body Corporate and Community Management Act* 1997 (Qld), the contract between the applicant and the respondent headed "Rivage Sales Contract" entered into on or about 22 July 2005;
> 2. It is declared that the respondent must repay to the applicant, pursuant to s 218 of the *Body Corporate and Community Management Act* 1997, the sum of $99,500 paid to the respondent's agent towards the purchase of the proposed lot the subject of the contract;
> 3. The respondent pay the applicant's costs of and incidental to the originating application to be assessed.

HARRIS & ANOR v PRIGG

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(2009) LQCS ¶90-148; Court citation: [2009] QCA 47

Court of Appeal

Judgment delivered on 6 March 2009

Community schemes — Common property — Encroachment — Off the plan contract of sale — Purchaser terminates on the basis of an encroachment from the lot being purchased onto adjoining land — Whether an encroachment from common property lot constitutes an encroachment from the Lot being sold — Contract does not refer to common property being part of the Lot — Common property lot is separate from a proprietors lot — Body Corporate and Community Management Act 1997, s 35.

This was an application by the purchaser for leave to appeal the decision of the District Court of Queensland [2008] QDC 236.

The purchaser (applicant) and vendor (respondent) entered into a contract of sale for a unit within a residential community title scheme. The purchaser discovered from the body corporate records that the swimming pool located on common property for the scheme encroached onto the adjoining land to the scheme. The purchaser purported to terminate the contract pursuant to cl 7.5(4) of the contract on the basis that it was a material encroachment from the Lot.

> "Clause 7.5 provided that:
>
> > (1) The buyer may survey the Lot.
> > (2) If there is:
> >
> > > a. an error in the boundaries or an area of the Lot;
> > > b. an encroachment by the structures onto or from the Lot; or
> > > c. a mistake or omission in describing the Lot or the Seller's title to it;
> >
> > which is
> > d. immaterial; or
> > e. material, but the Buyer elects to complete this contract;
> >
> > the Buyer's only remedy against the Seller is for compensation, but only if claimed by the Buyer in writing on or before settlement.
> > (3) The Buyer may not delay settlement or withhold any part of the Balance Purchase Price because of any compensation claim under clause 7.5(2).
> > (4) If there is a material error, encroachment or mistake, the Buyer may terminate this contract before settlement."

The vendor rejected the purported termination contending that the reference in cl 7.5 is to the Lot being sold and does not include common property for the scheme.

The primary judge held in favour of the vendor, hence the purchaser made an application to appeal the decision.

Purchaser's submissions:

1. Section 35(3) provides that "an owner's interest in its lot is inseparable from the owner's interest in the common property and that when a lot is sold, the lot owner's interest in the common property is sold also". Therefore the reference in the agreement to the Lot being sold includes the vendor's interest in common property.

2. On this basis, leave should be granted to appeal the decision in the first instance.

Held: leave to appeal granted but appeal dismissed.

1. Section 35 of the Act does not assist the applicant's argument. Its effect is merely that, upon a person acquiring an interest in a lot, that person, by virtue of the acquired interest, also holds a prescribed interest in the common property. The latter interest is not sold and

[140108]

purchased as such. It would not follow that the Lot in cl 7.5 should be construed as including reference to the common property.

2. There is nothing in the agreement which supports the notion that the reference to Lot 18 (the lot being sold) includes a reference to the common property or may include such a reference.

3. No appealable error has been shown to exist, the appeal is dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

S Anderson (instructed by Oric Legal) for the purchaser.

LJ Nevison (instructed by Ferguson Cannon Lawyers) for the vendor.

Before: McMurdo P, Muir JA and Atkinson J.

Editorial comment: McMurdo P and Atkinson J agreed with the reasons given by Muir JA in dismissing the appeal.

McMurdo P: I agree with Muir JA's reasons for granting leave to appeal but dismissing the appeal with costs.

2. The contract between the parties was in the standard form approved by the Real Estate Institute of Queensland Limited and the Queensland Law Society Inc as being suitable for the sale and purchase of residential lots in a community titles scheme in Queensland. This appeal raises the concern that the present terms of such a contract may not always provide adequate protection to a purchaser of a residential lot in a community title scheme where there is an error in the boundaries of, or encroachment by structures onto or from, or a mistake or omission in describing, not the lot, but the common property under the lot's community titles scheme.

Muir JA: The applicants apply for leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) against a decision of a judge of the District Court given on 6 November 2008.

4. The issue for determination on the appeal, should leave be granted, is whether an encroachment of a structure built mainly on common property under a community titles scheme and extending onto adjoining land can be described as "an encroachment by structures … from a Lot" within the meaning of "Lot" in a contract for the sale of a lot in that scheme.

5. Under an agreement entered into in March 2007, the applicants agreed to purchase and the respondent agreed to sell for a purchase price of $415,000 a unit in the complex known as "Whitsunday Vista Resort". The property sold and purchased was described in the agreement as "Lot 18 on SP 121164" in the County of Herbert, Parish of Conway. On 26 April 2007, the date on which the agreement was to be settled, the applicants purported to terminate the agreement pursuant to clause 7.5 of its standard terms because the resort's swimming pool and related structures encroached onto some 93 m^2 of an adjoining parcel of land. They asserted that this constituted an encroachment from Lot 18.

6. Clause 7.5 of the agreement provides:

> "7.5 Survey and Mistake
>
> (1) The buyer may survey the Lot.
> (2) If there is:
>
> a. an error in the boundaries or an area of the Lot;
> b. an encroachment by the structures onto or from the Lot; or
> c. a mistake or omission in describing the Lot or the Seller's title to it;
>
> which is
> d. immaterial; or
> e. material, but the Buyer elects to complete this contract;
>
> the Buyer's only remedy against the Seller is for compensation, but only if claimed by the Buyer in writing on or before settlement.
> (3) The Buyer may not delay settlement or withhold any part of the Balance Purchase Price because of any compensation claim under clause 7.5(2).
> (4) If there is a material error, encroachment or mistake, the Buyer may terminate this contract before settlement."

7.

[140109]

The applicants contended that reference to "the Lot" in clause 7.5 includes reference to the scheme's common property. The contention is founded on s 35 of the *Body Corporate and Community Management Act* 1997 (Qld) (the Act) and on s 41C of the *Land Title Act* 1994 (Qld). Section 35 provides:[1]

> "35 Ownership of common property
>
> (1) Common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common, in shares proportionate to the interest schedule lot entitlements of their respective lots.
> (2) Subsection (1) applies even though, under the Land Title Act, the registrar creates an indefeasible title for the common property for a community titles scheme.
> (3) An owner's interest in a lot is inseparable from the owner's interest in the common property.
>
> *Examples —*
>
> 1. A dealing affecting the lot affects, without express mention, the interest in the common property.
> 2. An owner can not separately deal with or dispose of the owner's interest in the common property.
>
> ....."

8. The essence of the applicants' argument is as follows. An owner's interest in its lot is inseparable from the owner's interest in the common property and that when a lot is sold, the lot owner's interest in the common property is sold also. Consequently, the reference in the agreement to "the Lot" necessarily includes the vendor's interest in the common property which is included in the parties' bargain by force of statute.

9. This argument did not find favour with the learned primary judge and I am unable to accept it either. The question is one of contractual rather than statutory construction. The description of the property to be sold and purchased is clear. It is "Lot 18 on SP 121164". For a community titles scheme to be registered, there must be two or more lots and other land designated as the common property for the scheme.[2] The scheme plan, as reasonable persons in the position of the parties with their background knowledge knew or ought reasonably to have known at the date of the agreement, had delineated on it the scheme's common property and each of the lots in the scheme. Also, as such reasonable persons would have known, the lots were separate from each other and from the common property. A lot or an interest in it is capable of assignment and of being encumbered by a proprietor, but no proprietor of any lot is capable of assigning or encumbering the common property or any interest in it.[3]

10. Clause 1.2 of the standard conditions of contract provides that words and phrases in the Act "have the same meaning in this contract unless the context indicates otherwise". "Lot" is defined relevantly in Schedule 6 to the Act as "a lot under the *Land Title Act*". Section 41C(1) of the *Land Title Act* provides that "in this Act, a reference to a lot is taken to include a reference to common property". Sub-section (2) however provides that sub-section (1) "has effect only to the extent necessary to allow for the registration, and appropriate recognition under this Act, of dealings that (a) affect common property …; and (b) are consistent with the BCCM Act". Sub-section (4) provides that sub-section (1) has no application for the purpose of the *Land Title Act*'s definition of lot. Lot is defined, relevantly, as "a separate, distinct parcel of land created on the registration of a plan of subdivision".

11. There is nothing in the agreement which supports the notion that the reference to "Lot 18" includes a reference to the common property or may include such a reference, depending on the context and there is certainly no indication in clause 7.5 that the words "the Lot" do not have their statutory meaning.

12. The second page of the agreement makes provision for a statement of whether an electrical safety switch is "installed in the Lot". Plainly, "the Lot" in that context means the lot as depicted on the plan. Beside the heading "Additional Body Corporate Information" the words "interest schedule lot entitlement of the Lot" and

other references to “Lot entitlement” appear. All such references are obviously to physical property which does not include common property. On the third sheet, under the heading “Seller’s Disclosure”,

[140110]

the words “Latent or Patent Defects in Common Property or Body Corporate Assets” appear. Thus, where the agreement wishes to make reference to the common property it does so expressly.

13. Clause 4 of the Standard Conditions of contract makes provision for the consequences of obtaining a Building and Pest Inspection Report which is unsatisfactory to the buyer. The report may be obtained on “the Lot” and the “Building”. “Building” is defined as “any building that forms part of the Lot or in which the Lot is situated”. There is thus a distinction between “the Lot” and the “Building” in which “the Lot” is situated. Clause 7.7 provides for the consequences of adverse affectation of the Land. “Land” is defined as “the Scheme Land”. Again, there is no blurring in the agreement of the distinction between “the Lot” and other real property within the scheme. The agreement’s treatment of a lot and common property as quite separate pieces of real property is consistent with the scheme and language of the Act.

14. There is no reason to suppose that what was in contemplation in clause 7.5(1) by the right on the part of the purchaser to survey “the Lot” was the survey of all of the land the subject of the scheme, or for that matter, the common property. Apart from any other consideration, the respondent vendor had no right to confer on the applicant purchasers authority to survey common property. It is unlikely that “the Lot” in 7.5(1) has a meaning different from its meaning in 7.5(2), as the two provisions are interrelated. If the parties had in mind conferring the rights and remedies in clause 7.5 in respect of errors, mistakes, omissions or encroachments in or affecting the common property generally, their failure to add “or the common property” after “the Lot”, wherever those words appear in the clause, is remarkable.

15. Section 35 of the Act does not assist the applicants’ argument. Its effect is merely that upon a person’s acquiring an interest in a lot, that person, by virtue of the acquired interest, also holds a prescribed interest in the common property. The latter interest is not sold and purchased as such, but even if this analysis is erroneous, it would not follow, for the reasons I have given, that “the Lot” in clause 7.5 should be construed as including reference to the common property.

16. Leave to appeal is usually granted “only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected.” [4] No appellable error has been shown to exist but, as this Court has heard all the arguments which would have been advanced on the hearing of the appeal, the preferable course is to allow the application for leave to appeal and to dismiss the appeal.

17. In view of the conclusions I have reached on the question of construction, it is unnecessary to consider the subsidiary issues which would have arisen had the applicants’ construction of the agreement been accepted.

18. I would order that the application for leave to appeal be allowed and the appeal be dismissed with costs.

Atkinson J: I agree with the orders proposed by Muir JA and with his Honour’s reasons for doing so.

Footnotes

1 *The Land Title Act* 1994 (Qld), s 41 BA is in similar terms.

2 *Body Corporate and Community Management Act* 1997 (Qld), s 10.

3 *Land Title Act* 1994 (Qld), s 41 BA.

4 *Pickering* v *McArthur* [2005] QCA 294 at [3].

BODY CORPORATE OF THE LANG BUSINESS v GREEN

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(2008) LQCS ¶90-149; Court citation: [2008] QSC 318

Supreme Court of Queensland

Judgment delivered on 5 December 2008

Community schemes — body corporate seeks summary judgment against lot owner for unpaid levies — lot owner disputes calculation of levies — body corporate failed to comply with case flow management plan ordered by the court — body corporate seeks further application for summary judgment — whether summary judgment should be heard by the court — whether s 229 of the Act precludes the defendant from raising a defence to the claim for summary judgment — Body Corporate and Community Management Act 1997, s 229.

The plaintiff (body corporate) claimed an amount of $325,930.98 was owing by the defendant (Mr Green) for unpaid levies relating to his lot within the residential community title scheme. The body corporate made an application for summary judgment against Mr Green for payment of the debt. Mr Green did not pay his levies on the basis that he has requested but not received details of the calculation of those levies.

The court ordered the body corporate to provide a case flow management plan for the determination of the dispute but the body corporate failed to comply with the order. The body corporate then filed a further application seeking the orders be set aside and its original application for summary judgment be listed for hearing.

Submissions from the body corporate

1. The defendant owes the body corporate a debt.

2. The defendant's dispute cannot be determined by this court due to the exclusivity provisions of s 229 and should have been pursued by the defendant via an adjudication application.

Section 229 provides:

> "229 Exclusivity of dispute resolution provisions:
>
> (1) Subsections (2) and (3) apply to a dispute if it may be resolved under this chapter by a dispute resolution process.
> (2) The only remedy for a complex dispute is:
>
> (a) the resolution of the dispute by:
>
> (i) an order of a specialist adjudicator under chapter 6; or
> (ii) an order of the CCT under the CCT Act; or
>
> (b) an order of the District Court on appeal from a specialist adjudicator or the CCT on a question of law.
>
> (3) The only remedy for a dispute that is not a complex dispute is:
>
> (a) the resolution of the dispute by a dispute resolution process; or
> (b) an order of the CCT on appeal from an adjudicator on a question of law.
>
> (4) However, subsections (2) and (3) do not apply to a dispute if:
>
> (a) an application is made to the commissioner; and
> (b) the commissioner dismisses the application under part 5.
>
> (5) Subsection (3) does not affect a right, under section 289, to appeal to the District Court on a question of law."

3. Accordingly, the matters raised in the defendant's defence cannot be used to resist the application for summary judgment.

Held: application for summary judgment dismissed.

1. The dispute of calculations and resolutions relating to the levies is conventionally not appropriate to be determined by summary judgment.

2. The defendant had raised particular matters in defence of the plaintiff's claim. There is no legal or statutory impediment to the defendant's ability to raise a defence.

3. His Honour stated, "… it would be surprising indeed if chapter 6 of the BCCM [s 299] read as so significantly constraining the right of a defendant to advance a defence as to render it unable to advance a simple contention that it is 'only liable to pay such contributions as have been properly identified, calculated and resolved to be payable by members of the Body Corporate'".

4. If the defendant instituted separate court proceedings challenging the notices of contributions then the defendant would be precluded from doing so.

5. The application for summary judgment is dismissed with costs against the plaintiff.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

MA Hindman (instructed by McInnes Wilson) for the plaintiff.

WL Cochrane (instructed by WHD Lawyers) for the defendant.

Before: Daubney J.

Daubney J: The plaintiff is a body corporate created under the *Body Corporate and Community Management Act 1997* (BCCM) constituted by the various owners of the lots in a community titles scheme. The defendant owns one of the lots in the community titles scheme for which the plaintiff was created.

2. By a claim filed on 7 September 2007 (the Claim) the plaintiff claims $325,930.98 "as monies due and owing by the Defendant to the Plaintiff pursuant to s 99 of the *Body Corporate and Community Management (Standard Module) Regulation 1997*".

3. On 7 December 2007, the plaintiff filed an application seeking summary judgment in that sum plus interest. This application was adjourned by consent to a date to be fixed. On 27 May 2008, the registry issued a Case Flow Management Intervention Notice to the plaintiff requesting that a plan to facilitate the "timely determination of the proceeding" be provided to the registry. Such a plan was prepared and submitted by the plaintiff. On 24 June 2008, apparently without notice to the defendant, the following order was made in terms of the plan:

> "1. That if the Plaintiff intends to pursue the Application for Summary Judgment it be re-listed by 30 August 2008.
> 2. If Judgment is not obtained that disclosure be provided by each party by 4:00 pm, 15 September 2008 and that inspection of documents and provision of copies of documents pursuant to the UCPR be made by 4:00 pm, 29 September 2008.
> 3. That any amendments to the Claim arising out of disclosure be made by 4:00 pm, 13 October 2008 and any consequential amendments to the Defence by 27 October 2008.
> 4. That there be a Mediation or Case Appraisal by 31 October 2008.
> 5. That the Request for Trial be filed by 07 November 2008."

4. The application for summary judgment was not listed by 30 August 2008.

5. On 24 September 2008, the plaintiff filed a further application seeking that Orders 1 and 2 of the orders of 24 June 2008 be set aside, and that the plaintiff's application for summary judgment filed 7 December 2007 be listed for hearing on the return date of the 24 September application.

6. There are then two primary questions before me:

> 1. whether, notwithstanding the failure to comply with the order of 24 June 2008, I should entertain the summary judgment application; and
> 2. if so, whether summary judgment should be entered in favour of the plaintiff.

7. These questions, however, are not wholly discrete — determining whether to allow the application for summary judgment to proceed necessarily requires at least some consideration

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of the merits of the application itself. I will therefore turn to consider the summary judgment application before considering the impact of the non-compliance with the order of 24 June 2008.

The pleadings

8. The money claimed is said to be owing pursuant to unpaid Notices of Contribution issued to the defendant on 26 August 2006, 26 September 2006, 16 November 2006, 14 February 2007 and 26 June 2007 in respect of his Lot 12 in Community Titles Scheme 5941.

9. The plaintiff claims that it is now entitled to recover the amounts set out in these notices as a debt due under s 99 of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld) (the Regulation).

10. Section 99(1) of the Regulation provides:

"(1) If a contribution or contribution instalment is not paid by the date for payment, the body corporate may recover each of the following amounts as a debt—

(a) the amount of the contribution or instalment;
(b) any penalty for not paying the contribution or instalment;
(c) any costs (***recovery costs***) reasonably incurred by the body corporate in recovering the amount."

11. The defendant admits having been served with purported Notices of Contribution on the dates indicated by the plaintiff but complains that he has previously requested, but not been provided with, further details of the calculations contained in the notices, namely information relating to the method of calculation, and the basis upon which the levies referred to in the notices were agreed upon by the Committee of the Body Corporate. On this basis, the defence filed 5 October 2007 "denies that the notices served on him were served in accordance with or calculated in accordance with the provisions of the Body Corporate and Community Management Act 1997".[1]

12. The defence then states that the failure to provide such information renders the defendant unable to properly plead to the allegations in the statement of claim until disclosure has been completed between the parties and until further and better particulars have been provided.

13. In short, the defendant acknowledges that he owes some money to the plaintiff, but considers that he is "only liable to pay such contributions as have [been] properly identified, calculated and resolved to be payable by members of the Body Corporate".[2]

The application for summary judgment

14. Before summary judgment can be entered in favour of a plaintiff it is necessary for the court to be satisfied both that:

(a) the defendant has "no real prospect of successfully defending" the claim; and
(b) there is no need for a trial of the claim or part of the claim.[3]

15. Whilst it is clear that the "no real prospect of successfully defending" test is applied according to its tenor, an appropriately cautious approach is required, bearing in mind the well established principle that issues raised in proceedings will be determined summarily only in the clearest of cases.[4]

16. The burden of satisfying the court that the matters raised in r 292 are satisfied rests firmly on the plaintiff.[5]

17. The defence, in querying the calculations and resolutions underpinning the Notices of Contribution, raises issues of a type which conventionally would not be considered appropriate for summary determination.

18. This view is reinforced by a consideration of the defendant's complaints about the state of disclosure in the matter. On 29 March 2007, the defendant's solicitors wrote to the plaintiff's solicitors requesting "copies of all documentation in respect of each of the levies made which total the amount of $275,817.05 which you say remains unpaid". The documents sought included details of works to which the levies related, including contracts, invoices and the like.

19. On 4 September 2007, the plaintiff's solicitor wrote to the defendant's solicitor in relation to the request for documents and records held by the body corporate. The letter included the following passage:

"Our client does not intend to be put to the expense of collating and providing to you the extensive documentation requested. As a

[140114]

member of the body corporate your client is entitled to access to the full records of the body corporate. Should he wish to access the body corporate records we suggest that he contact the body corporate manager in this regard."

20. The order of 24 June 2008, made provision for disclosure to be given in the event summary judgment was not obtained. Clearly, there was no order for summary judgment and, by the terms of the order, further

disclosure should have been made by 15 September 2008. This order was not complied with and the application filed 24 September 2008, seeks to have it set aside. I observe here that no proper explanation was provided for the failure to re-list the application for summary judgment by 30 August 2008, beyond information that the plaintiff's solicitor was on leave in July. Nor was there any proper explanation for the plaintiff's failure to make disclosure, it being contended, in effect, that in view of the summary judgment application now being pursued, that order for disclosure should be vacated.

21. The plaintiff contends that it has, in fact, addressed the defendant's complaints about disclosure by virtue of the answer to the defendant's request for further and better particulars and by the affidavit material filed.

22. The key outstanding issue in this respect would seem to arise out of paragraph 3 of the defendant's request for further and better particulars. In it the defendant requests further and better particulars of, inter alia, "[t]he basis upon which the Plaintiff says that that the amount of $325,930.98 was due and owing by the Defendant".

23. The plaintiff's response to the request for further and better particulars, insofar as it relates to this complaint, says only that:

> "The basis of the Plaintiff's claim that the amount of $325,930.98 was due and owing by the Defendant at the date of the Statement of Claim is as particularised in the Statement of Claim."

24. As to the requests contained in the rest of that paragraph, which are largely requests for certain documents including minutes of meetings, quotations, invoices and contracts, the plaintiff says only that the requests are not proper requests for particulars, and that the request is "properly a matter for disclosure".

25. This may be so but, in circumstances where disclosure has not occurred, it cannot be said to strengthen the plaintiff's position on a summary judgment application.

26. The importance of disclosure in the determination of applications of this type is readily apparent. In *Jessup* v *Lawyers Private Mortgages Ltd & Ors* [2006] QSC 3, Chesterman J reviewed the decision in *Deputy Commissioner of Taxation* v *Salcedo* and observed:

> "In practical terms I suspect the rule means (as the old rules meant) that summary judgment should not be given where the facts upon which the parties respective rights depend are disputed, or where the respondent to the application for summary judgment adduces evidence as to the existence of facts which, if proved, would establish a defence or a right to relief. In other words it is only where all the facts are known and/or are established beyond controversy that the court should embark upon determining whether to give summary judgment. Where relevant facts are controverted, or where it appears that facts may exist which would affect a right of action or defence, there should be a trial to determine the facts." [6]

27. In this case, relevant facts are in issue on the pleadings, pending the provision of further information. This also militates against the exercise of the discretion to grant summary judgment, in the particular circumstances of this case.

28. The plaintiff, however, continued to press for the summary remedy despite these matters having been identified to it. It did so on the basis of a contention that the matters raised in the defence are matters which cannot be determined by this court, but rather fall exclusively within the dispute resolution procedures set out in the BCCM.

29. Chapter 6 of the BCCM is entitled "Dispute Resolution". Section 228 sets out the purpose of Chapter 6. It provides:

[140115]

"228 Chapter's purpose

(1) This chapter establishes arrangements for resolving, in the context of community titles schemes, disputes about—

(a) contraventions of this Act or community management statements; and

(b) the exercise of rights or powers, or the performance of duties, under this Act or community management statements; and
(c) the adjustment of lot entitlement schedules; and
(d) matters arising under the engagement of persons as body corporate managers, the engagement of certain persons as service contractors, and the authorisation of persons as letting agents."

30. Section 227 of the BCCM defines "dispute" to include a "dispute between a body corporate for a community titles scheme and the owner or occupier of a lot included in that scheme".[7] This definition, however, does not clarify with any precision whether it covers every conceivable dispute between a body corporate and an owner or merely those within the purview contemplated by the Chapter's purpose set out in s 228. In my view, good-sense and practicability, in conjunction with a purposive approach to the legislation, dictate that the latter must be the case; it could scarcely be said, for instance, that the legislature intended for the dispute resolution processes set out in the BCCM to apply in case of a personal injuries dispute between an owner and a body corporate.

31. In any event, the present proceeding would not appear to test the boundaries established by ss 227 and 228.

32. The present matter involves the levying of members of the body corporate for contributions. This is plainly an exercise of a right or power under the BCCM or a community management statement. The defendant's failure to make the contributions set out in the notices, can also, if not otherwise excused, be said to constitute a contravention of the BCCM or a community management statement.

33. This then brings me to the question of whether the defendant is precluded from advancing their defence by virtue of the "exclusivity" provision contained in Chapter 6 of the Act.

34. Section 229(3), in the plaintiff's submission, provides the only remedy for a dispute under the BCCM. The relevant section (considering that the present matter does not involve a so-called "complex dispute") provides:

"Exclusivity of dispute resolution provisions

(3) The only remedy for a dispute that is not a complex dispute is —

(a) the resolution of the dispute by a dispute resolution process; or
(b) an order of the CCT on appeal from an adjudicator on a question of law."

35. The BCCM then goes on, in subsequent sections, to set out the "dispute resolution process" in more detail. The dispute resolution processes available include conciliation and adjudication.[8]

36. The plaintiff submits that the matters raised as underpinning the denials in the defence constitute a dispute under the BCCM and should have been pursued via an adjudication application under the BCCM. Such an application has not been made and would, in the plaintiff's submission, be out of time if it was now brought by reason of s 242. In those circumstances, the plaintiff contends that the matters sought to be raised in defence of the plaintiff's claim are not within the jurisdiction of this Court to determine and, accordingly, cannot be deployed to resist the present application for summary judgment.

37. Before considering this submission further, it is worth noting the suggestion in argument that the exclusivity provisions might work against the plaintiff so as to preclude it from pursuing the current claim. Indeed, in the course of argument it was suggested that the plaintiff's proceeding ought be struck out for this reason. It is unnecessary to agitate this speculation further. Section 99(1) of the Regulations outlined above in paragraph [9],

[140116]

makes it clear that amounts unpaid in respect of properly issued notices of contribution are recoverable as a debt.

38. Furthermore, s 312 of the BCCM includes the following terms:

"**312 Proceedings**

> (1) The body corporate for a community titles scheme may start a proceeding only if the proceeding is authorised by special resolution of the body corporate.
> (2) However, the body corporate does not need a special resolution to —
>
> > (a) bring a proceeding for the recovery of a liquidated debt against the owner of a lot included in the scheme; or
> > (b) bring a counterclaim, third-party proceeding or other proceeding, in a proceeding to which the body corporate is already a party; or
> > (c) start a proceeding for an offence under chapter 3, part 5, division 4; or
> > (d) start a proceeding, including a proceeding for the enforcement of an adjudicator's order or an appeal against an adjudicator's order, under chapter 6."

39. Thus, there is no merit in the suggestion that s 229 could prevent the plaintiff pursuing its claim.

40. Returning then to the primary point for determination, it appears that, had the defendant instituted separate proceedings in this court challenging the Notices of Contribution, he would have been thwarted by the exclusivity provisions of the BCCM. He has not, however, done so. Rather, the defendant has raised particular matters in defence of the plaintiff's claim. I would be loathe to conclude, in the absence of a specific statutory provision compelling such a conclusion, that a defendant to a claim such as the one advanced by the plaintiff could not, under any circumstances, raise in a defence a matter which might trespass into the territory covered by the dispute resolution provisions of the BCCM. There is no legal or statutory impediment to these matters being raised by way of defence.

41. My view is reinforced by reference to *Independent Finance Group Pty Ltd* v *Mytan Pty Ltd*[9] , in which the Court of Appeal was called upon to consider whether an appeal to the Court of Appeal lay from a decision of the District Court made under the appeal provisions of the dispute resolution processes set out in the BCCM, McMurdo P expressed a "preliminary view" in the context of the precursor to s 229, that "it would be surprising if, in the absence of the clearest words, the inherent jurisdiction of the Supreme Court was diminished by ch 6". In the same vein, it would be "surprising" indeed if chapter 6 of the BCCM were read as so significantly constraining the right of a defendant to advance a defence as to render it unable to advance a simple contention that it is "only liable to pay such contributions as have been properly identified, calculated and resolved to be payable by members of the Body Corporate".

42. For these reasons, the application for summary judgment should be dismissed.

43. Apart from the consideration that costs should follow the event, the failure of the plaintiff to comply with the order of 24 June 2008 renders it proper for it to be ordered that the plaintiff pay the defendant's costs of and incidental to the application.

Footnotes

1 See defence, para 2(c).
2 See defence, para 5.
3 Rule 292, *Uniform Civil Procedure Rules* 1999 (Qld).
4 See *Deputy Commissioner of Taxation* v *Salcedo* 2005 ATC 4562; [2005] 2 Qd R 232, per McMurdo P at [3]; see also my observations in *JM Kelly (Project Builders) Pty Ltd* v *Toga Development 31 Pty Ltd & Anor (No 2)* [2008] QSC 312 at [10]–[12].
5 See my observations in *Elderslie Property Investments No 2 Pty Ltd* v *Dunn & Anor* [2007] QSC 192 at [6]–[8].
6 At para 21.
7 Per 227(b).
8 See s 248.
9 (2001) Q ConvR ¶54-558; [2003] 1 Qd R 374 at 378.

KATSIKALIS v BODY CORPORATE FOR "THE CENTRE"

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(2009) LQCS ¶90-150; Court citation: [2009] QCA 77

Court of Appeal

Judgment delivered on 3 April 2009

Community schemes — Common property – Powers of Body Corporate — Body corporate resolution allowing owner to extend structure onto common property — Extension of structure allows owner exclusive use and possession of that part of the common property encumbered by the structure — Whether exclusivity and possession amounts to disposition of that part of the common property to owner — Whether body corporate resolution only amounts to authority for owner to make improvements to its lot — Body Corporate and Community Management (Commercial Module) Regulation 1997, s 91 and 94 — Body Corporate and Community Management Act 1997, s 154 and 159.

This was an appeal by the owner of lot 6 (applicant) against the decision of Southport District Court handed down on 19 August 2008.

The owner of lot 5 (the lot which was adjacent to the applicant's lot) carried out an extension of its bulkhead to the shop to align it with the frontages of lot 6 and lot 4 within the commercial scheme. The bulkhead, which was used to identify the name of the shop, occupied part of the common property of the respondent body corporate. The body corporate passed a special resolution in retrospect to allow the owner of lot 5 to retain the extension onto common property but did not specify what statutory power was exercised by the body corporate nor any conditions or revocation to the grant.

The applicant applied to the District Court (on appeal from the Adjudicator's decision) and asserted that the body corporate had illegitimately disposed of that part of the common property encumbered by the extension. The extension only benefited the owner of lot 5 and prevented the common property on which the extension was placed from being used by another person and prevented the applicant from using that part of his lot frontage on the return face of the bulkhead from being used for signage.

The body corporate argued it allowed the extension as an improvement to the common property for the benefit of the owner of lot 5 under s 94 of the Commercial Module Regulation; it was not a disposition of common property.

The District Court judge concluded that there was insufficient evidence to confirm that the body corporate had disposed of that part of the common property to the owner of lot 5. The applicant further appealed the decision.

Applicant's submissions:

1. The permitted extension was only capable of being used by the owner of lot 5 which amounted to a grant of exclusive use, for an indefinite period as there were no provisions for revocation under the body corporate resolution. As such it is a disposition of an interest in that part of the common property rather than an improvement to common property for the benefit of lot 5.

2. It can be inferred by the body corporate's conduct that the body corporate intended to act under s 91 of the regulation to dispose of common property.

Respondent's submissions:

1. The definition of "improvement" read in conjunction with s 94 concludes that an erection of a building on common property which is regarded as semi-permanent would not

[140118]

be a disposal of interest in common property. The extension by the owner of lot 5 is a temporary structure able to be removed, therefore it is not a disposition of common property.

2. Structural alterations can be made on common property without there being a disposition of that property.

Statutory context:

Section 91 of the Commercial Module Regulation (now repealed) provided:

"(1) This section sets out the way in which, and the extent to which, the body corporate is authorised —

(a) to sell or otherwise dispose of common property; and
(b) to grant or amend a lease over common property.

(2) The body corporate may —

(a) if authorised by resolution without dissent —

(i) sell or otherwise dispose of part of the common property; or
(ii) grant or amend a lease for more than 10 years over part of the common property; and

(b) if authorised by special resolution — grant or amend a lease for 10 years or less over part of the common property."

Section 94 of the Commercial Module Regulation (now repealed) provided:

"(1) The body corporate may, if asked by the owner of a lot, authorise the owner to make an improvement to the common property for the benefit of the owner's lot.

(2) An authorisation may be given under this section on conditions the body corporate considers appropriate.

(3) The owner of a lot who is given an authority under this section —

(a) must comply with conditions of the authority; and
(b) must maintain the improvement made under the authority in good condition, unless excused by the body corporate."

Held: Appeal allowed, matter remitted to adjudicator.

Per Douglas J (McMurdo P and Chesterman JA agreeing):

1. The terms of s 154 of the Act allows a body corporate to sell or otherwise dispose of common property and also to grant or amend a lease or licence over it in the way and to the extent authorised under the regulation module applying to the scheme. As such it suggests that the grant of a licence is one of the means of disposing of common property envisaged by the legislation.

2. The approvals given by the body corporate showed that the extension over common property will be enjoyed exclusively and indefinitely by the owner of lot 5. This amounts to a disposition of that property at least by the grant of an exclusive licence to it for some indefinite period. It may also amount to a gift of the property unless it is a mere licence that would normally be revocable.

3. The resolution purporting to authorise the extension was a disposition for the purposes of s 91(2)(a)(i). However, as the resolution was not passed by resolution without dissent, it is invalid. The application for leave to appeal is granted. The matter should be remitted to the adjudicator for determination in accordance with these reasons.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

PW Hackett (instructed by PK Lawyers) for the appellant (owner of lot 6).

BG Cronin (instructed by Adamson Bernays Kyle & Jones) for the respondent (body corporate).

[140119]

Before: McMurdo P, Chesterman JA and Douglas J.

Editorial comment: Sections 91 and 94 of the Commercial Module Regulation have been repealed and replaced with s 117 and 120 respectively.

McMurdo P: The application for leave to appeal should be granted and the appeal allowed for the reasons given by Douglas J.

2. I share Chesterman JA's concern about the delay between the filing of the appeal in the District Court at Southport on 17 March 2006 and the hearing of the appeal two years and five months later on 13 August 2008. Neither party in this Court suggested that the delay was caused by the other; nor could the parties provide any explanation for this delay. This suggests that the delay was the fault of the court. Perhaps there is some extraordinary explanation for the delay which is unknown to the parties and not apparent from the appeal record in this Court. If not, such a delay in the disposal of an appeal of this kind is undesirable, unacceptable and of institutional concern.

3. I agree with the orders proposed by Douglas J.

Chesterman JA: I have read and agree with the reasons for judgment prepared by Douglas J, and with the orders proposed by his Honour.

5. One aspect of the appeal deserves mention.

6. The application made to the Adjudicator to resolve the applicant's dispute with the respondent body corporate was lodged on 27 July 2005, four months short of four years ago. The Adjudicator gave his decision on 15 February 2006, having received and considered several lengthy submissions from a number of proprietors. The application, for an order that the bulkheads on Lots 4 and 5 of BUP 343 be removed, was dismissed.

7. The applicant's appeal from that order to the District Court was filed on 17 March 2006, three years ago.

8. The appeal was argued in the District Court on 13 August 2008. Judgment was given six days later, on 19 August 2008.

9. The chronology reveals a delay of about two and a half years between the institution of the appeal to the District Court and that Court's disposition of it. The delay was not the subject of particular complaint in this Court and there was no investigation into its causes. We were told that the applicant wanted the matter resolved and made endeavours to have it brought on.

10. Despite not knowing all the circumstances it is both possible and necessary to condemn the delay in strong terms. It is completely unsatisfactory and, indeed, unacceptable that a litigant be so long denied a hearing.

11. The case was one in which the applicant complained that his propriety rights had been infringed. The judgment of this Court has vindicated his complaint. It is not an exaggeration to describe the District Court's indifference to his complaint, and the application for its redress, as disgraceful. The appeal was self evidently of a kind that would never impose a strain on the Court's resources. It was limited to questions of law. The hearing occupied only two hours. It is impossible to conceive of any reason why the matter could not have been heard within a few months of the institution of the appeal.

12. A consequence of the delay is that the parties have acted in ignorance of their legal rights and the infringement of the applicant's rights went uncorrected for years. The primary Court failed quite dismally to deliver justice. Such a failure should not be allowed to happen again.

Douglas J: This is an application for leave to appeal from a decision of the District Court which was itself an appeal on a point of law from an adjudicator appointed under the *Body Corporate and Community Management Act* 1997 (Qld) (the Act).

Background

14. The dispute relates to a group of shops in an arcade called "The Centre" in Surfers Paradise. The applicant's shop, lot 6 in a building unit plan, was adjacent to lot 5. The owner of lot 5 carried out works to extend the ceiling bulkhead of his shop to align with the frontages of lot 6 and lot 4 which flanked lot 5. The design of these shops was such that the front of each odd-numbered lot was recessed 57 cms from its neighbours.

15.

[140120]

The extension of the bulkhead over the entrance to the shop by that distance meant that it, the bulkhead, which was used to identify the name of the shop, occupied part of the common property of the respondent body corporate. No previous permission was obtained from the body corporate to do the work but subsequently, on 10 November 2005, at its annual general meeting, it passed a resolution, described as a special resolution, in the following terms:

> "10. THAT owners of lots with recessed bulkheads be permitted to extend the bulkhead above the front of their lots to the same alignment as the bulkhead of an adjoining lot provided written application for that modification is first made to and approved by the Committee AND THAT any approval given by the Committee must include such conditions that the Committee considers reasonable and appropriate."

16. Forty-six votes were cast in favour of the resolution, four against with one abstention. A subsequent committee resolution of 8 March 2006 was made, in respect of lot 5, that the owner be permitted "on the usual conditions to retain the bulkhead extensions already made" but those conditions were not identified. Therefore neither resolution clarifies, for example, whether the approval constituted a licence for the use of that part of the common property and whether or when it might be revoked. Nor did it identify the relevant statutory provision permitting the common property to be appropriated for that purpose.

17. One of the applicant's main concerns was that the extension of the bulkhead limited his ability to use the return face of his lot for signage.

The statutory context

18. Section 154 of the Act allows a body corporate to sell or otherwise dispose of common property and also to grant or amend a lease or licence over it in the way, and to the extent, authorised under the regulation module applying to the scheme. Section 159 authorises a regulation module to provide for "making improvements to the common property, including making improvements for the benefit of the owner of a lot …". The term "improvement" is defined in Schedule 6 to the Act as follows:

> ***"improvement*** includes —
>
> (a) the erection of a building; and
> (b) a structural change; and
> (c) a non-structural change, including, for example, the installation of air conditioning."

19. Sections 91 and 94 of the *Body Corporate and Community Management (Commercial Module) Regulation* 1997 (Qld) identified some possible methods by which this extension of the bulkhead could have been effected. They provided, relevantly, as follows:

> **"91 Disposal of interest in and leasing of common property — Act, s 116 [SM, s 111]**
>
> (1) This section sets out the way in which, and the extent to which, the body corporate is authorised —
>
> (a) to sell or otherwise dispose of common property; and
> (b) to grant or amend a lease over common property.
>
> (2) The body corporate may —
>
> (a) if authorised by resolution without dissent —
>
> (i) sell or otherwise dispose of part of the common property; or
> (ii) grant or amend a lease for more than 10 years over part of the common property; and
>
> (b) if authorised by special resolution — grant or amend a lease for 10 years or less over part of the common property.
>
> …
>
> **94 Improvements to common property by lot owner — Act, s 121 [SM, s 114]**
>
> (1) The body corporate may, if asked by the owner of a lot, authorise the owner to make an improvement to the common property for the benefit of the owner's lot.
> (2) An authorisation may be given under this section on conditions the body corporate considers appropriate.
> (3) The owner of a lot who is given an authority under this section —
>
> [140121]
>
> (a) must comply with conditions of the authority; and
> (b) must maintain the improvement made under the authority in good condition, unless excused by the body corporate."

20. The resolution itself does not make clear what statutory power is being exercised by the body corporate. It is clear from the resolution, however, that there has been no sale or lease of common property. No money was offered for that use of the common property. There is no rental or term of any lease prescribed and the premises the subject of any notional lease, although capable of being made certain, were not defined in the resolution.

21. The resolution is capable, however, of being construed as the grant of an indefinite licence to the owner of lot 5 to use that part of the common property. If it were such a disposition "otherwise", to use the language of s 91(l)(a) of the regulation then in force, the resolution said to authorise it retrospectively should have been passed without dissent in order to make it valid. That did not occur as four lot owners voted against it.

22. Another possibility is that the body corporate authorised the owner of lot 5 to make an improvement to the common property for the benefit of his lot under s 94. That would not have needed the authority of a

particular form of resolution, such as s 91 requires for dispositions of interests in common property, unless the grant of permission to make the improvement itself amounted to a disposition of the common property.

The opposing arguments

23. The applicant's submission, in support of the argument that the body corporate had purported illegitimately to give the relevant part of the common property to the owner of lot 5, was that the extension of the bulkhead only benefited the owner of lot 5, prevented the common property on which the extension was placed from being used by another person or the body corporate and prevented the applicant from using that part of his lot frontage on the return face of the bulkhead from being used for signage. The argument was that the alteration or improvement made by the owner of lot 5 was indefinite temporally as the resolution did not specify that the permission to extend the bulkhead may be revoked. It was also said to be an improvement only capable of being used by the owner of lot 5 and, so, amounted to the grant of the exclusive use of that part of the common property for an indefinite period and became a disposition of an interest in the common property rather than simply an improvement to the common property for the benefit of lot 5. As the resolution of 10 November 2005 was a special resolution, the applicant also argued that the appropriate inference from that conduct was that the body corporate must have intended to act under s 91 of the regulation.

24. It was submitted by the respondent, however, that the legislation permitted structural alternations to be erected on common property to which the body corporate may consent. The definition of improvement, coupled with the power in s 94 of the regulation, was said to require the conclusion that the erection of a building on the common property, which one would normally regard as being of a semi-permanent nature, was not an alienation or a disposal of an interest in that property. Rather it should be taken to be simply something that was built on the common property which could be removed. In its submission a structural change such as the extension of a bulkhead from a lot was even more clearly a temporary structure able to be removed. The submission was, accordingly, that this was not a disposition of common property as structural alterations can be made on common property without there being a disposition of that property. In that context the submission was that s 91 and s 94 of the regulation were mutually exclusive.

Discussion

25. Where the improvement permitted under s 94 of the regulation has the effect of granting the use of part of the common property exclusively to a lot owner for an unlimited period, as has happened here, it seems to me that s 94 cannot be treated separately in its effect from s 91. The sections are not necessarily mutually exclusive as there is the real likelihood of the creation of a disposition of the land in those circumstances.

26.

[140122]

That may not necessarily be the case in some examples that one may think of. For example, a lot owner may ask for permission to fix a bench or place some seats outside his lot on the common property for the benefit of the business's customers. Although it would be an improvement it may not necessarily amount to a disposition of that part of the common property, especially if it remains accessible to others. A different conclusion would be likely to follow if, for example, the permission sought was to make an improvement to enclose indefinitely a car parking space on common property for use as a private parking space exclusively for a lot owner.

27. The position accepted by both the adjudicator and the learned District Court judge was that the evidence was not sufficient to allow the conclusion that what had occurred was a de facto acquisition of common property by the owner of lot 5. In a sense that is an approach that casts the onus of proof on the applicant to show that the resolution had the effect of otherwise disposing of that part of the common property. It is not necessary in this case to decide whether that is the correct way to approach the issue as it is my view, for reasons I shall explain, that there has been a disposition of the common property on the evidence available. In making a resolution of this type, however, the body corporate is potentially interfering with the rights of unit holders to the common property and should be required to make it clear just how those rights are to be affected.

28. In this case the approvals given retrospectively show that the extensions to the bulkheads over the common property will be enjoyed exclusively and indefinitely by the lot owner. That, in my view, amounts to a disposition of that property at least by the grant of an exclusive licence to it for some indefinite period. It may also amount to a gift of the property unless it is a mere licence that would normally be revocable.[1]

29. "A licence is an agreement in which the grantor confers on the licensee permission to enter the land for specific purposes which would otherwise be unlawful or constitute a trespass."[2] Because of the uncertainty attaching to the duration of the licence in this case and the absence of any obligation to pay rent it could not be treated as a lease even though there is a clear case that the owner of lot 5 has been given exclusive possession of it.[3]

30. The words, "dispose", "disposition" and "disposal" are very wide in their effect and, depending on the context, are not restricted to arrangements involving the transfer or creation of proprietary rights.[4] The terms of s 154 suggest that the grant of a licence is one of the means of disposing of common property envisaged by the legislation. Even if one assumes that the transaction here was simply the creation of a mere licence that gave no interest, legal or equitable, in the common property and was revocable,[5] the fact that exclusive possession of that part of the common property had passed to the owner of lot 5 would, in my view, allow the conclusion that there had been a disposition of the relevant part of the common property. The right to possession of that part of the common property had been made over or parted with for the period of the licence.[6] If the licence remained unrevoked, no action of trespass could have been maintained by the respondent against the owner of lot 5.[7]

31. It would have been simple for the body corporate to clarify in its resolution whether the permission to extend the bulkhead was for a particular period or was revocable and whether it was subject to other conditions. It would then have been possible to ascertain clearly what type of resolution was required, whether one without dissent or a special resolution. That task may have been more difficult under s 91 as it stood in 2006 as it, unlike s 154 of the Act, did not then refer to the grant of licences but spoke only of sales, other dispositions and leases for more than or less than 10 years. Section 117(2)(b) of the current regulation, *Body Corporate and Community Management (Commercial Module) Regulation* 2008, makes it clear, however, that a licence for less than 10 years may be granted by a special resolution.

32. It is important that the rights to common property of bodies corporate are not removed unheedingly or inadvertently and to the detriment of their members. That is why the rules require such resolutions to be passed without dissent. That the infringement on those

rights is relatively trivial in this case does not excuse what occurred. The principle is significant.

Conclusion and orders

33. In my view, therefore, the resolution purporting to authorise the extension of bulkheads was a disposition "otherwise" for the purposes of s 91(2)(a)(i) of the regulation and was not passed without dissent. It was therefore invalid.

34. The application for leave to appeal was argued as if it were also a hearing in respect of an appeal. Consequently, as it seems to me that the matter is one where an appeal is necessary to correct a substantial injustice to the applicant, there is a reasonable argument that there is an error to be corrected and the issue is one of some general importance to bodies corporate and their members, the application for leave to appeal should be granted.

35. The orders should be as follows:

1. The application for leave to appeal is granted;
2. The appeal is allowed;
3. The order of the District Court of 19 August 2008 is set aside and instead it is ordered that the appeal is allowed and the order of the adjudicator made under Part 9 of Ch 6 *Body Corporate & Community Management Act* 1997 (Qld) on 15 February 2006 is set aside;

4. The matter is remitted to the adjudicator for determination in accordance with these reasons;
5. The respondent is to pay the applicant's costs of and incidental to this application and appeal and of the proceedings before the District Court.

36. An injunction was also sought requiring the respondent to remove the bulkhead structure from lot 5 but that relief was not pressed at the hearing. It seems to me that relief of that nature should not be granted at this stage because it is open to the respondent to approve another resolution to authorise the use of the extension to the bulkhead that does conform to the powers available under the legislation. I would remit that part of the application to the adjudicator for determination in accordance with these reasons.

Footnotes

1 *Halsbury's Laws of Australia* at [140–125].

2 *Halsbury's Laws of Australia* at [245–235]; *Winter Garden Theatre (London) Ltd* v *Millennium Productions Ltd* [1948] AC 173 at 188, 193.

3 *Lace* v *Chantler* [1944] KB 368; *HH Halls Ltd* v *Lepouris* (1964) 65 SR (NSW) 181, affirmed on appeal (1965) 39 ALJR 259 and discussed in *Wilson* v *Meudon Pty Ltd* [2006] ANZ ConvR 93; [2005] NSWCA 448 at [61]–[65].

4 *Henty House Proprietary Limited (in voluntary liquidation)* v *Federal Commissioner of Taxation* (1953) 88 CLR 141 at 153 and other authorities discussed in *A. Raptis & Sons Holdings Pty Ltd* v *Commissioner of Stamp Duties (No 2)* [1999] 1 Qd R 462 at 467–468.

5 *Halsbury's Laws of Australia* at [140-125]; *Cowell* v *Rosehill Racecourse Co. Ltd* (1937) 56 CLR 605 .

6 *A. Raptis & Sons Holdings Pty Ltd* v *Commissioner of Stamp Duties (No. 2)* [1999] 1 Qd R 462 at 467–468.

7 *Cowell* v *Rosehill Racecourse Co. Ltd* (1937) 56 CLR 605 at 629.

PAZCUFF PTY LTD v FARMILO & ORS

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(2009) LQCS ¶90-151; Court citation: [2009] QSC 230

Supreme Court of Queensland

Judgment delivered on 14 August 2009

Community schemes — Off-the-Plan Contract for Sale entered into by seller and purchaser — Disclosure Statements provided to purchaser not signed by seller or solicitors — Purchaser terminates contract for seller's breach of Body Corporate and Community Management Act 1997, s 206 — Whether solicitor signed covering letter enclosing Disclosure Statement is sufficient compliance with s 206 — Whether specific authorisation was provided by sellers to its solicitors to verify Disclosure Statement — Whether contracts validly terminated by purchaser for seller's breach.

The purchaser (applicant) entered into a contract with the sellers (respondents) for the purchase of six residential lots in a community titles scheme in Cairns. The purchaser also entered into a contract with Farmilo Pty Ltd for the management and letting rights of the scheme. Upon entering into the contracts, the sellers' solicitors provided the purchaser with six contracts for sale and six disclosure statements which were not signed by the sellers or its solicitors. The sellers' solicitors provided a signed covering letter directing the purchaser's attention to the attached warning statements and accompanying documents for execution.

None of the disclosure statements were signed by the sellers until a time after the purchaser had signed the documents. The sellers did not suggest there was any formal or specific authorisation by them for their solicitors to sign any such statement, nor did the solicitors in fact sign the disclosure statements or in any way specifically verify the statement's contents.

The purchaser has applied to the court for:

(a) a declaration that the six contracts were each lawfully terminated, and
(b) the return of its deposit on the sale,

on the basis that the sellers had breached its obligations under s 206 of the Body Corporate and Community Management Act for failure to provide disclosure statements signed by the sellers or a person authorised by the sellers.

The relevant provisions of s 206 of the Act provides:

"(1) The seller of a lot included in a community titles scheme … must give a person (the buyer) who proposes to buy a lot, before the buyer enters into a contract to buy the lot, a disclosure statement.

(2) …

(3) The disclosure statement must be signed by the seller or a person authorised by the seller …"

The sellers argued that the disclosure statements provided to the purchaser prior to entering the contracts substantially complied with s 206. It also argued that the signature by the sellers' solicitors at the front of the covering letter enclosing the documents was an effective signing for the purposes of s 206.

Question before the court

Whether the sellers' solicitors signing of the covering letter was done with the authority of the sellers and was sufficient to verify the unsigned documents.

Held: Contracts validly terminated by purchaser

Decision

1. There was no evidence of any specific conduct by the sellers from which it could be inferred that their solicitors had authority to bind them to the terms of the disclosure statements. The text of the solicitors' letter did not contain terms suggestive of authority to verify the contents of the disclosure statements.

[140125]

2. The terms of s 206 properly construed requires that there be personal verification by the seller, whether by the seller's own hand or by another person specifically authorised to do so. In this instance, there was no evidence of the sellers having given specific authority to their solicitors and, as a consequence, verification required by s 206 has not therefore been fulfilled.

3. The result is that the requirements of s 206(1) of the Act have not been complied with and therefore the purchaser was entitled to cancel the contract and recover the deposit paid.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M Jonsson (instructed by Greenwoods Solicitors) for the applicant.

A Philp SC (instructed by MacDonnells Law) for the respondents.

Before: Jones J

Editorial comment: Interestingly, in his Honour's opinion, the relevant provisions of the BCCMA are designed to meet the consumer protection objectives of the Act which are allied to the similarly designed provisions of PAMDA. Once it is accepted that consumer protection is the rationale for its existence, then that fact must determine the approach to the proper construction of the provisions of the BCCMA.

Jones J: On 5 November 2008, the applicant entered into a contract in writing with the first respondents for the purchase of six building units, namely Lots 11, 13, 14, 16, 17 and 21 on BUP 70791 County of Nares, Parish of Cairns (hereinafter the "unit contract"). On the same day the applicant entered into a contract in writing with the second respondent for the purchase of a Management and Letting business associated with the Reef Gateway Apartments (hereinafter "the rights contract").

2. By this Originating Application, the applicant seeks a declaration that it has lawfully terminated each contract and that it is entitled to have the respective deposits repaid to it. The basis for this claim is that the applicant was not, in relation to the unit contract, given a disclosure statement signed by the first respondents prior to his entering into that contract. The giving of a disclosure statement is required by s 206 of the *Body Corporate and Community Management Act 1997* (hereinafter "BCCMA"). It is common ground that the performance of the rights contract was linked to the unit contract such that a valid cancellation of the latter meant that the former could also be validly terminated.

3. The respondents oppose the application on the basis that upon the proper construction of the relevant terms of BCCMA, the first respondent did substantially comply with s 206 before the applicant entered into the contract.

Background facts

4. The facts are not in dispute and no oral evidence was called. The relevant circumstances and documents are contained in the affidavit of David Greenwood filed on 11 March 2009 and the affidavit of Peter William Farmilo filed on 23 April 2009.

5. In early August 2008, John Gallo, a director of the applicant, approached Peter Farmilo offering to purchase the subject units and the management business. Each of the parties retained separate solicitors to act in the transaction.

6. On 31 October 2008, the respondents' solicitors sent a letter to the applicant's solicitors enclosing the following documents for their consideration:—

(a) Residential units contract to which was attached the PAMD Form 30c Warning Statement, followed by the BCCMA Form 14 Contract Warning; and
(b) BCCMA Disclosure Statements for the relevant lots; and
(c) Contract for the sale of management business.[1]

The respondents had not executed any of the documents but the letter was signed by a partner of the respondents' solicitors.[2]

7. On 4 November 2008, the applicant returned the documents duly executed by it though containing some amendments which were agreed to by the respondents.

8. On 5 November 2008, the first respondents signed the relevant documents

[140126]

including the disclosure statements in respect of the units. The signed documents identified in (a), (b) and (c) above were forwarded to the applicant's solicitors on 6 November 2008.[3]

9. The applicant relies upon these facts to contend that before it entered into the contract none of the disclosure statements were signed by the first respondents and thus there was no compliance with s 206 of BCCMA. The respondents contend that there has been substantial compliance with the section, arguing primarily that the signature by the respondents' solicitors in the letter of 31 October 2008 was an effective

signing for the purpose of the section. In the alternative, the respondents argue that there has at least been substantial compliance with the section.

10. These issues did not arise until 18 February 2009[4] by which time there had been a number of concessions made by the respondents — a reduction in the purchase price of the rights contract, an extension of time for finance approval and an extension of time for the date of settlement. However, the respondents do not argue that there is any question determinable by reference to waiver. The issue between the parties turns solely on whether there has been compliance with the provisions of s 206.

11. Section 206 relevantly provides:—

> "**206 Information to be given by seller to buyer**
>
> (1) The seller (the **seller**) of a lot included in a community titles scheme … must give a person (the **buyer**) who proposes to buy the lot, before the buyer enters into a contract (the **contract**) to buy the lot, a disclosure statement.
> (2) The disclosure statement must—
>
> (a) state the name, address and contact telephone number for—
>
> (i) the secretary of the body corporate; or
> (ii) if it is the duty of a body corporate manager to act for the body corporate for issuing body corporate information certificates — the body corporate manager; and
>
> (b) state the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot; and
> (c) …
> (d) identify improvements on common property for which the owner is responsible; and
> (e) list the body corporate assets required to be recorded on a register the body corporate keeps; and
> (f) identify the regulation module applying to the scheme; and
> (g) state whether there is a committee for the body corporate or a body corporate manager is engaged to perform the functions of a committee; and
> (h) include other information prescribed under the regulation module applying to the scheme.
>
> (3) The disclosure statement must be signed by the seller or a person authorised by the seller.
> (4) The disclosure statement must be substantially complete.
> …
> (7) If the contract has not already been settled, the buyer may cancel the contract if—
>
> (a) the seller has not complied with subsection (1); or
> (b) …
>
> (8) The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies."

12. The section does not prescribe any form which must be followed in making out the disclosure statement. All that is required is that the information identified in subsection (2) above must be disclosed and that the statement must be "signed by the seller or a person authorised by the seller". The applicant does not express any concern about the content or the form of any of the disclosure statements. Each of them was, in fact, in a form which appears to have been designed by Cairns Search Agents who claim to be, with others, the copyright

[140127]

owner.[5] The document contains the following paragraph:—

> "2. This disclosure statement is commissioned by the vendor or the vendor/s agent or solicitor MacDonnells (Solicitors) and is designed to accompany a unit sale contract for (Lot No.) 'Reef Gateway Apartments'."

13. It is common ground that none of the disclosure statements were signed by the first respondents until a time after the applicant had signed the several documents. The first respondents do not suggest there was any formal or specific authorisation by them for their solicitors to sign any such statement. Nor did the solicitors in fact sign the disclosure statements or any way specifically verify the statement's contents. It might well be that the solicitors secured the information by authorising Cairns Search Agents to make the necessary inquiries. One could easily infer that this was the process followed. But the question is whether the solicitors signing of the letter of 31 October 2008[6] was done with the authority of the first respondents and was sufficient to verify the unsigned document.

14. The authority of a solicitor to make agreements or to verify information on behalf of a client is not open-ended. The legal effect of a solicitor's action will depend on whether the solicitor has the actual, or an ostensible, authority to bind the client. In *Nowrani Pty Ltd* v *Brown*[7] McPherson J said (at p 586):—

> "The mere fact that a person is a solicitor confers no implied authority to make contracts on behalf of one who happens to be his client: *Pianta* v *National Finance & Trustees Ltd* (1964) 38 ALJR 232; *Rymark Australia Development Consultants Pty Ltd* v *Draper* [1977] Qd R 336, 344. Nor, apart from express authority, does a solicitor have authority to agree to a variation of his client's contract; see *George* v *Pottinger* [1969] Qd R 101, 107. … The proposition contended for by Mr Douglas went the length of saying that a solicitor retained to bring to completion a contract for the sale of land, has, by virtue of that retainer alone, authority (1) to extend the time for completion of the contract; and (2) to elect to (or not to) avoid, rescind or determine the contract. If that is so, solicitors are certainly very powerful people, and one should think twice before retaining them."

Also at p 587 his Honour said:—

> "For ostensible authority it is necessary to show that there was some holding out of (the solicitor) by the defendant as having her authority to make the variation agreement."

15. McPherson J made reference to *Legione* v *Hateley*[8] and to *Sargent* v *ASL Developments Ltd*[9] where the High Court on separate occasions considered when a client was bound by the actions of, or by the information held by, his or her solicitor. In neither of those cases, nor in the principles identified, was there any suggestion that a solicitor signing a letter in the course of a general authority constituted the verification of a statement of the kind mandated by s 206.

16. There is no evidence of any specific conduct by the first respondents from which it could be inferred that their solicitors had authority to bind them to the terms of the disclosure statement. The text of the solicitors' letter of 31 October 2008 (ex "DG3") does not contain terms suggestive of authority to verify the contents of the disclosure statement, rather the text is consistent with the solicitors being authorised to prepare the contractual documents and to secure their execution. That letter also contains a paragraph directing the applicant's attention to the disclosure statement and various warnings given pursuant to the *Property Agents & Motor Dealers Act 2001* (PAMDA) and BCCMA. This direction was no more than what was required of the solicitors in compliance with s 366B(4) of PAMDA.

17. Neither in that direction, nor in the above quoted paragraph taken from the disclosure statement, is there any direct authority to the solicitors to verify the information contained in the disclosure statement. Nor, in my view, is there anything in the circumstances by which such authority can be inferred.

18. The relevant provisions of BCCMA are designed to meet the consumer protection objectives of the Act. In so doing, they are allied to the similarly designed provisions of PAMDA. For example, Part 2 of Chapter 5 of PAMDA relevantly places obligations both on sellers of residential property and lawyers who

act on a seller's behalf, by which warnings are brought to the attention of intending buyers. These objectives were discussed by de Jersey CJ in *MNM Developments Pty Ltd* v *Gerrard*[10] who said as follows:—

> "[16] The context of the requirement set up by s 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchases of residential property. One of the objects of the Act, stated in its preamble, is 'to protect consumers against particular undesirable practices'. That protection extends, in cases like these, to giving a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s 366(4)(a), s 366(4)(b) (including the example) and s 367(2) …
> [21] Finally, had the parliament intended to sanction a situation like this, it would have done so by using language less prescriptive than, 'as its first or top sheet'. It is those terms which to my mind compellingly exclude the respondent's position. The legislature has considered an exacting obligation justified to secure the goal of consumer protection."

19. I am informed that there are no decided cases dealing directly with s 206 of BCCMA but once it is accepted that consumer protection is the rationale for its existence then that fact must determine the approach to its proper construction.

20. Mr Philp of Senior Counsel argues that the objectives of BCCMA do not highlight particularly the consumer protection intentions. He contrasts the primary objective of PAMDA as being "to protect consumers against particular undesirable practices" with the more sedate secondary objectives in s 4(g) of BCCMA "to provide an appropriate level of consumer protection for owners and intending buyers" against the background in s 4(a) of "balancing the rights of individuals". These objectives, he contends, were met by the transmission of the disclosure statement in the solicitor's letter and the details warnings provided by the letter.

21. Mr Jonsson of Counsel for the applicant points to the centrality of the disclosure to the fulfilment of the objective of consumer protection. He relies firstly on s 207 of BCCMA by which the contract includes the disclosure statement and all material accompanying the statement. Secondly, by s 208, the information in the disclosure statement may be relied upon by the buyer as if it had been warranted. Thirdly, by s 209, the buyer may, if the contract has not been settled, cancel the contract if the disclosure statement is inaccurate or its accuracy cannot be verified upon reasonable inquiry.

22. Consumer protection is clearly one of the significant motivations for the enactment of the provisions of Chapter 5 of BCCMA. It demands of the seller of lots, or proposed lots, the disclosure of information which a buyer could not easily ascertain for himself or herself. It imposes significant safeguards by imposing on the seller warranty for the truth of the information and it provides a significant sanction in that the contract may be cancelled if the information is not accurate. As well, these provisions incorporate the warning statements required under the PAMDA.

23. I accept the submissions made on behalf of the respondents that the provisions of ss 207–209 do indicate the centrality of the disclosure statement to the contractual rights and obligations of the parties. As such, the requirement that the provision of the disclosure statement be a legal and binding act of the seller is made clear.

24. Once this is accepted, the question then is whether the disclosure statement provided by the first respondents complied with the provisions of s 206 of BCCMA.

25. The first respondents argue that by reason of s 206(8) there has been substantial compliance with the requirements of the section. The argument is that subsection (8) qualifies not only the content of the disclosure statement but also its execution as required by subsection (3). The argument thereafter contends that the solicitor's signature on the accompanying letter, the likely circumstances of the preparation of the disclosure statement

[140129]

and the general authority of the solicitor is sufficient compliance with the terms of the Act.

26. The applicant contends, having regard to the purpose of the disclosure statement and its centrality to the contract, that verification of its contents must be given by the seller or a person duly authorised by the seller.

In this connection, the applicant refers to s 48A of the *Acts Interpretation Act 1954* which is in the following terms:—

> "**48A Verification of documents**
>
> If an Act requires that, for a purpose of the Act or another law, a document, or information or a document include in, attached to or given with a document, be verified in a specified way, the purpose is not fulfilled unless the requirement is satisfied."

27. The legislature has not prescribed any form to be used in making a disclosure statement but the scope of the information to be disclosed is mandated by s 206(2). Such information must be substantially complete as at the date of the contract. If information is later found to be inaccurate, this does not invalidate the statement. This fact does not, in my view, lessen the importance of the disclosure statement in the contractual arrangement. Rather it seems to me, to be no more than a reflection of the fact that some information comes to the knowledge of the seller only upon inquiry of others. Read as a whole, the provisions of Parts 1A and 1 of Chapter 5 of BCCMA bespeak a statutory objective of providing an appropriate level of consumer protection. Even though these provisions do not contain punitive sanctions such as exist in PAMDA, the evident purpose of the provisions calls for a strict approach to the fulfilment of their terms.

Conclusion

28. In the absence of any contention as to the contents of the disclosure statement, the only issue between the parties is the manner of its verification. In this regard I take the view that the terms of s 206 properly construed requires that there be personal verification by the seller, whether by the seller's own hand or by another person specifically authorised to do so. In this instance, there is no evidence of the respondents having given specific authority to their solicitors and as a consequence verification in the sense envisaged by s 48A of the *Acts Interpretation Act* and by the statutory purpose, has not therefore been fulfilled. The result of this finding is that the requirements of s 206(1) of BCCMA have not been complied with. The applicant was therefore entitled to cancel the unit contract and with it the rights contract as well and to recover the deposits paid.

Orders

29. I make the following orders:—

The Court—

> 1. Declares that the first respondents failed to give the applicant a disclosure statement complying or, alternatively, substantially complying with s 206(1) of the *Body Corporate and Community Management Act 1997* before the applicant entered into a contract dated 5 November 2009 for the purchase from the first respondents of Lots 11, 13, 14, 16, 17 and 21 on BUP 70791, County of Nares, Parish of Cairns, (the "Unit Contract") by failing to give to the applicant a disclosure statement signed by the first respondents, or a person authorised by the first respondents, before the applicant entered into the Unit Contract.
> 2. Declares that the applicant has lawfully cancelled the Unit Contract pursuant to s 206(7) of the *Body Corporate and Community Management Act 1997*.
> 3. Declares that the applicant is entitled to be repaid the whole of the deposit paid by the applicant under the terms of the Unit Contract in the sum of $10,000.00.
> 4. Declares that the applicant has lawfully terminated the contract dated 5 November 2008 for the purchase by the applicant from the second respondent of the management and letting business known as Reef Gateway Apartments (the "Rights Contract") for non-fulfilment of the condition relating to completion of the Unit Contract.
> 5. Declares that the applicant is entitled to be repaid the whole of the deposit paid by the applicant under the terms of the Rights Contract in the sum of $10,000.00.
> 6. Orders that the first and second respondents pay the applicant's costs of and incidental to this application to be assessed on the standard basis.

[140130]

Footnotes

1 See affidavit of Peter Farmilo at para [11].
2 Affidavit David Greenwood Ex “DG3”.
3 Affidavit of Peter Farmilo at para [15].
4 Affidavit of David Greenwood Ex “DG13”.
5 Affidavit David Greenwood Ex “DG12” at para [14].
6 Affidavit David Greenwood Ex “DG3”.
7 (1989) 2 Qd R 582.
8 (1983) 152 CLR 406.
9 (1974) 131 CLR 634.
10 (2005) Q ConvR ¶54-624; (2005) 2 Qd R 515.

BOSSICHIX PTY LTD v MARTINEK HOLDINGS PTY LTD

(2009) LQCS ¶90-152; Court citation: [2009] QCA 154

Queensland Court of Appeal

Judgment delivered 5 June 2009

Community schemes — Establishment of community title scheme — Off-the-plan contract of sale — Where contract provides that settlement date is 14 days after notification of registration of building format plan — Body Corporate and Community Management Act 1997 s 212 — Legislative requirement that settlement must not take place earlier than 14 days after the seller gives advice to buyer that the scheme has been established or changed — Where purchaser may cancel if contract does not comply with legislative requirement — Whether contract complies with legislative requirement — Whether purchaser entitled to cancel contract.

This was an appeal by the developer (appellant) against the decision of the Queensland Supreme Court which was previously reported at (2008) LQCS ¶90-147. The purchaser (respondent) entered into an "off-the-plan" contract of sale with the developer for a building unit to be created within a residential community titles scheme and subsequently purported to cancel the contract on the basis that cl 14 of the contract failed to comply with the requirements of s 212 of the *Body Corporate and Community Management Act 1997*. The purchaser's solicitors argued that the contract did not expressly state that "settlement must not take place earlier than" 14 days after the vendor gave notice to the purchaser that, relevantly, the scheme has been established. The unambiguous grammatical meaning of s 212 was that the contract had to expressly so provide.

Clause 14 of the contract provided that:

> "The settlement date is the later of—
>
> a) 14 days after the Seller notifies the Buyer that the Building Format Plan is registered; and
> b) Three days after the Seller notifies the Buyer that a Certificate of Classification is issued for the building."

Section 212 of the Act provides that:

> "A contract entered into by a person (the seller) with another person (the buyer) for the sale to the buyer of a lot intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed."

The developer rejected the purchaser's purported cancellation and affirmed the contract. The developer notified the purchaser of registration of the building format plan and fixed the date for settlement of the contract. The purchaser failed to settle the contract and accordingly the developer terminated the contract and forfeited the deposit.

[140131]

Decision of the Supreme Court

The Queensland Supreme Court held that the contract did not adequately provide notice for settlement in accordance with s 212 of the Act as the seller failed to properly inform the buyer that the scheme had been established. To comply with s 212, the contract must notify the buyer that settlement must not take place until 14 days after the building format plan and the community management statement has been registered (and the scheme established).

Arguments on appeal

1. The judge at first instance wrongly attributed that the purpose of s 212 is to give effect to disclosure and information to assist a buyer to understand its legal position, whereas the evident purpose is rather to require relevant contracts to have the effect that the parties will not be obliged to settle the contract until 14 days after the property (the subject of the contract) is completed.

2. By law the registration of the plan of subdivision and the recording of the community management statement must occur contemporaneously or at least must immediately follow the first, so a notice that the first has occurred (ie registration of the plan) is effectively notice that both have occurred and that the scheme has been established.

3. The parties have considered the registration of the plan to be the point at which the scheme will be established and the effect of cl 14 of the contract is that the parties have agreed that the notice should be one which advises of the establishment of the scheme. In this way the contract has met the requirement of s 212.

Held: Appeal dismissed (Holmes JA and A Lyons J agree with McMurdo J's reasons)

1. McMurdo J agreed that the primary judges' reasoning is open to criticism in terms of the interpretation of the purpose of s 212; however it does not deter from the point that registration of a plan and the establishment of a scheme are not the same thing. A notice to the buyer of the first occurring (being the registration of the plan) would not appear to be, without more, a notice that the scheme had been established and thereby sufficient for s 212.

2. Registration of the plan of subdivision has the effect of creating the lots defined in the plan, but of itself does not have the effect of creating the common property depicted in the plan. That occurs only once the plan is registered and the community management statement is recorded. The recording of the statement is an act which has distinct legal consequences. The two steps are distinct and s 24 of the Act makes it clear that both steps are necessary for the establishment of the scheme.

3. The event triggering settlement unambiguously specified in cl 14 is the registration of the building format plan. The fact that the parties were mistaken about the event which, in law, established the scheme does not alter the fact that they have made registration of the plan, not the establishment of the scheme, the relevant event for fixing the date for settlement. The result is that cl 14 does not have the same effect as the provision required by s 212. The respondent was entitled to cancel the contract.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

W Sofronoff QC SG, with A M Pomerenke (instructed by Brian Bartley & Associates) for the appellant.

S R Lumb (instructed by McKays Solicitors) for the respondent.

Before: Holmes JA, McMurdo J and A Lyons J

Editorial Comment: McMurdo J interestingly added that in his view, s 212 does not require the employment of the very words in the section, it requires the contract to have the effect prescribed by the section.

The precedent set by the Supreme Court and Court of Appeal decisions led to the Queensland Parliament passing the *Body Corporate and Community Management Amendment Act 2009* which replaces the previous s 212 with a new s 212 and 212A. The amending Act has retrospective effect as the government hopes to remedy technical breaches of the previous s 212 in most Queensland standard off-the-plan contracts.

[140132]

Holmes JA:

1. I agree with McMurdo J that clause 14.1 of the contract did not meet the requirements of s 212(1), because, as he has explained, notification that the Building Format Plan had been registered did not equate to advice that the scheme had been established (although the latter might ordinarily be expected to occur contemporaneously with the former). Like McMurdo J, I do not think that compliance with s 212(1) necessitated the use of its precise words: it would suffice if the contract clause had the required effect. I prefer, however, not to express any view on whether, in order to comply with s 212(1), it was necessary that the relevant clause preclude settlement earlier than 14 days after the necessary advice, as opposed to merely providing for settlement 14 days after it.

2. It follows that I too would dismiss the appeal with costs.

McMurdo J:

3. On 30 June 2005, the appellant agreed to sell to the respondent a home unit in a proposed building in Mackay, for a price of $995,000. The appellant promised to construct the building, in which this would be one of 57 units, and to:

> "register the Building Format Plan and to obtain a Certificate of Classification for the Building as soon as reasonably possible after construction of the Building is complete".

4. The date for completion, according to cl 14.1, was as follows:

> "14.1 The settlement date is the later of—
>
> (a) 14 days after the date the Seller notifies the Buyer that the Building Format Plan has registered; and
> (b) 3 days after the date the Seller notifies the Buyer that a Certificate of Classification has issued for the Building."

5. On 13 November 2007, which was prior to any notice under that clause, the respondent purported to cancel the contract pursuant to s 212(3) of the *Body Corporate and Community Management Act 1997* (Qld) ("the BCCM Act"). Section 212 provides:

> "**212 Cancellation for not complying with basic requirements**
>
> (1) A contract entered into by a person (the ***seller***) with another person (the ***buyer***) for the sale to the buyer of a lot intended to come into existence as a lot included in a community

titles scheme when the scheme is established or changed must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed.
(2) Also, when the contract is entered into, there must be a proposed community management statement for the scheme as established or changed.
(3) The buyer may cancel the contract if—

(a) there has been a contravention of subsection (1) or (2); and
(b) the contract has not already been settled."

6. The appellant disputed that cancellation and upon completing the construction of the building and causing the community titles scheme to be established, it gave a notice to the respondent purportedly under cl 14. By an originating application, the respondent sought declarations that it had validly cancelled the contract and was entitled to the return of the deposit. The facts were not in dispute and the only question was whether cl 14 of the contract met the requirements of s 212(1) of the BCCM Act. Mackenzie J held that it did not do so and granted the declarations which were sought.[1]

7. Before his Honour, the present respondent argued that cl 14 was insufficient for two reasons. The first point, which his Honour found it unnecessary to consider, was that only a contract which contained the very words of s 212(1) would suffice. The second argument was (and is) that cl 14 refers to a notice of the registration of the Building Format Plan, whereas s 212 refers to a notice of the establishment of the community titles scheme. It argues that the registration of the plan and the establishment of the scheme are not the same thing, and they could not, or at least need not, occur contemporaneously. That argument was accepted by the learned primary judge by this reasoning:

"[22] It may be interpolated that although clause 14.1 refers to the Building Format Plan (defined in clause 2), there is no reference in clause 14.1 to the Community Management Statement, the recording of which

[140133]

is one of the essential elements of establishing a scheme. The definition refers to it being 'registered' with the Building Format Plan, but it was not suggested that there was any statement elsewhere in the contract referring to its recording as one element of establishing the scheme. In that sense, clause 14.1 omits to mention it. Clause 14.1 fixes the date of settlement by reference to three events, the registration of the Building Format Plan, the issue of the Certificate of Classification and the elapsing of a relevant time calculated by reference to clause 14.1. The event that would trigger the obligation to settle does not equate to advice that, in all respects, the scheme has been established. Without determining at what point it is relevantly 'recorded', it must be acknowledged that because of Registrar of Titles' practice, the Community Management Statement will have been recorded, at worst, virtually contemporaneously with registration of the plan of subdivision (which fits the description of Building Format Plan as defined in clause 2). However, there is no guarantee that that would be known to an average buyer and if it is accepted that the requirement in s 212 is essentially a consumer protection provision, it has not been complied with. It is not the fact that contemporaneous recording may occur that is decisive. It is the fact that clause 14(1) does not adequately convey to the buyer that more than registration of the Building Format Plan is necessary to establish the Community Title Scheme and trigger the fixing of a time for settlement.
[23] With regard to an argument that the provision in s 212 is intended to achieve a balance between the seller and the buyer of a unit, principally because the obligation under s 212 is not placed on any particular person, the practical reality is that, because all the detriment that might flow from non-compliance lies with the seller, it would be imprudent for a seller to fail to ensure that the contract complies with any prescriptive requirements. If they are not complied with, it is difficult to see that the objective of s 212, of ensuring that a buyer is made aware of being protected against being forced to settle a unit sale before the scheme is fully established or at short notice once it is, is promoted by the kind of construction proposed by the respondent."

8. On this appeal, much of the appellant's argument was directed to what his Honour saw as the purpose of s 212, which was to adequately convey to the buyer that "in all respects the scheme has been established". It is argued that his Honour wrongly attributed to the section a purpose of the disclosure or provision of information to assist a buyer to understand its legal position, when the evident purpose is to require relevant contracts to have a certain effect, namely that the parties will not be obliged to settle earlier than 14 days after the property, the subject of the contract, has been "perfected". His Honour's reasoning is open to that criticism but that does not resolve the present question. In particular it does not meet the point that the registration of a plan and the establishment of a scheme are not the same thing.

9. By s 10(1) of the BCCM Act, a community title scheme is defined to comprise:

> "(a) a single community management statement recorded by the registrar identifying land (the ***scheme land***); and
> (b) the scheme land."

The required content of a community management statement is prescribed by s 66, and it is that document which, subject to the operation of the Act, defines the legal relationship between the participants in a scheme, who are the owners of individual lots, the body corporate for the scheme and others such as a body corporate manager for the scheme.

10. Section 24 of the BCCM Act provides as follows:

> "**24 Establishment of community titles scheme**
>
> (1) A community titles scheme is established by—
>
> (a) firstly, the registration, under the Land Title Act, of a plan of subdivision for identifying the scheme land for the scheme; and
> (b) secondly, the recording by the registrar of the first community management statement for the scheme.
>
> [140134]
>
> (2) A community titles scheme is established when the first community management statement for the scheme is recorded."

There are then two acts by which a scheme is established. Each is performed by the registrar of titles[2] under the *Land Title Act 1994* (Qld). A notice to the buyer that the first of them (the registration of the plan of subdivision) has occurred would not appear to be, without more, a notice that the scheme had been established and thereby sufficient for s 212.

11. However, the appellant argues that by law these two acts must occur contemporaneously or at least that the second must immediately follow the first, so that a notice that the first has occurred is effectively a notice that both have occurred, and that the scheme has been established. That requires a consideration of what the registrar is to do under the Land Title Act.

12. Division 3 of Pt 4 of the Land Title Act provides for the registration of plans of subdivision. Section 49A provides that upon registration of a plan of subdivision, "a lot defined in the plan is created". Section 49C applies to a "building format plan of subdivision", which is a "plan of survey which defines land using the structural elements of a building, including, for example, floors, walls and ceilings".[3] The plan of subdivision which was required in the present case was a building format plan, to which s 49C thereby applied. By s 49C(2), common property for the community titles scheme had to be "created under the plan". Section 49DA provides that if scheme land for a community titles scheme is to be subdivided by such a plan of subdivision:

> "the registration of the plan and recording of the new community management statement for the scheme operate, without anything further, to create the common property".

Accordingly, the registration under the Land Title Act of a plan of subdivision, which is the first of the steps within s 24 of the BCCM Act, has the effect of creating the lots defined in the plan[4] but of itself, does not have the effect of creating the common property depicted in the plan. That occurs only once the plan is registered and the community management statement is recorded.

13. The recording of the community management statement is performed by the registrar under Pt 6A of the Land Title Act, within which s 115J requires the lodgement with the registrar of a request to record the statement. When recording a statement, the registrar must record a reference to it on the title for each lot and the common property within the scheme land: s 115L(1)(b). The statement takes effect when it is recorded as the statement for the scheme: s 115L(3). To the same effect is s 52 of the BCCM Act, which provides that a community management statement has no effect unless it is recorded.

14. Accordingly, the recording of the statement is an act which has distinct legal consequences. For example, until that occurred in this case, the appellant could not have conveyed the title which was required by the contract, which was the registered ownership of a lot within the scheme.

15. Although there is no express requirement for the registrar to record a statement immediately upon registering the relevant plan, it is at least strongly arguable that the registrar should endeavour to do so and that, before registering a plan, the registrar should be satisfied that the statement is in appropriate terms to be immediately recorded. If a substantial interval of time could occur between the creation of the lots by the registration of the plan and the establishment of the scheme upon the recording of the statement, the result could be the existence of individual lots, capable of being transferred, but not as lots the subject of the scheme. Accordingly, the practice of the registrar, to which his Honour referred, corresponds with what would seem to be an implied requirement of the legislation.

16. Nevertheless, the two steps are distinct, and s 24 of the BCCM Act makes it clear that both steps are necessary for the establishment of the scheme. As Mr Lumb for the respondent argued, it is possible that at least by an oversight, the recording of the statement might not immediately follow the registration of the plan. It remains the case that a notice of registration of the plan is not the equivalent of a notice of the establishment of the scheme.

17. The question then is whether this contract complied with s 212 of the BCCM Act. At least if considered alone, cl 14 did not

[140135]

comply because it provided for completion at least 14 days from a notice of registration of the plan. But the appellant argues that this should be read in the context of other terms of the contract, which include the following:

> "1.1 The Seller will sell to the Buyer and the Buyer will buy from the Seller the lot identified in the Contract Details on the terms in this Contract.
> …
> 1.4 The Lot will be a lot in a Community Titles Scheme. This means that the lot will be subject to the Body Corporate and Community Management Act 1997 and the Community Management Statement.
> …
> 2.1 In this contract, these terms have these meanings unless the contrary intention appears —
>
> **Building Format Plan** means the Building Format Plan that is registered to create the lot.
>
> **Community Management Statement** means the Community Management Statement to be registered with the Building Format Plan. The draft Community Management Statement forms part of the Disclosure Statement.
>
> …
>
> **lot** means a lot in the Scheme.
>
> **the Lot** means the Lot the Buyer is buying under this Contract

…

Scheme means the Community Titles Scheme for Rivage that will be created on registration of the Building Format Plan

…
4.2 The Seller will register the Building Format Plan and obtain a Certificate of Classification for the Building as soon as reasonably possible after construction of the Building is complete."

Particular reliance is placed on the definitions of the terms "Community Management Statement" and "Scheme". The first suggests that the Community Management Statement will be "registered" at the same time as the plan is registered. The definition of "Scheme" suggests that the Scheme will be established on registration of the plan. These provisions involve some misstatement of the operation of the legislation, and particularly s 24 of the BCCM Act. However, the appellant argues that as the parties have considered the registration of the plan to be the point at which the scheme will be established, the effect of cl 14.1 is that they have agreed that the notice should be one which advises of the establishment of the scheme. In this way it is argued that the clause met the requirement of s 212.

18. I am unable to accept that argument because the event unambiguously specified in cl 14.1(a) is the registration of the Building Format Plan. The fact that the parties were mistaken about the event which, in law, established the scheme does not alter the fact that they have made the registration of the plan, not the establishment of the scheme, the relevant event for fixing the date for settlement. And in cl 13, where it was agreed that the buyer might

> "apply to the body corporate created on registration of the Building Format Plan and the Community Management Statement to do any one or more of the things specified in Section 205 of the Act …",

they recognised the distinction between the registration of the plan and the "registration" (or more precisely, the recording) of the statement.

19. The learned primary judge described the registrar's practice of recording the statement virtually contemporaneously with registration of the plan. Nevertheless that is a practice which for many reasons might not be followed in every case. Notice of registration of the plan would be no more than notice that, if the practice had been followed, the scheme had been established. That is different from notice that the scheme has been established.

20. The result is that cl 14 does not have the same effect as the provision required by s 212(1). The respondent was entitled to cancel the contract and the declarations in its favour were correctly made.

21. The alternative submissions for the respondent were not persuasive. In my view s 212 does not require the employment of the very words of the section. It requires the contract to have the effect prescribed by the section. No purpose would be served by requiring the exact words to be used. The

[140136]

purpose of s 212 is not to inform the buyer of its legal rights. Rather the purpose is to inform the buyer that the scheme has been established and to allow a sufficient time prior to settlement for the buyer to make any necessary searches and enquiries. (It must be said that those purposes could have been just as well served by a provision which simply deemed every relevant contract to contain such a term, rather than providing a right of cancellation where the relevant term is not drafted according to the statute. In the present case, for example, there would seem to be no prospect that the buyer could have been prejudiced by the non-compliance with the statute such that it should be necessary to make the contract voidable by one side).

22. The other argument for the respondent was that s 212 requires a "prohibition" on an early settlement. On this argument, had cl 14.1(a) used the words "the community titles scheme has been established" in lieu of "the Building Format Plan has registered", nevertheless it would not have sufficed. This is because, it is suggested, the effect of that clause would have been different from one which was in terms that "the settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme

has been established". But there would be no difference in effect between those clauses. In each case the parties would have agreed that there was no obligation to settle within the 14 days and that the contract might be settled earlier only with the concurrence of the parties. In neither case would they be precluded from later reaching that concurrence, and settling earlier. In each case a variation of the contract to provide for an earlier settlement would contravene s 212(1). But that would not mean that the variation had no legal effect, but only that it gave rise to the right of cancellation. Accordingly, I would not have accepted this submission.

23. I would dismiss the appeal with costs.

A Lyons J:

24. It is clear that the parties agreed pursuant to cl 14.1(a) of the contract that the relevant settlement date was to be "14 days after the Seller notifies the Buyer that the Building Format Plan has registered". Section 212(1) however requires that the contract "must provide that settlement must not take place earlier than 14 days after the seller gives advice to the buyer that the scheme has been established or changed". The Act required notice of establishment or change of the scheme whereas the contract provided for notice of registration of the Building Format Plan. Those two events are not the same.

25. As McMurdo J outlines in his reasons, the clear result is that cl 14 does not have the effect which s 212(1) requires and the respondent was entitled to cancel the contract pursuant to s 212(3) of the Act. I also agree that use of the precise words of s 212(1) was not required and that it is sufficient if the relevant clause has the effect required by the section. I also consider that the purpose of s 212 is to inform the buyer that the scheme has been established and then provides a period of time which is sufficient for all the relevant searches to be completed prior to settlement.

26. I agree with the reasons given by McMurdo J that cl 14 of the contract did not meet the requirements of s 212(1) of the BCCM Act and that the appeal should be dismissed as the declarations were correctly made.

27. Accordingly, I also agree that the appeal should be dismissed with costs.

Footnotes

1 *Bossichix Pty Ltd* v *Martinek Holdings Pty Ltd* (2008) LQCS ¶90-147; [2008] QSC 278.

2 The term "registrar" in the BCCM Act being defined within Sch 6 of that Act to mean the registrar of titles.

3 *Land Title Act 1994* (Qld), s 48C.

4 s 49A.

SCALI PROPERTIES PTY LTD v CRITTENDEN & ANOR

(2009) LQCS ¶90-153; Court citation: [2009] QSC 290

Queensland Supreme Court

Judgment delivered 14 September 2009

Contract of Sale — Termination rights— Interpretation of finance approval condition under contract for sale — Purchaser's failure to give express notice of finance approval by finance date — Seller and purchaser continue to negotiate terms of contract — Further terms could not be reached — Whether seller may subsequently terminate contract on the basis of purchaser's failure to notify of finance approval by finance date — Purchaser asserts contracts on foot — Seller waived its rights to terminate through its subsequent actions — Seller's solicitors failed to reserve sellers rights to terminate — Contracts remain on foot and enforceable.

The respondents (sellers), Mr and Mrs Crittenden, entered into two contracts for sale to sell units to the applicant (purchaser) Scali. The issue disputed in this case was whether the sellers had validly terminated the contract for failure by the purchaser to confirm finance approval in relation to the sale. The purchaser applied to the court for declarations that the contracts remain on foot and decrees for specific performance of the contracts by the sellers.

The relevant finance approval provision in the contracts is stated as follows:

> "**3 Finance**
>
> 3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount … by the Finance Date …
>
> 3.2 The Buyer must give notice to the Seller that:
>
> (1) approval had not been obtained by the Finance Date and the contract is terminated; or
> (2) the finance condition has been either satisfied or waived by the Buyer.
>
> 3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5 pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice …"

The Finance Date was 17 June 2009. The purchaser failed to give notice required by cl 3.2 on 17 June 2009, and the sellers had a right to terminate the contracts by notice to the purchaser on that date. However, neither the sellers nor its solicitors gave notice to the purchaser on 17 June 2009 to terminate the contracts but rather continued to negotiate with the purchaser on further terms relating to the early release of the deposit in exchange for an extension to the settlement date under the contracts.

Subsequently, further terms to the contracts could not be reached by the parties, and the solicitors for the sellers terminated the contracts based on the purchaser's failure to advise the sellers of finance approval in accordance with cl 3.2. The purchaser disputed the termination and asserted that the contracts remain on foot.

Held: Contracts remain on foot

1. The purchaser failed to provide notice under cl 3.2 by 5 pm on 17 June 2009, and as such the sellers gained a right to terminate the contracts by notice to the purchaser. The sellers did not purport to exercise that right until later, but by then, the sellers had waived the right of termination or elected to affirm the contracts.

2. In the subsequent (after 17 June 2009) letters of negotiation between the parties, the sellers proceeded as if the contracts were on foot, contemplating an extension of time for settlement on certain conditions. The terms of the letters involved an acknowledgment that time was then "of the essence". The letters did not reserve the sellers' right to terminate or say that the further negotiation was "subject to" or "without prejudice to" that right to terminate.

3.

[140138]

The communications evidence the sellers clear and unequivocal intention to proceed to completion; they are consistent only with the sellers maintaining or affirming the contracts. It follows that the sellers could not terminate the contracts later on 2 July 2009 as they purported to do so.

4. The contracts remain on foot and enforceable.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

C D Coulsen (instructed by Winchester Young and Maddern) for the applicant.

CC Wilson (instructed by Rowe Lawyers) for the respondents.

Before: de Jersey CJ

Editorial Comment: It is interesting in his Honour's opinion (in obiter) that although it was not necessary to determine this point in the case, the letter to the seller in the subsequent negotiations, which stated on behalf of the purchasers: "Transfer documents will be forwarded to your client's execution today", did not waive the benefit of the finance condition under cl

3.2 of the contracts. Clause 3.2 required the ***express*** waiver by the purchasers, and the waiver could not be inferred from conduct.

This judgment highlights the importance of the wording of correspondence and dealings between negotiating parties to a contract. For the purposes of practice, it suggests that solicitors should be careful to note any conditions precedent to settlement or terms which give rise to a client's right to terminate. Solicitors should reserve its client's contractual rights prior to further negotiations between the parties, as failure to do so may result in a waiver of those rights.

Chief Justice:

1. The respondents, Mr and Mrs Crittenden, entered into two separate contracts to sell home units to the applicant Scali. The contracts were dated 27 May 2009. The issue is whether the contracts have been terminated, or remain on foot. Scali seeks declarations that they remain on foot, and decrees for specific performance. Because Mr and Mrs Crittenden raise a factual issue about Scali's financial capacity to complete, any relief should be confined to declarations.

2. Each contract contained the following cl 3:

"**3 Finance**

3.1 This contract is conditional on the Buyer obtaining approval of a loan for the Finance Amount from the Financier by the Finance Date on terms satisfactory to the Buyer. The Buyer must take all reasonable steps to obtain approval.
3.2 The Buyer must give notice to the Seller that:

(1) approval has not been obtained by the Finance Date and the contract is terminated; or
(2) the finance condition has been either satisfied or waived by the Buyer.

3.3 The Seller may terminate this contract by notice to the Buyer if notice is not given under clause 3.2 by 5 pm on the Finance Date. This is the Seller's only remedy for the Buyer's failure to give notice.
3.4 The Seller's right under clause 3.3 is subject to the Buyer's continuing right to terminate this contract under clause 3.2(1) or waive the benefit of this clause 3 by giving written notice to the Seller of the waiver."

3. The "Finance Date" was 17 June 2009. Scali failed to give the notice required by cl 3.2. Consequently, at 5 pm on 17 June 2009, Mr and Mrs Crittenden gained a right to terminate the contracts by notice to Scali.

4. The evidence shows the following exchange of correspondence after 17 June 2009:

1. On 26 June 2009, the solicitor for Scali wrote to the solicitors for Mr and Mrs Crittenden saying:

   "We confirm that we are holding the deposit funds of $170,000 in respect of both contracts.

   Mrs Crittenden has been contacting our office and requesting the release of the deposit.

   We have taken instructions from Mr Scali and while at some point during the many negotiations between our respective clients there was some talk about the early release of the deposit, as you will be able to advise your client the

   [140139]

   contracts do not make provision for early release of the deposit, and Mr Scali has instructed that he is not prepared to authorise its early release."
2. On 29 June 2009, the solicitors for Mr and Mrs Crittenden wrote to the solicitor for Scali saying:

   "We confirm that our client is agreeable to an extension of the settlement date until 31 August 2009, with time to remain of the essence for both contracts above on the provision that your client releases the deposit monies of $170,000 (in total) to our client immediately."
3. On 30 June 2009, the solicitor for Scali wrote to the solicitors for Mr and Mrs Crittenden saying:

   "Our client has not contacted us as yet with the instructions as per your correspondence however we will contact him today.

Part of the problem in this matter is that the clients continue to discuss matters amongst themselves and it would be better for all concerned if they directed their instructions through our respective selves."

4. On the same day, the solicitor for Scali wrote again as follows:

"Mrs Crittenden has requested that the deposit be released unconditionally. That did not form part of the terms of the contract.

If Mr Scali is to release the deposit unconditionally he has advised that it be on the following terms:

1. That the settlement date be extended to 31 August 2009.
2. That the contract value for each of the properties be amended to $1 million."

5. On the same day, the solicitors for Mr and Mrs Crittenden wrote:

"Our clients are unable to change the contract values for either properties as changes to the values will have serious capital gains tax implications for our clients. They are only prepared to extend the settlement date until 31 August 2009, with time to remain of the essence if the full deposit is released to our clients unconditionally immediately."

6. On 2 July 2009, the solicitor for Scali wrote:

"Our instructions are not to extend settlement nor to release the deposit to your clients.

Transfer documents will be forwarded to you for your client's execution today."

7. On the same day, the solicitors for Mr and Mrs Crittenden wrote:

"Can you please advise urgently whether your client has obtained finance for the above properties and that the contract is unconditional? Finance was due on 17 June 2009."

8. Also on 2 July 2009, the solicitors for Mr and Mrs Crittenden wrote:

"We confirm that our clients have elected to terminate both the contracts above under the Finance Clause for your client's failure to advise of your client's finance approval by the finance date in the contract.

We authorise you to release the deposit monies to your client."

9. Also on 2 July, the solicitor for Scali wrote:

"My client has not advised that he has agreed to terminate the contracts.

In addition, there is no positive obligation under the contracts for our client to advise in relation to finance. Our client is only entitled to rely on the Finance Clause in the event that finance is not available.

As far as I am concerned, the contracts remain on foot, with settlement and vacant possession to be given on 13 July 2009."

5. As mentioned, when Scali failed to give notice under cl 3.2 by 5 pm on 17 June 2009, Mr and Mrs Crittenden gained a right to terminate the contracts by notice to Scali. Mr and Mrs Crittenden did not purport to exercise that right until by fax of 2 July, referred to in para 8 above. But by then, Mr and Mrs Crittenden had waived that right of termination or elected to affirm the contracts.

6. That emerges from the letters from their solicitors of 29 June 2009 (para 2 above) and 30 June 2009 (para 5 above).

7.

[140140]

In those letters, the solicitors for Mr and Mrs Crittenden were proceeding as if the contracts were on foot, contemplating an extension of time for settlement on certain conditions. The terms of the letters involved an acknowledgement that time was then "of the essence". (The then current date for completion was 13 July 2009.)

8. The solicitors for Mr and Mrs Crittenden did not in those letters reserve the Crittendens' right to terminate, or say that the further negotiation was "subject to" or "without prejudice to" that right to terminate. In that regard see *Tropical Traders Ltd* v *Goonan* (1964) 111 CLR 41, 53, 55, 61.

9. The communications evidence Mr and Mrs Crittenden's clear and unequivocal intention to proceed to completion: they are consistent only with the Crittendens maintaining or affirming the contracts. See *Sargent* v *ASL Developments Ltd* (1974) 131 CLR 634, 641–6, 655–6. It follows that they could not terminate on 2 July as they purported to do.

10. Separately, Mr Coulsen submitted, for Scali, that by the letter of 2 July 2009 (para 4.6 above), in saying: "Transfer documents will be forwarded to your client's execution today", Scali waived the benefit of the finance condition. It is not necessary for me to determine that point, but it would have to confront an argument that cl 3.2 contemplates notice of express waiver, in terms that is, and not a waiver to be inferred from conduct (see also cl 3.4).

11. On the undisputed facts established by the evidence before me, the contracts remain on foot and enforceable.

12. There will be declarations:

> 1. that the contract of sale between the respondents and the applicant for the sale of the property at 1/32 Sunset Boulevard, Surfers Paradise, lot 1 on BUP 101831, County of Ward, Parish of Gilston, remains on foot;
> 2. that the contract of sale between the respondents and the applicant for the sale of the property at 2/32 Sunset Boulevard, Surfers Paradise, lot 2 on BUP 101831, County of Ward, Parish of Gilston, remains on foot.

13. There will also be an order that the respondents pay the applicant's cost of and incidental to the proceeding, to be assessed on the standard basis. I reserve liberty to apply in writing within seven days should a different costs order be sought.

COLLIS v CURRUMBIN INVESTMENTS PTY LTD

(2009) LQCS ¶90-154; Court citation: [2009] QSC 297

Queensland Supreme Court

Judgment delivered 18 September 2009

Contract of sale — Purchaser entered into a contract for sale — Purchaser alleged seller did not direct purchaser's attention to warning statement — Seller argues covering letter enclosing "Important Notice to Buyer" as first page of documents is sufficient to direct purchaser's attention to the warning statement — Whether actual words "direct attention" is required — Whether seller breached the Property Agents and Motor Dealers Act 2000 s 365(2A)(c)(ii) — Whether purchaser's subsequent actions in agreeing to an extension of settlement 9 months after contract signed means waiver of purchaser's statutory right to be directed to warning statement and any termination in that aspect.

The applicant (purchaser), Mr Collis, entered into a contract for sale of a house with the respondent (seller), Currumbin. Subsequently, the purchaser terminated the contract as it asserts that the seller failed to comply with s 365(2A)(c)(ii) of the Property Agents and Motor Dealers Act (PAMDA) in directing the purchaser's attention to the warning statement prior to entering into the contract.

One of the established facts of this case was that the seller's solicitors sent a letter enclosing the signed contract. The letter said:

[140141]

"We now **enclose** the following documents:

1. Important Notice to Buyer;
2. PAMD Form 27c;
3. Disclosure Statement; and
4. PAMD Form 30c and Contract."

The solicitor for the sellers confirmed that the documents were included in the order noted, and the "Important Notice to Buyer" was the first document in the set of documents spirally bound.

Under s 365(1)(b), the purchaser and seller became bound by the contract when the purchaser or its solicitor (as in this case) received the warning statement (the Important Notice to Buyer) in a way prescribed by subsection (2A). Subsection (2A)(c)(ii) refers to the agent's receiving the document if (as in this case) the seller's agent directs the attention of the buyer's agent to the warning statement; an example under the statutory provision was "by including a paragraph in an accompanying letter". When the purchaser became bound by the contract, the five-day "cooling-off period", within which the buyer might terminate (s 368), commenced.

1. Was there sufficient direction by seller to the Warning Statement?

The purchaser's solicitor asserted that the cooling off period had not commenced, because the sellers had not directed the attention of the purchaser or his solicitor to the warning statement.

Counsel for the seller submitted that the seller sufficiently directed the attention of the purchaser's solicitor to the warning statement by referring to it in the short one-page covering letter. The covering letter was the first document of the four referred to, and the first in the first set in spiral binding. Counsel for the seller also argued that it was particularly significant that the recipient of the covering letter was the solicitor for the purchaser who might have been expected to appreciate the significance of that particular document.

2. Whether purchaser waived right to terminate?

The seller also submitted as an alternative argument that the seller had waived the right to terminate the contract or was estopped from terminating because in October 2008 (9 months), after the contract had been signed, one of the directors of the seller company offered the purchaser some design upgrades to the house and at the same time requested an extension of the construction period allowed under the contract in order to complete the upgrades. The purchaser signed a form agreeing to the extension. The seller argued that the purchaser made a clear representation that he was proceeding with a subsisting contract upon which the seller relied in the steps it subsequently took.

Held: Purchaser's application dismissed, contract remains on foot

1. The seller did direct the attention of the solicitors for the purchaser to the warning statement by referring to it expressly in that short one-page covering letter, and as the first of the four numbered documents enclosed with the letter describing it as an "Important Notice to Buyer". It was not necessary in order to comply with s 365 that the words "direct attention" as such must have been used. It was, in the Chief Justice's judgement, sufficient if, by referring specifically to the document, as one of importance, and prominently in an otherwise brief communication, the seller in fact drew attention to the document. The position would have been different had the notice not been referred to expressly in the letter, and simply included in the same envelope when

delivered. It follows that the purchaser became bound by the contract; the cooling-off period began and the purchaser could within the five days have terminated the contract but did not exercise that right to termination so that the contract subsisted.

2.

[140142]

The purchaser acted in such a way in October 2008 so as to waive his statutory right to have the warning statement drawn to his attention or to terminate in relation to any aspect of that requirement.

3. The application is dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

G Radcliff (instructed by Radcliff Taylor Lawyers) for the applicant.

P L O'Shea SC (instructed by Kinneally Miley) for the respondent.

Before: de Jersey CJ

Editorial Comment: This case clarifies for practitioners that it is not necessary in order to comply with s 365 of the Property Agents and Motor Dealers Act that the actual words "direct attention" be used to draw a purchaser's attention to the Warning Statement. By including a covering letter as the first page of enclosed documents, and the letter prominently referring to the enclosed Warning Statement as one of importance, then it was determined in this case that the seller did in fact draw the purchaser's attention to the Warning Statement.

Further the case also suggests that where a purchaser takes subsequent action indicating an intention to complete the contract, the courts may interpret the purchaser's actions to be an implied waiver of his statutory right to have the warning statement drawn to his attention.

Chief Justice:

Introduction

1. The applicant Mr Collis seeks a declaration that he lawfully terminated an agreement dated 10 January 2008, and the return of the deposit monies of $39,500. It was an agreement for the purchase by Mr Collis of a proposed lot, on which a dwelling house was to be constructed. The case raises questions under the Property Agents and Motor Dealers Act 2000 (Qld) (PAMDA).

Events of 9 January 2008

2. On 9 January 2008 Mr Collis attended the sales office of the respondent company. He signed the contractual documents proffered to him. There is a factual issue, not susceptible of summary resolution, whether the seller or the seller's agent directed the attention of Mr Collis to the warning statement, as required by s 365(2A)(c)(ii).

Events of 14 January 2008

3. Then on or about 14 January 2008, the solicitors for Mr Collis received, from the solicitors for the respondent, a letter enclosing the contract which had by then been signed by the respondent (seller). The letter said:

> "We now **enclose** the following documents:
>
> 1. Important Notice to Buyer;
> 2. PAMD Form 27c;
> 3. Disclosure Statement; and
> 4. PAMD Form 30c and Contract."

Mr Thorpe, the solicitor for the respondent, confirms that the documents were included in that order. The "Important Notice to Buyer" was the first document in a set of documents spirally bound.

Whether the requirement of s 365(2A)(c)(ii) PAMDA was satisfied.

4. Under s 365(1)(b), Mr Collis and the respondent became bound by the contract when, as relevant, the buyer's agent (his solicitors) received the warning statement (the Important Notice to Buyer document) "in a way mentioned in subsection (2A)". Subsection (2A)(c)(ii) refers to the agent's receiving the document if, as

presently relevant "the seller's agent directs the attention of the … buyer's agent to the warning statement …" The examples under the statutory provision include "by including a paragraph in an accompanying letter". When the buyer became bound, the five-day "cooling-off period", within which the buyer might terminate (s 368), commenced.

5. There was no purported termination within the ensuing five-day period. But Mr Radcliff, for Mr Collis, submitted that the cooling-off period had not commenced, because the respondent had not directed the attention of Mr Collis or his solicitor to the warning statement. Mr Radcliff submitted the letter of 14 January 2008 "in no way draws the attention of the applicant to the warning statement". He referred to the decision of Fryberg J in *Hedley Commercial Property Service Pty Ltd* v *BRCP Oasis Land Pty Ltd* [2008] QSC 261 esp paras 84–88.

6.

[140143]

On the other hand, Mr O'Shea SC, for the respondent, submitted that the respondent sufficiently directed the attention of the solicitors for Mr Collis to the warning statement, by referring to it in the short one-page letter of 14 January 2008, with its being the first document of the four referred to, and the first in the first set in spiral binding. It was additionally significant, Mr O'Shea submitted, that the recipient of the letter was the solicitor for Mr Collis, who might have been expected to appreciate the significance of that particular document.

7. I consider that the respondent did direct the attention of the solicitors for Mr Collis to the warning statement, by referring to it expressly in that short one page letter of 14 January 2008, and as the first of the four numbered documents enclosed with the letter, describing it as an "Important Notice to Buyer". It was not necessary, in order to secure compliance with the statutory requirement, that the words "direct attention" as such must have been used. It was sufficient if, by referring specifically to the document, as one of importance, and prominently in an otherwise brief communication, the respondent in fact drew attention to the document. It did so. The position would have been different had the notice not been referred to expressly in the letter, and simply included in the same envelope when delivered.

8. It follows that Mr Collis then became bound to the contract (s 365(1)(b)), the cooling-off period began (s 364 definition of "cooling-off period"), and Mr Collis could within those five days have terminated the contract (s 368). Mr Collis did not exercise that right of termination, so that the contract subsisted.

9. I turn to the respondent's alternative position, which assumes (contrary to my view) that in mid-January 2008 there was no compliance with s 365(2A)(c)(ii).

Events of October 2008: waiver/estoppel

10. According to the affidavit of Mr Chapman, a director of the respondent, on 20 October 2008 he wrote to Mr Collis offering some "design upgrades, including dual water reticulation, each house having its own 10,000 litre tank, natural gas supply and reticulation and electrical wiring", at the same time requesting an extension of the period for construction allowed by the contract, from 18 months to 36 months. Mr Collis subsequently returned a signed form to the respondent confirming that extension.

11. Mr Chapman swears as follows:

> "Currumbin Investments (the respondent) did not contract with a builder to build houses where there was (to the knowledge of Currumbin Investments) doubt as to there being a building contract in place, or where the buyer was in default or otherwise indicating an intention not to proceed with the contract because it was unable or unwilling to settle."

12. On 25 November 2008 the solicitors for the respondent wrote to Mr Collis's solicitors saying:

> "Our client expects registration of the plan and settlement to occur in July 2009. Our client expects to appoint a builder by the end of this week. The sequencing of building of the house may change giving rise to a later settlement date. Please advise immediately (before our client appoints a builder) if your client has any issue with settlement occurring in the period from July to December 2009."

No such advice was forthcoming. The respondent proceeded to engage a builder.

13. Mr O'Shea submitted that Mr Collis thereby waived any right to terminate in relation to the warning statement. The respondent relied on waiver in the sense of estoppel rather than election, and referred to *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 428. The evidence led for the respondent would, if accepted, arguably establish the elements going to found an equitable estoppel or waiver. On that evidence, Mr Collis made a clear representation that he was proceeding with a subsisting contract, upon which the respondent relied in the steps it subsequently took.

14. In the event that the parties had not by then become bound to a contract, for the reason that the requirement in s 365(2A)(c)(ii) had not been satisfied, Mr Radcliff queried how any waiver or estoppel could operate, there being no established legal framework of rights and duties binding the parties.

15.

[140144]

Mr O'Shea referred in response to the comparable case of *Blackman* v *Milne* [2006] QSC 350, paras 14 and 20. I conclude that by his conduct in October 2008, Mr Collis waived his "statutory right … to have the buyer's attention directed to the warning statement", that being "a statutory right created for the buyer's private benefit" (para 20).

Events of March 2009

16. It remains to mention the purported determination of the contract by Mr Collis in March 2009.

17. On 3 March 2009 the respondent wrote to Mr Collis enclosing various documents, including an extension agreement and another copy of the warning notice, which it said had been "delivered to your solicitor with letter of 14 January 2008 and the Contract of Sale as a direction in accordance with the PAMD Act 2000 (s 365(2A)(c)(ii))".

The letter then said:

> "Out of an abundance of caution, we again direct your attention to the PAMD Form 30c Warning Statement; BCCM Form 14 information sheet and the relevant contract (spiral bound in that order as the document referred to as the Contract of Sale)."

18. Mr Collis proceeded on the basis that was the first and only compliance with s 365(2A)(c)(ii), and on 9 March 2009 (conceded to be within any five day period arising), the solicitors for Mr Collis wrote to the respondent purporting to terminate the contract.

19. That purported termination was of no effect, on two alternate bases:

> 1. because the only applicable "cooling-off period" had commenced on or about 14 January 2008, the letter of that date having satisfied the requirement of s 365(2A)(c)(ii), and Mr Collis did not terminate within that period; or
> 2. because if, contrary to my view, the respondent had not complied with s 365(2A)(c)(ii), in October 2008 Mr Collis acted in such a way as to waive his statutory right to have the warning statement drawn to his attention or to terminate in relation to any aspect of that requirement.

20. I should make clear the extent of my factual determination on this application. I have determined matter one, where the underlying facts are clear and undisputed. As to the alternative matter two, it suffices that I conclude that the respondent's position in that respect is factually arguable, so as to render inappropriate any summary determination of the application in Mr Collis's favour, should there have been no compliance with s 365(2A)(c)(ii) to that stage.

Orders

21. I therefore order that the originating application filed on 30 July 2009 be dismissed. I order the applicant to pay the respondent's costs, to be assessed on the standard basis. I reserve liberty to apply in writing, within seven days, should a different costs order be sought.

MIRVAC QUEENSLAND PTY LTD v HORNE & ORS

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(2009) LQCS ¶90-155; Court citation: [2009] QSC 269

Queensland Supreme Court

Judgment delivered 4 September 2009

Off-the-plan contract of sale — Where one disclosure statement given to buyer under s 21 of the Land Sales Act 1984 and s 213 of the Body Corporate and Community Management Act 1997 — Where further statement given to buyer pursuant to s 214 of the Body Corporate and Community Management Act — Whether further statement to correct inaccuracies in original disclosure necessitates a rectification statement under s 22 of the Land Sales Act — Whether there was anticipatory breach of contract by seller not providing rectification statement — Whether buyer must specifically perform contract.

The defendants (Horne) have applied to the court for summary judgment against the plaintiff (Mirvac) on Mirvac's claim for specific performance of an off-the-plan contract of sale entered into between the parties, and for further summary judgment on their counterclaim that they had validly terminated the contract because of an anticipatory breach by Mirvac.

[140145]

On entering into the contract, Mirvac had provided Horne with one disclosure statement which contained all the required disclosure information under s 21 of the *Land Sales Act 1984* (LSA) and s 213 of the *Body Corporate and Community Management Act 1997* (BCCMA). Later in the development, Mirvac also provided Horne with further statements pursuant to s 214 of the BCCMA to correct inaccuracies in the original disclosure statement, in particular, the floor area of the proposed lot. Horne argued that s 22 of the LSA required Mirvac to also provide a "rectification statement" because the further statement provided under s 214 of the BCCMA acknowledged that the information contained in the original disclosure statement was or had become inaccurate.

Mirvac refused to provide a rectification statement and claimed for specific performance of the contract by Horne. Horne did not settle the contract as it alleged that Mirvac's failure to provide a rectification statement under the LSA was anticipatory breach of the contract thereby allowing Horne to validly terminate the contract. In its answer to Horne's counterclaim, Mirvac denied that Horne had any right to terminate the contract and denied that the contract had been validly terminated. Mirvac pleaded that pursuant to the contract terms, Mirvac was entitled to vary the size of the lot by up to 5%.

Section 22 of the LSA provides:

> "**22 Rectification of statement under s 21**
>
> (1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section 21(4) or (6) in sufficient compliance with, section 21(1)—
>
> (a) is not accurate at the time it is given; or
> (b) contains information that subsequently to the time it is given becomes inaccurate in any respect;
>
> it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot.
> (2) Subsection (1) applies whether the statement in writing is given in due time in accordance with section 21 or at a later time.
> …
> (4) Where a vendor or a vendor's agent is required under subsection (1) to give to the purchaser or the purchaser's agent a statement of particulars then—
>
> (a) the vendor or the vendor's agent shall not deliver to the purchaser or the purchaser's agent a registrable instrument of transfer in respect of the lot the subject of the purchase in question; and
> (b) the purchaser shall not be required to pay the outstanding purchase moneys;
>
> until the expiration of a period of 30 days after the receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1) or until the time stipulated by the instrument made in respect of the sale and purchase for the payment of those moneys (whichever period is the later to expire) unless it is otherwise agreed in writing between the vendor or the vendor's agent and the purchaser or the purchaser's agent, after receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1)."

Horne's submission for summary judgment against Mirvac:

1. Firstly, s 22 of the LSA is engaged if the disclosure statement contains information that "subsequently to the time it is given becomes inaccurate in any respect", even in respect

[140146]

of a matter that was not required to be included in the statement given pursuant to s 21 of the LSA. This is based on the premise that if the seller provides a single disclosure statement and chooses to include in that document information that subsequently becomes inaccurate, then s 22 is engaged.

2. Secondly, the further statements given by Mirvac each state that the earlier statement given pursuant to s 213 of the BCCMA "is or has become inaccurate". That was an admission by Mirvac that the original statement (which was also given in compliance with s 21 of the LSA) has become inaccurate; thereby a rectification statement from Mirvac is required under s 22 of the LSA.

3. Thirdly, the original statement became inaccurate because the floor area of the lot was used to identify it (a requirement under s 21 of the LSA is that the seller must identify the lot being sold), and this area has now changed.

Held: Application for summary judgment dismissed

1. Horne's interpretation of s 22 of the LSA was not accepted. Section 22 refers to "a statement in writing of particulars referred to in section 21(1)". For s 22 to apply, the statement in writing of the s 21(1) particulars (ie particulars regarding identifying the lot to be purchased, the names and addresses of the vendor and buyer etc) must be inaccurate at the time the statement of particulars was given or contain information that subsequently becomes inaccurate. Inaccurate information in the statement that relates to other matters may be the subject of a separate obligation under s 214 of the BCCMA or other consequences; however, it does not trigger s 22. The language of s 22 indicates that it is concerned with inaccuracies in the statement in writing of the particulars referred to in s 21(1), not extraneous matters.

2. The further statements provided by Mirvac were admissions of inaccuracy in respect of matters required to be disclosed pursuant to s 213 of the BCCMA rather than particulars required by s 21 of the LSA. In any event, the factual issue of whether these statements are admission that the original disclosure statement had become inaccurate in respect of the particulars referred to in s 21(1) is not one appropriate for determination on an application for summary judgment.

3. Section 21(1) requires a statement to be given that "clearly identifies the lot to be purchased". The contract provided that the seller could make changes to the size of a lot of up to 5% (more or less) than that shown in the disclosure statement. Accordingly, the description of the floor area on the plan insofar as it operated to clearly identify the lot should be taken to be up to 5% different (more or less) from 177 m^2, namely that it would have an area of between 168.15 m^2 and 185.85 m^2. In short, insofar as the description of the floor area served to clearly identify the lot, the information provided did not become inaccurate after the disclosure statement was given. The reduction in 1 m^2 in the size of the lot did not give rise to an inaccuracy that would trigger s 22.

4. The defendants' application for summary judgment in respect of its defence against specific performance of the contract was dismissed. The defendants' counterclaim against Mirvac was also dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

J W Peden (instructed by Nicholsons Solicitors) for the applicant (Horne).

M D Martin (instructed by ClarkeKann) for the respondent (Mirvac).

Before: Applegarth J

Editorial Comment: This case clarifies for practitioners that in an off-the-plan sale, if the vendor or vendor's agent chooses to provide a single disclosure statement to the purchaser in compliance with both the vendor disclosure requirements of s 21 of the LSA and s 213 of the BCCMA, then any "further statements" provided to the purchaser pursuant to s 214 of the BCCMA will not trigger the requirement that the vendor has to provide a further "rectification

[140147]

statement" under s 22 of the LSA, ***except*** in the circumstance where those inaccuracies concern the particulars listed under s 21 of the LSA.

Applegarth J:

1. The defendants apply for summary judgment on the plaintiff's claim for specific performance of a building unit contract, and for summary judgment on their counterclaim that they have validly terminated the contract because of an anticipatory breach. One matter in dispute between the parties is whether s 22 of the *Land Sales Act 1984* (Qld) ("the *LSA*") required the plaintiff to give a "rectification statement" to the defendants after the proposed lot became registered because, as the defendants allege, a disclosure statement which identified the lot to be purchased contained information that later became inaccurate in respect of the floor area of the proposed lot. Another matter in dispute is whether s 22 of the *LSA* required the plaintiff to give a rectification statement because further statements provided pursuant to s 214 of the *Body Corporate and Community Management Act 1997* (Qld) ("the *BCCM Act*") acknowledged that the information contained in the original disclosure statement given pursuant to s 213 of the *BCCM Act* was or had become inaccurate.

That matter involves a question of statutory interpretation about the extent of the duty in s 22 of the *LSA* in circumstances in which an original disclosure document is made pursuant to s 213 of the *BCCM Act* and s 21 of the *LSA*.

2. The issues to be determined in applying the principles governing applications for summary judgment are:

> (a) whether the plaintiff has no real prospect of succeeding on its claim, and there is no need for a trial of the claim because of a failure to provide a "rectification statement" pursuant to s 22 of the *LSA*; and
> (b) whether the defendants are entitled on their counterclaim to a declaration that they have validly terminated the contract and to the return of their deposit because the plaintiff has no real prospect of successfully defending that counterclaim and there is no need for a trial of it because the plaintiff was not entitled to insist on settlement on the date that it fixed for settlement by reason of non-compliance with s 22 of the *LSA*, and that the plaintiff thereby committed an anticipatory breach of contract, entitling the defendants to terminate the contract.

Facts

3. The defendants agreed to purchase a residential unit in an apartment block in a staged residential development known as Tennyson Reach. Prior to the defendants' entry into the contract on 27 June 2007, the plaintiff gave to the defendants a "Disclosure Statement" pursuant to the *BCCM Act* and the *LSA*, along with other documents including a sale contract, in respect of lot number 3209. A disclosure statement was required by s 213 of the *BCCM Act*, and a statement was required by s 21 of the *LSA* because the unit, which had yet to be constructed, was a proposed lot that was to be included as part of a community title scheme for the Tennyson Reach development. There was one disclosure document because, as contemplated by s 21(5) of the *LSA*, the statement in writing required by s 21(1) of the *LSA* was incorporated into the statement required by s 213 of the *BCCM Act*. The document was provided to the defendants on 24 June 2007. It consists of 196 pages, including a substantial volume of plans in Chapter 4. Clause 1.6 of Chapter 1 (Information Disclosure) states:

> "1.6 **Plans**
>
> Chapter 4 of this Disclosure Statement incorporates copies of the initial plan of subdivision SP 195275 and draft Building Format Plan SP 195376 for Stage 1 identifying the Lot as described in item 3 of this Chapter and *subject to the provisions of the Contract*." (emphasis added)

4. The plans in the document included a floor plan for Level G and Lot 3209 was depicted on this plan by a mark around its perimeter. The plan showed it to be one of six apartments on Level G in Tower A. The plan depicted Lot 3209 having a floor area of 177 m^2 including a balcony of 15 m^2. The provisions of the contract include clause 6.3 which relevantly provides:

> "6.3 The Seller may make the following changes to the Lot:—
>
> (a) the size of the Lot or any part of the Lot may be up to 5% different (more or
>
> [140148]
>
> less) from that shown in the Disclosure Statement …"

The purchase price was $1,458,400, and the defendants paid a deposit in two parts totalling $145,840. Settlement was to occur no earlier than 14 days after the plaintiff gave notice to the defendants that "the scheme" as that term is defined in the contract had been established.

5. Further statements were provided by the plaintiff to the defendants, each of them expressed to be given pursuant to s 214 of the *BCCM Act*. The first "Further Statement" was dated 9 November 2007. A second further statement was dated 27 March 2009. Further statements were dated 16 April and 27 April 2009. The second further statement dated 27 March 2009 detailed various changes to the proposed community title scheme including a proposal to include a new lot in the scheme upon its establishment. The new lot was separated from the Stage 1 scheme land and its inclusion did not result in any changes to the lot entitlements

of any residential unit lots. The second further statement also included as an annexure a copy of survey plans that had been submitted to the Brisbane City Council for sealing. Those plans included a plan for Level G indicating that the floor area of Lot 3209 was 176 m^2 including a balcony of 14 m^2.

6. The proposed lot was registered on 28 April 2009. The solicitors for the plaintiff nominated 12 May 2009 as the date for settlement, and sought to deliver to the defendants a registrable instrument of transfer in respect of the lot.

7. By letter dated 11 May 2009 the solicitors for the defendant noted that Lot 3209 as indicated on the registered plan was different to the proposed Lot 3209 as detailed in the plan contained in the disclosure documents provided to the defendants prior to contract. They asserted that in accordance with s 22 of the *LSA* the particulars of the statement given to the defendants in accordance with s 21 of the *LSA* had become inaccurate and requested a further statement in accordance with s 22 of the *LSA*. On 12 May 2009 the solicitors for the plaintiff wrote in respect of the scheduled settlement, but did not address the matters raised in the letter of 11 May 2009, possibly because its author had yet to receive or read the letter of 11 May 2009. In any event, on 12 May 2009 the defendants' solicitors wrote two further letters restating the defendants' objections to settling and requesting that the plaintiff comply with its obligations under s 22 of the *LSA*. They indicated that the defendants did not intend to tender at settlement that day. They suggested and requested a 21 day extension of the settlement date to enable the parties to consider their positions, with time to remain of the essence. On 13 May 2009 the plaintiff's solicitors addressed the matter raised in relation to alleged non-compliance with s 22 of the *LSA* and two other unrelated matters that were raised by the defendants' solicitors. The plaintiff's solicitors contended that the defendants' solicitors appeared to be confusing the disclosures given pursuant to s 213 of the *BCCM Act* and those required by s 21 of the *LSA*. The plaintiff did not accept that there had been any non-disclosure of the matters required by s 21 of the *LSA* and accordingly rejected the defendants' contention that a further statement was required to be delivered under s 22 of the *LSA*.

8. On 25 May 2009 the plaintiff commenced a proceeding for specific performance of the contract and damages in lieu of or in addition to specific performance. The defence admitted most of the allegations contained in the statement of claim, but denied that the defendants were in breach of contract in failing to complete it on the date nominated for settlement, and denied the allegation that the plaintiff was ready, willing and able to complete the contract on that date. Paragraph 4 of the defence pleaded certain facts which are not in issue concerning the provision of the original disclosure statement on or about 21 June 2007, the further disclosure statements and the fact that the original statement and the second further statement included information about the floor area of the proposed lot. Paragraph 4(e) of the defence pleaded that the original statement contained information that "subsequently to the time it was given became inaccurate, in that the Proposed Lot as disclosed in the plaintiff's Original Statement would have a floor area of 177 m^2 (including a balcony of 15 m^2); whereas the Registered Lot had a floor area of 176 m^2". The defence pleaded that, in the premises, pursuant to s 22(1) of the *LSA* the plaintiff was required to give the defendants a

[140149]

rectification statement pursuant to s 22(1) of the *LSA* as soon as reasonably practicable after the proposed lot had become registered on 28 April 2009. The reply and answer does not specifically plead to paragraph 4(e) of the defence, however, it denied that the plaintiff was required to provide a statement of particulars as required by s 22(1) of the *LSA* and pleaded that the identity of the lot did not alter from the time of disclosure to the time of registration of the lot.

9. The reply and answer also pleaded that:

> (a) the provision of the further statements as pleaded in the defence rectified any inaccuracy in the original disclosure statement so that:
>
> > (i) upon registration of the lot there were no inaccuracies in the Disclosure Statement; and
> > (ii) there was no requirement to provide a s 22(1) *LSA* statement of particulars.
>
> (b) even if a notice pursuant to s 22 of the *LSA* was required (which was denied) the defendants had not been materially prejudiced within the meaning of s 25 of the *LSA*.

The plaintiff did not rely upon these additional matters in opposing the defendants' application for summary judgment.

10. By their counterclaim the defendants relied upon the matters contained in their defence and upon the communication by the plaintiff's solicitors of an election to affirm the contract and pursue the remedy of specific performance. The defendants pleaded that the plaintiff's "failure and/or refusal to provide the Rectification Statement when requested to do so" and calling for settlement without having complied with s 22 of the *LSA* constituted an anticipatory breach of the contract by the plaintiff entitling the defendants to terminate it. By the delivery of their pleading, the defendants purported to accept the anticipatory breach and terminate the contract. In its answer to the counterclaim the plaintiff denied that the defendants had any right to terminate the contract, denied that the contract had been validly terminated and pleaded that pursuant to clause 6.3 of the contract the plaintiff was entitled to vary the size of the lot by up to five per cent.

The statutory regime

11. The *BCCM Act* and the *LSA* provide for the disclosure of information by a seller to a buyer of a lot that is to be created in a community titles scheme. Each Act provides for certain disclosures to be made prior to entry into the contract. Section 213 of the *BCCM Act* provides for the disclosure of various matters in relation to the body corporate and the community titles scheme. Section 21(1) of the *LSA* provides for a statement in writing to be given that:

> "(a) clearly identifies the lot to be purchased; and
> (b) states the names and addresses of the prospective vendor and the prospective purchaser; and
> (c) clearly states whether the prospective vendor or the prospective vendor's agent (whether personally or by any employee) has made or offered to the prospective purchaser or the prospective purchaser's agent any representation, promise or term with respect to the provision to the purchaser of a certificate of title that relates to the lot in question only; and
> (d) if any representation, promise or term, such as is referred to in paragraph (c) has been made or offered, clearly states the particulars thereof; and
> (e) states the date on which it is signed."

If a prospective seller of a proposed lot is required to give a statement under s 21(1) of the *LSA*, also is required under s 213 of the *BCCM Act* to give a first statement relating to the proposed lot, and gives the first statement under that section that incorporates in the first statement the matters prescribed by ss 21(1)(a) to (d) of the *LSA*, then there is sufficient compliance with s 21(1) of the *LSA*.[1]

12. Each Act provides for further statements to be provided. Section 22(1) of the *LSA* requires a rectification statement to be given as soon as is reasonably practicable *after* the proposed lot has become a registered lot. It is necessary to set out s 22:

> "**22 Rectification of statement under s 21**
>
> (1) If a statement in writing of particulars referred to in section 21(1) given in accordance with, or pursuant to section
>
> [140150]
>
> 21(4) or (6) in sufficient compliance with, section 21(1)—
>
> (a) is not accurate at the time it is given; or
> (b) contains information that subsequently to the time it is given becomes inaccurate in any respect;
>
> it is the duty of the vendor and the vendor's agent to give to the purchaser or the purchaser's agent a statement in writing signed by the vendor or the vendor's agent of particulars required to be included in a statement given for the purposes of section 21(1) as soon as is reasonably practicable after the proposed lot has become a registered lot.

(2) Subsection (1) applies whether the statement in writing is given in due time in accordance with section 21 or at a later time.
(3) It shall be sufficient compliance with subsection (1) if 1 of them, the vendor or the vendor's agent, discharges the duty thereby imposed, whereupon the other of them shall be freed of the duty in respect of giving the rectification notice that has been given.
(4) Where a vendor or a vendor's agent is required under subsection (1) to give to the purchaser or the purchaser's agent a statement of particulars then—

(a) the vendor or the vendor's agent shall not deliver to the purchaser or the purchaser's agent a registrable instrument of transfer in respect of the lot the subject of the purchase in question; and
(b) the purchaser shall not be required to pay the outstanding purchase moneys;

until the expiration of a period of 30 days after the receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1) or until the time stipulated by the instrument made in respect of the sale and purchase for the payment of those moneys (whichever period is the later to expire) unless it is otherwise agreed in writing between the vendor or the vendor's agent and the purchaser or the purchaser's agent, after receipt by the purchaser or the purchaser's agent of a copy of the statement of particulars in accordance with subsection (1)."

13. By comparison, s 214 of the *BCCM Act* applies if the contract has not been settled and:

"(a) the seller becomes aware that information contained in the disclosure statement was inaccurate as at the day the contract was entered into; or

(b) the disclosure statement would not be accurate if now given as a disclosure statement."[2]

In such a case the seller must, within 14 days (or a longer period agreed between the buyer and the seller) after subsection 214(1) starts to apply, give the buyer a further statement rectifying the inaccuracies in the disclosure statement.[3]

14. Section 214(4) provides that the buyer may cancel the contract if:

"(a) it has not already been settled; and
(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate; and
(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement."[4]

Subsections 214(1) to (4) continue to apply after the first statement is given, on the basis that the disclosure is taken to be constituted by the disclosure statement and any further statement, and the disclosure statement date is taken to be the most recent further statement date.[5]

15. One significant difference between the further disclosure regime under s 22 of the *LSA* and the further disclosure regime under s 214 of the *BCCM Act* relates to the timing of the further statement. As can be seen from s 22(1) of the *LSA*, the rectification statement under that Act must be given as soon as is reasonably practicable *after* the proposed lot has become a registered lot. Under s 214(2) of the *BCCM Act* the seller must give the buyer a further statement within 14 days (or a longer agreed period) after:

(a) the seller becomes aware that information contained in the disclosure

statement was inaccurate as at the day the contract was entered into or;
(b) the disclosure would not be accurate if then given as a disclosure statement.

Accordingly, the obligation to give a further statement under s 214 of the *BCCM Act* may arise prior to the obligation to give a rectification statement under s 22(1) of the *LSA*. The obligation in s 214 of the *BCCM Act* does not cease once a scheme is established under the Act.[6] It continues until settlement.

16. Another significant difference between s 22 of the *LSA* and s 214 of the *BCCM Act* is that s 22(4) of the *LSA* effectively extends the date for settlement until the expiry of a period of 30 days after the receipt of the rectification statement. This differs from s 214 of the *BCCM Act* where there is "no statutory moratorium".[7] Each Act confers certain rights to avoid or cancel the contract if the buyer would be materially prejudiced by reason of the inaccuracy of a particular in the first statement or the extent to which the disclosure statement was, or has become, inaccurate.[8]

17. In *Hudpac Corporation Pty Ltd v Voros Instruments Pty Ltd*[9] I observed:

> "It is clear from the legislation that so far as the original disclosure statement is concerned that there is a legislative intent to ensure that there is not unnecessary duplication or repetition of the original information. However, the Act, in its terms, does not similarly state that a notice given under s 214 of the BCCM Act will operate to relieve a party from complying with the obligation in s 22(1) of the LSA. Such relief from the operation of section 22(1) cannot, in my opinion, be implied into the Act or carried forward by reason of the provisions in relation to the original statement.
>
> The principal reason that I reach that conclusion is that s 22(1) of the LSA and s 214 of the BCCM Act confer different rights in different circumstances. The obligation to give a statement, which I will refer to as a rectification statement, under each Act may arise in some cases at different times. The most important point of distinction is that s 22(4) gives a purchaser, in the circumstances in which a notice under s 22(1) is received, a period of 30 days after receipt of the relevant document to pay. That section does not give a right to avoid.
>
> However, the period of 30 days, amongst other things, will permit such a purchaser to check the title as registered and to, amongst other things, consider whether the changes are such as to give them a right to avoid the contract. By contrast, s 214 of the BCCM Act does not give that simple extension of time. It provides a buyer with an opportunity to cancel the contract if, amongst other things, the buyer 'would be materially prejudiced if compelled to complete the contract, given the extent to which the disclosure statement was, or has become, inaccurate'.
>
> In some cases the contents of the rectification statement will be relatively innocuous and not give a party such a right to avoid. In other cases, it may. In other cases, it may be a matter of uncertainty.
>
> It might have been possible for the legislation to be better aligned so as to avoid the unnecessary provision of rectification statements pursuant to both s 22 of the LSA and s 214 of the BCCM Act. However s 22 gives important rights to a purchaser. One right is to consider their position. It is a right which is conferred by statute, being a statute that has the purpose of protecting the interests of consumers in relation to property development and I do not consider that, in those circumstances, the Act can be construed so as to make it apply on a basis identical to that provided in s 214 of the BCCM. In essence, s 22(4) of the LSA gives important rights conferred by statute to an extension of time to settle."

Summary judgment principles

18. *UCPR* 292 and *UCPR* 293 govern summary judgment for the plaintiff and summary judgment for the defendant in near-identical terms. The discretion to give summary judgment for a plaintiff only arises if the court is satisfied that:

> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
> (b) there is no need for a trial of the claim or the part of the claim.

[140152]

The discretion to give summary judgment for the defendant against the plaintiff only arises if the Court is satisfied that:

(a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
(b) there is no need for a trial of the claim or the part of the claim.

The term "no real prospects" in *UCPR* 292 and *UCPR* 293 has been the subject of extensive judicial consideration, including by the Court of Appeal in *Deputy Commissioner of Taxation v Salcedo*[10] and more recently in *Bolton Properties Pty Ltd v JK Investments (Australia) Pty Ltd*.[11] In *Bolton*[12] Holmes JA remained of the view that was expressed by her Honour in *Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*:

> "The more appropriate inquiry is in terms of the Rule itself: that is whether there exists a real, as opposed to a fanciful, prospect of success. However, it remains, without doubt, the case that:
>
> > 'great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case'."[13]

Daubney J reached the same conclusion, and stated that the question is not whether a party's case is "hopeless" or "bound to fail".[14] Their Honours did not agree with the reasons of Chesterman JA that a case which has no real prospect of succeeding is one which is "hopeless" or "bound to fail".[15]

19. The rules require a judge to be satisfied, amongst other things, that there is "no need for a trial". Each member of the Court in *Bolton* emphasised the need for caution in granting applications for summary judgment. Holmes JA observed that summary judgment cannot be granted without the confidence that "there is no need for a trial of the claim or the part of the claim".[16] Chesterman JA stated that it is only where a trial can be seen to be pointless that judgment should be entered summarily.[17] Daubney J also remarked upon "the necessity for a judge to exercise great care, and proceed with appropriate caution, having regard to the patent seriousness of a decision to summarily terminate a proceeding by effectively denying a party the opportunity to present its case at a trial 'in the ordinary way and after taking advantage of the usual interlocutory processes'". [18]

20. The application of these principles may arise in a case in which the facts are not in dispute and the respective rights of the parties turn upon a question of law. Under the former rules governing summary judgment it was open to a judge to take the view that the extent and complexity of the matters of law and of argument thereon made it appropriate to decline to dispose of them "in chambers".[19] This view appears in *Theseus Exploration NL v Foyster*.[20] The Chamber Judge in that case dismissed the application for summary judgment without giving reasons. The High Court granted the plaintiff leave to appeal and heard full argument upon the legal issues in dispute. Barwick CJ, having reached "a clear conclusion as to the lack of validity in the respondent's submission that the appellant was unable to recover the amount claimed", stated that he was not prepared to hold that the judge erred in the course he took. Equally however, the Chamber Judge would not have been in error if he had granted the appellant's application for summary judgment. Barwick CJ stated:

> "The case was one which, in my opinion, could have been disposed of upon legal argument upon the application. But it was for the judge to be satisfied that there was a matter to be tried. Whilst there were no facts to be decided, it was open to the judge, in my opinion, to take the view that the extent and complexity of the matters of law and of argument thereon warranted a hearing."[21]

Gibbs J adopted a similar view and reviewed earlier authority which recognised the existence of some discretion by a judge to whom application for summary judgment is made in deciding whether the question of law raised is so difficult that it ought not to be decided summarily. The case involved questions that were "serious and disputable and, assuming that the learned primary judge had a discretion, it was entirely proper for him to decline to dispose of them in chambers".[22] Logically, the appeal should have been dismissed, however, the High Court having heard full argument on the questions upon which the fate of the action depended, each member of the court reached the conclusion that the defence raised by the

[140153]

respondent must fail. Stephen J[23] observed that while it may have been correct, on the original chamber application and after the nature of the respondent's intended defence was outlined, to have refused the application for summary judgment, it was contrary to both good sense and to justice after full argument in the High Court to permit the action to go to trial, followed perhaps by an appeal.

21. In *Sunbird Plaza Pty Ltd v Boheto Pty Ltd*[24] McPherson J (with whom Campbell CJ and Matthews J agreed) stated:

> "Difficult questions of law frequently arise in matters before the judge sitting in Supreme Court Chambers. There is authority for saying that in such instances the judge has a discretion which he may properly exercise by declining to determine such matters of law in Chambers for reasons such as pressure of work, the complexity of the issues involved, or the quality (or lack of it) of the submissions presented by counsel. But to require that a judge should invariably refrain from determining what are said to be difficult questions of law in Chambers, even though he may be ready, willing and able to undertake the task, is to deprive him of the discretion which the Rules unquestionably confer upon him in relation to such matters."

22. In Bolton[25] Chesterman JA observed that where the facts are settled and the respective rights of the parties turn upon questions of law, *UCPR* 292 would require the Court to give judgment in advance of trial, even where the point is difficult. This conclusion was said to involve a departure from the practice under the former rules.

23. I do not need to venture an opinion as to whether *UCPR* 292 and *UCPR* 293 have necessitated a departure from the practice under the former Rules concerning the discretion to determine, or to decline to determine, difficult questions of law on an application for summary judgment. The matter was not argued before me. I was prepared to hear the application for summary judgment and reserve judgment because the applicant/defendants contended that the facts were not in dispute and the issue turned on a matter of law concerning the application of s 22(4) of the *LSA*. It should not be assumed, however, that an application for summary judgment is the appropriate procedure to determine questions of law in advance of trial. Substantial time, legal costs and public resources can be occupied on applications for summary judgment only to reach the point in which the judge reaches the conclusion that the question of law is a complex one which cannot be conveniently heard and determined in the Applications List, or that what is presented as a question of law depends upon a contentious determination of factual issues that makes it inappropriate for summary judgment. If the application is likely to occupy more than two hours then generally it is an inappropriate matter for the Applications List and consideration should be given to the question of law being determined pursuant to *UCPR* 483. Even in cases in which a judge is able to embark upon difficult questions of law in the Applications List, consideration is required as to whether the determination of those questions, will facilitate "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense".[26] If the result is the entry of summary judgment then an appeal is a distinct possibility. The Court of Appeal may resolve the question of law but, in some cases, it may conclude that the matter was not a suitable one for summary judgment, for instance because what originally appeared to be a pure question of law in fact involved the resolution of contentious factual issues, with the result that the summary judgment is set aside. In such an event there will have been delay and unnecessary costs, without resolution of the question of law.

24. In this matter the question of law concerning the proper interpretation of s 22(1) of the *LSA* was an appropriate one for determination in the Applications List.

Defendants' application for summary judgment on the plaintiff's claim

25. On the application brought under *UCPR* 293 there is no dispute that a rectification statement has not been given to the defendants pursuant to s 22 of the *LSA*. The issue is whether s 22 of the *LSA* required the plaintiff to give a rectification statement because the original Disclosure Statement had become inaccurate. The defendants' submissions were in three parts. The first concerned the meaning of s 22(1). It involved the argument that s 22(1)

is engaged if the disclosure statement contains information that "subsequently to the time it is given becomes inaccurate in any respect", even in respect of a matter that was not required to be included in the statement given pursuant to s 21 of the *LSA*. The essential argument is if the seller resorts to a single Disclosure Statement and chooses to include in that document information that subsequently becomes inaccurate, then s 22 is engaged.

26. The second aspect of the defendants' case for summary judgment is that the further statements given to the defendants each state that the earlier statement given pursuant to s 213 of the *BCCM Act* "is or has become inaccurate".[27] This is said to involve admissions by the plaintiff that the original statement (which was also given in compliance with s 21) has become inaccurate, thereby necessitating a rectification statement under s 22. An associated submission is that the plaintiff's reply created a deemed admission that the information in the original statement became inaccurate because the size of the lot changed from 177 m^2 to 176 m^2.

27. The third aspect of the defendants' argument is that, in any event, the original statement became inaccurate because the floor area of the lot was used to identify it, and this area changed. I shall deal with each aspect in turn.

28. The defendants contend that any information in the Disclosure Statement that becomes inaccurate in any respect triggers the operation of s 22 of the *LSA*. They place reliance on the words in s 22(1)(b) "contains information that subsequently to the time it is given becomes inaccurate in any respect", and submit that s 22 focuses on inaccuracies in the disclosure statement. The result is that information which the seller chooses to include in a Disclosure Statement, whether in compliance with its obligations under s 21 of the *LSA*, its obligations under s 213 of the *BCCM Act* or otherwise[28] is covered by the section. I do not accept the defendants' interpretation of s 22. It is not supported by the words of the section or its purpose. Section 22(1) refers to "a statement in writing of particulars referred to in section 21(1)". It is this statement in writing of the particulars referred to in s 21(1) (namely the statement insofar as it gives particulars that clearly identify the lot to be purchased, states the names and addresses of the prospective vendor and the prospective purchasers etc) to which reference must be had for the purpose of s 22, and not the whole of the document in which these particulars are contained. For s 22 to apply the statement in writing of the s 21(1) particulars must be inaccurate at the time the statement of particulars was given or contain information that subsequently becomes inaccurate. Inaccurate information in the document that relates to other matters may be the subject of a separate obligation under s 214 of the *BCCM Act* or other consequences, however, it does not trigger s 22. The language of s 22 indicates that it is concerned with inaccuracies in the statement in writing of the particulars referred to in s 21(1), not extraneous matters.

29. The defendants' contention about the scope of s 22 of the *LSA* would have unreasonable and even absurd consequences. For instance, a minor inaccuracy, such as an error in respect of a matter that had nothing to do with the information required by s 21(1) (such as a typographical error in the postcode of the address of a surveyor whose details appear on a plan) would trigger s 22, and if no rectification statement was given, result in a delay in settlement by at least 30 days by virtue of s 22(4). It is not a sufficient response to these unreasonable and absurd consequences to contend that a seller who chooses to include extraneous information in a document that also discloses the particulars referred to in s 21(1), must face the consequences if the extraneous information proves to be inaccurate. An interpretation of s 22 that will best achieve the purpose of the *LSA* is to be preferred to any other interpretation.[29] The objects of the Act are:

> "(a) to facilitate property development in Queensland; and
> (b) to protect the interests of consumers in relation to property development; and
> (c) to ensure that proposed allotments and proposed lots are clearly identified; and
> (d) to achieve the objects mentioned in paragraphs (a) to (c) without imposing procedural obligations on local governments
>
> [140155]
>
> in addition to their obligations under the *Integrated Planning Act 1997*."[30]

Although a wide view of s 22 might protect the interests of consumers in relation to property development by requiring the provision of a rectification statement in respect of information in any part of a disclosure statement that contains information that is inaccurate at the time the statement is given or which contains information that subsequently becomes inaccurate in any respect, the purpose of the section is more limited. It is the rectification of a statement of particulars given under s 21. A broad interpretation of s 22 is not necessary to protect the interests of consumers in relation to property development, since other consumer protection legislation exists to protect consumers from statements that are misleading or deceptive or likely to mislead or deceive. The wide interpretation of s 22 contended for by the defendants might frustrate the timely settlement of contracts and generate substantial costs through the provision of rectification statements that are not necessary to correct a statement of the particulars referred to in s 21(1). Such an interpretation is inconsistent with facilitating property development in Queensland and is not necessary to protect the interests of consumers in relation to property development or to ensure that proposed lots are clearly identified.

30. I conclude that the information at which s 22(1)(b) is directed is information that is contained in the "statement in writing of particulars referred to in section 21(1)", and not in other parts of a document which do not include these particulars but which, for instance, disclose other matters required by s 213 of the *BCCM Act* or extraneous matters which the seller is not obliged to disclose under either s 21 of the *LSA* or s 213 of the *BCCM Act*.

31. The second aspect of the defendants' application for summary judgment points to the fact that the further statements given by the plaintiff pursuant to s 214 of the *BCCM Act* state that "information contained in the First Disclosure Statement given to the Buyer pursuant to s 213 of the *BCCM Act* (and as rectified by Further Statements given pursuant to s 214 of the *BCCM Act*) is or has become inaccurate".[31] This is relied upon as an admission that the original Disclosure Statement (which also operated as a statement for the purpose of s 21 of the *LSA*) contains inaccurate information and thereby triggers s 22. However these further statements appear to be an admission of inaccuracy in respect of matters required to be disclosed pursuant to s 213 of the *BCCM Act*, rather than the statement of particulars required by s 21 of the *LSA*. Given the contents of the further statements it is at least strongly arguable that this is the case, and the factual issue of whether these statements constitute an admission that the original Disclosure Statement had become inaccurate in respect of its statement of the particulars referred to in s 21(1) is not one which is appropriate for determination on an application for summary judgment.

32. Subparagraph 4(e) of the defence pleads that the disclosure statement that was provided to the defendants in June 2007 "contained information that subsequently to the time it was given became inaccurate, in that the Proposed Lot as disclosed in the plaintiff's Original Statement would have a floor area of 177 m^2 (including a balcony of 15 m^2); whereas the Registered Lot had a floor area of 176 m^2". This allegation was not specifically pleaded to by way of a denial or non-admission in the reply and answer and the defendants accordingly rely on a deemed admission under *UCPR* 166(1). At the hearing of the application counsel for the plaintiff indicated that subparagraph (4)(e) should have been specifically addressed in the reply and answer and indicated an intention to amend to specifically plead to it. It is apparent from the parties' pleadings, their correspondence and the submissions on the application for summary judgment that the real issue in dispute is whether the Disclosure Statement given in June 2007 contained information that subsequently became inaccurate in a respect which obliged the plaintiff to give a rectification statement pursuant to s 22 of the *LSA*. The plaintiff denies that it was required to provide a statement under s 22, and pleads that the identity of the lot did not alter from the time of disclosure to the time of registration of the lot. The defendants, in their submissions, recognise that this is a matter which goes "to the heart of the issue in dispute". The reply and answer pleads that

[140156]

pursuant to clause 6.3 of the contract the plaintiff was entitled to vary the size of the lot by up to five per cent. The plaintiff's reply and answer should be amended so that it specifically addresses paragraph 4(e) of the defence so as to facilitate the just and expeditious resolution of "the real issues" in the proceeding at a minimum of expense.[32] The application for summary judgment should not be determined on the basis of a deemed admission that the original statement contained information in relation to the floor area of the lot

which subsequently became inaccurate in circumstances in which the plaintiff's pleaded case is that it was entitled to vary the size of the lot as depicted on the plans by up to five per cent.

33. The third aspect of the defendants' case for summary judgment against the plaintiff's claim relates to the floor area of the proposed lot and whether, as alleged in paragraph 4(f) of the defence, the plaintiff was required pursuant to s 22(1) of the *LSA* to give the defendants a statement in writing of the particulars required to be included in the statement given for the purposes of s 21(1) as soon as reasonably practicable after the proposed lot had become a registered lot. Section 21(1) of the *LSA* requires a statement to be given that "clearly identifies the lot to be purchased". In this matter the lot was identified by lot number and by, amongst other things, a marking on a detailed drawing of the location of Lot 3209. The sheet is Sheet 10 of 15 amongst the plans contained in Chapter 4 of the Disclosure Statement and depicts Level G of the development. Lot 3209 appears on this sheet as one of six units in Tower A. This served to identify the lot as being located on Level G of Tower A and its position in relation to other units on that floor. Other plans in the Disclosure Statement identified other geographical aspects of relevance to the unit's location.[33]

34. The defendants rely on the floor area of the lot as recorded on Sheet 10 as something that identified the lot to be purchased. There is a compelling argument that the floor area of the unit is part of "describing and identifying the precise compartment of air space into which the constructed unit will fit".[34] The competing argument is that the Disclosure Statement sufficiently and clearly identified the lot without reference to its floor area and that the lot was clearly identified by its lot number, the floor on which it was intended to be and the marking on the drawing that indicated its location on that floor and its shape.

35. Although it may be possible to clearly identify a lot to be purchased without recording its total floor area in a statement provided under s 21 (a matter which I am not required to decide in order to determine this application) in a case such as this where the floor area is included on the plan, the better view is that the description of its floor area serves to clearly identify the lot in conjunction with other matters such as the lot number, the floor on which it is located and its position in the building. However, the identification of the lot by reference to the plan that I have described, which recorded it having a floor area of 177 m^2 (including a balcony of 15 m^2) has to have regard to the Disclosure Statement's contents concerning those plans. As previously noted, clause 1.6 of the Information Disclosure in Chapter 1 of the Disclosure Statement indicated that the plans incorporated in Chapter 4 including the draft building format plan for Stage 1 identifying the lot was "subject to the provisions of the Contract". The contract provided that the seller could make changes to the size of a lot of up to five per cent (more or less) than that shown in the Disclosure Statement. Accordingly, the description of the floor area on the plan insofar as it operated to clearly identify the lot should be taken to be up to five per cent different (more or less) from 177 m^2, namely that it would have an area of between 168.15 m^2 and 185.85 m^2. On this basis the reduction in the size of the balcony by 1 m^2 as depicted on later plans including plans that became part of the second further statement did not mean that the Disclosure Statement contained information concerning the floor area of the proposed lot that became inaccurate.

36. In short, insofar as the description of the floor area served to clearly identify the lot, the floor area was to be between 168.15 m^2 and 185.85 m^2 and this information did not become inaccurate after the Disclosure Statement was given. On this basis, the reduction in the size of the balcony by 1 m^2 did not give rise to an inaccuracy that the plaintiff was required to address in a rectification statement under s 22. The plaintiff has grounds to resist the

[140157]

defendants' defence to its claim for specific performance on this basis. It cannot be said that the plaintiff has "no real prospect" of succeeding on its claim because of this ground of defence or that there is no need for a trial of the claim.

37. The defendants' application for summary judgment pursuant to UCPR 293 should be dismissed.

Defendants' application for summary judgment on its counterclaim

38. The defendants' counterclaim rests on the correctness of their contentions in relation to the necessity for a rectification statement to be given pursuant to s 22. The reasons that I have given in relation to the defendants' application for summary judgment on the plaintiff's claim also preclude summary judgment on their counterclaim. Two other matters also preclude summary judgment on their counterclaim. For the purpose of addressing these issues I shall assume for the purpose of argument the correctness of the defendants' contentions that the plaintiff was obliged to give a s 22 rectification statement, failed to do so and called for settlement on 12 May 2009 in circumstances in which s 22(4) operated to delay settlement beyond that date. The relevant issue is whether the plaintiff's conduct in this regard constituted an anticipatory breach of the contract that entitled the defendants to terminate it.

39. If the defendants are correct then the plaintiff took an erroneous view of the settlement date because s 22(4) dictated that the plaintiff should not deliver to the defendants a registrable instrument of transfer in respect of the lot and the defendants were not required to pay the outstanding purchase moneys until the expiration of a period of 30 days after the receipt by the defendants or their agent of a copy of a statement of particulars in accordance with subsection 22(1) or until the time stipulated in the contract (whichever period was later to expire) unless the parties otherwise agreed in writing after receipt of the statement in accordance with s 22(1). In effect, s 22(4) postponed the settlement date.[35]

40. The plaintiff did not purport to terminate the contract. It kept the contract on foot. On the defendants' case, the plaintiff made erroneous contentions about the operation of s 22 and the date for settlement under the contract. In *DTR Nominees v Motor Homes Pty Ltd*,[36] Stephen, Mason and Jacobs JJ stated:

> "No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet & Maxwell Ltd* v *Universal News Services Ltd* [1964] 2 QB 699 at 734:
>
> > 'In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments …'"

This principle applies in the present circumstances. The plaintiff should not be found to have committed an anticipatory breach of contract, at least for the purpose of determining an application for summary judgment, by making what are assumed for the purposes of argument to be incorrect contentions concerning the interpretation and application of s 22 of the *LSA* and calling for settlement on the basis that s 22 of the *LSA* did not operate to postpone the date for settlement under the contract. It cannot be said that the plaintiff has no real prospect of successfully defending the counterclaim on the basis that its conduct did not constitute an anticipatory breach of the contract, and that there is no need for a trial of the counterclaim in relation to this issue.

41. Finally, it is at least arguable that the defendants' asserted entitlement to terminate the contract requires them to prove that they were ready, willing and able to perform their obligations under the contract.[37] The defendants have not pleaded this matter and not addressed it in evidence.

42.

[140158]

The defendants' application for summary judgment pursuant to *UCPR* 292 in respect of its counterclaim should be dismissed.

Conclusion

43. The defendants have not established an entitlement to summary judgment pursuant to *UCPR* 293 in respect of the plaintiff's claim for specific performance and other relief, and they have not established an entitlement to summary judgment pursuant to *UCPR* 292 in respect of their counterclaim.

44. The plaintiff is directed pursuant to r 375 to amend its reply and answer within seven days so as to specifically plead to subparagraph 4(e) of the defence.

45. The orders will be:

1. Application dismissed.
2. The defendants pay the plaintiff's costs of and incidental to the application to be assessed on a standard basis.
3. The plaintiff is directed to amend its reply and answer within seven days so as to specifically plead to subparagraph 4(e) of the defence.

Footnotes

1 *LSA* ss 21(5) and (6).
2 *BCCM Act* s 214(1).
3 *BCCM Act* s 214(2).
4 *BCCM Act* s 214(4).
5 *BCCM Act* s 214(5).
6 *Lee* v *Surfers Paradise Beach Resort Pty Ltd* (2008) Q ConvR ¶54-688; [2008] 2 Qd R 249 at 265–266 [25]–[28]; at 267 [37].
7 Ibid at 271 [58].
8 *LSA* s 25; *BCCM Act* s 214(4).
9 Unreported, Queensland Supreme Court, No 3785 of 2009; ex tempore judgment delivered on 27 April 2009.
10 2005 ATC 4562; [2005] 2 Qd R 232.
11 [2009] QCA 135.
12 Ibid at [2].
13 [2003] 1 Qd R 259 at 264–5 (with whom Davies JA and Mullins J agreed) (citations omitted).
14 [2009] QCA 135 at [66]–[74].
15 Ibid at [22]–[35].
16 Ibid at [2].
17 Ibid at [23] and see [24].
18 Ibid at [78].
19 As the Applications List was then known.
20 (1972) 126 CLR 507.
21 Ibid at 514.
22 Ibid at 515.
23 Ibid at 523.
24 [1983] 1 Qd R 248 at 255.
25 (supra) at [26].
26 *UCPR* 5.
27 See the affidavit of Mr Van de Beld, exhibit bundle at pages 311, 490 and 495.
28 I raised during argument the hypothetical example of a statement that accurately stated in June 2007 "The Prime Minister is Mr Howard" being information that subsequently became inaccurate.
29 *Acts Interpretation Act 1954* (Qld), s 14A(1).

30 *LSA*, s 2.

31 See Further Statements at pages 311, 490 and 495 of the affidavit of Mr Van de Beld filed 13 August 2009.

32 *UCPR* 5, *UCPR* 375; *Aon Risk Services Australia Ltd* v *Australian National University* (2009) 258 ALR 14.

33 cf *Sunbird Plaza Pty Ltd v Boheto* (supra) at 258.

34 *Sunbird Plaza Pty Ltd* v *Boheto Pty Ltd* (supra) at 258.

35 In this regard, the operation of s 22(4) should be contrasted with the consequences of non-compliance with obligations under s 214 of the *BCCM Act* which does not provide a "statutory moratorium" on settlement: *Lee* v *Surfers Paradise Beach Resort Pty Ltd* (2008) Q ConvR ¶54-688; [2008] 2 Qd R 249 at 271 [58], and see *Hudpac Corporation Pty Ltd v Voros Investments Pty Ltd* (supra).

36 (1978) 138 CLR 423 at 432; applied in *Savoy Investments (Qld) Pty Ltd* v *Global Nominees Pty Ltd* [2008] QCA 282 at 41.

37 *Savoy Investments (Qld) Pty Ltd v Global Nominees Pty Ltd* (supra) at [46]–[49].

WU v CARTER

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(2009) LQCS ¶90-156; Court citation: [2009] NSWSC 355

New South Wales Supreme Court

Judgment delivered 14 May 2009

Strata Schemes — Common property — Body Corporate duty to maintain common property in good repair — Balcony railing collapse — Tenant recovered damages against Body Corporate — Strata Schemes Management Act 1996 s 62 (equivalent to s 152 of the Body Corporate and Community Management Act 1997 (Qld)) — Landlords' agents confirmed balcony in good condition prior to tenancy — Body Corporate seek indemnity and contribution from landlords' agents as joint tort-feasor — Law Reform (Miscellaneous Provisions) Act 1946 s 5(1)(c) (equivalent to s 6(c) of the Law Reform Act 1995 (Qld)) — Managing agent to contribute 25% towards damages — Body Corporate remain principally liable for damages to plaintiff.

The plaintiff was a tenant residing in a unit within a residential community scheme when she sustained injuries due to a fall to the ground over a defective railing on the second floor balcony. The plaintiff brought proceedings to recover damages from the landlords, the Body Corporate, the managing agent hired by the landlords as well as the managing agent hired by the Body Corporate. The proceedings brought by the plaintiff were resolved mostly by consent between the parties and a consent judgment was entered against the Body Corporate in the sum of $775,000 in damages to the plaintiff.

Cross-claim by Body Corporate

Evidence during the proceedings established that the managing agent hired by the landlords (landlords' agents) completed a condition report of the unit prior to leasing the unit to the plaintiff and in the report had determined that the balcony was in good condition. In this respect the Body Corporate brought a cross-claim against the landlords' agents for indemnity and contribution towards the damages payable to the plaintiff.

Pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946*:

> "(1) Where damage is suffered by any person as a result of a tort (whether a crime or not):
>
> …
> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-fesor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by that person in respect of the liability in respect of which the contribution is sought …"

Submission by Body Corporate

The Body Corporate submitted that the landlord and landlords' agents entered into an agreement to manage and lease the unit, and therefore the landlords' agents are in the same position as the landlords in terms of the duty of care owed to the plaintiff.

Submissions by the landlord agents

The landlords' agents argued that a duty of care was owed only to the landlords as their agents but the duty does not extend to the plaintiff. Secondly, even if a duty was owed to the plaintiff, there was no breach of that duty as evidence did not establish the railing was in a

[140160]

defective condition at the time of the inspection of the unit or that, if it was, there was no sign which ought to have made the landlord agents aware of the defect.

Questions before the court

1. Whether it can be established that the landlords' agents are liable to the plaintiff for damages.

2. If so, what is the apportionment of responsibility between the Body Corporate and the landlords' agents.

Held: Judgment in favour of the Body Corporate on its cross-claim

Liability of landlords' agents

1. The landlords' agents undertook the obligation to inspect and complete the condition report of the unit and by doing so are subject to a duty of care to the plaintiff to warn the plaintiff and/or the landlords of any dangerous defects in the premises of which it was or ought to have been aware.

2. The railing, on the balance of probabilities, was in a dangerously defective condition at the time of the commencement of the tenancy and the landlords' agents ought to have been aware of the condition of the railing if an appropriate lay test had been properly carried out and the landlords' agents were negligent in either not performing or not adequately performing the appropriate test.

3. If the landlords' agents had informed the landlords of the defective condition of the railing, they would have in turn informed the Body Corporate of the problem and the Body Corporate would have rectified the railing in time to avert the injury to the plaintiff.

Apportionment of responsibility

The railing formed part of the common property which the Body Corporate had a continuing duty to maintain and keep in a state of good and serviceable repair pursuant to s 62 of the *Strata Schemes Management Act 1996* (equivalent to s 152 of the *Body Corporate and Community Management Act 1997* (Qld)), hence the primary duty rested with the Body Corporate. The failure of the Body Corporate to make the railing safe and thereby avert injury to the plaintiff was of a much higher degree than the failure by the landlords' agents to carry out an adequate inspection of the unit at the commencement of the plaintiff's tenancy. Apportionment of responsibility is 75% to the Body Corporate and 25% to the landlords' agent.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

B Dooley SC with Mr G Hickey (instructed by Keddies Lawyers) for the Plaintiff.

J Reimer (instructed by Hunt & Hunt Solicitors) for the owners of the unit.

S A Kerr (instructed by Thompson Playford) for the landlord agent.

G M Watson SC (instructed by Curwoods lawyers) for the Body Corporate.

Before: Hislop J

Editorial Comment: This case highlights that the body corporate's duty to maintain common property is an absolute and primary duty. This case is especially relevant to body corporate managers and caretakers as any defects in common property should be addressed as a matter of priority. Failure to maintain common property in good condition may result in the body corporate being liable for not discharging its statutory duty.

Although this is a New South Wales case, the equivalent statutory duty in Queensland can be found under s 152 of the Body Corporate and Community Management Act and s 159 of the Body Corporate and Community Management (Standard Module) Regulation 2008. The regulation states:

> "(1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.
>
> [140161]
>
> (2) To the extent that lots included in the community titles scheme are created under a building format plan of subdivision, the body corporate must—
>
> (a) maintain in good condition—
>
> (i) railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; and
> (ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and
> (iii) roofing membranes that are not common property but that provide protection for lots or common property; and
> …"

Hislop J

Introduction

1. The plaintiff was the tenant of a second floor home unit at 6/6-8 St George Parade, Hurstville, New South Wales. On 7 December 2003 she sustained significant injuries when a wooden railing on the unit balcony gave way causing her to fall to the ground, a distance, she estimated, of 7–8 metres.

2. The plaintiff brought proceedings to recover damages for her injuries from the owners of the unit (first and second defendants), the real estate agents employed by the first defendant to manage the unit (third defendant), the body corporate (fourth defendant) and the managing agent retained by the body corporate (fifth defendant).

3. The proceedings brought by the plaintiff against the first, second and fifth defendants, were resolved by consent verdicts and judgments in favour of those defendants. The cross-claims between the third

defendant and the first and second defendants, and the fourth defendant's cross-claim against the first and second defendants, were dismissed by consent. Judgments were entered in favour of the fifth defendant on cross-claims against it, also by consent. A consent judgment was entered for the plaintiff against the fourth defendant for $775,000.00 plus costs.

4. There remained for determination, after the settlements above noted, a cross-claim by the fourth defendant against the third defendant seeking indemnity or contribution pursuant to s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* and the proceedings by the plaintiff against the third defendant.

Background

5. I accept the following evidence which was either agreed, the subject of documentary proof, or not the subject of significant dispute.

(a) The strata plan was registered on 15 August 1972. The unit block was completed about that time.
(b) The first and second defendants purchased unit 6 on 19 April 1989.
(c) The premises comprised a brick home unit block, consisting of three residential levels above ground floor garages. Unit 6 was situated on the middle residential level, at the rear of the block.
(d) The balcony was bordered by a brick balustrade 600 mm high. Attached to the top of the balustrade was a timber railing. The railing which gave way ("the railing") was placed latitudinally to the building and was approximately 600 mm long, 140 mm deep and 32 mm thick. It was attached to the brick wall of the unit by an L shaped bracket held by a single masonry bolt with two wood screws going through the bracket into the under side of the timber. The other end of the railing was mitred and formed a right angle with the mitred end of the longitudinal railing. That join was secured by six nails, three driven into the outer face of the railing and the other three driven into the longitudinal railing. The nails were 2.5 mm in diameter and 30 mm long. They penetrated about 15 mm into the end grain of the other rail. The total height of the balustrade and railing was 940 mm.
(e) The first defendant entered into a management agency agreement with the third defendant on 8 August 1994. The agreement provided that all inspections by prospective lessees were to be carried out in

the company of the third defendant, the third defendant had authority to lease the premises, sign tenancy agreements and authorise certain repairs. The owners gave the third defendant a general indemnity.
(f) The third defendant inspected the condition of the unit when new tenants were entering into a residential tenancy agreement and once yearly. The records of a number of those inspections were admitted into evidence. They revealed the following:

(i) On 25 August 1994 the third defendant inspected the premises and recorded that the condition of the balcony was *"clean", "undamaged"* and *"working"*: Exhibit D.
(ii) On 7 June 1996 the third defendant inspected the premises and recorded that the condition of the balcony was *"clean", "undamaged"* and *"working"*. A handwritten notation was entered that the balcony was *"clean"*: Exhibit E.
(iii) On 3 January 1997 the third defendant undertook an *"Annual Condition Report"* and reported that apart from some minor matters the *"unit was in satisfactory condition"*: Exhibit F.
(iv) On 26 July 1997 the third defendant inspected the premises and recorded that the balcony was *"clean"* and *"undamaged"*: Exhibit G.
(v) About 14 April 1998 the third defendant carried out an annual inspection of the premises: Exhibit H. It did not refer to the balcony.
(vi) On 18 November 1999 the third defendant inspected the premises and recorded that the condition of the balcony was *"clean"*: Exhibit J.
(vii) On 16 September 2000 the third defendant produced an Annual Condition Report: Exhibit K. It did not refer to the balcony.

(g) The plaintiff, her husband and a friend (Wei Liu) inspected unit 6 in company with an employee of the third defendant before the residential tenancy agreement was signed.
(h) The plaintiff signed the residential tenancy agreement for unit 6 on 8 January 2003. Under the residential tenancy agreement the landlord agreed to make sure that the premises were reasonably fit to live in and to keep the premises in reasonable repair; the landlord and tenant agreed that the condition report set out in part 2 of the agreement formed part of the agreement; the tenant agreed to notify the landlord as soon as practicable of any damage to the premises and at the end of the agreement to leave the premises as nearly as possible in the same condition (fair wear and tear accepted) as set out in the condition report.
(i) A residential tenancy agreement condition report completed by the third defendant was handed to the plaintiff at the time of signing the agreement. The third defendant had noted on the report that the balcony was then clean, undamaged and working. The plaintiff was not present when the document was completed by the third defendant and there were no written comments by her on that document.
(j) The condition report was required to be included in the residential tenancy agreement by s 8(4) of the *Residential Tenancies Act 1987* and to be completed by or on behalf of the landlord at or before the time the agreement was given to the tenant for signing — *Residential Tenancies (Residential Premises) Regulation 1995*.
(k) The plaintiff took up residence in the unit on 9 January 2003 and she, her husband and Wei Liu resided at the unit until the plaintiff sustained the subject injury. Another friend lived there for part of that period.
(l) A consulting engineer retained by the plaintiff attended at the site on 9 December 2003. He observed the equivalent join on the unit above had been repaired with an L shaped steel strap on the outside of the end joint and that the balcony railing of the unit below had a visible separation of the timber joint and a partial failure of the fixing to the brick work. He also observed that the railing which had fallen was on the balcony of the downstairs unit leaning against the corresponding railing.

[140163]

(m) The plaintiff gave notice of intention to vacate the unit on 12 December 2003. It was in the course of cleaning the unit preparatory to moving out that the injury occurred.

The lay evidence for the fourth defendant

6. The plaintiff's evidence was, in short, as follows:

(a) She was born in 1977 in China. She contacted the third defendant maybe after seeing a for lease sign outside the unit block. An agent of the third defendant showed her, her husband and Wei Liu over the unit. The inspection took about 10 minutes, during the course of which the agent opened the door to the balcony and said "this is the balcony". The plaintiff did not step onto the balcony being more interested in the living room.
(b) After residing in the unit for a while the plaintiff, her husband and Wei Liu inspected it and made a list of faults ("Exhibit N") which they gave to the third defendant. The plaintiff understood that it was "the rule to go around the various parts of the unit and note down things" … "they gave us a check list and we need to double check". The plaintiff was concerned to tell the third defendant all of the things she thought were wrong with the unit as she did not wish to forfeit any part of the residential bond as had occurred in relation to a previous rental. Exhibit N does not refer to any damage to, or defect in, the balcony. The plaintiff was not expressly asked by either party whether she had inspected the balcony when preparing Exhibit N.
(c) The plaintiff seldom used the balcony. One or two months after moving in she observed "a little gap between the timbers", at the joinder of the railing and the longitudinal railing. She estimated the gap as being 2 to 3 cm wide. She did not tell the third defendant about it as the third defendant had not fixed some other problems which had been reported.
(d) On the day of injury she was dropping material from the balcony to her husband who was standing on the ground below catching the items as they fell. She dropped an empty plastic milk crate to her husband. She described what then happened as follows "I hold the rail to see my

husband got it or not, then the rail gave way and I just fall down". She said that she had just put her two hands on the railing and did not put any weight down. No part of the front of her body touched the timber nor did the crate. When the rail gave way she lost her balance and fell to the ground.

7. The plaintiff's husband gave evidence which added little of significance to that of the plaintiff. He said he very seldom used the balcony; he noticed a "crack" between the two timbers after a couple of months residing at the premises. He was asked no questions by either party in relation to the inspection of the property giving rise to Exhibit N.

8. Wei Liu gave evidence that he, on occasions, used the balcony to dry his clothing and to smoke. He said he used the balcony one or two times per week. Neither party asked him any questions as to his observations in respect of the railing either generally or when preparing Exhibit N.

The expert evidence for the fourth defendant

9. Mr Buckland, a consulting engineer, was called by the fourth defendant. He gave evidence that;

(a) the railing failed by detaching from its connections at a loading well below its required design load thereby indicating that the railing was in a substandard and dangerous condition at that time.
(b) That condition was the result of the deterioration of the end connections of the balcony railing and would have been gradual. It was an inevitable result of poor construction practice when originally installing the railing. It was not possible to form an adequate mitred joint by merely relying on nails to secure the railing in the manner attempted. The screw connection between the timber rail and the L shaped bracket attached to the brick work was ill devised and not adequate.
(c) There was deterioration evident in the mitred joint end fixing of the railing. That involved the splitting of the abutting timber rail and the rusting of the nails used to secure the joint which, given the extensive amount of rusting, was clearly of a long term nature.

[140164]

(d) The soundness of the balcony railing could have been tested at any time by applying measured loads of the value specified in the building code. Short of such exact and involved testing a simple and practical "lay" test for the soundness of the railing would have been to grip the top of the rail firmly with two hands and shake it vigorously. Any resulting undue movement in the railing and deformation or separation of the mountings would be an indication that the railing was not sound.
(e) Another practical "lay" test would have been to strike the inner face of the rail firmly near the end points with the heel of the hand, again looking out for undue movement and/or deformation.
(f) The railing would have failed if a proper inspection had been made and such simple testing had been carried out, well prior to the date of the plaintiff's accident.
(g) In cross-examination Mr Buckland agreed that he did not know whether or not there was a visible gap prior to the accident taking place, the fact that there was a gap between the railings on the unit below did not mean that there was a gap in the join of the railing which gave way, he did not know whether the railing had fallen onto the balcony of the unit below or had been placed there nor did he know if the falling railing was responsible for the gap in the railing on the downstairs unit. He agreed that the railing could have caused such a gap if it had struck the downstairs railing.
(h) He agreed that evidence of splitting in timber does not automatically result in the timber being inadequate. It depended on the position of the splitting and its extent. That was something that one with some experience needed to consider in determining whether or not timber exhibiting signs of splitting was inadequate or not.
(i) Mr Buckland agreed he did not know what the condition of the railing was in January 2003. However he said he would be surprised if the timber was any different and the condition of the railing was any different in January 2003. He didn't know if anything had occurred to the railing in the months after January 2003 and prior to 7 December 2003.

The evidence for the third defendant

10. The only witness called by the third defendant was Ms Andreadis who was the third defendant's property manager at the relevant time. She gave evidence:

(a) She was 20 years old at that time and had no qualifications or experience as a builder, architect or engineer.
(b) Her role as a property manager was to carry out routine inspections, ingoing and outgoing inspections, tribunals, showing properties, rent reviews, repairs. When carrying out an inspection she had to go around the premises and check that everything was in good order. If there were any repairs that needed to be done she had to record that on a document which she had with her during the inspection.
(c) She said she did an inspection prior to the renting of the property to the plaintiff. She said that she checked that everything was intact and there were no structural problems. The plaintiff was not with her during the inspection.
(d) She said as part of her duties she walked onto the balcony and checked it to see if it was intact by which she meant that the brackets were attached to the wall and "we used to shake the balcony to see that it was in good order." She shook the balcony on this occasion and formed the opinion that the balcony was in good condition and "everything was intact". She ticked the report form to that effect.
(e) She said in cross-examination that she had gone to the edge, held it and checked to see that it was "in good tact" because that was "our normal procedure that we were taught to do". She did it to check that it was in good order to see that it was safe for the tenants to move in. She said it was a safety issue and that if the balcony rail was defective "we wouldn't rent the property until it was fixed". She was asked detailed questions in cross-examination as to her observations at the time. She had difficulty in answering many of these questions.

11.

[140165]

The third defendant had qualified a consulting engineer but did not call him to give evidence.

Determination

12. The fourth defendant seeks indemnity or contribution from the third defendant pursuant to the provisions of the *Law Reform (Miscellaneous Provisions) Act 1946* which provides

"Where damage is suffered by any person as a result of a tort (whether a crime or not)–

> "… (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued had been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be identified in respect of the liability in respect of which the contribution is sought."

13. The third defendant conceded that "to the extent that it can be shown that someone had a liability to the plaintiff in respect of the accident, the settlement which is recorded in the first of the two sets of orders that your Honour made today is an appropriate settlement". The first of the two sets of orders was the judgment in favour of the plaintiff against the fourth defendant.

14. The initial question for determination was whether a liability of the third defendant to the plaintiff for the damage conceded by the fourth defendant could be established. If this was established there was a further question as to the apportionment of responsibility between the third and fourth defendants.

15. The third defendant submitted that it did not owe a duty of care to the plaintiff. Alternatively, if a duty was owed, there was no breach of that duty as the evidence did not establish the railing was in a defective condition at the time of the inspection or that, if it was, there was any sign which ought to have made the third defendant aware of the defect.

16. It was common ground that the High Court in *Jones* v *Bartlett* (2000) Aust Torts Reports ¶81-582; (2000) 205 CLR 166 established a landlord may be liable to a tenant in respect of defects in rented property provided the landlord was aware of, or ought to have been aware of, the defect at the time the lease was entered into — see also *Sakoua* v *Williams* (2005) 64 NSWLR 588 at [3] and [8].

17. The fourth defendant submitted that, as a result of the agreement between the first and third defendants, the third defendant was in the same position as the first and second defendants in terms of the duty owed to the plaintiff. The third defendant submitted the third defendant was not the landlord. It was the agent of the landlord. As such it owed duties to the landlord but those duties did not extend to the plaintiff.

18. In *State of NSW* v *Watton* (1998) NSW ConvR ¶55-885 the Court of Appeal held that there was an obligation to inspect residential premises before the commencement of a tenancy which obligation arose under statute implied from the requirement to complete and provide the tenant with a condition report at the start of the tenancy. Pursuant to the *Residential Tenancy (Residential Premises) Regulations* there was a duty to carry out the inspection with due care. Fitzgerald AJA who was a member of the court said:

> "The report relating to the condition of residential premises must be completed by or on behalf of the landlord and given to the tenant at or before the time the residential tenancy agreement is executed by the landlord. These statutory regulatory provisions necessarily import a requirement that residential premises be inspected with reasonable care prior to letting to a new tenant. Breach of that obligation is evidence of negligence."

19. In my opinion the third defendant undertook the obligation to inspect and complete the condition report and by so doing became subject to a duty of care to the plaintiff to warn the plaintiff and/or the landlord of any dangerous defects in the premises of which it was, or ought to have been aware.

20. Such a duty was acknowledged by Miss Andreadis when she observed that the condition of the railing was obviously a safety issue and that if the railing was defective "we wouldn't rent the property" until it was fixed.

21. I do not accept that it has been proven that the gap at the join of the railings was present at the commencement of the tenancy. There is no direct evidence that anyone

[140166]

observed a gap at that time, notwithstanding that the premises were inspected by the plaintiff, her husband and Mr Liu and Miss Andreadis for defects and damage. Mr Buckland was unable to say that the gap would have been present at that time.

22. I do not accept that the evidence of splitting in the timber was, by itself, such as to put a lay person on notice that the railing was dangerously defective nor do I accept that the condition of the bracket attaching the railing to the wall of the unit was such as to put the third defendant on notice that it was defective.

23. Nevertheless I find the railing, on the balance of probabilities, was in a dangerously defective condition at the time of the commencement of the tenancy for the following reasons:

> (a) I accept the plaintiff's evidence as to the circumstances of the railing giving way without any weight being placed upon it other than the plaintiff's hands. I infer from that evidence that at that time the railing was in an extremely defective condition. I also accept the evidence of Mr Buckland that the condition of the railing was due to deterioration over a long period of time.
> (b) I accept the evidence of the plaintiff and her husband that there was a two to three centimetre gap at the join between the railing and the longitudinal railing and this was present no later than one or two months after the commencement of the tenancy. I find that the existence of the gap was a sign of the advanced deterioration of the join of the railings.
> (c) I accept the evidence of Mr Buckland that the railing was in a substandard and dangerous condition at the time it gave way and that he would be surprised if the condition of the railing was any different in January 2003. In my opinion there was no evidence that the railing had sustained accidental damage during the period of the plaintiff's tenancy.

24. In my opinion the age of the railing was such that reasonable care required that a simple lay test such as described by Mr Buckland should have been performed on the railing at the time of the inspection prior to the commencement of the plaintiff's tenancy. The third defendant apparently had instructed Ms Andreadis to perform an appropriate lay test.

25. Having regard to the condition of the railing at the time of the fall, the small amount of pressure on the railing when it gave way, the presence of the gap at the join one or two months after the commencement of the tenancy, the existence of splitting and the other matters referred to in [23], I consider it more likely

than not that if an appropriate "lay test" for the soundness of the railing had been properly carried out at the commencement of the tenancy it would have resulted in undue movement in the railing or deformation or separation of the mountings such as to indicate that the railing was unsound.

26. In my opinion it is more likely than not that the test which Miss Andreadis said she carried out was either not performed on the railing or not adequately performed.

27. I therefore conclude that the railing was dangerously defective at the time of the commencement of the tenancy, that the third defendant ought to have been aware of the condition of the railing if an appropriate lay test had been properly carried out by it and that the third defendant was negligent in either not performing or not adequately performing an appropriate lay test.

28. I infer that if the third defendant had informed the owners of the defective condition of the railing they, in turn, would have informed the fourth defendant of the problem and the fourth defendant would have rectified it in time to avert the injury to the plaintiff.

Apportionment

29. In determining any apportionment under s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* it is "the whole conduct of each negligent party in relation to the circumstances of the accident which must be subject to comparative examination … there must be a comparison both of culpability, that is, of the degree of departure from the standard of care of the reasonable man, and of the relative importance of the acts of the parties in causing the damage … the other tortfeasors' responsibility for the damages are to be taken into account and given weight to 'as a fundamental element' in making the finding by the court of what is just and equitable" — *James Hardie & Co Pty Ltd* v *Roberts* (1999) Aust Torts Reports ¶81-527; (1999) 47 NSWLR 425 at [89] and [90].

[140167]

30. The fourth defendant submitted that a just and equitable apportionment of responsibility for the injury between the third and fourth defendants was 50% each. The third defendant submitted that its liability, if it had any at all, was of a minor degree and the apportionment should be in the order of 10 to 15%.

31. Section 62 of the *Strata Schemes Management Act 1996* provides:

> "(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation."

32. In my opinion the railing formed part of the common property which the fourth defendant had a continuing duty to maintain and keep in a state of good and serviceable repair pursuant to section 62 of the *Strata Schemes Management Act 1996*. The primary duty in respect of the condition of the balcony railing rested with the fourth defendant. It is apparent it took no steps to make the railing safe and thereby avert injury to the plaintiff. In my opinion its culpability in failing to repair the railing was of a much higher degree than the failure by the third defendant to carry out an adequate inspection of the premises at the commencement of the plaintiff's tenancy. In my opinion the appropriate apportionment is 75% to the fourth defendant and 25% to the third defendant.

33. As I understand it the effect of my findings is that the orders in [34] are appropriate. However I grant leave to the parties to apply within three days should my orders not accurately represent the agreement of the parties in this regard.

Orders

34. I make the following orders:

> (1) Verdict and judgment for the fourth defendant on its cross-claim against the third defendant in the sum of $193,750.

(2) The third defendant is to pay the fourth defendant's costs of its cross-claim against the third defendant.
(3) By consent the proceedings by the plaintiff against the third defendant are dismissed with no order as to costs between the plaintiff and the third defendant. The fourth defendant is to pay 75% of the third defendant's costs of defending those proceedings.

BLUESTONE HOLDINGS PTY LTD v JUNIPER PROPERTY HOLDINGS NO 14 PTY LTD

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(2008) LQCS ¶90-135

Court citation: [2008] QSC 219

Supreme Court of Queensland

1 August 2006

Community schemes — Contracts for sale — Formal requirements — Vendor attaches statutory form to contract, but fails to attach latest version — Whether failure entitles purchaser to cancel contract — Body Corporate and Community Management Act 1997 (Qld)s 213(5), 213(6) — Acts Interpretation Act 1954 (Qld)s 4, 49.

Bluestone Holdings Pty Ltd (the purchaser) purchased a lot in a community titles scheme from Juniper Property Holdings No 14 Pty Ltd (the vendor).

An information sheet was attached to the contract of sale, and therefore given to the purchaser, as required by s 213(5) of the Body Corporate and Community Management Act 1997 (Qld) (the BCCM Act). However, the version of the sheet that was given was version 4, whereas the most recent version was version 5.

The differences between the two versions were inconsequential. Nevertheless, the purchaser purported to cancel the contract pursuant to s 213(6) of the BCCM Act on the basis that the vendor had not complied with s 213(5). It contended that strict compliance with s 213(5) was necessary and that this required the vendor to give the purchaser the latest version of the information sheet. It applied to the Supreme Court of Queensland for a declaration that the cancellation was valid.

Held: Purchaser's application dismissed.

1. Under s 49 of the Acts Interpretation Act 1954 (Qld), strict compliance with a form approved under an Act is not necessary and substantial compliance is sufficient. However, under s 4, the application of the Acts Interpretation Act 1954 may be displaced by a contrary intention appearing in any Act.

2. Plainly, the version of the form which was attached to the contract substantially complied with the version of the form which should have been attached to the contract. Furthermore, the BCCM Act's object of providing an "appropriate level of consumer protection" indicated that substantial compliance with the requirement to give the latest version of the information sheet was sufficient. It followed that the purchaser's purported cancellation of the contract under s 213(6) was invalid.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Mr Philp for the purchaser.

Mr Sofronoff for the vendor.

Before: de Jersey CJ.

Full text of judgment below

de Jersey CJ:

1. THE CHIEF JUSTICE: By this application the applicant seeks a declaration that it was entitled to cancel a contract dated 21st February 2005 providing for its purchase of a proposed lot in a community title scheme.

2. Before the time due for settlement, and on 22nd June 2006, the solicitors for the applicant

[140482]

wrote to the solicitors for the respondent cancelling the contract.

3. The right of cancellation was said to arise from section 213 subsection 6 of the *Body Corporate and Community Management Act 1997*. That says that a purchaser may cancel such a contract if the seller has not complied with subsection 5.

4. Subsection 5 obliges the seller to attach to the contract what is termed an information sheet. In this case that fell to be attached immediately beneath a warning statement required by the *Property Agents and Motor Dealers Act 2000*.

5. Subsection 5 says that the information sheet is to be in the approved form. This seller attached a superseded version of the information sheet. The requisite forms are approved by the Chief Executive Officer. It suffices to say that the seller attached version 4 whereas it should have attached version 5.

6. The differences are really quibbles. Version 4 is unsurprisingly headed “Version 4” whereas version 5 is unsurprisingly headed “Version 5”. The second difference between the two documents is that version 4 does not specify its “commencement date” whereas version 5 does.

7. The third difference appears under the heading “What help is available to owners”. The difference concerns the name of a Government department. Version 4 relevantly reads:

> “The Department of Tourism, Racing and Fair Trading has a free call telephone ‘Community Titles Advisory Service’ to answer queries by owners on community title scheme matters. Owners use this service for advice on such matters as — determining responsibility for repairs, how to conduct a committee election, what type of resolution is necessary in a particular situation, how to enforce a by-law et cetera. You may contact this service by telephoning 1800 060 119.
>
> The department also offers a dispute resolution service for settling disputes between owners and between owners and their body corporate. There are a variety of means available for resolving disputes including mediation, formal order or specialist assessment. For information on this service telephone the Office of the Commissioner for Body Corporate and Community Management, Department of Tourism, Racing and Fair Trading phone 0732277654 or 0732277899”.

Version 5 is in precisely the same terms save that it specifies the by then correct name of the department, which had changed from Department of Tourism, Racing and Fair Trading to Department of Tourism, Fair Trading and Wine Industry Development.

8. The important point is that the telephone numbers remained the same and the reference to the Office of the Commissioner for Body Corporate and Community Manager remained the same. In short, the difference would appear to be inconsequential and not such as relevant, to mislead a reader of the document.

9. In *MNM Developments Proprietary Limited* and *Gerrard* [2005] QCA230 the Court was concerned with the requirement to attach a warning statement required under the *Property Agents and Motor Dealers Act 2000*.

10. Mr Philp, who appears for the applicant, has drawn attention to paragraph 16 of that judgment where I said that in effect the requirement to attach the warning statement should not be liberally interpreted and I referred to some sections which indicated that purchasers were given a right to terminate

> “Even for quite technical contraventions and whether or not the purchaser has suffered any material disadvantage”.

11. He referred also to paragraph 21 where I suggested that the legislature had considered “an exacting obligation” justified to secure the goal of consumer protection. The issue being addressed in that case was obviously different from the issue here.

12. Going to section 213 of the *Body Corporate and Community Management Act 1997* one sees that two documents are to be attached. The first one called “the first statement” has to be completed by the seller. Details have to be included into a pro forma document.

13. Subsection 4, then, provides that the document must be “substantially complete”. That provision was included to avoid the sort of

[140483]

quibbles which characterised the 1980s in relation to home unit contracts which occupied so much litigation and wasted so many people’s resources.

14. Subsection 5 requires that the information sheet — the second document — be in the approved form. Subsection 5 is not followed by a provision like subsection 4. There is no provision, in short, in the Body Corporate and Community Management Act, saying that substantial compliance with the approved form will suffice.

15. Mr Sofronoff, who appeared for the respondent, submitted that was because the legislature considered applicable section 49 of the *Acts Interpretation Act 1954*. It says that:

> “If a form is…approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient.”

Plainly, in this case, the version of the form which was attached to the contract substantially complied with the version of the form which should have been attached to the contract.

16. But Mr Philp submits that section 4 [of the Acts Interpretation Act] excludes reliance on section 49, subsection 1. Section 4 provides that:

> "The application of this Act may be displaced wholly or partly by a contrary intention appearing in any Act."

17. Mr Philp draws from the Body Corporate and Community Management Act, by an approach which impressed the Court of Appeal in MNM Developments Pty Ltd and Gerrard, an intention that strict compliance with, in this case, version 5 of the form was required. I do not accept that submission.

18. Support for the contrary position emerges from section 4, paragraph (f) of the Body Corporate and Community Management Act, which states as one of the secondary objects of the Act:

> "To provide an appropriate level of consumer protection for owners and intending buyers of Lots included in Community Titles schemes."

19. It is, to my mind, obvious that substantial compliance with version 5, as achieved here, would provide that "appropriate level of consumer protection". It follows, in my view, that the purported cancellation of the contract, under section 213, subsection 6, was invalid.

20. I should mention a decision of her Honour, Justice White, in *Celik Developments Pty Ltd* and *Mayes* 2005, Queensland Supreme Court, 224, in two respects. Firstly, her Honour did not consider any arguable application of section 49 of the Acts Interpretation Act, and secondly, her Honour found that there were material differences between the documents which fell for consideration in that case. See paragraph 27.

21. I also mention, finally, the decision of Justice Gibbs in *Equipment Investments Pty Ltd* and *MJ Dowthwaite and Co Pty Ltd*, 1969, 16, Federal Law Reports, 23, where his Honour offered guidance as to when divergence from a form should be considered substantial. He said this:

> "A divergence from the form would be substantial or material if it caused the statement to convey less information than the form requires, or to confuse or mislead the prospective hirer as to the matters which the form is designed to bring to his notice. The dealer is not entitled to abandon the form completely and to claim the right to represent the information to the hirer in a quite different way but, in my opinion, he does not substantially or materially depart from the form simply by including additional words, unless their presence in some way distorts or obscures or minimises the information which the form is designed to give."

22. The application is dismissed.

…

23. THE CHIEF JUSTICE: With costs to be assessed. Thank you.

DINDAS & ANOR v BODY CORPORATE FOR "ONE PARK ROAD" CTS 2114 & ORS

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(2008) LQCS ¶90-136

Court citation: [2006] QDC 302

District Court of Queensland

25 August 2006

Community schemes — Disputes — Adjudication — Adjudicator makes orders invalidating "unreasonable" body corporate resolutions on basis that majority lot owners exercising voting rights oppressively or fraudulently — Whether orders valid — Whether adjudicator wrongly importing company law principles into decision-making process and disenfranchising majority owners — Whether body corporate's resolutions inconsistent with alleged democratic ethos of legislation — Body Corporate and Community Management Act 1997 (Qld), s 276.

Dindas (the first appellant) and her company, Edith Dindas Pty Ltd (the second appellant), held 60% of the lot entitlements in a community titles scheme (the scheme). Disputes arose between the appellants and several others (the respondents) who, together, held almost all of the remaining lot entitlements in the scheme.

The disputes were heard by an adjudicator who, pursuant to his power under s 276 of the Body Corporate and Community Management Act 1997 (Qld) (the Act) to make orders that are "just and equitable in the circumstances", made orders invalidating a number of resolutions of the scheme's body corporate and set aside the appointment of the second appellant as the scheme's building manager. Drawing on concepts derived from equity and company law, the adjudicator held that the body corporate's resolutions were "unreasonable". In particular, he considered that the appellants, as the majority lot owners, were guilty of a "fraud on a power" — they had exercised their voting rights in bad faith and for purposes foreign to those for which their voting rights existed.

The appellants appealed against the adjudicator's orders on questions of law to the District Court of Queensland. They argued that the adjudicator: (1) had wrongly imported company law principles into the process of decision-making under the Act; (2) having done so, had wrongly characterised the exercise of the appellants' statutory rights as "unreasonable"; and (3) on that basis, had wrongly overridden the appellants' wishes as the majority, and therefore disenfranchised them, through orders that the adjudicator wrongly deemed to be "just and equitable".

The respondents largely sought to uphold the adjudicator's orders. They argued that: (1) the Act rests upon democratic principles, which the appellants subverted through their "oppressive" practices; and (2) the adjudicator's powers under s 276 were wide enough to support the orders that were made.

Held: Appeal allowed.

1. It was a manifest error to assume that s 276 of the Act addresses either fundamental democratic or moral principles. Rather, it is posited on the existence of a dispute about legal rights within the parameters of the legislation. Therefore, a just and equitable order made under the section is necessarily one made in accordance with the law and is not one which rests on imported, and irrelevant, notions of a pure democracy.

2. The adjudicator made no findings that the resolutions were motivated, on the appellants' part, by a desire for personal or particular gain or could, on any view, be classified as fraudulent. Rather, he held that the resolutions themselves were "unreasonable". Without evidence of fraud or actual oppression, that was a step too far.

3. Therefore, the adjudicator fell into error in determining that various decisions were "unreasonable" if, in fact, they were not discordant with the appellants' rights under the Act. In particular, the powers under s 276 could only be exercised if the orders made did not

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unacceptably trample the appellants' rights as lot owners. The adjudicator's orders failed to meet these criteria.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

KC Fleming QC (instructed by Herdlaw) for the appellants.

L Alford (instructed by Holding Redlich) for the fourth, fifth, sixth, seventh, ninth, tenth, eleventh and twelfth respondents.

DK Kanitz (instructed by Dunstan Hardcastle) for the eighth respondents.

Before: Wilson DCJ.

Full text of judgment below

Alan Wilson SC, DCJ:

1. This is an appeal and cross-appeal from orders made by an adjudicator under the *Body Corporate and Community Management Act 1997* (BCCMA) published, with reasons [1] , on 12 January 2005. A copy of the orders the adjudicator made is attached, marked "A". Each order is numbered; the numbering did not appear when the adjudicator made the orders, but the parties agreed it helps in addressing the issues.

2. The proceedings involve commercial premises at Park Road. The material, which is voluminous, reveals a sorry history of disagreement and dispute and several previous instances of recourse to adjudicative proceedings under the BCCMA. I was told that, since the appeal and cross-appeal were lodged, an administrator has been appointed under the BCCMA with limited powers. Nevertheless, the parties wished to proceed and did so over two days of oral argument, with lengthy written submissions and wide-ranging references to case law. At the outset an attempt was made, by the respondents/cross appellants, to file an affidavit containing 405 pages of material about events involving the parties since the adjudicator's order, but leave was refused. The appellants then sought to set aside an *ex parte* order of this court made on 12 May 2005 giving some of the respondents leave to cross-appeal out of time but that application was also refused.

3. The purpose of the BCCMA is to provide a system of governance and management of "community titles schemes" (CTS) through bodies corporate. All lot owners are members of their CTS body corporate, which manages common property and assets. The body corporate operates, here, through a committee [2] chosen at an annual general meeting. Voting rights are determined by lot entitlements. The appellants hold over 60% of the lot entitlements, and the respondents about 35%.

4. The BCCMA has a variety of mechanisms for resolving disputes about management, some of which have been tried here; they include the procedure which led to the adjudicator's orders. These matters reached the adjudicator *via* procedures under Chapter 6 of the Act, following "applications" by persons concerned with disputes arising about matters touched by its provisions. The appeal and cross-appeal are brought under ss 289 and 290, which permits a challenge to an adjudicator's decision, but only on a question of law.

5. The appellants' primary attack is upon those orders of the adjudicator which, they say, over-ride their wishes as the majority, and disenfranchise them. The respondents' principal contention is that the adjudicator should have appointed an administrator[3] in the face of conduct by the appellants which, they assert, was oppressive and constituted what was, to borrow (as their submissions do) a phrase usually associated with corporations and their shareholders, a "fraud on the power".

The Proceedings before the Adjudicator

6. The Adjudicator's reasons show he dealt, simultaneously, with five "Dispute Resolution Applications" brought by a number of the respondents/cross-appellants here. He published five orders, each in identical terms[4] . The orders made in the first, second, third, ninth and tenth paragraphs of those orders relate only to one application (682-2003). After the appellants brought their appeal, the adjudicator stayed two of his orders[5] , concerning mailboxes and a directory board. In the scheme of things, these were not important matters.

7.

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The adjudicator's reasons are lengthy and detailed, covering 15 single spaced pages. Those reasons and the orders they are said to justify rely heavily upon significant findings the adjudicator made about the meaning and effect of the BCCMA and, in particular, s 276 which provides:

> **"276. Orders of Adjudicators**
>
> (1) An Adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community title scheme, about—
>
> (a) A claimed or anticipated contravention of this Act or the community management statement; or
> (b) The exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
> (c) A claimed or anticipated contractual matter about:—
>
> (i) The engagement of a person as the body corporate manager or service contractor for a community title scheme; or

(ii) The authorisation of a person as a letting agent for a community title scheme.

"

8. Before turning to a more detailed discussion of the way the adjudicator construed that section (and the legislation generally) it is relevant to note that this CTS operates under what is called the *Commercial Module* which, as the adjudicator noted, leaves matters of nomination and election to be determined by the body corporate itself in the form of a special resolution[6] — unlike the *Standard Module* which, as the adjudicator also noted, had been amended in December 2003 "…*to improve the transparency of committee decision making and address issues including potential stacking of the committee with the advantage of a small number of owners, a body corporate manager, or the resident manager.*"[7]

9. The adjudicator was persuaded that s 276 enlivened a wide ranging discretion to address the matters upon which he was called to adjudicate in a way which reflected certain principles found in company law, and equity. His reasons contain the following, various statements:

> "It is a well accepted principle of equity that a majority shareholder in a company cannot alter the rules by which the company is governed in a way that is oppressive to a minority shareholder or group of shareholders. More generally, courts in equity have established the doctrine of *'fraud on a power' stating 'a person having a power, must exercise its bone (sic) fide for the end designed, otherwise it is corrupt and void'* and establishing that the doctrine of fraud on a power *'authorises intervention where the power is exercised in bad faith or for purposes foreign to the power.'* The New South Wales Court of Appeal has recognised this doctrine of fraud on a power as being of general application and, specifically, as applicable to bodies corporate under the *Strata Titles Act* of New South Wales.
>
> While the *Body Corporate and Community Management Act* 1997 does not expressly confer equitable jurisdiction on an adjudicator, an adjudicator is expected to make an order that is *'just and equitable'* to resolve a dispute adjudicators have jurisdiction to declare a resolution void if unreasonable or to declare a motion past [sic] if the opposition to it is unreasonable (*Act, 276*). In considering whether a resolution is unreasonable it is instructed [sic] to consider the decisions of the courts that have found a procedurally valid exercise of a power invalid on the basis that it constitutes a fraud on the power. In particular it is relevant that a fraud on a power can be constituted if the power is exercised for a purpose or with an intention beyond the scope of the power. The conduct does not need to be dishonest or immoral to constitute a fraud on the power[8] ."

10. It was in reliance upon these premises that the adjudicator found a number of the decisions of the committee of the body corporate were "unreasonable". An example concerns the adjudicator's first order, which declared void a decision of an extraordinary general meeting which limited the committee's

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decision making power to decisions involving spending of no more than $500. The adjudicator said:

> "This is the type of decision by a majority group that the courts recognise as a fraud on the minority. It is a resolution that I propose to invalidate on the basis that it is unreasonable and that a just and equitable order requires restoration of effective decision making powers to the committee (*Act* 94 (2), 276)."

Another example concerned Order 3, touching a decision of the body corporate to appoint the second appellants as building manager, which the adjudicator declared void "…*on the basis that it was unreasonable*"; and, the further order that the company was prohibited from voting for itself or an associate as replacement building manager "…*on a just and equitable basis"*. In his reasons the adjudicator said:

> "The respondents are correct in submitting that members of a company may generally vote in their own interest. However, the courts of equity have consistently invalidated the exercise of voting power by a majority of members in a company where the vote is a means of securing some personal gain rather than for purposes of the proper management of a company."

The Appellants' Submissions

11. The appellants' case is, in short, was [sic] that they were simply exercising statutory rights under the BCCMA and, in those circumstances, the principles the adjudicator sought to attach to the legislation simply had no application. Moreover, it is asserted, he made no actual findings that they had been guilty of any fraud in the exercise of their rights or powers under that legislation, or had acted oppressively; or, in the alternative, if the adjudicator is deemed by implication to have found that the appellants were acting beyond their rights, that finding was wrong.

12. The adjudicator, the appellants say, undertook this incorrect process of reasoning: first, he determined that the legislation permitted him to apply principles brought across from company law; second, he determined (by implication) that the appellants lawful exercise of their rights attracted a sanction under those principles because the appellants' acts constituted a fraud on the power and/or oppression; thirdly, he wrongly categorised those acts as "unreasonable"; and, fourthly, he took that process as the basis for a conclusion that he was, as a consequence, entitled to make wide ranging orders which took away the appellants' statutory rights, on the basis those orders were "just and equitable" (under s 276) in the face of the appellants' wrongful conduct.

The Respondents' Submissions

13. The respondents' submissions (on both the appeal and their cross appeal) went through a variety of forms, and the final one was filed by leave at the hearing. Their first contention is a very interesting one: that the legislation rests on democratic principles and, as the submissions say: "…*the democratic ethos of the legislation calls for the recognition of the voice of the community, not just the satisfaction of the wishes of one person who is the majority owner. The general meetings and committee meetings are intended to reflect a communal voice… it is the intention of the Parliament of Queensland to encourage the democratic process through the Act and that the oppressive practices of the Appellants have subverted that intention*"[9] . Reliance for this proposition was placed, among other things, upon an article co-authored by the respondents' Counsel, Mr Alford[10] .

14. Secondly, it is said that the adjudicator's powers under s 276 are wide enough to permit the orders he made, and that this proposition is supported by three decisions of appeal courts: *Houghton* v *Immer (No 155 Pty Ltd)* [1997] 44 NSW LR 46; *McColl* v *Body Corporate for Lakeview Park CTS 20751* [2004] QCA 44; and, *Hablethwaite* v *Andrijevic* [2005] QCA 336.

15. Finally, in support of the cross appeal, it is said that the appellants' actions constituted such serious breaches of the legislative intent of the BCCMA and the principles of company law already mentioned that the adjudicator should have gone much further, and appointed an administrator to the scheme; and his failure to do so is described as "timid"[11] .

16. Two additional matters were raised in the respondents' submissions: the first asserted that the adjudicator erred in law by failing to

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recognise that an extraordinary general meeting of 6 September 2004 had been wrongly called and was invalid; and the second that, having found the appointment of the second appellants Edith Dindas Pty Ltd as building manager was invalid, the adjudicator should have ordered restitution to the body corporate in an amount of $41,275, plus interest. The first claim ought not be ventilated: it was the subject of a separate application to the adjudicator[12] and did not fall for his determination in the proceedings under appeal. Even without that procedural barrier I would not, in any event, be prepared to make an adverse finding: although, as the respondents contend, there was no secretary filling that office in the committee of the body corporate at the time that was, at worst, a procedural irregularity which should not automatically be taken to invalidate the meeting[13] .

17. As to the second point the adjudicator found[14] that he did not have jurisdiction to make an order for restitution, that matter being properly a dispute between the body corporate and Edith Dindas Pty Ltd. In any event, s 265 of the BCCMA indicates that disputes of this kind should be the subject of a "specialist" adjudication and that was not, it appears, what this process was.

18. Two other aspects of the appeal, and the parties' submissions, should be remarked: first, the appellants' Notice of Appeal asserts that the making of identical orders in five applications required the unnecessary joinder of parties[15] but the respondents specifically disavowed the point[16] and it was not pursued at the hearing.

19. Second, the respondents' submissions otherwise make it clear that, if their cross appeal fails, they actively support all of the adjudicator's orders save for the second part of Order 3, under which the body corporate was directed to refuse to accept votes from any owner in favour of appointing themselves or an associate as the replacement for the current building manager. The respondents say that the owners ought to be able to make "…*such an appointment on the merits from an open field of candidates*"[17] .

A Democracy?

20. The notion that a body corporate operates on democratic principles underpins the respondents' assertion that the adjudicator was required, under the legislation and, in particular, s 276 to "…*balance the rights of the individuals …within the statutory and equitable powers ascribed…"* by that section[18] . Arguments in support of the contention that parliament intended to "imbue" the legislation with "a democratic principle" are summarised in Mr Alford's article, and in the respondents' Outline at paragraphs 15–20[19] . Those submissions rely upon the use of words like "community" and "corporate" in the legislation, as well as specific provisions — eg, ss 94 and 100, which require that a body corporate administer the common property and assets "…*for the benefit of the owners*"; and, some aspects of the Minister's Second Reading Speech.

21. Mr Alford, counsel for the respondent, submitted that these elements warrant a particular approach to construction of the BCCMA:

> "The construction of the Act is evidence for the precept that minority owners in a body corporate do have a right to be heard as part of the voice of the community and that actions that silence that voice, intentional or unintentional, run contrary to the ethos of legislation."

22. If, as I understand them, these submissions are intended to support the proposition that the adjudicator's powers to make orders that are "just and equitable" under s 276 can be construed so that minority interests may prevail over the wishes of the majority (lawfully expressed through legitimate voting) in certain circumstances the proposition runs up hard, firstly, against the difficulty that the voting process is, in many instances, one based upon property interests — as the learned article co-written by Mr Alford fairly acknowledges:

> "Interestingly, although the Queensland legislation on its face supports a democratic ethos its Achilles heel is that it enables the ethos to be subverted because the voting process is based on a tally of ownership interests expressed as a percentage of ownership of the whole."

23. Counsel sought to circumvent this rather, on its face, significant difficulty by submitting that although the Act permitted a voting process

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based on ownership interests, that process was subsumed to other parts of the legislation which favoured a true democracy[20] . The legislation is, in truth, however, a reversion to "democratic" principles applying at an earlier stage in the evolution of the voting process in democratic countries — i.e. one based upon property rights. Nothing could be clearer but that the "ethos" created under the legislation is not always one based upon an individual's right to vote, but upon the property rights which accrue to lot owners. That is a conclusion applying with particular force to schemes operating under the *Commercial Module*.

24. It is a manifest error, then, to assume that s 276 addresses either fundamental democratic, or moral principles; rather, it is posited on the existence of a dispute about legal rights arising within the parameters of the legislation and, hence, a just and equitable order made under the section is necessarily one made in accordance with the law, and is not one which rests on imported, and irrelevant, notions of a pure democracy.

25. The distinction is well made, albeit in the context of a corporation, in the fourth edition of Justice McPherson's *Company Liquidation*, at page 177:

> "It has frequently been stressed that s 246 AA is not intended to provide minority shareholders with a means of stultifying the voting power of the majority:
>
> > 'The mere use of voting power at board meetings or at a general meeting to secure the passing of resolutions which the other members of the board or shareholders oppose would not in general constitute oppression for the purpose of the section or for any other purpose. For a petition to succeed it must be shown that there has been oppression in a real sense of members qua shareholders, and not merely a subordination of their wishes to the power of the voting majority.'
>
> Hence, it does not constitute oppression for those in control to insist upon the adoption of a policy on a matter of business on which there may be legitimate differences of opinion, nor is it oppression if an existing state of inequality results from the provisions of a constitution of the company and not from any action on the part of those in control."

These remarks are, with respect, entirely apposite here: the "existing state of inequality" results not from any subversion of ordinary democratic principles but, simply, from the voting rights created by the legislation.

The Adjudicator's Powers under the BCCMA

26. That the adjudicator was moved to make wide ranging orders is not, as various parts of his reasons show, unsurprising. They reveal a history of disputes between the two camps, and unsuccessful earlier attempts at resolution. Nevertheless, this appeal addresses, at its core, a simple question: whether or not the solutions he reached and the orders he imposed as a consequence (practical and sensible as they might, at first blush, appear) were within power. As the parties argued this appeal, that question revolves around the construction of the Act, and the nature and effect of the three decisions of the NSW and Queensland Courts of Appeal, mentioned earlier.

27. In the course of his reasons the adjudicator referred to three sections of the BCCMA as founding a right to declare resolutions void as unreasonable: s 276, and ss 94 (2) and 152. Section 94 provides:

> **"94. Body Corporate's General Functions**
>
> 1. The body corporate for a community title scheme must —
>
> (a) Administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and
> (b) Enforce the community management statement (including any bye-laws for the scheme); and
> (c) Carry out the further functions given to the body corporate under this Act and the community management statement.
>
> 2. The body corporate must act reasonably in anything it does under sub-section (1)."

28. Section 152 provides, relevantly:

[140490]

> **"152. Body Corporate's Duties about Common Property etc.**
>
> 1. The body corporate for a community title scheme must —
>
> (a) Administer, manage and control the common property and body corporate assets reasonably and for the benefit of all owners; and …"

29. *Houghton v Immer* (both at first instance[21] and on appeal[22]), upon which significant reliance was placed by the respondents, was a case in which the body corporate passed a resolution permitting some lot owners to sub-divide common property for their own benefit. In both courts it was held that because the

common property had value, the special resolution of some lot owners was a fraud on the minority, voidable in equity; and, relevantly here, that the doctrine of fraud on a power is of general application and could be applied to bodies corporate under the NSW *Strata Title Act* 1973.

30. As the judgment of Handley JA on appeal[23] makes clear, however, the transposition of company law principles into this jurisdiction does not change their nature, which continues to rely on actual wrong doing. As he pointed out (at pp 52–53) the relief flowing from these principles will ordinarily attach where the party guilty of fraud or oppression has been motivated by a desire for some personal or particular gain which, in the words of Dixon J in *Peters' American Delicacy Co. Ltd* v *Heath* [1939] 61 CLR 457 (at 511) "…*does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power*"[24] .

31. There was no evidence that the acts and decisions which led to the resolutions declared void by the adjudicator were motivated, on the appellants' part, by a desire for personal or particular gain; or, that their actions were inconsistent with concepts of honesty or could, on any view, be classified as fraudulent. Significantly, the adjudicator made no findings to that effect. Rather, he held that the resolutions themselves were "unreasonable".

32. Without evidence of fraud or actual oppression, that was a step too far. This conclusion applies even to the finding that the resolution to appoint Edith Dindas Pty Ltd as building manager should be set aside. The adjudicator's reasons traverse the respondents' assertion, before him, that the appointment constituted a fraud because the decision was for the benefit of that company, rather than in the interests of the body corporate, but the actual findings do not go so far; he simply concluded, after reviewing the contractual terms and evidence, that because the tender price submitted by the company was in excess of other tenders, the decision was "…*unreasonable and not in the best interests of the body corporate*".

33. As the reasons also show, the company relied upon its "permanent onsite presence" as a justification for the higher price and the adjudicator acknowledged, while rejecting, that argument. Importantly, however, the reasons plainly indicate that whatever difficulties beset this decision, it fell short of fraud, and there is nothing to suggest the adjudicator thought the appellant company was motivated solely by self interest; or that this was not a case in which there was no actual benefit to the body corporate (in that management actually occurred); or that fraud arose as an issue when the decision had several, concurrent benefits, albeit they included a financial one for the appellant company. The respondents' complaint is, essentially, that they did not get value for money. That is, on its face, something which might in some circumstances constitute a fraud but was not, here, found by the adjudicator to be so and, indeed, any finding to that effect would be surprising.

34. Nor do the two Queensland decisions, *McColl* and *Hablethwaite* go so far as the respondents wish to take them. *McColl* concerns the question whether a by-law passed at an extraordinary meeting of a body corporate was "exclusive use" [sic] by law under s 133 of the BCCMA. On appeal from an adjudicator's decision a District Court Judge held that it was not, and the Court of Appeal agreed. In the course of argument it was contended that s 87 of the Act (later amended, and now s 94) compelled the body corporate to act "reasonably", and that the adjudicator should have dealt with the appellant's complaints on that basis. As Davies JA pointed out[25] , however, the section is concerned with a

[140491]

body corporate's general management functions and is not directed towards regulating decisions made at meetings of the body corporate.

35. The respondents' Outline here argues this conclusion is incorrect — or, perhaps, that it was *per incuriam* because the court does not seem to have been referred to s 276[26] — but the [sic] s 94 is clearly intended to apply to the performance of functions, and not the carriage of resolutions made at meetings; and s 276 does not take the matter further, or impinge on that conclusion.

36. In *Hablethwaite* the applicants were, it appears, seeking something in the nature of an advisory opinion from the Court of Appeal[27] . The matter had a complex history: in short, the original decision of the

adjudicator had overridden the applicants' exercise of their controlling vote in respect of a number of motions proposed at an annual general meeting, a decision which was upheld on appeal by a District Court Judge.

37. The applicant's complaint was that, contrary to s 276, the adjudicator made an order which was not "just and equitable in the circumstances". Keane JA said, at paras [33] – [34]:

> "[33] The effect of the adjudicator's conclusion, which was upheld on appeal to the District Court, was that the applicants did not demonstrate that they would be adversely affected in the use and enjoyment of their rights as lot owners (other than their voting rights) by the nullification of their voting rights on the motions in question. The adjudicator's statutory powers extend to making orders resolving disputes about the exercise of voting rights by lot owners. The statutory conferral of power upon the adjudicator to make an order which is 'just and equitable in the circumstances' necessarily contemplates a decision by the adjudicator which may be 'just and equitable in the circumstances' even though it overrides the exercise of voting rights by a scheme member.
> [34] Accordingly, the mere circumstance that voting rights of the owner of a lot in a scheme are overridden by a decision cannot, of itself, render the decision something other than 'just and equitable'. Insofar as the rights of a lot owner, other than voting rights, are not affected by the adjudicator's decision, it is impossible to see how the lot owner can be prejudiced in a way which could not be 'just and equitable' simply by a decision to nullify his or her voting rights. As I have already noted, the applicants did not seek to demonstrate to the adjudicator that the enjoyment of their rights as lot owners would be adversely affected by the nullification of their voting rights. As a result, there is no basis on which the applicants could seek to demonstrate that the adjudicator had erred in reaching his decision so as to entitle him to succeed on appeal to the District Court on a question of law".

38. I do not think, with respect, that the statement in *Hablethwaite* appearing at the end of paragraph [33] was intended to extend to the notion that the discretion arising under s 276 empowers an adjudicator to ignore the voting rights associated with lot entitlements under the Act. The second and third sentences in paragraph [34] make it clear, I think, that the reference to overriding the exercise of voting rights is limited to the voting process itself, and was not intended to go further. That conclusion may be gleaned from the reference, in paragraph [34], to rights "…*other than voting rights*", and the implied acceptance that those further, extensive rights could not readily be destroyed by an adjudicator's decision. Here, the appellants *have* vigorously sought to demonstrate that the enjoyment of their other rights as lot owners *would* be adversely affected by the nullification of their voting rights.

39. Neither decision is, then, authority for the proposition that the adjudicator's powers under s 276 to make a just and equitable order to resolve a dispute necessarily connotes the power to override other rights which lie behind, and form the basis of, voting rights. The legislation plainly contemplates and permits a majority (determined by reference to voting rights granted by the Act) to assert its will by the legitimate exercise of that voting power. The principle adumbrated in *Hablethwaite* is confined to circumstances surrounding the actual exercise of voting rights; it does not support the much broader proposition which the respondents

[140492]

propound.

The Appellants' Appeal

40. These conclusions mean the adjudicator has, with respect, fallen into error in determining that various decisions were "unreasonable" if, in fact, they were not discordant with the appellants' rights under the BCCMA. In particular the power arising under s 276 may only, as follows from the discussion set out above, be exercised if the orders which are made do not unacceptably trample the appellants' rights as lot owners. For reasons which follow, I am of the view the adjudicator's orders failed to meet those criteria, save in respect of the first part of Order no 3 which revoked the appointment of Edith Dindas Pty Ltd as building manager. That is a matter which, again for reasons which follow, involved a dispute referrable to s 276(1)(c)(i) and, in the face of the evidence placed before the adjudicator, warranted interference.

41. A particular, additional difficulty concerns Order no 7 which directs that the nomination and election of committee members at the annual general meeting is to be performed (as nearly as practicable) in accordance with the procedures for nomination and election of committee members under the *Standard Module*; and, that the first and second appellants and their associates are only entitled to nominate one individual for committee membership. An immediate and surprising aspect of this order is the reference to the *Standard Module* when, as the adjudicator recognised, this is a CTS to which the commercial module properly applies. More importantly, however, it is clear that none of the applications sought the orders made in no. 7 and, as I also accept, the appellants who were directly affected by it were afforded no opportunity to be heard on the question whether it should be made. If for no other reason, that order ought to be set aside on grounds relating to principles of natural justice.

42. Order 1 concerned the resolution of an extraordinary general meeting which limited the committee's decision making power to those involving expenditure of no more than $500, a resolution which was held by the adjudicator to be unreasonable and to deprive the committee of a substantial part of its function. The adjudicator found that the limit was "absurdly low"[28] and the "…*type of decision by a majority that the courts recognise as a fraud on the minority*". For the reasons already given, the latter is incorrect. The adjudicator's reasons show why the monetary limit is lower than might be expected for a scheme of this type, but the *Commercial Module* clearly granted the appellants the right to vote in favour of a motion to restrict the committee's decisions. That statutory acknowledgment makes it very difficult to see how a decision which permits actual, albeit limited, expenditure can be categorised as "unreasonable".

43. Order 2 invalidated a resolution of an extraordinary general meeting which gave the majority owners the opportunity to veto committee decisions, on the grounds that the body corporate in general meeting had no power to alter its procedures in that manner. The respondents' submissions did not directly address this order but it is plain from the adjudicator's reasons[29] that he considered the matter in some detail. In particular, he noted that the resolution was almost identical to one appearing in the *Standard Module* which allowed the owners of at least half the lots in a scheme governed by that module to veto committee decisions; but, also, that under s 95 of the BCCMA the body corporate is to have "…*all the powers necessary for carrying out its functions*".

44. As the Reasons note, the legislation does not contain anything from which it might be implied that the body corporate has unlimited power to alter the procedures under which it is to carry out its functions; and, indeed, those occasions in which the power does arise are specifically described: they include specifying the conduct of committee elections, calling committee meetings, and the power to alter, by special resolution, the procedures for voting at general meetings (*Commercial Module*, cl 13, 17 and 41).

45. It was said for the appellants that the resolution was simply a reiteration of the right of the majority to review a committee decision and to call an extraordinary general meeting; and, that it avoided the expense and difficulty of that procedure[30] . This order does not rest on s 276 and, indeed, the adjudicator found that there was nothing "…*inherently unreasonable*

in this type of restriction". Nor was there any attack by the appellants upon the reasons insofar as they touched upon the procedures regulating the body corporate's performance of its functions. The mere fact that the original resolution avoided the need to call extraordinary general meetings is not overwhelming and the adjudicator's reasons — based, as they were on their face, on an analysis of the legislative provisions touching procedural matters — should stand.

46. Order 3, setting aside the appointment of the second appellant as building manager, has already been remarked. It appears to have been within the adjudicator's powers under s 276(1)(c)(i) and to have attracted justifiable interference on the "just and equitable" ground because there was evidence suggesting lower tenders from independent managers. The second part of the order, however, limiting both Edith Dindas Pty Ltd from voting for itself or an associate as building manager, or any other owner doing so, is rejected by both parties. The appellants contend that it is beyond power and the respondents that "…*the owners of the body corporate should be able to make such an appointment on the merits from an open field of candidates*"[31] .

47. The dispute resolution provisions do not empower an adjudicator to make orders about how a lot owner may vote in relation to a future matter, and limit the adjudicator's powers to circumstances where a power has been exercised contrary to the legislation. The adjudicator has assumed (without any factual foundation for the assumption) that all future proposals for the appointment of a building manager by either the appellants, or the respondents will be "unreasonable" and, therefore, invalid when there is no proper basis for that presumption. Further, there is nothing in the Act or modules that prevent a lot owner from voting at a general meeting in favour of the appointment of themselves as a service contractor, even though they might derive a direct or indirect benefit. For these reasons, the second part of order no.3 should be removed.

48. Order 4 concerns car parking. Findings about it were coloured by some submissions concerning the previous intervention of Edith Dindas Pty Ltd as building manager and an apparent attempt to regulate car parking in that role. The respondents' complaint was that the resolution of the general meeting of 6 September 2004 was the product of "unreasonable" conduct because it was made "…*without an opportunity for discussion between committee members as representatives of all owners".* For the reasons already explored at length, the mere exercise, by the appellants, of their voting rights at a general meeting would not ordinarily constitute conduct attracting the operation of s 276. In the absence of any legislative basis to go behind the resolution of the general meeting, and in particular any basis for a finding that the resolution was unreasonable, this order should not stand.

49. Orders nos. 5 and 6 were not, again, specifically addressed by the parties in their Outlines or oral submissions, and the former seems to be directed to nothing more than a repair of the current circumstance in which the office of secretary is vacant, and the holding of a meeting. The latter, however, purports to direct the committee to pass resolutions concerning car parking in circumstances where that has already been dealt with at a general meeting, and the decision of that meeting has not been shown to be unreasonable. The other parts deal with matters which have now been overtaken by the passage of time. Although I was told that an administrator with limited powers was appointed in late 2005 there was no evidence about the extent of those powers. The second and third paragraphs in the sixth order may, for all I know, remain appropriate and the fourth is not insensible in light of the removal of Edith Dindas Pty Ltd as building manager.

50. Order 7 has, for reasons already discussed, been shown to have been made in a way which breaches the rules of natural justice and, for that reason alone, should be set aside. The appellants have also advanced other persuasive reasons why it was improper to limit the first and second appellants or their associates to only one nomination of one individual for committee membership: clause 11 of the *Commercial Module* imposes no restriction on a member's right to nominate persons to the committee and the adjudicator has, it appears, incorrectly relied upon amendments to the *Standard Module* which do,

[140494]

in fact, impose a limitation of that kind. The absence of any similar change to the applicable module reflects, fairly clearly, a legislative intent which is inimical to the order made.

51. Orders 8, 9 and 10, while reflecting an understandable desire on the adjudicator's part to re-establish some order in this scheme, suffer from the embarrassment that the appellants' voting rights have been limited in the manner just discussed and, for that reason, fall with order 7.

52. With respect to the appeal, then, it succeeds in respect of order no. 1, the second part of order no. 3, order 4, order 5, the first sub-clause in order 6, and orders 7, 8, 9 and 10.

The Respondents' Cross Appeal

53. There was no compelling basis for a finding, by the adjudicator, that the circumstances warranted the appointment of an administrator. His reasons make it clear that, mistakenly but understandably, he strove to fashion procedures and directions which would militate against the continuance of the long history of disputes which has beset this CTS but also, as may readily be inferred, that he considered more drastic remedies. It is not correct to say, as the respondents do in their most recent submission that stopping short of appointing an administrator was a "timid" response which should now be corrected.

54. The appointment of an administrator would involve very substantial costs to the body corporate (and, in particular, the appellants) and deprive all owners of any say in its affairs. While, as I have found, the adjudicator's purported remedies lacked a sound basis in the legislation, it would be a mistake to usurp the Commissioner's right to consider each case on its merits as it arises and determine whether or not an administrator, with either absolute or limited powers, should be imposed. The fact administration, subject to some unknown limitations has now been put in place strengthens this conclusion.

55. For these reasons, the cross appeal is dismissed.

56. I will hear submissions about any further orders the parties seek.

Footnotes

1 Exhibit 1, Appeal book, vol 2 pp 197–211

2 The *Commercial Module*

3 Notice of Cross Appeal, Appeal Book Vol 2, pp 382–384

4 In matters designated 266-2003, 361-2003, 682-2003, 703-2003, and 521-2004

5 Letter 15 March 2005; Appeal Book, Vol 2, p 251

6 *Commercial Module Regulations*, cl 13

7 Adjudicator's reasons, Appeal Book Vol 2, p 201

8 Adjudicator's reasons, Appeal Book Vol 2, p 202

9 Respondents' submissions on hearing of appeal and cross appeal, filed by leave 7 February 2006, p 4 par 16

10 Protection of Minority Orders in a Body Corporate, *Australian Property Law Journal* (Vol 11, No 2, January 2005).

11 Respondents' submission (SUPRA) p 6, par 24

12 780 of 2004

13 I accept, in this respect, the submissions made in the appellants' reply to the cross appeal: appeal book Vol 2, pp 398-4 par 11(f)

14 Reasons, p 11: Appeal Book Vol 2 p 207

15 Appeal Book Vol 2, p 263, par 12

16 Respondents first outline of argument, appeal book Vol 2 p 309 par 37

17 Respondents' outline, Appeal Book Vol 2, pp 305–6 pars 12, 13 and 14

18 Appeal Book Vol 2, p 308

19 Appeal Book Vol 2, pp 306–7

20 T107.23 – 28

21 13 November 1996, SCNSW Equity Division, Cowdroy AJ; BC 9605329

22 [1997] 44 NSWLR 46

23 with whom Mason P and Beazley JA agreed

24 and, see *Gambotto* v *WCP Ltd* [1995] 182 CLR 432 at 444 – 455

25 At pars [24] and [25]

26 Respondents' outline Appeal Book Vol 2, p 344, pars [44–47]

27 Judgment of Keane JA, pars [23] and [24].

28 Appeal book Vol 2, p 202

29 Appeal book Vol 2, p 203

30 T69.10 – 36

31 Appeal book Vol 2, p 352, par 14

THE OWNERS STRATA PLAN NO 61643 v 183 ON KENT MANAGEMENT PTY LTD

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(2008) LQCS ¶90-137

Court citation: [2007] QSC 281

Supreme Court of New South Wales

30 March 2007

Community schemes — Management — Managers, service contractors and letting agents — Owners corporation appoints manager to provide building management services and letting services — Whether appointment void and unenforceable as a delegation of the owners corporation's functions Strata Schemes Management Act 1996 (NSW), s 13(3)

An owners corporation constituted under the Strata Schemes Management Act 1996 (NSW) (the Act) entered into an agreement with 183 On Kent Management Pty Ltd (the manager).

Under the agreement, the owners corporation appointed the manager to provide certain services in relation to the relevant strata scheme, including building management services and letting services. The manager's specific duties were set out in Sch 1 of the agreement. Clause 1 provided that the manager was to "supervise and arrange for the maintenance, cleaning and repairs to the Common Property so as to keep the Common Property in good order and repair". Other clauses required the manager to report to the owners corporation with quotations for repairs; assist the owners corporation with the preparation of the annual budget; make recommendations to the owners corporation about the management, maintenance and care of the building; and comply with directions from the owners corporation in relation to the manager's duties under the agreement.

The owners corporation commenced proceedings against the manager in the Supreme Court of New South Wales, alleging that the agreement amounted to a delegation of the owners corporation's functions to the manager and, therefore, was void by reason of s 13(3) of the Act. Section 13 provides that an owners corporation may employ persons to assist it in the exercise of its functions. However, s 13(3) states that an "owners corporation may not delegate any of its functions to a person unless the delegation is specifically authorised by this Act".

Held: Judgment for the manager.

1. Section 13 of the Act deals with two different concepts. The first is that of employment, while the second is that of delegation. The concept of delegation reflects the independence of the delegate and the lack of direct control by the delegator. By contrast, the concept of employment means that the employer has direct control over the employee in the way that the employee performs its duties: *Gillett* v *Halwood Corporation Ltd & Ors*; unreported, New South Wales Court of Appeal, 26 March 1998.

2

[140496]

There is no bright, dividing-line test to determine whether an agreement constitutes an employment or a delegation. The crucial question is whether, by the agreement's provisions, the owners corporation has "given over sufficient decision-making and control in relation to its maintenance and repair functions to amount to delegation of some of those functions": *Owners — Strata Plan No 56443* v *Regis Towers Real Estate Pty Ltd* (2003) 58 NSWLR 78, per Hodgson JA at 92.

3 In bald terms, cl 1 of the agreement's Schedule was framed in a way that suggested that the owners corporation had delegated its statutory duty to the manager. However, the otherwise-wide words of cl 1 were cut down when read in the context of the clauses that followed. That context strongly suggested that the ultimate power of decision-making and control remained with the owners corporation and that such power of decision-making as was given to the manager was specific and limited to implementing that which had been decided or approved by the owners corporation. Therefore, on a construction of the Schedule as a whole, the owners corporation had not conferred on the manager sufficient decision-making and control to amount to a delegation.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

FC Corsaro SC (instructed by Andreones Pty Ltd) for the owners corporation.

PR Gray SC (instructed by David Le Page) for the manager.

Before: McDougall J.

[**Editorial comment:** The Queensland counterpart of s 13(3) of the Strata Schemes Management Act 1996 (NSW) is s 97 (formerly s 89A) of the Body Corporate and Community Management Act 1997, which states: "A body corporate can not delegate its powers." Presumably, cases in Queensland concerning s 97 will follow the same line of reasoning as in this case to determine whether a body corporate has delegated its powers.]

Full text of judgment below

McDougall J: On 2 March 2000, the plaintiff (the Owners Corporation) and the defendant (Management) entered into an "Agreement for the Provision of Building Management Services, Owners' Services and

Letting Services" (the Agreement). By that Agreement, the Owners Corporation appointed Management to perform and provide a number of defined services. The term of the Agreement was 5 years. Management had three options for renewal. The Owners Corporation contends that the Agreement constitutes, or includes, a delegation of some of its functions to Management. It contends further that, Management not being a "strata managing agent" as defined in s 26 of the *Strata Schemes Management Act* 1996 (the SSM Act), the delegation is not authorised by any provision of the SSM Act, and accordingly is void (relying on s 13(3)).

The separate question

2. On 9 February 2007, Bergin J ordered that the following question be determined separately from and before the determination of any other question in the proceedings:

> "Is the Agreement between the plaintiff and the defendant made on 2 March 2000 (as amended) relating to the provision of services by the defendant to the plaintiff in connection with 'Stamford on Kent' being strata plan no. 61643 (**the Management Agreement**) void and unenforceable by reason of section 13(3) of the *Strata Schemes Management Act, 1996?"*

3. When that separate question was argued on 8 March 2007, the parties agreed that there had been no amendment to the Agreement. Accordingly, and to avoid any possible confusion, I made an order by consent varying the separate question by deleting "(as amended)" from it.

4. The hearing was to proceed on the basis of a statement of agreed facts, to which were attached copies of the strata plan, the minutes of the Inaugural General Meeting of the Owners Corporation held on 2 March 2000 (at which meeting, among other things, the Owners

[140497]

Corporation resolved to enter into the Agreement) and a copy of the Agreement itself. However, each party decided that its case would be bolstered by the tender of further evidence. It is unnecessary to refer to the detail of that further evidence.

The legislative scheme

5. Section 8(1) of the SSM Act provides for the establishment of an owners corporation on registration of a strata plan for a strata scheme. Section 8(2) gives principal responsibility for the management of the scheme to the owners corporation.

6. Upon registration of a strata plan relating to land held in fee simple, the common property comprised in that strata plan vests in the owners corporation that has come into existence on registration of the strata plan. See s 18 of the *Strata Schemes (Freehold Development) Act* 1973.

7. Section 9 provides that the owners corporation may be assisted by its executive committee, a strata managing agent or a caretaker.

8. Section 11(1) declares an owners corporation to be a body corporate. Section 12 states that the owners corporation has the functions conferred or imposed on it by or under the Act. In Part 1 of the dictionary to the Act, "function" is defined to include "a power, authority or duty".

9. Section 13 provides that an owners corporation may employ persons to assist it in the exercise of its functions.

10. Section 26 defines a strata managing agent. It was common ground in this case that Management was not a strata managing agent so defined.

11. Section 27 provides for the appointment of strata managing agents: by instrument in writing authorised by a resolution in general meeting.

12. Section 28 sets out the functions that may be delegated to a strata managing agent, and provides for some limitations on such a delegation. Sections 29 to 32 make further provision for the exercise by strata managing agents of functions delegated to them.

13. Sections 9, 13 and 28 are the essential provisions on which the resolution of the separate question turns. Accordingly I set them out:

"**9 Who else may be involved in managing a strata scheme?**

The owners corporation may be assisted in the carrying out of its management functions under this Act by any one or more of the following:

(a) the executive committee of the owners corporation established in accordance with Part 3,
(b) a strata managing agent appointed in accordance with Part 4,
(c) a caretaker appointed in accordance with Part 4A.

…

13 Owners corporation may employ persons to assist in exercise of functions

(1) An owners corporation may employ such persons as it thinks fit to assist it in the exercise of any of its functions.
(2) An owners corporation must ensure that any person employed to assist it in the exercise of a function has the qualifications (if any) required by this Act for the exercise of that function.

Note. An owners corporation may employ such persons to assist it as, for example, caretakers and persons providing services to retirement villages. For example, a caretaker is required to be appointed under Part 4A. In addition, the Act requires certain functions to be performed by particular persons or persons having particular expertise. For example, section 24 places restrictions on the persons who can exercise functions relating to the finances and accounts of an owners corporation.
(3) An owners corporation may not delegate any of its functions to a person unless the delegation is specifically authorised by this Act.

…

28 What functions of an owners corporation can a strata managing agent exercise?

(1) An owners corporation may, by the instrument appointing a strata managing

agent or some other instrument, delegate to the strata managing agent:

(a) all of its functions, or
(b) any one or more of its functions specified in the instrument, or
(c) all of its functions except those specified in the instrument, but only if authorised to do so by a resolution at a general meeting and subject to subsection (3).

(2) An owners corporation may, if authorised to do so by a resolution at a general meeting, revoke a delegation under this section.
(3) An owners corporation cannot delegate to a strata managing agent its power to make:

(a) a delegation under this section, or
(b) a decision on a matter that is required to be decided by the owners corporation, or
(c) a determination relating to the levying or payment of contributions.

(4) A function delegated under this section may, while the delegation remains unrevoked, be exercised from time to time in accordance with the delegation.
(5) A delegation under this section may be made subject to such conditions or such limitations as to the exercise of all or any of the functions, or as to time or circumstances, as may be specified in the instrument of delegation.
(6) Despite any delegation made under this section, the owners corporation may continue to exercise all or any of the functions delegated.
(7) Any act or thing done or suffered by a strata managing agent while acting in the exercise of a delegation under this section:

(a) has the same effect as if it had been done or suffered by the owners corporation, and
(b) is taken to have been done or suffered by the owners corporation."

14. The "key areas of management for a strata scheme" are set out in Chapter 3 of the SSM Act. Section 61 defines, by way of "overview", those key management areas, and s 62 sets out the duties of an owners corporation to maintain and repair property. Those sections read as follows:

"**61 What are the key management areas for a strata scheme?**

(1) An owners corporation has, for the benefit of the owners:

(a) the management and control of the use of the common property of the strata scheme concerned, and
(b) the administration of the strata scheme concerned.

(2) The owners corporation has responsibility for the following:

(a) maintaining and repairing the common property of the strata scheme as provided by Part 2,
(b) managing the finances of the strata scheme as provided by Part 3,
(c) taking out insurance for the strata scheme as provided by Part 4,
(d) keeping accounts and records for the strata scheme as provided by Part 5.

(3) Other functions of an owners corporation are included in Part 6.

62 What are the duties of an owners corporation to maintain and repair property?

(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
(3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and
(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

[140499]

Note. The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138)."

15. Management relied on Pt 4A of Chapter 2 of the SSM Act. That part deals with "Others Assisting in Management — Caretakers". Part 4A was introduced into the Act by the *Strata Schemes Management Amendment Act* 2002, which commenced on 10 February 2003. However, cl 12(1) of Schedule 4 to the SSM Act provides as follows:

"**12 Effect of certain common property management agreements**

(1) Any agreement that was in force immediately before the commencement of Part 4A of Chapter 2 that, if entered into after that commencement, would be a caretaker agreement is taken to be a caretaker agreement appointing a caretaker."

16. For reasons that will become apparent, I conclude that Pt 4A does not assist Management; accordingly, it is unnecessary to set out what were said to be the relevant provisions of that Part.

The Inaugural General Meeting

17. The inaugural general meeting was held on 2 March 2000. In the usual way of such things, it appears to have been controlled by the developer of the strata scheme. The minutes record that, among other things, the following business was transacted:

" …

2. MANAGING AGENT:

(a) RESOLVED that BCS Strata Management Pty Ltd trading as Body Corporate Services be:

(i) appointed as strata managing agent under section 27 of the Strata Schemes Management Act 1996; and
(ii) delegated all of the functions of the owners corporation, executive committee and office bearers under section 28 of the Strata Schemes Management Act 1996.

(b) RESOLVED that the common seal be affixed to the agency agreement tabled at this meeting incorporating the instruments of appointment of and delegation to BCS Strata Management Pty Limited t/a Body Corporate Services.

…

7. SERVICES AGREEMENT

RESOLVED that the Services Agreement between Strata Plan No. 61643 and Stamford on Kent Management Pty Ltd in the form of the agreement tabled and being exhibit "B" to the minutes of this meeting [be?] executed by the owners corporation affixing the common seal to it in accordance with section 238 of the Strata Schemes Management Act 1996."

18. Management was then known as Stamford on Kent Management Pty Ltd.

The Agreement

19. Recital C to the Agreement noted the agreement of the parties that the Owners Corporation would engage Management (which was called "the Manager" in the Agreement) and Management would accept the engagement, to provide the services set out on the terms contained in the Agreement.

20. Clause 2 constituted the appointment. It provides as follows:

"**2. APPOINTMENT OF MANAGER**

2.1.1 The Owners Corporation appoints the Manager and the Manager accepts the appointment to carry out the duties and provide the services comprised in the Required Works, the Additional Works, the Owners Services and the Letting Services for a period of five (5) years commencing on the Commencement Date upon the terms and conditions of this Agreement."

21. The "Required Works" to which reference was made in clause 2.1 are the works set out in Schedule 1 to the Agreement. I return to that schedule in para [25] below. It is not necessary to consider the definitions of Additional Works, Owners Services or Letting Services.

22. Clause 3 specified the duties and powers of Management. It included the following:

"**3. DUTIES AND POWERS OF MANAGEMENT**

3.1 The Manager must by its employees, agents or subcontractors take all reasonable steps to:

[140500]

(a) perform the Required Works; and
(b) perform such other acts and things as are reasonably necessary and proper in the performance of the Required Works.

In doing so the Manager must have regard to the obligation of the Owners Corporation under any Strata Management Statement.

…
3.4 Nothing in this Agreement requires the Manager to or confers any right on the Manager to:

(a) exercise any of the functions of the Owners Corporation or of the Treasurer of the Owners Corporation relating to the receipt or expenditure of, or the accounting for, money of the Owners Corporation or the keeping of the books of account of the Owners Corporation; or
(b) perform any function, duties or powers which may only be carried out by the holder of a strata managing agent's licence under the Agents Act."

23. Clause 4 specified duties of the Owners Corporation in relation to the Agreement. It includes the following:

"**4. DUTIES OF OWNERS CORPORATION**

4.1 The Owners Corporation must provide the Manager with copies of all documents necessary to enable the Manager to perform its duties. These include, without limiting the obligations of the Owners Corporation, all documents or plans identifying the location and specifications of any services or amenities installed or erected on or forming part of the Common Property.
4.2 The Owners Corporation must give the Manager all access to the Common Property as the Manager may require to efficiently perform its duties and provide services under this Agreement.
4.3 The Owners Corporation must not, during the term, employ or contract with any other person to perform any function or duty or provide any service comprised in the Required Works, the Additional Works, the Owners Services and the Letting Services that the Manager is entitled to perform or provide under this Agreement. This does not prevent the Owners Corporation from appointing a strata managing agent licensed as a strata managing agent under the Agents Act to carry out functions, duties or services which the Manager cannot legally carry out without such a licence.

…
4.7 The Owners Corporation must, from time to time, appoint a member of the Council for the Owners Corporation or a strata managing agent as its representative to communicate with, receive request from and liaise with the Manager, on behalf of the Owners Corporation. The Owners Corporation must ensure that that person, or their nominated substitute, is at all times available to give instructions promptly in relation to anything on which the Manager seeks instructions. The Owners Corporation is bound by instructions given by the person so appointed or nominated."

24. Clause 5 made it plain that the "Required Works" were those set out in Schedule 1.

25. Schedule 1 listed some 22 categories of "duties". Although the parties did not refer to all of them, I think that it is desirable to reproduce the schedule in full:

"*1. Supervise and arrange for the maintenance, cleaning and repairs to the Common Property so as to keep the Common Property in good order and repair.
*2. Report promptly with quotations to the Owners Corporation on required repairs, replacement or renewal of things on the Common Property and all matters known to the Manager causing any hazard or danger and to arrange for remedial action where practicable.
3. Have regard to all By-Laws in force from time to time in respect to the Strata Scheme.
*4. Arrange for and supervise a program for the regular cleaning of driveways, foyers, stairs, hallways, doors and windows (other than internal doors and windows of Lots in the Strata Plan), utility rooms, car parking areas, amenities and other areas of the Common Property within, upon and around the building.

[140501]

5. Implement a program reasonably designed to ensure all lighting on the Common Property is operative and efficient and arrange for the maintenance and replacement of lighting when necessary.
*6. Arrange for the maintenance of machinery and plant and equipment located on the Common Property.
7. Regularly inspect the internal and external areas of Common Property (including equipment plant and machinery forming part of the Common Property) and report to the Owners Corporation in respect of the condition of the Common Property including that equipment plant and machinery.
8. Advise the Owners Corporation in the preparation of its annual budget with respect to items involving the repairs and maintenance or renewal and replacement of the Common Property.
*9. Make recommendations to the Owners Corporation for the management, maintenance and care of the building.
10. Implement a program reasonably designed to ensure all drains running from or serving the Common Property are kept clear and functioning efficiently.
11. Implement a program reasonably designed to ensure all fire fighting equipment is operative and efficient and arrange for inspection of same from time to time to ensure it complies with the requirements of the Fire Brigades of New South Wales.
12. When necessary arrange for the treatment and supply of insecticides for the Common Property.
13. Arrange for the supply and erection of such signs and notices on Common Property as may be necessary for the proper and efficient control, management, use and enjoyment of Common Property and in particular carparking signs and notices.
*14. Supervise control and regulation of the parking of motor vehicles on Common Property.
15. Organise and supervise the removal of all garbage, rubbish, refuse and waste from the Common Property.
*16. Arrange for and supervise such licensed security guards and concierges as the Owners Corporation may employ and to act as coordinator of those security guards and concierges.
17. Supervise, control and regulate any employees or contractors of the Owners Corporation (other than any strata managing agent).
18. Advise the Owners Corporation of any correspondence, reports, enquiries and complaints relating to the Common Property and the performance of the Manager's duties.
*19. Comply with and carry out all reasonable and lawful directions by the Owners Corporation to the Manager in relation to its duties under this Agreement.
20. Keep in its possession and control Security Keys and whenever it is necessary to surrender possession or control of Security Keys to any person then the Manager agrees to take all reasonable steps to implement a system to recover possession or control of the Security Keys from the person to whom possession or control was surrendered.
21. Supervise the observance of the Special By-Laws and in doing so the Manager is authorised by the Owners Corporation to require due compliance with the Special By-Laws.
*22. As far as the Manager can reasonably and lawfully do, to keep order on the Common Property and take such precautions as it sees fit to safeguard Common Property against unlawful entry or accident or damage."

26. The asterisk denotes duties that were, or were said to be, substantially the same as duties (under a different but not dissimilar agreement) considered by Hamilton J in *Owners — Strata Plan No 51487* v *Broadsand Pty Ltd* [2002] NSWSC 770 *(Broadsand).*

The issue

27. The issue between the parties is whether, by the Agreement, the Owners Corporation delegated any of its "functions" to Management. It was common ground that if that question should be answered "yes", the

[140502]

delegation was not (in the language of s 13(3)) one "specifically authorised by" the SSM Act.

Approach to the question of interpretation

28. The Owners Corporation relied on the decision of Hamilton J in *Broadsand,* and on the earlier decision of the Court of Appeal in *Gillett v Halwood Corporation Ltd & Ors* (26 March 1998, unreported; BC9800883). Management relied on the decision of the Court of Appeal (Hodgson JA, with whom Handley and McColl JJA agreed) in *Owners — Strata Plan No 56443* v *Regis Towers Real Estate Pty Ltd* (2003) 58 NSWLR 78.

29. The agreements considered by the Court of Appeal in *Gillett* and by Hamilton J in *Broadsand* were made when the *Strata Titles Act* 1973 (the ST Act) was in force, and fell to be considered according to the relevant provisions of that Act. Those provisions included, in s 78(1), authorisation for a body corporate in general meeting and by written instrument to appoint a managing agent and to delegate to "him" all or some of the powers, authorities, duties and functions of the body corporate. Sub section (1A) restricted, in a presently immaterial way, that power of delegation. Sub section (1AA) prohibited the appointment of a managing agent unless the appointee were the holder of a strata managing agent's licence issued pursuant to the relevant legislation.

30. Clause 2 of the statutory by-laws set out in schedule 1 to the ST Act authorised the council of a body corporate (the equivalent of what is now the executive committee of an owners corporation) to "employ for or on behalf of the body corporate such agents and servants as it thinks fit in connection with the exercise and performance of the powers, authorities, duties and functions of the body corporate."

31. Thus, in broad outline, the scheme comprised in those provisions of the ST Act resembled the scheme comprised in ss 13 and 28 of the SSM Act.

32. In *Gillett,* Priestley JA observed at BC 43 that the scheme set out in s 78(1) of the ST Act appeared to involve a two step procedure of, firstly, appointment and, secondly, delegation. However, his Honour doubted whether an appointment without any delegation would have any content; and said that for any appointment to have "definite content" it must include "the delegation to the appointee … of at least one of the body corporate's powers, authorities, duties and functions." It may be noted that ss 27 and 28 of the SSM Act contemplate appointment in writing and delegation, either by that instrument or by some other instrument, of functions.

33. Priestley JA contrasted s 78(1) of the ST Act and cl 2 of the statutory by-laws. His Honour said at BC 45 that the contrast between the concept of appointing a delegate (s 78(1)) and employing agents and servants (cl 2 of the statutory by-laws) "… points clearly to the intended different functions of the two powers; the former is directed to the appointment of an agent in the nature of an independent contractor, over whom the body corporate will not have the power of control that an employer has over an employee; the latter is directed to the creation of an employment relationship, in the course of which the council will have the power of an employer to control directly the way in which its employed agent or servant carries out the employment … . In a s 78(1) case, the managing agent will exercise one or more delegated powers etc of the body corporate, for the body corporate. In a by-law 2 case the body corporate will itself be exercising powers etc by the direct controlled employment of an agent or servant."

34. At BC 46, his Honour noted that "the distinction I have sought to describe is sometimes difficult to apply". He posed the alternative choices as being whether the contract in question involves "an attempted delegation" or whether it puts in place "a relationship subject to the greater control implied by by-law 2". His Honour said that the elucidation of this sometimes difficult distinction was to be achieved by looking at what the delegate or agent "is authorised and required to do under the [agreement of appointment] and the degree of authority it is given".

35. Thus, his Honour concluded, "there can be no managing agency without delegation." That conclusion must be considered in the context of the ST Act which (unlike the SSM Act) did not define a "managing agent";

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although it should be noted that Handley JA said (at BC 4 of his Honour's reasons) that the term "managing agent" should have the definition accorded to it in the *Auctioneers and Agents Act* 1941 (as it then stood).

36. Handley JA agreed with Priestley JA, although his Honour gave additional reasons. His Honour's additional reasons did not, I think, add to what Priestley JA had said on this topic.

37. Powell JA agreed with Priestley JA and with the further observations of Handley JA (and I note that Priestley JA in turn agreed with the further observations of Handley JA).

38. In *Broadsand,* Hamilton J referred to the relevant passages of the judgment in *Gillett.* He concluded (see para [29]) that the agreement under consideration by him "constituted an appointment of the company … as managing agent and delegation to it of at least some of … the powers, authorities, duties and functions of the [body corporate]." His Honour said that "the agreement on its proper construction creates a relationship within which the agent is to perform the agreement on its part as a contractor acting independently, perhaps with some small and specific limitations, and not as an employee subject to the degree of supervision and direction inherent in the employment relationship."

39. In para [30], Hamilton J referred to "the mishmash of generality and particularity" in the schedule there under consideration (a description that could be applied to schedule 1 to the Agreement). However, his Honour noted that the first item of the schedule that he was considering imposed "a requirement to manage, supervise and arrange for the maintenance, cleaning and repair of the common property in terms which closely echo those specifying the duties of wide and general ambit imposed on the body corporate by s 68(1)(a) and s 68(1)(b) of the [ST Act]". His Honour considered that the first duty was not to be read down or qualified by reference to subsequent and more particular duties, which of themselves might indicate that the relationship was that "of employee status".

40. The approach taken by Hamilton J was to consider all the terms of the agreement. That is the approach directed, as his Honour observed, by the well known statement of Gibbs J in *Australian Broadcasting Commission* v *Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109, to the effect that, in seeking to ascertain the intention of the parties from the words of their contract, the whole of the contract must be considered and an attempt must be made to render every part "all harmonious one with another."

41. Gibbs J referred to the observation of Lord Wright in *Hillas & Co Ltd* v *Arcos Ltd* (1932) 147 LT 503 at 514, that the courts should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects". His Honour observed at 110 that this principle "should not … be understood as limited to documents drawn by businessmen for themselves and without legal assistance." Barwick CJ expressed a similar view in *The Council of the Upper Hunter County District* v *Australian Chilling and Freezing Co Limited* (1968) 118 CLR 429 at 437: in searching for the parties' intention, "no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements."

42. The agreement considered by the Court of Appeal in *Regis Towers* was one made after the commencement of the SSM Act. Hodgson JA said at 91 [29] that "what is prohibited by s 13(3) of the Act is the engaging of another person or corporation to undertake significant decision-making and control in relation to the various areas of responsibility of an owners' corporation." At 91 [30] his Honour contrasted the performance of duties with the giving of general authority to make decisions or exercise control. At 92 [35], his Honour stated the "crucial question" as follows:

> "It seems to me that this is the crucial question in this case: namely, has the owners corporation by these provisions given over sufficient decision-making and control in relation to its maintenance and repair functions to amount to delegation of some of those functions?".

The parties' submissions

43. For the Owners Corporation, Mr F C Corsaro SC pointed to the similarities between schedule 1 of the present Agreement and schedule 1 of the agreement considered by

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Hamilton J. He submitted that the change in the legislation had not changed the basic test; and that, just as Hamilton J had concluded overall that there was a delegation in *Broadsand,* so I should conclude overall that there was a delegation in this case.

44. For Management, Mr P R Gray SC pointed to the agreement considered by the Court of Appeal in *Regis Towers.* He submitted that even powers of the width there considered did not lead to the conclusion that there was a delegation; and that the same conclusion should follow in this case.

45. Mr Corsaro referred to s 62 of the SSM Act: in particular, the obligations of maintenance and repair of common property and personal property. He submitted that cl 1 of schedule 1 to the Agreement was a delegation of the Owners Corporation's duty under s 62(1). This, he submitted, followed in particular from the duty to "arrange for" the specified matters.

46. Mr Gray pointed to the following obligations relating (either exclusively or in part) to maintenance. He referred in particular to cls 2, 8 and 9, submitting that these qualified, or defined the limits of, the duty to supervise and arrange that was the subject of cl 1. He referred also to cl 19, whereby the Owners Corporation retained, so he submitted, the power to direct Management in the performance of all its duties under the Agreement.

47. Further, Mr Gray pointed to the apparently wide terms of the equivalent power considered by the Court of Appeal in *Regis Towers,* which included (as appears from the reasons of Hodgson JA at 85 [15]) a duty to "[m]aintain and care for the strata scheme and attend to the gardening, cleaning and building maintenance of the building and common property … and … [to] use its best endeavours to maintain the common property of the building in a good state of repair … ".

48. Hodgson JA referred at 92 [30] to the various ways in which the respondent in that case was subject to the control or direction of the appellant. A similar observation can be made in this case. Although Management is given the duty of supervising and arranging for maintenance etc, cls 2 and 9 indicate the continuing involvement of the Owners Corporation in the direction of that process; and cl 19, as I have said, confirms that the Owners Corporation has not given away control over the process.

49. Mr Gray relied further on cl 3.4(b). He accepted that it was for the Court, and not the parties, to characterise the transaction. This is correct; see for example the decision of the High Court of Australia in *Radaich* v *Smith and Another* (1959) 101 CLR 209. However, he submitted that cl 3.4(b) remained relevant in at least two ways:

> (a) it was an objective indication of the parties' intention not to effect an appointment that would be prohibited by s 13(3); and
> (b) alternatively, and more widely, it was a test to be applied to schedule 1, on the basis that it would effectively sever from the schedule anything that would otherwise be an impermissible delegation of the Owners Corporation's functions.

50. Finally, Mr Gray relied on the terms of resolutions (2) and (7) of the inaugural general meeting. He noted that the second resolution was in terms an appointment of a strata managing agent and a delegation to that appointee of all (permissibly delegable) functions of the Owners Corporation. He submitted that the Owners Corporation could not have intended, in the very same meeting and five items of business later, to carve out from that delegation a separate delegation in favour of Management.

51. Mr Corsaro accepted that such an intention was unlikely; but submitted that the question of characterisation was to be determined by reference not to the events of the inaugural general meeting but to the language of the Agreement.

Decision

52. Section 13 of the SSM Act deals with two different concepts. The first is that of employment. The second is that of delegation. Neither term is defined in the dictionary to the Act.

53. **The Oxford Australian Dictionary** (2nd Edition, 2004) gives the primary meanings of the verb "delegate" as "commit (authority, power etc.) to an agent or deputy … entrust (a task) to another person". The same dictionary

gives the primary meanings of the verb "employ" as "use the services of (a person) in return for payment; keep (a person) in one's employment".

54. The distinction between the two concepts that is evident from those definitions is evident also in the analysis of Priestley JA in *Gillett.* At BC 45–46, his Honour spoke of the distinction between s 78(1) of the STA Act and statutory by-law 2. As I have foreshadowed in para [31] above, the basic scheme of s 78(1) of the STA Act is now to be found in s 28(1) of the SSM Act, and the basic scheme of statutory by-law 2 is

now to be found in s 13(1) of the SSM Act. Priestley JA observed that the concept of delegation reflected the independence of the delegate, and the lack of direct control by the delegator. By contrast, his Honour said, the concept of employment meant that the employer had the power of direct control over the employee in the way that the employee performed its duties.

55. However, the decision in *Regis Towers* makes it clear that there is no bright line dividing test. As I have noted in para [42] above, Hodgson JA framed the test at 92 [35] as enquiring whether the owners corporation had "given over sufficient decision-making and control … to amount to delegation … ?". It seems to follow from his Honour's statement of the test that there may be some handing over of decision-making and control without there being a delegation. The question in any given case is what is "sufficient" to amount to delegation.

56. In bald terms, the first of the Schedule 1 duties in the present Agreement is framed in a way that suggests that the Owners Corporation has delegated its statutory duty under s 62 of the SSM Act to Management.

57. I think it is correct to say, as Mr Corsaro submitted, that in principle the obligation to "arrange for" something may carry with it the power to enter into contracts to cause that thing to be done. Thus, the duties of supervision and arrangement, or arrangement (see among others cls 1, 4, 6, 12 and 16 of the schedule to the Agreement) appear to give Management the power to enter into contracts, which would be binding on the Owners Corporation, for the performance of the various obligations comprehended in those clauses. But those powers cannot be considered in isolation from their context. The context includes the specific obligations imposed by the particular requirements of cls 2, 8 and 9 relating to repair and maintenance and the general provisions of cl 19.

58. It should also be noted that cl 16 suggests that the duty to "arrange for" something does not always or necessarily confer an independent power to enter into contracts in relation to the relevant subject matter. Management is empowered to "arrange for and supervise" licensed security guards and concierges. But the clause itself makes it plain that it is the Owners Corporation that "employs" those guards and concierges. The power of arrangement and supervision would appear to be limited to day-to-day administration of those whom the Owners Corporation has decided to "employ", and not to extend to the decision as to who is to be employed.

59. Clauses 2, 8 and 9 suggest that the duties relating to maintenance and repair of the common property are to be carried out within the overall context of control by the Owners Corporation. Clause 9 indicates that there is to be an overall plan or scheme for management, maintenance and care. That is to be a scheme authorised by the Owners Corporation after considering recommendations from the manager. Clause 8 reinforces this. There is to be an annual budget for repair, maintenance, renewal or replacement. Again, this budget is to be decided by the Owners Corporation after considering recommendations from Management.

60. Thus, to the extent that cl 1 gives some general power to supervise and arrange, it is, at least in respect of planned or repetitive maintenance, cleaning and repair, a power to be exercised within the framework of the maintenance plan and budget set by the Owners Corporation.

61. Clearly, not all maintenance and repair will fall within the plan or the budget that has been approved by the Owners Corporation. But there is, nonetheless, an obligation to report with quotations where repairs, replacement or renewal are required (cl 2). It is implicit in cl 2

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that any works the subject of reports and quotations are not to be carried out except with the approval of the Owners Corporation.

62. Thus, I think, the otherwise wide words of cl 1 of the schedule are to an extent cut down when they are read in context. That context suggests strongly that the ultimate power of decision-making and control remains with the Owners Corporation; and that such power of decision-making as is given to Management is specific, and limited to implementing that which has been decided or approved by the Owners Corporation.

63. This reading is reinforced by cl 19, which empowers the Owners Corporation to give reasonable and lawful directions to Management in relation to Management's duties under the Agreement. That clause is not

consistent with the concept of independence to which Priestley JA referred to in *Gillett;* on the contrary, it is consistent with the concept of supervision or control to which his Honour also referred.

64. Clause 21 deals with enforcement of "Special By-Laws". That does not appear to be a defined term in the Agreement, notwithstanding the capitalisation of the initial letters. It is not clear whether the expression "Special By-Laws" refers to the by-laws adopted by or lodged with the strata plan on registration or subsequently amended (see ss 41 and 47 of the SSM Act), or to some more limited class of by-laws (for example, by-laws under Division 4 of Part 5 of Chapter 2 of the SSM Act conferring rights or privileges on the owners of specified lots).

65. One of the duties of the "caretaker" in Regis Towers was to "[s]upervise the observance of the by-laws", which included the duty to "serve notices on occupants in relation to breaches of by-laws". Hodgson JA said at 92 [33] that he would not construe that paragraph as authorising the caretaker to serve a notice unless the requirements of s 45, which required the owners corporation to be satisfied that there had been a contravention, had been complied with. In my view, the same approach to construction should be taken to cl 21 in this case. It should be noted that cl 21 is, as much as is any other clause in the schedule, subject to cl 19.

66. Thus, on a construction of the schedule as a whole, I do not think that the Owners Corporation has conferred on Management sufficient decision-making and control to amount to a delegation.

67. As I have noted above, Mr Corsaro based his submissions very heavily on the decision of Hamilton J in *Broadsand.* Whilst I do not wish to be understood to suggest that his Honour's decision was incorrect, it cannot compel the conclusion that a similar (or even identical) agreement between other parties is, likewise, void. In any event, I think, the focus of the analysis has changed somewhat, by reason of the decision in *Regis Towers.* Thus, without wishing to be thought to be disrespectful either to his Honour's decision or to the submissions based on it, I do not think that there is anything to be gained by the close comparison of the two agreements that Mr Corsaro undertook in his submissions. As I have sought to indicate, the question is one to be answered, in accordance with the test posed in *Regis Towers,* by an analysis of the particular agreement.

68. My conclusion renders it unnecessary to deal with the submissions founded on cl 3.4(b) of the Agreement and on the events of the inaugural general meeting. Nonetheless, those matters tend to confirm the conclusion. Each is inconsistent with the proposition that the parties intended the Agreement to amount to a delegation of the Owners Corporation's functions in relation to common property. In addition, I think, it is at least arguable that cl 3.4(b) should be construed so as in effect to excise from the Agreement any "duty" in schedule 1 that, on its proper construction, did involve a delegation.

"Caretaker agreement"

69. As I have noted, Mr Gray submitted that the Agreement was a "caretaker agreement" within Part 4A of Chapter 2 of the SSM Act. However, it was an agreement made before the commencement of Part 4A. Accordingly, as cl 12 of Schedule 4 makes plain, it would only be taken to be a caretaker agreement on the commencement of Part 4A if it were "in force immediately before the commencement of Part 4A".

70.

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It is not necessary to decide this point. If however it were, I would conclude that it should be answered in accordance with what Hodgson JA said in *Regis Towers* at 91 [25]. If on its proper construction the Agreement did amount to an impermissible delegation, it would have been void, and therefore would not have been an agreement "in force" on the commencement of Part 4A.

71. Mr Gray submitted that this reasoning was obiter, and that it was incorrect. I agree that it is obiter, since the Court decided that the agreement under consideration did not give rise to any prohibited delegation. Nonetheless, I do not think that it would be open to me to decline to follow a considered (and unanimous) statement of the Court of Appeal on the precise point in issue.

72. Mr Gray submitted further that the Owners Corporation, in proceedings against Management in the Consumer Traders and Tenancy Tribunal, had alleged by its points of claim that the Agreement was a

“caretaker agreement”. Perhaps not surprisingly, his client had admitted this allegation in its points of defence. There has been no determination of the Tribunal on that point.

73. I do not think that an assertion or admission in a “pleading” in one set of proceedings should be taken to be an admission for the purposes of separate proceedings. In any event, it is unnecessary to decide this point.

Conclusion

74. The separate question (amended as indicated in para [2] above) should be answered “no”.

75. I will hear the parties on the questions of further relief and costs.

COMMUNITY ASSOCIATION DP NO 270180 v ARROW ASSSET MANAGEMENT PTY LTD & ORS

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(2008) LQCS ¶90-138

Court citation: [2007] NSWSC 527

Supreme Court of New South Wales

30 May 2007

Community schemes — Management — Management agreements — Community association, under control of developer, enters into site management agreement during "initial period" — Site manager pays premium to developer for agreement — Terms of agreement excessively favourable to site manager — No moneys in administration or sinking fund when agreement made, but developer pays association's debts during initial period — Terms of agreement disclosed in community management statement, but payment of premium not disclosed — Site manager assigns agreement to assignee — Whether developer in breach of fiduciary duty to association by profiting from agreement to association's detriment without proper disclosure — Whether developer liable to association for equitable damages or to account for profits — Whether developer liable to association for causing association to incur debt during initial period without sufficient moneys in administration or sinking fund — Whether agreement terminated at end of first annual general meeting — Whether effect of agreement adequately disclosed in community management statement or ratified at annual general meeting — Whether association liable to site manager and, later, assignee under agreement — Whether assignment of agreement effective — Whether association estopped by convention from denying effectiveness of agreement and assignment — Community Land Management Act 1989 (NSW), s 23, 24.

Community Association DP No 270180 (the association) was the community association for a community titles complex in Sydney. In December 1998, during the "initial period" in which all the lots in the complex were still owned by the developer (Australand Consolidated Investments Pty Ltd), the association (under the developer's control) entered into a site management agreement (the agreement) in relation to the complex with Arrow Asset Management Pty Ltd (the site manager). The terms of the agreement were more favourable

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to the site manager — and therefore less favourable to the association — than those the association could have obtained on the open market in an arm's length transaction. The site manager paid the developer a premium of $190,000 for the agreement.

The association's intention to enter into the agreement with the site manager during the initial period, together with the basic terms of the agreement, were disclosed in the community management statement for the complex. However, the site manager's payment of a premium to the developer was not disclosed in the statement.

When the agreement was entered into, there were no moneys in the association's administrative or sinking funds. However, the developer undertook to pay all the association's outgoings until the association itself was able to meet its outgoings from the funds. The developer honoured that undertaking, which included paying the site manager the first instalment under the agreement.

Almost eight months after the date of the agreement, the association held its first annual general meeting (the AGM). At the AGM, the association resolved that contributions to the administrative and sinking funds be determined in accordance with specified figures set out in a draft budget. One of those figures in the budget was for "On Site Management".

Approximately 11 months after the AGM, the site manager assigned its rights and obligations under the agreement to Bondlake Pty Ltd (the assignee). The association was a party to the assignment, giving its consent to the assignment and releasing the site manager from all further obligations under the agreement.

The association commenced proceedings in the Supreme Court of New South Wales against the developer, the site manager and the assignee. Among other things, the association argued:

> 1. against the developer, that: (a) the developer owed the association a fiduciary duty when it entered into the agreement with the site manager; (b) the developer breached that duty in that it profited from the agreement to the detriment of the association without proper disclosure; (c) therefore, the developer was liable to the association for equitable damages or to account for the premium it received from the site manager; (d) the association, under the control of the developer, breached s 23 of the Community Land Management Act 1989 (NSW) (the Act) by incurring a debt during the initial period which exceeded the amount then available for repayment of the debt from the administration or sinking fund; and (e) therefore, the developer was liable to the association under s 23(5) either for the debt or for damages resulting from the breach
> 2. against the site manager and the assignee, that: (a) the agreement ended at the conclusion of the AGM pursuant to s 24(2) of the Act. Section 24(2) provides that any service agreement entered into by an association during the initial period terminates at the end of the first annual general meeting unless the effect of the agreement is disclosed in the association's management statement or is ratified at the meeting; (b) therefore, the association was not liable to the site manager under the agreement; (c) therefore, the assignment of the agreement from the site manager to the assignee was ineffective; and (d) therefore, the assignee had no right to provide site management services to the association and the association had no obligations to the assignee.

Held: Proceedings against developer upheld; proceedings against site manager and assignee dismissed.

Proceedings against the developer

Breach of fiduciary duty

1. It is appropriate to regard the developer of a community scheme as being, vis-à-vis the community association, in a position analogous to that of a promoter of a company. It

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follows that the relationship between the developer and the community association is a fiduciary relationship.

2. Because the consideration for the association's entry into the agreement (that is, the premium) was paid to the developer and not to the association, the developer had an interest in ensuring that the terms of the agreement were sufficiently generous to the site manager to justify the consideration. However, the developer had a conflicting duty to the association to make the agreement on the best terms commercially available to the association. The developer thereby breached its fiduciary duty to the association.

3. The developer's breach of duty was not negated by the making of adequate disclosure in the community management statement. None of the disclosures about the agreement in the statement alerted any prospective members of the association that the site manager had paid $190,000 for the rights given to it by the agreement. The disclosure of such information was material because, viewed objectively, it bore on a prospective purchaser's ability to make a proper assessment of the terms of the agreement.

4. The association was not entitled to equitable compensation for the developer's breach of duty because the evidence as to the difference between the amount payable under the agreement and an amount payable under an arm's length agreement was deficient and did not permit the necessary quantification. Therefore, the appropriate remedy was an account of profits. The developer was required to account to the association for the $190,000 profit it received for causing the association to enter into the agreement.

Incurring of debt during initial period

5. When the association entered into the agreement, it incurred a debt for the first month's instalment payable to the site manager for the performance of its duties. In breach of s 23 of the Act, this debt exceeded the amount then available for the repayment of the debt from the association's administrative or sinking fund.

6. There was no evidence that the association incurred any liability because of the breach of s 23. Pursuant to its undertaking, the developer paid the debts incurred by the association while there was no money in the funds. As to the association's future liabilities under the agreement, the Act does not require the administrative or sinking funds to cover more than the debts due and payable during the initial period. Therefore, the association was not entitled to relief under s 23(5) of the Act.

Proceedings against the site manager and assignee

Termination of agreement at AGM

7. The effect of the agreement was not disclosed by the community management statement for the purposes of s 24(2) of the Act. Furthermore, there was no express or implied ratification of the agreement at the AGM. Even if implied ratification was sufficient for the purposes of s 24(2) (which was doubtful), the mere mention of "On Site Management" in the draft budget went nowhere near providing any information about an agreement, let alone an agreement for which ratification was required. Accordingly, by force of statute, the agreement terminated at the end of the AGM.

Effectiveness of assignment

8. The Act had the effect of terminating the agreement at the end of the AGM, thereby suggesting that there was nothing left for the site manager to assign to the assignee. However, the conventional basis of the dealings between the association and the site manager between the date of the AGM and the date of the assignment was that the agreement was in force, valid and effective. Furthermore, the conventional basis of the assignment transaction was that the management agreement as between the association and the assignee was in force, valid and effective on and from the date of the assignment. Also, the site manager and the assignee would both suffer detriment if the association was permitted to depart from such

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conventions. Therefore, the association was estopped by convention from denying the effectiveness of the site agreement and the assignment.

9. There is nothing in the policy underlying s 24 of the Act that suggests that an agreement terminated by the section should be stigmatised as illegal, void or otherwise offensive to public policy so as to bring into play the principles relating to estoppel in the face of a statute. If it would be open to parties to renew a management agreement on identical terms to that which was terminated by the section, it must be open to them to achieve the same result through a conventional assumption adopted as the basis of their dealings thereafter.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

FC Corsaro SC and DB Studdy (instructed by McLaughlin & Riordan) for the association.

JS Wheelhouse SC (instructed by Deutsch Partners Lawyers Pty Ltd) for the site manager and assignee.

N Perram SC and JS Emmett (instructed by Mallesons Stephen Jaques) for the developer.

Before: McDougall J.

[**Editorial comment:** The relevance of this case for Queensland is discussed in detail by Gary Bugden in an article entitled "Implications of the Arrow Asset Management decision". The article is reproduced with Mr Bugden's permission in the commentary at ¶38-250.]

Full text of judgment below

McDougall J: "Balmain Cove" is a large residential development on the southern shores of Iron Cove, adjacent to the Iron Cove Bridge. It was developed by the third defendant (Australand – known at the relevant time as Walker Consolidated Investments Pty Ltd) in stages pursuant to the *Community Land Development Act* 1989 (the CLD Act). The plaintiff (the Association) is the community association for Balmain Cove.

2. The Association entered into a Site Management Agreement (the management agreement) with the first defendant (Arrow) on 2 December 1998. On about 30 June 2000, the Association, Arrow and the second defendant (Bondlake) entered into a "Deed of Assignment of Agreement" (the deed of assignment) whereby Arrow, with the consent of the Association, purported to assign to Bondlake all Arrow's rights and obligations under the management agreement.

3. The Association now contends that the management agreement came to an end on 28 July 1999 — the date of its first annual general meeting — and that the deed of assignment was therefore ineffective. Arrow and Bondlake dispute both contentions and say in addition that the Association is estopped from raising them.

4. Further, the Association says that Australand, as the developer of Balmain Cove, owed the Association fiduciary and common law duties, and breached them when, in consideration of payment from Arrow to itself, it caused the Association to enter into the management agreement.

The issues

5. The parties agreed that the real issues for decision were as follows:

> "1. Whether the third defendant ("Australand"), when it caused the plaintiff (the "Association") to enter into the Site Management Agreement (the "SMA") with the first defendant ("Arrow") on 2 December 1998, owed the Association a fiduciary duty to:
>
> (a) Act with absolute candour and honesty to the Association;
> (b) Not to place self [sic] in a position of conflict or to profit from contracts entered into between the Association and Arrow, without proper disclosure;
> (c) Act in the best interest of the Association in the exercise of a power or discretion affecting the Association's interests;
> (d) Not to act to the detriment of the Association; and
>
> [140511]
>
> (e) To disclose relevant matters to the Association to enable it to make an informed and impartial decision about whether to enter into the SMA.
>
> 2. Whether Australand as at 2 December 1998 owed the Association a duty of care to avoid it suffering economic loss.
> 3. If the answer to questions 1 and/or 2 is yes, did Australand's conduct in causing the Association to enter into the SMA with Arrow breach its fiduciary duty and/or its common law duty?
> 4. If the answer to question 3 is yes, in so far as breach of fiduciary duty is concerned, is the Association entitled to equitable compensation from Australand being the difference between the amount payable under the SMA and an amount payable under an agreement entered into at arm's length as at 2 December 1998?

5. If the answer to question 3 is yes, in so far as breach of fiduciary duty is concerned, is Australand also liable to account to the Association for the profit of $190,000 it made by causing the Association to enter into the SMA?
6. If the answer to question 3 is yes, in so far as breach of common law duty is concerned, is Australand liable in damages to the Association for economic loss, the measure being the difference between the amounts paid by the Association under the SMA and the amounts that would have been paid on an arm's length transaction entered into as at 2 December 1988 [sic: obviously, 1998]?
6A. If:

> (a) the Site Management Agreement terminated; and
> (b) the first and second defendants establish that the plaintiff is not entitled to rely on that fact;

then the question is whether the loss suffered by the plaintiff is caused by the actions of the third defendant or its own actions.
7. (a) Was the effect of the SMA disclosed in the Association's Community Management Statement registered on 27 November 1998 within the meaning of s 24(2)(a) of the Community Land Management Act, 1989 (the "CLMA")? and
(b) Was the SMA ratified at the first Annual General meeting of the plaintiff?
8. If the answer to question 7(a) and (b) is no, then did the SMA terminate at the end of the Association's first annual general meeting on 28 July 1999?
9. If the answer to question 8 is no, then why not?
10. By entering into the SMA, did the Association incur a debt during the "initial period" for an amount in excess of the amount then available for repayment of the debt from the administrative fund or the sinking fund of the Association?
11. If the answer to question 10 is yes, is Australand liable to the Association pursuant to s 23(5)(a) or (b) of the CLMA?
12. Was the assignment of the SMA from Arrow to Bondlake on 30 June 2000 ineffective?
13. If the SMA terminated on 28 July 1999, can the conduct of the Association pleaded in paragraphs 18 and 19 of Arrow's Response and paragraphs 18 to 20 of the second defendant's ("Bondlake") Response give rise to the alleged estoppels?
14. If the answer to question 13 is no, were the payments made by the Association to Arrow and Bondlake made under a mistake of law requiring Arrow and Bondlake to make restitution to the extent of the payments exceeding the true benefit received by the Association?
15. If the answer to question 13 is yes, do the estoppels cease to have any operation from the time when Arrow and Bondlake were on notice that the Association believed the SMA had been terminated?
16. If the SMA terminated on 28 July 1999, what is the value of the true benefit of the services received by the Association from 2 December 1998 to date?
17. In relation to 7(b) above, does the term "ratification" in s 24 include implied ratification?
18. If yes to question 17, does the conduct of the plaintiff amount to ratification in accordance with s 24?

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19. Did the conduct of the plaintiff and the first defendant prior to and after 28 July 1999, create an estoppel (promissory or conventional) which either (a) precludes the plaintiff from now asserting that the SMA was not unenforceable at all times prior to the execution of the deed of assignment on or about 20 June 2000, or (b) precludes the plaintiff from now asserting that the SMA was not unenforceable at all times after 31 August 1999?
20. If yes to question 19(a) or (b), will the first defendant suffer detriment if the plaintiff is permitted to depart from that conduct?
21. Was an agreement made on 30 June 2000 between the plaintiff and the second defendant that in consideration of the plaintiff paying to the second defendant the regular duties fee, the second defendant would perform the obligations under the SMA as if it was named "site manager" in the SMA?

22. Was there a separate and new agreement created by the novation of the SMA by 30 June 2000?
23. Was there a separate and enforceable agreement between the plaintiff and the second defendant made on or about 30 June 2000 by deed that the second defendant would perform the obligations under the SMA as if it was named the "site manager" in the SMA?
24. Did the following:

> (a) The assignment of the SMA from the first defendant to the second defendant effective 30 June 2000;
> (b) The plaintiff's consent to that assignment; and
> (c) The continued operation of the SMA subsequent to the assignment,

create an assumption that the SMA was valid and enforceable and capable of assignment?
25. If yes to question 24, has the second defendant relied upon the assumption to its detriment?
26. If yes to question 24, is it unjust to allow the plaintiff to depart from the assumption?
27. Did the second defendant and the plaintiff in executing the deed of assignment on or about 30 June 2000 conduct themselves on the common assumption that the deed of assignment created a new agreement between the plaintiff and the second defendant such that an estoppel (promissory or conventional) now prevents the plaintiff from denying that assumption?
28. Has the plaintiff established that the true value of the services provided under the SMA was other than the regular duty fee paid by the plaintiff from time to time?
29. Has the plaintiff contravened the Trade Practices Act 1974 (Cwth) ("TPA") by conduct comprising representations to the first and/or second defendants that the SMA is binding and enforceable; or
30. If the answer to question 29 is yes:

> (a) Is the first defendant entitled to relief under sections 80, 82 or 87 of the TPA? and
> (b) Is the second defendant entitled to relief under s 80, s 82 or s 87 of the TPA? or
> (c) In respect of the second defendant, that it was additionally bound to perform the duties and obligations of the SMA under a fresh agreement as if it was named as the site manager in the SMA and was entitled to receive the remuneration thereunder.

31. If the answer to either 30(a) or 30(b) is yes, [to] what relief is either the first defendant or second defendant entitled?
32. In the event that an injunction in favour of either the first or second defendant is declined in the exercise of the Court's discretion, although the basis of an injunction is made out, is either the first or second defendant entitled to equitable damages?"

The legislative scheme

6. The CLD Act provides for the staged development of land into parcels for separate development or disposition, with those parcels retaining an interest in common facilities or property. The parcels created may be developed both horizontally, through further subdivision in the traditional way, and vertically, in

accordance with the *Strata Schemes (Freehold Development) Act* 1973.

7. When a community plan is registered, there is constituted a corporation with the corporate name "Community Association D.P. No … ", with the number being that of the deposited plan (see s 25(1) of the CLD Act). A community association thus incorporated has the functions given to it by the *Community Land Management Act* 1989 (the CLM Act).

8. Because land subdivided by a community plan may be further divided, both horizontally and vertically, there may be a number of other associations that have management functions with respect to different parts of the overall parcel — precinct associations, neighbourhood associations and owners' corporations.

9. Section 5(1) of the CLM Act provides that a community association constituted pursuant to s 25(1) of the CLD Act "is a community association for the purposes of this or any other Act". Subsection (4) declares a community association "to be an excluded matter for the purposes of s 5F of the *Corporations Act* 2001 … in relation to the whole of the Corporations legislation."

10. By s 5(2) of the CLM Act, the members of a community association are the proprietors of each community development lot that has not been further subdivided, and any precinct or neighbourhood association or owners' corporation in respect of lots that have been further subdivided.

11. By s 5(4) of the CLD Act, there is to be registered with any community plan a "community management statement". By s 13(1) of the CLM Act, such a community management statement binds the community association, each subsidiary body within the community scheme (ie, the precinct or neighbourhood associations or owners' corporations) and all proprietors, lessees, occupiers etc of development lots, neighbourhood lots or strata lots within the community scheme.

12. The CLM Act seeks to limit the activities of associations during their "initial period". That expression is defined in s 3 of the CLM Act. It is unnecessary to set it out because one of the few things on which the parties to these proceedings are agreed is that the management agreement was made during the initial period for the community scheme of which the Association is the community association. In essence, the initial period expires when the developer of the scheme loses control of at least one third of the unit entitlements in the scheme — ie, after the developer becomes unable to muster the votes for a special resolution.

13. Section 23 restricts the powers of an association during its initial period. Subsection (1) restricts among other things its power of borrowing, and subs (5) gives a right of recovery against the developer in the event of breach:

"**23 Restriction on powers during initial period**

(1) During the initial period for its related scheme, an association may not, unless an order made under subsection (4) otherwise provides:

(a) incur a debt of an amount in excess of the amount then available for repayment of the debt from the administrative fund or sinking fund, or
(b) borrow money or give security for the repayment of money, or
(c) make, amend or repeal a by-law creating restricted property.

…
(5) An association may recover from the original proprietor under the relevant scheme:

(a) as a debt — any liability incurred by the association because of a breach of subsection (1), (2) or (3), or
(b) as damages — any loss suffered by the association as a result of such a breach."

14. Section 24 of the CLM Act restricts the kinds of management agreements that an association may make during its initial period. In essence, any such agreement made during the initial period terminates at the end of the first annual general meeting unless its effect was disclosed in the management statement, or unless it is ratified at the meeting:

"**24 Termination of certain agreements**

(1) This section applies to an agreement with a person (other than a public authority)

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for the continuing provision to an association, or to the members of an association, of services or recreational facilities.
(2) If, during the initial period for a scheme, an association enters into an agreement to which this section applies, the agreement terminates at the end of the first annual general meeting of the association unless:

(a) its effect was disclosed in the association's management statement before the transfer of any lots in the scheme, or
(b) it is ratified at the meeting.

(3) An association is guilty of an offence if:

(a) during the initial period, it enters into an agreement to which this section applies, and
(b) the agreement would terminate at the end of the first annual general meeting of the association unless ratified at the meeting, and
(c) the association did not, before entering into the agreement, inform the other party, or each of the other parties, to the agreement that it would so terminate.

Maximum penalty: 5 penalty units.

(4) In this section:

services does not include the services of a managing agent."

15. Section 50 of the CLM Act empowers associations to appoint managing agents and delegates functions to managing agents by appointment, or by instrument in writing authorised at a general meeting of the association.

Disclosure in relation to the management agreement

16. Clause 42 of the community management statement for Balmain Cove noted that the Association had power to enter into agreements including for "management, operation, maintenance and other services for Community Property and subsidiary property … services or amenities to owners and occupiers … and … services or amenities to Community Property and Subsidiary Property."

17. Clause 43 sought to make disclosure in relation to the management agreement. Clause 43.1 noted that the Association intended to make the agreement. Clause 43.4 noted the term of the agreement, and cl 43.5 dealt with the remuneration payable under it. Clause 43.6 set out the duties of the site manager and cl 43.8 dealt with other rights. I set out the relevant provisions of cl 43:

"**43 Agreement with the Site Manager**

Initial period disclosure

43.1 The Community Association intends to enter into an agreement with the Site Manager during the initial period. The effect of the agreement is disclosed in this by-law for the purposes of section 24 of the Act.

…

Terms of the agreement

43.4 The term of the agreement may be up to ten years with two options of up to five years each. The agreement may have provisions about:

(a) the rights of the Community Association and Site Manager to terminate the agreement early; and
(b) the Site Manager's rights to assign the agreement.

43.5 The Site Manager's remuneration for the first year of the agreement will not exceed $200,000. The Site Manager's remuneration for subsequent years of the agreement may be increased by 5% or by the Consumer Price Index (All Groups) for Sydney (whichever is higher).

Site Manager's duties

43.6 The Site Manager's duties may include:

(a) caretaking, supervising and servicing Community Property, Restricted Subsidiary Property and other Subsidiary Property for which the Community Association is responsible;

(b) supervising the security, cleaning, repair, maintenance, renewal or replacement of Community Property, Restricted Subsidiary Property and other Subsidiary Property for which the Community Association is responsible;

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(c) providing services to the Community Association, Subsidiary Bodies, owners and occupiers including, without limitation, the services of a handyperson, room cleaning and servicing, food and non-alcoholic drink service;
(d) providing a letting, property management and sales service for owners and occupiers (at the cost of owners or occupiers);
(e) supervising, controlling and regulating employees and contractors of the Community Association as required by the Community Association;
(f) supervising Balmain Cove generally; and
(g) doing anything else that the Community Association agrees is necessary for the operation and management of Balmain Cove.

43.7 The Site Manager must comply with the Community Association's reasonable instructions about performing its dues [sic: obviously, duties] under the agreement.

Letting and tenancy management service

43.8 The Site Manager may have the sole right to enter into an agreement with the Community Association to conduct a letting service and a tenancy management service and to provide ancillary services.

43.9 Despite by-law 43.8, the agreement must contain an acknowledgment by the Site Manager that owners and occupiers:

(a) are not bound to use the letting services, property management services and ancillary services provided by the Site Manager, and
(b) may use the person of their choice to provide those services.

… . "

The inaugural Special General Meeting

18. The community plan for Balmain Cove was registered on 27 November 1998. On 2 December 1998, when Australand owned all the lots in the community scheme (I interpose that there was no evidence to suggest that any contract for sale for any lot, or interest in a lot, had been made as at 2 December 1998), what was called the inaugural special general meeting (SGM) of Australand was held. That meeting was attended by Mr Matthew Crews of Australand (or its parent company), representing the only member of the community scheme at that time, and Ms Cathy Laws of Mallesons Stephen Jaques (Mallesons), who were Australand's solicitors.

19. The business transacted at the inaugural SGM included the following:

(1) The appointment of Dynamic Property Services (DPS) as the Association's strata managing agent, and the delegation of functions to DPS;
(2) Noting an undertaking given by Australand to pay the Association's outgoings from the date of registration of the community plan until one month after Australand notified the Association that the undertaking would terminate;
(3) Resolving, in light of that undertaking, to determine contributions to the administrative and sinking funds at "$Nil";
(4) Resolving that the executive committee of the Association (see s 27 of the CLM Act) be constituted by the appointment of Mr Crews as the nominee of all relevant parties; and
(5) Resolving that the Association enter into the management agreement with Arrow.

20. The management agreement appears to have been made on the same day — 2 December 1998.

The Management Agreement

Negotiations for the agreement

21. Arrow was formerly known as Astor Apartment Management Pty Limited, part of the Astor Management Group. That group was controlled by Mr Ken Gresham (who was at the relevant time the CEO of the group) and Messrs Andrew and Luke Veron. The Astor Management Group provided consulting and management services to residential apartment buildings. Some of the buildings managed by it were occupied by proprietors or lessees, and others were operated as hotels.

22. On 17 April 1997, Mr Gresham of the Astor Management Group wrote to Mr David Edelstein of Walker Corporation Limited (Walker Corporation, the holding company of, among others, the third defendant) concerning "Management Rights — Balmain Cove". That

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letter provided (omitting formal parts) as follows:

"I write to confirm our terms as follows:

1. We will purchase a retail space (shop) for our on-site management office at nett value exchanging on 2.5% deposit.
2. We will require either exclusive or contractual rights of use of some common and community areas.
3. We will require Walker Corporation to put in place of [sic] a ten year management agreement.
4. Appropriate By-Laws and rules will need to be put in place so that we may carry out our duties unimpeded.
5. We will consult with you in the design of common areas, security systems, handover book, budgeting and any other appropriate issues.
6. The PABX will be leased by the Community resulting in no cost internal calls eg. to the building manager and low cost calls locally and internationally. The cabling costs are inclusive of the lease and co-ordinated with the builder as they would with Telstra.
7. The management service facility and it's [sic] supporting By-Laws are put in place at the inaugural meeting. Systems remain the property of the Community under control of the manager.
8. Our fee to the Community will be $580.00 per lot plus approved other expenses rising annually by the CPI or 5% (whichever is greater).
9. We will pay Walker Corporation the sum of $140,000 for the management rights for Balmain Cove upon registration [of] the appropriate by law and signing of the Management Agreement.

The detail of services and rights under the agreement need to be finalised, however, we feel sure that the decision to contract with the Astor Group will be one which enhances this excellent project.

Please confirm your acceptance of our offer."

23. On 27 May 1997, Mr Gresham wrote again to Mr Edelstein, as follows (again omitting formal parts):

"We have reconsidered our offer in our letter of 17th April 1997 to increase the consideration payable in Item 9 to $190,000.

… ".

24. On 11 August 1997, Mr Haig Conolly of the Astor Management Group, wrote to Mr Mark Randall of Walker Corporation, introducing to Mr Randall "the full range of Astor Management Group Services".

25. There is no direct evidence of any express acceptance of the revised offer, nor any evidence of any written agreement between Walker Corporation and Arrow. The absence of that evidence was explained by Mr Michael Newsom, the General Counsel and Joint Company Secretary of the holding company of Australand (affidavit sworn 10 April 2007, paras 5 to 7):

"…

5. Documentary investigations conducted by the third defendant during the discovery phase of the proceedings indicated that the records and files Australand had received from Walker in relation to the Balmain Cove project were incomplete.

6. In addition, my inquiries revealed that Australand no longer employed any personnel who had been closely involved in the events relating to the site management rights in 1998 and 1999.
7. As a result, the third defendant does not have a complete evidentiary record of the events forming the basis of the plaintiff's claim in the Amended Summons. The third plaintiff does not have any documents which identify the process by which the decision to appoint the first defendant was made. Further, the third defendant does not have any contemporaneous records indicating what the fair market value of the site management rights was at the relevant time."

26. Mr Newsom was not challenged on this (or any other) part of his evidence.

[140517]

Terms of the agreement

27. It is not necessary to set out in detail all the relevant terms of the management agreement. The parties accept that (to adapt the wording of s 24(1) of the CLM Act) the agreement was one for the continuing provision to the Association, or its members, of services or recreational facilities. The term of the management agreement was ten years. Arrow was given two options for renewal, each for a period of five years.

28. Clause 5 requires more attention, since it bears on issues 10 and 11. I set it out so far as it is relevant:

"**5 Regular Duties Fee**

Paying the fee

5.1 The Community Association must pay the Regular Duties Fee to the Site Manager according to this clause (and clause 6 if the Community Association and the Site Manager agree to vary the Regular Duties Fee).

Calculating the fee

5.2 The Regular Duties Fee for the first year of this agreement is the amount shown in item 3 of schedule 1.

5.3 The Site Manager must calculate the Regular Duties Fee for the second and subsequent years of this agreement by this formula:

$$\frac{\textit{Previous Regular Duties Fee} \times \textit{Current CPI}}{\textit{Previous CPI}}$$

[I omit the definitions of the terms in this formula.]

5.4 The Regular Duties Fee cannot be less than it was in a previous year. If the increase calculated under clause 5.3 is less than 5%, then the Regular Duties Fee for that year is the Previous Regular Duties Fee increased by the percentage shown in item 4 of schedule 1.

5.5 [Sets out some exclusions from the fee.]

Dates for paying the fee

5.6 The Community Association must pay:

(a) the first instalment of the Regular Duties Fee on the date this agreement commences; and
(b) after the first instalment, the Regular Duties Fee in equal instalments on the first day of each month.

5.7 The Community Association must adjust instalments if they are not for a full month.

5.8 [Dealt with disputes]."

29. Schedule 1 specified that the regular duties fee for the first year was $168,200; and that the minimum percentage increase in a year was 5%.

Mr Andrew Veron's evidence in relation to the agreement

30. Mr Andrew Veron swore three affidavits. Two were sworn on 26 September 2006: one in his capacity as a director of Arrow, and the other in his capacity as a director of Bondlake.

31. In paras 5 and following of the former, Mr Veron (as from this point on I shall call him) dealt with events up to the making of the management agreement and afterwards, in relation to payment. He referred to discussions that he said he had had with Mr Crews of Walker Corporation and concludes as follows in para 8:

> "8. During my discussions with Matt Crews in relation to the SMA as outlined above, in my mind Mr Crews was representing The Walker Group which was at that time in my mind effectively acting as the Community Association of Balmain Cove in all dealings with me regarding the SMA. As a consequence of the matters referred to above, it was my belief that the Walker Group, acting as the Community Association of Balmain Cove:
>
> (a) considered that the disclosure contained in the Community Management Statement of the SMA was adequate to satisfy any legal requirement associated with the SMA; and
> (b) considered that by reason of that disclosure the SMA was valid, binding and enforceable according to its terms and was in all respects in order,
>
> [140518]
>
> in reliance upon which I caused the First Defendant to complete its agreement with The Walker Group."

32. Mr Veron was cross-examined on that evidence. He accepted that Arrow had solicitors acting for it in relation to the acquisition of the management rights (T 216.50, T 218.10). Mr Veron accepted that his solicitor's role was to look after "the legalities of the transactions" (T 228.5) and to ensure "that whatever [he was] doing was done properly and that [his] company was protected" (T 228.15). Nonetheless, Mr Veron asserted that he did not rely on his solicitor to advise whether sufficient disclosure of the management agreement had been made in the community management statement, or whether it was safe for Arrow to pay to Australand the consideration of $190,000 for the grant of the management agreement (T 228.30–.55). He explained this by saying that he was speaking to Walker Corporation and DPS, and that he relied on what they had told him to pay the consideration (T 229.1–.17):

> "A. Because to settle the proposition, I was speaking to Walker Corporation and I spoke to the strata agents, and it was after those discussions that I released the funds.
>
> HIS HONOUR
>
> Q. Do you mean by that that you relied on what you'd been told by Walker Corporation and the strata managing agent when you on behalf of Arrow agreed to release the funds?
>
> A. The $190,000, yes.
>
> CORSARO
>
> Q. That was advice that you received from Mr Cruz, who was from the Walker Group. Is that right?
>
> A. Yes, when he requested it, I then contacted the strata agents."
>
> (The reference to "Mr Cruz" should be read as a reference to Mr Crews of Australand, referred to in para 8 of Mr Veron's affidavit.)

33. Mr Veron did not suggest in his oral evidence that he understood that Mr Crews, or Australand, was "acting as the community association of Balmain Cove".

34. Mr Veron plainly sought in cross-examination to play down his knowledge of s 24 of the CLM Act. He had however said the following in para 5 of his affidavit sworn on behalf of the first defendant:

> "Prior to the First Defendant's entry into the SMA, I was aware from both discussions with the First Defendant's then solicitors, and from discussions with David Edelstein and Matt Crews of The Walker Group, that there was a requirement that the SMA be disclosed in the Community Management

Statement of the Plaintiff, which would be a document registered at the Land Titles Office and disclosed to all purchasers of individual lots in the development."

35. In cross-examination, Mr Veron sought to disavow this evidence. He denied that it was likely that he had become familiar with s 24 as at 2 December 1998, and said that he had not "been exposed to it" at that time (T 222.23–.38). He reaffirmed this at T 223.1–.11 (averring that he was "fair dinkum" in giving this evidence). When confronted with paragraph 5, and having considered it, he said "I'll have to go with my affidavit" (T 224.34). However, having made that concession, Mr Veron sought again to withdraw from it (see for example T 226.11–.40 where, apart from effectively disavowing paragraph 5 once more, he also disavowed his evidence at T 222.23–.38 that I have referred to above).

36. I deal in paras [69] to [74] below with Mr Veron's evidence relating to entry into the deed of assignment. I formed the very strong impression, both from reading the two affidavits to which I have referred, from observing him in the witness box and considering the evidence that he there gave, that Mr Veron is a man who is prepared to say whatever he thinks might be conducive to the success of his litigious enterprise. I formed the very clear view that expediency, rather than veracity, was the lodestar by which Mr Veron plotted his evidentiary course. That tendency was demonstrated not only in the evidence to which I have referred in this section of my reasons, but also in the evidence to which I refer in paras [69] and [70] below.

37. I have come to the conclusion that Mr Veron is not a witness whose evidence I can accept unless it is corroborated by other, acceptable, evidence, is consistent with the

[140519]

probabilities objectively ascertained, or is against interest. In reaching that conclusion I have taken into account also Mr Veron's demeanour in the witness box. I would hesitate to reject anyone as a credible witness simply on grounds of demeanour. However, to the extent that a consideration of demeanour is relevant, it certainly does not assist Mr Veron in this case.

38. My view as to the acceptability of Mr Veron's evidence relates not only to his evidence concerning the entry into, and payment of the consideration relating to, the site management agreement and the entry into the deed of assignment. It relates to the whole of his evidence.

Australand's undertaking

39. I have referred (in para [19(2)] above) to Australand's undertaking to pay the Association's outgoings. The evidence relating to the undertaking and its performance was somewhat sketchy. Nonetheless, it appears to be the case that Australand honoured the undertaking and met all the Association's liabilities (including those to Arrow under the management agreement) until the Association was in a position, through the establishment and funding of its administrative and sinking funds, to meet those expenses itself.

The first Annual General Meeting

40. The first annual general meeting (AGM) of the Association was held on 28 July 1999. There is some dispute as to whether the notice of that meeting was given to members of the Association. That notice (leaving aside for the moment the question as to whether it was given) included items of business relating to contributions and ratification of an agreement. Those items (two and four respectively) read as follows:

> **"2. To decide whether amounts determined as contributions to the administrative fund and sinking fund should be confirmed or varied.**
>
> The Community Association must have two funds:
>
> (a) an administrative fund to cover management fees, insurance premiums, community property maintenance and other day to day running costs according to clause 13 in schedule 1 of the Act; and
> (b) a sinking fund for long term capital replacements of community property according to clause 13 in schedule 1 of the Act.
>
> At this stage, the Community Association has not determined administrative fund or sinking fund contributions. Dynamic Property Services Pty Ltd will table a proposed budget at the meeting to help the Community Association assess its administrative and sinking fund costs.

…

4. To decide whether an agreement to which section 24 applies should be ratified.

Section 24 applies to agreements with a person for the continuing provision to the Neighbourhood Association of services or recreational facilities. The section does not apply to agreements with public authorities or a Managing Agent.

Agreements under section 24 terminate at the first Annual General Meeting unless:

(a) the agreement was disclosed in the community management statement; or
(b) the agreement was ratified by the Community Association at the first Annual General Meeting.

There are no other agreements under section 24."

41. The wording of item 4 — particularly, the word "other" — is somewhat obscure, given that neither item 4 nor anything else in the notice discloses that the business to be transacted at the meeting included consideration of the ratification of any agreement. Presumably, it was intended to refer to the agreement with Howitt Solutions (see the following paragraph). Be that as it may, there was no notice given to members that the business of the meeting would include consideration of the ratification of the management agreement.

42. The minutes of the first AGM record the following resolutions in relation to items 2 and 4:

"CONTRIBUTIONS:

(a) RESOLVED that contributions be determined in accordance with Section 76

[140520]

(a) of the Strata Schemes Management Act 1996 for the twelve month period from 1st July 1999.

(i) to the Administrative Fund for the sum of $597,475.83; and
(ii) to the Sinking Fund for the sum of $20,000.

…

SECTION 24:

RESOLVED that the agreement entered into with Howitt Solutions on 8th June 1999 be ratified for cleaning and landscaping at Balmain Cove."

43. There was a dispute in the evidence as to whether DPS had tabled a "Proposed Budget" at the first AGM, as contemplated by item 2 of the notice. The Association called its former Chairman, Mr Ronald Glew. Mr Glew denied that any budget had been tabled at the first AGM. Whilst I have no doubt that Mr Glew sought to give evidence truthfully and accurately to the best of his ability, I think that his memory must have failed him in this. There was evidence that DPS had prepared a budget, the various components of which (in relation to the administrative fund) added up to the precise sum of $597,475.83 referred to in the minutes.

44. It is difficult to accept that the members of the Association would have voted to create an administrative fund of almost $600,000 without requiring some justification of the amount. It is even more difficult to accept that they would have voted to create the administrative fund in the precise figure that was the subject of the resolution unless they had been guided by the draft budget that, according to the notice of meeting, DPS was to prepare and table.

45. In my view, the inference that the draft budget was tabled, and formed the basis of the resolution, is near inescapable. Thus, notwithstanding Mr Glew's testimony to the contrary and my view of his honesty, I draw that inference.

46. The first item in the draft budget related to "On Site Management". It read as follows:

"**Administration Fund**

On Site Management $ 168,200.00

Manager]

Secretary]

Assistant]"

The caretaker agreements

47. Arrow entered into a number of agreements appointing people to the position of "On Site Manager/ Caretaker of 'Balmain Cove'." The first such agreement was made on 6 November 1998. Mr Tony Claridge was the nominated caretaker. He was to be paid $25,000 per annum and was to have the use of an unfurnished two bedroom apartment in Balmain Cove. This was apartment 5 (or lot 12) in a building known as "The Knoll", which lot Australand had sold to Arrow by contract dated 30 October 1997.

48. Mr Claridge was required to work "a forty hour week … spread across Monday to Friday and Saturday mornings". However, by the terms of the appointment, he recognised "that the nature of being 'On Site' [would] require [him] to be available or contactable outside these hours, so there is an inherent flexibility in these working hours." No doubt to assist in his being available or contactable, Arrow was to supply Mr Claridge with a mobile phone.

49. Arrow undertook to contribute superannuation at "the minimum requirement as set by Superannuation Guarantee Legislation."

50. On 13 July 2000, after the deed of assignment had been made, Bondlake agreed to employ Mr Claridge in the same role as, hitherto, he had been employed by Arrow. His remuneration was increased to $26,260. Otherwise, I think, there was no significant change to the terms of employment, although it was acknowledged that Mr Claridge would have the use of a car space (no doubt, he had enjoyed this luxury de facto under the previous regime).

51. On 1 March 2001, Mr Claridge was replaced by Mr David Warren. Mr Warren was appointed as "Building Manager of 'Balmain Cove'." His salary was $35,000 per annum. He too enjoyed the rent free use of an apartment. This was said to lead to "an overall package of $58,100 per annum." Presumably, Mr Warren enjoyed the benefit of some superannuation contributions. The letter appointing Mr Warren

[140521]

did not specify the number of hours to be worked, or when they were to be worked. Nor did it deal with availability outside those hours.

52. On 16 November 2001, Bondlake appointed Mr Joshua Smith and Mrs Adriana Smith to be "On Site Manager/Caretaker of Balmain Cove." They were to be paid $35,000 per annum plus superannuation, and to have the benefit of rent-free accommodation. The printed text of the letter specified the working hours in the same way as they had been specified for Mr Claridge. However, a handwritten annotation, initialled by someone unidentified, reads:

"Joshua — 40 hrs

Adriana — 25–30 hrs."

53. Arrow had purchased a commercial unit in the Balmain Cove development, known as lot 11. That lot had a floor area of approximately 65 square metres. It was used as the office from which the caretakers from time to time have performed their duties.

54. The evidence of Mr Theodore Stamoulis, a valuer retained by the defendants, was that the rental value of the residential apartment (apartment 5, or lot 12) ranged from $22,880 per annum in 1998–1999 to $26,004 in 2005–2006. According to Mr Stamoulis, the rental value of the commercial unit (lot 11) ranged from $20,231.25 per annum in 1998–99 to $24,881.88 in 2005–06. Mr Stamoulis was not cross-examined.

The deed of assignment

Proposals for "assignment" of the management agreement

55. On 10 August 1999, Mallesons wrote to the Association. Mallesons advised that Arrow "has entered into an agreement with Max Management Pty Ltd to sell its rights under the site management agreement to Max". They stated that "completion of the Agreement [to sell] is subject to the approval by the Community

Association to the assignment of the Site Management Agreement to Max." They asked the Association to indicate, in substance, what information it would require to consider the assignment.

56. After various dealings which it is not necessary to recount, DPS wrote to Mallesons on 15 September 1999 informing them that the Association refused its consent to the assignment. There were further dealings thereafter, apparently directed to persuading the Association to change its mind. Ultimately, on 24 November 1999, the Association resolved to consent to the assignment subject to a number of specified conditions. DPS notified Arrow of that resolution by letter sent the following day. However, on 28 January 2000, Arrow notified the Association that Max Management had decided not to proceed with the assignment.

57. The Association then turned its attention to "purchasing the Site Services Agreement". At some stage, it communicated to Arrow its interest in this proposition.

58. On 4 February 2000, Arrow notified the Association that it proposed to assign the management agreement to Bondlake. On 8 February 2000, Arrow confirmed to the Association that Bondlake would continue to employ Mr Claridge as on site manager/caretaker.

59. It is apparent that the Association was dissatisfied with aspects of Arrow's performance of its obligations (or what the Association perceived to be Arrow's obligations) under the management agreement. On 10 February 2000, Mr Glew, in his capacity as chairman of the Association, wrote to Arrow setting out detailed allegations of non performance by Arrow of its obligations under the management agreement, and calling on Arrow to perform. Arrow replied to some aspects of that letter on 14 February 2000. Mr Glew replied on 18 February 2000, disputing that Arrow had complied with its obligations. He also requested information as to the assignment to Bondlake.

60. On 25 February 2000, Arrow provided a substantial amount of information to the Association. That information was considered at a meeting of the executive committee held on 29 February 2000. The outcome of that meeting is obscure. In any event, there was further correspondence, both about the proposed assignment and about the prospect of the owners' corporation's buying out the management agreement. This correspondence culminated in a letter from Arrow to the Association dated 23 May 2000, threatening legal action. That letter stated, relevantly:

[140522]

> "…
>
> We are becoming increasingly frustrated at the neglect or refusal of the Community Association to properly address our notice relating to assignment of our interest under the Site Management Agreement.
>
> In the circumstances we have no alternative but to press the matter of assignment, if necessary by means of legal action or alternate dispute resolution.
>
> On advice, we will be giving the Community Association a fresh notice under clause 14.4 of the Site Management Agreement. You should receive this shortly.
>
> We believe that the Community Association has had ample opportunity to conclude the "continuing" investigations that you have been referring to since at least 5th March 2000.
>
> …"

61. The executive committee met again on 5 June 2000. Relevantly, it resolved to "establish a working group to respond to the request for assignment of the Site Management Agreement … ". The members of that working group included Mr P Hennessy (a barrister, and one of Her Majesty's Counsel) and Mr F Cahill (a solicitor).

62. On 27 June 2000, Mr Glew wrote to Arrow, notifying it that the Association would "grant approval for the Site Services Agreement … to be assigned to Bondlake" subject to a number of specified conditions.

63. Arrow, whilst disputing that all those conditions could be imposed, nonetheless prepared a draft deed of assignment and sent it to the Association. Mr Cahill gave advice on that draft deed. He expressed the view that what was proposed was a novation and not an assignment:

"However, the 'Deed of Assignment of Agreement' is really a novation of the Site Management Agreement and it is not at law an 'assignment'. This is because under clause 2 the Transferor assigns to the Transferee ' … the rights, powers and obligations of the Transferor under the Agreement'. (emphasis in original)

In the legal process of novation, a new contract is created and the old one is terminated. This means that the Transferee and the Community Association effectively enter into a new agreement. That new agreement would be subject to GST from its inception."

64. As the last sentence indicates, the particular focus of Mr Cahill's concern was liability for GST.

65. Mr Cahill also advised that one clause of the draft deed could be deleted, because it was dealt with in the management agreement. The Association conveyed that comment to Arrow.

The deed of assignment

66. The deed of assignment is undated, but appears to have been made on or about 30 June 2000. The parties were Arrow, Bondlake and the Association. The recitals to the deed read as follows:

> "A. The Transferor is the site manager under the Agreement.
> B. The Transferor wants to assign to the Transferee all of the interests, rights and obligations of the Transferor under the Agreement.
> C. The Community Association agrees to the assignment."

67. Clauses 2, 3, 4 and 5 of the deed read as follows:

"**2 Assignment**

The Transferor as beneficial owner, assigns to the Transferee from an [sic] including the Effective Date all the rights, powers and obligations of the Transferor under the Agreement.

3 Consent by the Community Association

3.1 The Community Association releases the Transferor from compliance with the obligations of the Transferor under the Agreement from but excluding the Effective Date.

4 Covenants and acknowledgments by Transferee

The Transferee agrees to comply with all the Transferor's obligations under the Agreement from and including the Effective Date for the term of the Agreement as if the

[140523]

Transferee had been named in the Agreement as the site manager.

5. Undertakings and indemnities

5.1 The Transferee indemnifies the Transferor against any liability or loss arising from, and any costs, charges and expenses incurred in connection with the non-compliance of the Transferee with its obligations under this deed including, without limitation, legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is the higher.

5.2 The Transferor indemnifies the Transferee against any liability or loss arising from, and any costs, charges and expenses incurred in connection with the non-compliance of the Transferor with its obligations under the Agreement up to the Effective Date including, without limitation, legal costs and expenses on a full indemnity basis or solicitor and own client basis, whichever is the higher."

68. By cl 1.1, the "Effective Date" was defined to mean 30 June 2000.

Mr Veron's evidence in relation to the assignment

69. In his affidavit sworn on behalf of the second defendant, Mr Veron gave evidence of an understanding that the agreement between the Association and Bondlake "was in effect a new agreement … the terms of which were the same terms contained in the SMA plus the additional terms and conditions that the plaintiff required as conditions of the assignment and [Bondlake] agreed to accept" (affidavit sworn on 26 September

2006 on behalf of the second defendant, para 12). I consider that to be a self serving statement not based on or reflective of any actual state of mind as at the relevant time.

70. Mr Veron also gave evidence of the significance to him of what he said was his understanding, engendered by acts of the Association, that the Association considered the management agreement to be valid (paras 15 and 16 of the same affidavit):

> "15. As a consequence of the fact that the Plaintiff:
>
> (a) formally consented to an assignment of the SMA from the First Defendant to the Second Defendant; and
> (b) relied on the terms and provisions of the SMA both in dealing with and in delaying the request for that assignment; and
> (c) was a party to and executed the Deed of Assignment of the SMA from the First Defendant to the Second Defendant.
>
> I had no doubt in my mind and believed that the Plaintiff considered that the SMA was in all respects valid, binding and enforceable according to its terms. It would simply not have made sense to me that the Plaintiff would consent to an assignment of the rights in the SMA from the First Defendant to the Second Defendant and join in a formal Deed of Assignment of the SMA as a consenting party if the Plaintiff did not believe in all respects that the SMA was valid, binding and enforceable between the Site Manager and the Plaintiff according to its terms.
>
> 16. Had I not believed that the Plaintiff considered the SMA to be in all respects valid, binding and enforceable according to its terms, I would never have caused the Second Defendant to:
>
> (a) accept an assignment of the SMA from the First Defendant; or
> (b) execute the Deed of Assignment; or
> (c) assume the obligations and liabilities of Site Manager under the SMA; or
> (d) accept and assume the obligations and liabilities of and connected with the additional terms and conditions imposed by the Plaintiff as conditions of assignment; or
> (e) pay to the First Defendant the sum of $125,000.00 for the assignment of the rights in the SMA."

71. However, in cross-examination, Mr Veron gave somewhat inconsistent evidence. He said repeatedly that, having entered into the management agreement and paid the consideration of $190,000 for it, there was in his mind a valid agreement and he had no reason ever to doubt its validity. He then gave the following evidence bearing on his state of mind leading up to the assignment to Bondlake (T 233.18–234.26):

> "Q. Do you agree that there was no reason ever to think about the site management agreement's validity from that time on?
>
> [140524]
>
> A. What time, the time?
>
> HIS HONOUR
>
> Q. The time when you paid the money to the Walker Corporation for the purchase of the management rights?
>
> A. No I don't believe, I can't recollect an issue in terms of it at this stage.
>
> CORSARO
>
> Q. And in thinking about the question it [sic: presumably, "of"] its validity ever again, correct?
>
> A. No I would, as I mentioned when we were looking to sell the agreements it was put forward. We had a number of prospective parties that were negotiating on the purchase of the management rights and one of them, which we contracted with was Blessington Judd and Andreones and which we had the purchases utilised. They did not have an issue with the validity of the agreement. We had a number of other parties we were dealing with that looked at the agreements. Nobody called the agreement into question, its validity or the issues around it so, no, I didn't have an issue. The management rights were put on the open market and the open market and the open market was—

Q. Thank you so you would say to his Honour in the light of everything you have just said, from the moment you paid the money and settled on the transfer of the unit there was no reason for you ever again to think about the validity of that agreement, correct?

A. No I mentioned I had all the agreements and everything checked. At the time us or Arrow Management had taken over from Mr Gresham, there were issues within the company and I had all the items and looked at all the items within the company, I had spent a considerable period of time doing that. We had fresh agreements coming online, we had all these different buildings and I had the agreement, I looked at and I had looked at the details I had no reason to call it into question. I can't recall taking specific advice as to it but I may have.

Q. And when was that, that you had the agreements looked at by others by Blessington Judd for example?

A. We didn't have Blessington Judd look at the agreement. Max Management had Blessington Judd look at the agreement. They acted for the purchaser. We recommended Andreones as a strata solicitor that had the best expertise in the field.

Q. So I take it then your position is this, from the moment that you paid the money and settled on the transfer of the unit, you moved forward and provided the services on the basis that you had a valid agreement in place and because, from that time on, no one ever alerted you to any difficulty you had no reason to even think the agreement was invalid?

A. When you say no one alerted me, are you talking in respect to issues of numbers of CAs? I can't recall a specific instance of issue.

Q. Do you agree or disagree with the proposition I put to you?

A. I will agree with the proposition."

72. Mr Veron said that he had had the management agreement and others reviewed at the time he and his brother bought out Mr Gresham (T 234.35; the words "which you" at line 35 should read "reviewed"). He then gave the following evidence (T 234.39–.56):

"Q. Am I to understand nothing in that review caused you any concern about the validity of the site management agreement which is the subject of this case?

A. No.

Q. And do I take it from that, that when it was assigned from Arrow to Bondlake, you did not concern yourself at all with the question of validity?

A. No.

Q. And you did not even have in mind as an issue at that time the issue [sic: presumably, "of"] the validity?

A. No.

Q. And nothing in the course of that transaction as between Arrow and Bondlake

[140525]

entered your mind either way on the topic of validity?

A. No."

73. The clear inference from Mr Veron's evidence in cross-examination is that the topic of validity of the management agreement did not cross his mind after Arrow paid the sum of $190,000 to Walker. To the extent that the agreement was reviewed, it was, plainly enough, the outcome of that review on which Mr Veron relied, and not (as he would seek to suggest in paras 15 and 16 of his affidavit) some implied representation made by the Association.

74. In my view, this aspect of Mr Veron's affidavit evidence is another example of his willingness to give evidence by reference to considerations of expediency rather than veracity. A consideration of this aspect of his affidavit and oral evidence confirms the view that I have expressed above as to his credibility.

The expert evidence

75. The Association and the defendants called expert evidence, seeking to quantify the value of the services provided by Arrow or Bondlake (as the case may be) to the Association under the management agreement.

The Association's expert evidence

76. The Association called Messrs Nicholas Ferrara and Harn Goh of Rider Hunt Terotechnology (NSW and ACT) Pty Ltd. Messrs Ferrara and Goh prepared a joint report dated 11 April 2006, and Mr Ferrara prepared a report in reply dated 15 March 2007.

77. The methodology adopted by Messrs Ferrara and Goh was to build up a total "current market value" of the services by using a formula that divided the whole value into the caretaker's salary (38% of the total), overhead costs (21%) and profit margin (41%).

78. They sought to derive the first component by comparing the relative value of the caretaker's work under the site management agreement with that of a "facility manager". This rather unusual methodology involved comparing what they saw to be the "core competencies" of the caretaker under the management agreement with the core competencies of a "practitioner" facility manager, in six different areas.

79. By definition, the practitioner was assigned a total "effective competency factor" of 600 (100 points, for want of a better word, for each of the 6 core competencies). Messrs Ferrara and Goh concluded that a caretaker under the management agreement would score (if that is the right word) a total effective competency factor of 305.

80. Messrs Ferrara and Goh thus assessed the value of the caretaker's role under the management agreement as worth 305/600 of the services of a facility manager practitioner. For the year 2006, and by reference to what they said was a survey recognised in the discipline of facility management, they concluded that a facility manager practitioner's salary would be $107,980. (This involved taking a salary figure for the previous year from the survey and increasing it by what they said was an applicable percentage, 15%.) They thus concluded that, applying the proportion 305/600, the nominal value of the caretaker's services would be $54,890, which they rounded out to $55,000.

81. Messrs Ferrara and Goh considered the hours that they thought would be required to perform the caretaker's duties under the management agreement. They concluded that it would take 32.71 hours per week to do this. Apparently, they either did not appreciate, or ignored, the consistent requirement for the caretaker to work a 40 hour week, and the obligation to be "available or contactable outside [those] hours" (see para [48] above). Messrs Ferrara and Goh took the view that a facility manager practitioner would work a 40 hour week. Thus they prorated their derived value of $55,000 by 32.71/40.0 to arrive at an adjusted value of $44,976 for the caretaker services, which they rounded off to $45,000. They said that there could be variance of plus or minus 20%, giving a range of $36,000 to $54,000.

82. Messrs Ferrara and Goh sought to ascertain the allowance that should be made for overhead costs. They concluded that it was $24,415 per annum, which they rounded off to $25,000. This included an allowance for 25 square metres of office space at a rental of $300 per square metre per annum; and it included other obvious and proper overhead or on costs.

[140526]

It did not, however, include any allowance for the value of the residential apartment supplied rent free to the caretakers from time to time.

83. Messrs Ferrara and Goh then returned to their view that an appropriate profit would be 41%. They calculated the dollar amount of this not by taking 41% of what they said was the total for salary and overheads and adding it to that total to obtain a grand total. Instead (see para [77] above), they assumed that salary and overheads would amount to 59% of the total cost, divided the total for salary and overheads by 59 and multiplied it by 100. I have to say that I find this rather puzzling. If it were appropriate to use that methodology then I do not understand why it was not applied consistently. Given their view that salary would constitute 38% of the total "cost components", one would think that their methodology would require the derived salary figure to be divided by 38 and multiplied by 100, without the need to itemise and cost overheads. But they were not cross-examined on this, and I do no more than note the curiosity.

84. There are at least four major flaws in the methodology adopted by Messrs Ferrara and Goh. Three of those are practical and one is conceptual.

85. I have adverted to two of the practical flaws above. Their methodology does not take account of the requirement for the caretaker to work a 40 hour week, and to be on call outside those working hours. Nor does it take account of the value of the accommodation provided rent free to the caretaker (a benefit which is even more valuable to the caretaker than the dollar value of the rent free use, because it is a pre-tax benefit). Further, as to the first matter, if it were the case as the evidence suggests — see para [52] above — that Mr and Mrs Smith were required to work between them in excess of 40 hours per week, then the prorating exercise undertaken by Messrs Ferrara and Goh is even less sustainable.

86. The third practical flaw is that, although Messrs Ferrara and Goh purported to build up their assessment of the hours required having had the benefit of a view of Balmain Cove, they appear to have made their assessment of times on a theoretical or *a priori* basis, rather than undertaking it on a site specific basis. In other words, they did not assess the times taking into account whatever particular features there were of the Balmain Cove site that might have an impact on the time required for performance of the various tasks that they analysed.

87. The conceptual flaw in their methodology relates to the choice of a facility manager practitioner as the yardstick by which to measure the value of the caretaker's services. The evidence showed that facility manager status encompassed three, ascending, levels of skill: practitioner, manager and leader. Not surprisingly, the competency requirements increased as one ascended the ladder (a manager was required to have more competencies than a practitioner, and a leader to have more competencies than a manager). It is obvious that the level of responsibility would increase as one ascended the ladder. However, the methodology used by Messrs Ferrara and Goh had the necessary consequence that a leader who was employed in a role that demanded of him no more than the six core competencies of a practitioner would be paid the same as the practitioner, notwithstanding his greater seniority, competency and (presumably) experience. Further, the methodology led to the result that the practitioner, manager or leader would be paid at the same rate regardless of the size of complexity of the facility under management. Mr Goh was loath to accept that this was a defect; but Mr Ferrara (after some struggle) did so: see for example T 178.50, 179.45–180.55 and 183.15–184.30.

88. There are other problems too with the methodology of Messrs Ferrara and Goh. For example, the evidence showed that facility managers (at the practitioner level) were paid more in New South Wales than in other States. Messrs Ferrara and Goh however used the national average, notwithstanding that the services were to be performed in this State. Further, the evidence showed that the amount paid varied according to the kind of "site" that was managed. Again, however, Messrs Ferrara and Goh used the average.

89. Messrs Ferrara and Goh did not seem to think that it was appropriate to go into the marketplace and seek to ascertain what was being paid for services of the kind provided by Arrow or Bondlake (as the case may be) under

the management agreement. It may be that it would have been difficult to obtain this evidence — or, at least, to obtain enough to lead to reliable conclusions. It may be that, as a result, building up a total cost by valuing the components is an appropriate methodology. But the flaws in their methodology are such that I do not accept their evidence.

90. Mr F C Corsaro SC, who appeared with Mr D B Studdy of counsel for the Association, submitted that the only relevant result of the flaws to which I have adverted was that Messrs Ferrara and Goh had overvalued the services. It may be that some of the flaws lead to that result — for example, use of the salary level of a facility manager practitioner as the appropriate yardstick. But other flaws do not — for example, disregard of the actual hours and site conditions, and of the value of the rent free accommodation.

91. In the result, although accepting (as I have said) that it may be appropriate to analyse the cost of the services by costing their individual components, and allowing a reasonable profit, I do not accept the evidence of Messrs Ferrara and Goh as to the value of those services. Nor do I accept that, regardless of the flaws in their methodology, I can be confident that the cost could be no more than that assessed by them.

The defendants' experts

92. The defendants called three experts: Mr Delwyn Linkhorn, Mr Terry Short and Mr Stamoulis (to whose evidence I have referred in para [54] above).

93. Messrs Linkhorn and Short sought to value the services provided by Arrow or Bondlake (as the case may be) under the management agreement. Mr Stamoulis sought to ascertain the rental value of the residential accommodation (apartment 5) and the office accommodation (lot 11). As I have said, Mr Stamoulis' evidence was unchallenged. I accept it, although it should be noted that his valuation of the office was of the whole area (65 square metres), and it was accepted by all the other experts after a conference that the actual area required for performance of the caretaker's duties was 25 square metres. Thus, in principle, it might be open to Bondlake (and might have been open to Arrow) to partition lot 11 in some way, and to turn the 40 square metres not required for performance of the caretaker's duties to account in some other way. This was not explored in the evidence, although Mr Linkhorn said that, having regard to the configuration of lot 11, he doubted that it would be practicable.

94. Mr Linkhorn sought to identify the various tasks that the caretaker would perform, and to cost them by deriving a time value for their performance. Mr Short sought to identify the overhead and on costs that a site manager such as Arrow or Bondlake would incur relating to performance of the site manager's duties under the management agreement. However, Mr Short went further and "broadly checked Mr Linkhorn's estimates" (T 286.40).

95. In principle, as I have indicated, the methodology of Messrs Linkhorn and Short may produce an appropriate indication of the value of the management services. However, there are flaws in their approach: more specifically, flaws in Mr Linkhorn's approach.

96. Mr Linkhorn listed out what he said were the duties that a caretaker would be required to perform under the management agreement, and estimated the time that in his opinion would be taken for their performance. He concluded that performance of those duties would require a "total site manager's weekly minimum weekly labour content" of 70.526 hours. He then selected what he thought was an appropriate yardstick, namely the Real Estate Industry (Clerical and Administrative) State Award, decided that a Grade 5 employee under that award would provide an appropriate yardstick, and thereby fixed on a full time salary of $700.50 per week as the starting point for his calculations. He deduced an hourly rate of $17.31 from this, and applied that to his total calculation of hours to produce a labour cost, for the duties required under the management agreement, of $89,978.19 in the 2005/2006 financial year. (To enable this to be related to the amounts actually paid to Messrs Claridge and Warren and Mr and Mrs Smith: the equivalent figure deduced by Mr Linkhorn for the 1998–1999 year was $73,081.64, increasing by approximately $2,000 to $3,000 per year thereafter.)

97.

[140528]

To this figure, Messrs Linkhorn and Short then added what they said was an appropriate amount for "operating costs that would be required to carry out the duties as per the Site Management Agreement for Balmain Cove". Those amounts included the rental value of the residential apartment and the office, and other obvious and appropriate allowances. They then assigned alternative profit margins of 25% and 40% of the total cost thus derived (this being their opinion of the likely range of profit margins) to derive a total value for the services.

98. The outcome of their conclusions demonstrated that, with a 25% profit margin, the amount actually payable under the management agreement always exceeded the valuation. If however one took a profit margin of 40%, the amount payable was less than their valuation for the first three years, but a little more for the fourth year, with the margin (of actual over estimated) increasing steadily thereafter: a reflection of the power of annual compounding. In this context, I note that Messrs Ferrara, Linkhorn and Short agreed, after conferring, that 41% was an appropriate allowance for profit.

99. I have three principal concerns with this methodology. The first two relate to Mr Linkhorn's quantification of the number of hours of labour required. In essence, he was valuing the caretaker's duties. There was no evidence that the caretakers could not perform their duties broadly within the allotted hours under their agreements. (I recognise that there is some latent ambiguity in this proposition, in the case of Mr and Mrs

Smith, if it is proper to regard them as having been required to perform a combined total of 65 to 70 hours per week. However, there was no evidence that this is in fact what the notation to which I have referred in para [52] above meant. Nor is there any indication of the separate duties (if any) to be performed by Mrs Smith.)

100. The second matter, also connected with the subject of hours required, relates to Mr Linkhorn's understanding of the extent of the duties required under the management agreement. It would appear that Mr Linkhorn assumed that duties (for example, in relation to "Recreational Facilities") related to the whole of the Balmain Cove site. However, on a proper construction of the relevant provisions of the management agreement and the community management statement, those duties relate only to such facilities as are located on "Lot 1". At least in terms of area, lot 1 is a relatively small part of the overall site; and there was evidence that there were "Recreational Facilities" located on the Balmain Cove site other than on lot 1. Thus, I think, Mr Linkhorn's estimate of hours may involve some over-allowance, because the components include matters outside the caretaker's responsibility.

101. The third matter relates to the yardstick. When pressed, Mr Linkhorn was unable to offer any logical justification for the choice of the award to which he referred. Nor was he able to explain why a figure derived from that award might be appropriate when the evidence showed that a number of people had agreed to perform the caretaker's duties for the figures to which I have already referred, and had apparently done so freely and voluntarily. (The value of the rent free accommodation can be disregarded, because that is a matter expressly taken into account, and incorporated into the total cost of services, in Mr Short's part of the calculations.) In particular, Mr Linkhorn was unable to explain why he used the award that he did rather than an award that specifically included caretakers: the Miscellaneous Workers' General Services (State) Award. As to the award selected by Mr Linkhorn: he could not indicate why, in his view, the duties that might be performed by a person under the award relied on by him could be equated to the duties performed by a caretaker under the management agreement. As to the latter award: Mr Linkhorn said that his researches had not uncovered the award.

102. Thus, whilst in principle I accept Mr Linkhorn's (and Mr Short's) methodology, I do not accept the outcome. It might be noted that if Mr Linkhorn has wrongly estimated the cost of the labour content, then that error will flow on to so much of Mr Short's calculations as relate to on costs (superannuation, replacement caretaker during annual leave, payroll tax and other on costs).

103. Having said that, I think that the result of what I see as shortcomings in the exercise

undertaken by Mr Linkhorn would lead to overstatement of the true value of the services. Whether this means that the total cost (including a 40% profit) would exceed the actual cost for the first three years, I cannot say. But I can accept the conclusion flowing from the figures provided by Messrs Linkhorn and Short, that, at least from year 4 on, the actual amount payable under the management agreement has exceeded the true value of the services performed under it, and that the margin between the two is likely to increase thereafter during the remaining life of the agreement (including, if the options are taken up, any further terms). The adjustment of the profit margin from 40% to the agreed figure of 41% does not affect the substance of this conclusion.

Other matters

104. Each of the experts (apart from Mr Stamoulis) sought to characterise the features of the management agreement, including its term (with options) and ratchet compounding remuneration in qualitative ways. To the extent that they sought to suggest that something was or was not "grossly" excessive, or "unfair", I rejected that evidence. I did however allow it as evidence to the effect that in their experience, they had not come across such terms.

Conclusion

105. Thus, I conclude, on the whole of the expert evidence, that:

(1) The term of the agreement (10 years with two further options, each of five years and given to the manager only) is, and was at the time the agreement was made, unusual in the relevant industry.
(2) At least after the first three years of the agreement, the minimum remuneration actually payable under it has exceeded, and is likely to continue in the future to exceed, the true value (including profit margin) of the services provided, with the disparity increasing over time because of the minimum compounding 5% annual increase in the remuneration payable.
(3) The evidence does not permit a quantification of the past or present margin of disparity between the actual remuneration and the true cost of services, nor does it permit any projection of the likely actual amount of that disparity (from year to year) into the future.
(4) On the now agreed basis that 41% is an appropriate profit margin, the agreement has always provided at least a reasonable remuneration to the manager (Arrow or Bondlake) from time to time; and the effect of the compounding is that for most of the life of the agreement, and probably during any extensions arising from the exercise of the options, the agreement will provide for a remuneration that is more than fair and reasonable, and in this sense, "excessive".

106. I should add, by way of possible qualification of what I have said as to the disparity between the actual remuneration and the true cost of services, that no expert suggested that the cost of the services would increase as the complex ages and its facilities deteriorate.

Approach to the issues

107. It will be seen that the joint statement of issues commences with issues as between the Association and Australand. I propose however to start with the issues dealing with the management agreement (which commence with issue 7), to move from there through the issues to issue 32 and then to return to issues 1 to 6A.

Issue 7(a): disclosure

108. The defendants accepted that I was constrained by the decision of the Court of Appeal in *Hudson Property Group Pty Ltd* v *Community Association DP 270238* [2005] NSWCA 374 to conclude that the effect of the management agreement was not disclosed by the community management statement for the purposes of s 24(2)(a) of the CLM Act. They were correct to take that position. There is no material distinction between the form of disclosure considered by the Court of Appeal in that case and the form of disclosure in this case.

109. Thus, although the defendants formally submitted that the decision in *Hudson Property Group* was wrong, they accepted that I was bound to answer issue 7(a) "no"; and I do so.

Issues 7(b), 17 and 18: ratification

110. I have set out the relevant facts in paras [40] to [46] above.

111. Plainly, there was no express ratification of the management agreement.

[140530]

However, Mr J S Wheelhouse SC, who appeared for the first and second defendants, submitted that there was evidence of implied ratification. He relied on the decision of the Court of Appeal in *Aztech Science Pty Ltd* v *Atlanta Aerospace (Woy Woy) Pty Ltd* (2006) 55 ACSR 1.

112. I have some doubt that implied ratification is sufficient for the purposes of s 24(2)(b) of the CLM Act. The clear policy of s 24(2) is to protect purchasers of lots in community development plans from long term commitments made at the instigation of the developer during the initial period. Implied ratification, depending on inferences from matters that might or might not be apparent from the minutes of the first AGM, would not serve that purpose in many — if not the majority of — cases.

113. In this context, it is instructive to note cl 4(1) of Schedule 5 to the CLM Act. (By s 10 (2) of that Act, "Schedule 5 has effect in relation to the first annual general meeting of an association".) Clause 4(1) states that "[a] motion that does not relate to the business set out in the notice of the meeting is out of order." That is difficult to reconcile with the concept of implied ratification.

114. However, even if implied ratification is sufficient for the purposes of s 24(2)(b), I do not think that it has been established.

115. The verb "ratify" is defined by **The Australian Oxford Dictionary** (2nd Edition, 2004) to mean "confirm or accept (an agreement made in one's name) by formal consent, signature, etc." It is implicit in this that the ratifier at least knows of the existence, and perhaps as well the terms, of the agreement, and that it was purported to have been made in the name of, or on behalf of or for the benefit of, the ratifier. This suggests that a decision to ratify an agreement must involve some consideration not just of the fact of making of the agreement but also of its terms and their impact on the ratifier.

116. Basten JA (with whom Handley JA agreed) considered what was required for ratification in *Aztech Science* at 23–24 [81]–[82]. It is apparent from what his Honour said in the latter paragraph that the distinction between express and implied ratification may not be one that is always usefully drawn; but to the extent that it can be drawn, language is likely to be the source of express ratification and conduct the source of implied ratification.

117. In substance, and with some presently irrelevant qualifications, Basten JA accepted the explanation given by the primary judge, Barrett J: (2004) 51 ACSR 147 at 159 [49]–[50]. Implied ratification may arise where acts of the ratifier can only be explained on the basis that the ratifier accepts the contract as its own. As with express ratification, the words or conduct relied upon must demonstrate the intention of the ratifier to be bound to the contract.

118. It follows from this that there can be no ratification of a contract of which the alleged ratifier has no knowledge. Whether the requisite knowledge must be actual knowledge, or whether in some circumstances imputed knowledge will be sufficient, is a debate that can be left for another day, because there is simply no evidence that the existence of the management agreement was communicated to the members of the Association (apart from Australand if, at that time, it was still a member of the Association) prior to or at the first AGM. The notice of meeting (assuming that it had been distributed) gave no hint to members that the management agreement existed, let alone that it was to be ratified.

119. The minutes of the meeting disclose that one item of business concerned ratification under s 24 of the CLM Act. The agreement considered and ratified was that made with Howitt Solutions on 8 June 1999 for cleaning and landscaping services. There is no suggestion that the management agreement was even mentioned at the first AGM. One might think that the express reference to and consideration of the agreement with Howitt Solutions impliedly negatived the existence of any other agreement to which s 24, or the question of ratification, might be relevant.

120. Mr Wheelhouse relied on the item in the draft budget to which I have referred in para [46] above. However, that entry gives no indication that the amount for on site management is related to any agreement, let alone an agreement for which ratification is required, or of the terms of any such agreement. If the owners in general meeting had been asked

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to ratify an agreement, one would expect them to have given consideration to the terms of the agreement, including the obligations that it imposed on, and the benefits that it provided to, the Association. One would also expect them to have considered whether such benefits as the Association received under the agreement might be available in the market for a lesser price. One would expect them to have paid particular attention to the duration of the agreement and to the fee structure. The line entry in the draft budget goes nowhere near providing any such information.

121. Mr Wheelhouse relied also on the "disclosure" made in cl 43 of the community management statement. Perhaps a particularly alert or astute reader, who had the terms of cl 43 in mind when he or she read the draft budget, might have linked the two. But there is no reason to think that those who attended the first AGM would have refreshed their memories of the contents of the community management statement before the meeting. Nor, in my view, is the question of ratification to be answered by speculation of this nature.

122. Thus, even if implied ratification is sufficient for the purposes of s 24(2)(b), I do not think that it is established in the present case. Further, in this context, it would be a curious result if a "disclosure" were held to be insufficient for the purposes of s 24(2)(a) but sufficient for the purpose of imputing knowledge to

members so as to lead to ratification under s 24(2)(b). That is not to say that, in particular cases, the contents of an inadequate (for s 24(2)(a) purposes) disclosure might not be sufficient, when considered with other relevant circumstances, to give rise to an inference of ratification. But this is not such a case.

123. It follows that issue 7(b) should be answered "no".

124. In the light of what I have said, it is unnecessary to express a concluded view on issue 17.

125. If issue 18 were to arise for consideration, it follows from what I have said that it should be answered "no".

Issues 8 and 9: termination of the management agreement

126. What I have said in relation to issue 7 means that the answer to issue 8 is "yes", and the answer to issue 9 is "does not arise".

Issues 10 and 11: incurring a debt during the initial period

127. The Association's case in relation to s 23(1)(a) appeared to be that the Association incurred a debt for at least ten years' worth of the "Regular Duties Fee" payable by the Association to Arrow under clause 5 of the management agreement. The minimum amount of the debt, on that approach, was the total over 10 years of the fees, starting at $168,200 for the first year and compounding at 5% per annum thereafter for a further nine years.

128. If the foregoing paragraph appears to be expressed in uncertain terms, there is a reason: the Association's case on this point was never clearly articulated. Paragraphs 25 and 26 of the statement of contentions in the amended summons read as follows:

> "25. As at 2 December 1998 the Association did not have any funds in:
>
> (a) the administrative fund; or
> (b) sinking fund.
>
> 26. The Association did not levy any contributions to its administrative or sinking fund until the first annual general meeting of the association held on 28 July 1999."

129. In their written outline dated 12 April 2007 and filed before the commencement of the hearing, Messrs Corsaro and Studdy said the following (paras 47 to 49):

> "47. Australand's conduct in causing the Association to enter into the SMA in the initial period meant the Association was incurring a debt in excess of the amount then available for repayment of the debt from the administrative or the sinking funds. This constituted a breach of section 23(1) of the CLMA.
> 48. Australand is liable to the Association under section 23(5)(a) or (b).
>
> [140532]
>
> 49. The debt incurred was not limited to the initial period. Although it was first incurred during the initial period, it continued after that whenever the SMA remained on foot. Alternatively, the loss suffered by the Association was on-going whilst the SMA was on foot."

130. In paragraph 26 of their reply submissions dated 23 April 2007, Messrs Corsaro and Studdy said, among other things:

> "If a liability is incurred in the initial period and continues well after the expiry of the Undertaking given by a developer, and there is insufficient money in the funds, that is the vice that section 23(5) addresses".

131. The "Undertaking" referred to was the undertaking by Australand to pay the Association's outgoings (see para [19(2)] above). It was accepted that such an undertaking had been given and honoured.

132. In their submissions in reply, Messrs Corsaro and Studdy referred to the decision of the Court of Appeal in *Bondlake Pty Ltd* v *The Owners — Strata Plan No 60285* [2005] NSWCA 35: in particular, to the judgment of Giles JA (with whom Handley and McColl JJA agreed) at paras [16] and following. It is plain

from para [16] that Giles JA treated the agreement under consideration in that case as requiring payment of the management fee by monthly instalments, and treated the respondent in that case as having incurred an obligation to pay the first monthly instalment on entry into the agreement. The references, and the use sought to be made of them, suggest that the Association would contend that its case based on s 23(2)(b) would succeed even if the only "debt" incurred was that for the first month's instalment of the fee.

133. Mr Corsaro did not advert to this topic in oral address. Thus, the case sought to be made out is left in a state of some obscurity. Given the ways that it has been articulated, I think that the safer course is to approach it on the basis that:

> (1) The Association's case is that s 23(1)(a) was breached on entry into the management agreement, because it then incurred a debt for the first instalment of the management fee and had no funds to pay that debt; but
> (2) In some way that remains unclear, the claim against Australand may extend beyond the amount of that month's debt and to the whole value of the fee thereafter.

134. In its defence to the amended summons, Australand admitted paras 25 and 26 of the Association's contentions. Thus, if the Association did incur a debt when it entered into the management agreement, or for that matter, at any time at least up until the first AGM, Australand admits that the relevant fund of the Association did not then have money available for repayment of that debt. There was never any approval pursuant to s 23(4) of the CLM Act.

135. Mr N Perram SC, who appeared with Mr J S Emmett of counsel for Australand, submitted that:

> (1) no "debt" was incurred, when the agreement was made, for any amount beyond — at most — the first month's fee;
> (2) section 23 applied only to debts that were to be paid out of the administrative fund or the sinking fund, and that it was not applicable in this case because, by reason of Australand's undertaking, there was no such debt; and
> (3) section 23 did not apply to contracts governed by s 24.

The decision in Bondlake

136. *Bondlake* concerned s 113(1)(b) of the *Strata Schemes Management Act 1996* (the SSM Act). Section 113(1)(b) (as it stood at the relevant time) provided that an owners corporation could not, during the initial period, incur a debt for an amount exceeding the amount then available for repayment of the debt in the administrative fund or sinking fund without the authority of the Strata Titles Board under s 182 of the SSM Act. Thus, s 113(1)(b) of the SSM Act as it then stood is not materially distinguishable from s 23(1)(a) of the CLM Act.

137. At an extraordinary general meeting of the respondent on 25 May 1999, the respondent, having noted an undertaking by the developer to pay the respondent's outgoings (with presently immaterial temporal restrictions), resolved to enter into a caretaker agreement. That agreement was made on 25 May 1999. It provided for an annual fee (for the first year) of

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$84,042, payable by monthly instalments. The first instalment was due on the date of commencement of the agreement. At that time, there was nothing in the administrative or sinking fund.

138. Giles JA (with whom Handley and McColl JJA agreed) held at para [20] that the respondent incurred a debt at the very least for the first instalment of the fee when it entered into the agreement, even if the time for payment was fixed by reference to the date of issue of the invoice: 28 May 1998. His Honour noted, but did not resolve, the argument as to whether the debt incurred extended beyond the first instalment of the fee to the whole of the first year's fee or, indeed, fees falling due thereafter during the life of the caretaker agreement.

139. Giles JA held at paras [18] and [21] that where a debt to which s 113(1)(b) of the SSM Act applied was incurred pursuant to a contract, then the express statutory prohibition of the incurring of the debt extended to an implied statutory prohibition of the making of the underlying contract.

140. His Honour held at para [16] that these statutory consequences followed notwithstanding the developer's undertaking. That was because, as between the appellant and the respondent, it was the respondent who was obliged to pay the debt, even though the respondent had the benefit of the developer's undertaking, and even though in practice it appears to have been the developer that paid the instalments from time to time.

141. The principal question for decision in *Bondlake* was whether the contract was void for illegality. (The Court of Appeal held that it was not.) That issue does not arise in this case: the Association has expressly disavowed any such suggestion.

Analysis– the first month's instalment

142. By cl 5.6, the Regular Duties Fee was payable by monthly instalments, with the first instalment (subject to adjustment under cl 5.7) due on the date of commencement of the management agreement and instalments thereafter due on the first day of each month.

143. It follows from the decision in *Bondlake* that, for the purposes of s 23(1)(a), when the Association entered into the management agreement, it incurred a debt for the first month's instalment (adjusted as necessary) of the regular duties fee. Neither the existence nor the performance of Australand's undertaking intercepted or prevented the incurring of that debt.

144. The reasoning in *Bondlake* renders Australand's first submission (that "debt" does not include a future or continent debt) irrelevant. It is sufficient for the operation of s 23(1)(a) that when the Association entered into the management agreement, it incurred a debt for the first month's instalment of the fee.

145. Further, the decision in *Bondlake* requires the rejection of Australand's second submission (that the effect of Australand's undertaking was that the relevant debt was not one to be paid out of the Association's administrative or sinking funds).

146. Finally, the decision in *Bondlake* must lead to the rejection of Australand's third submission (that s 23 of the CLM Act does not apply to agreements authorised by s 24). The caretaker agreement with which the Court of Appeal was concerned in *Bondlake* was an agreement authorised by Part 4A of Chapter 2 of the SSM Act. It would have been possible to enter into a caretaker agreement that did not infringe s 113(1)(b) of the SSM Act. Equally, it would have been open to Australand and Arrow to enter into a site management agreement that did not infringe s 23(1)(a) of the CLM Act. Nothing in s 24 authorises an agreement to be made in breach of, or confines the operation of, the prohibition in s 23.

147. Thus, I conclude that when the Association entered into the management agreement, it incurred a debt — for the first month's instalment of the Regular Duties Fee payable to Arrow — that exceeded the amount then available for the repayment of that debt from the Association's administrative or sinking fund.

148. That conclusion makes it necessary to consider s 23(5). What is recoverable (as debt or damages respectively) is any liability incurred, or loss suffered, because of a breach of (here) s 23(1)(a).

149. The language of para (a) speaks of recovery, as a debt, of "any liability incurred by the Association … ". That may be contrasted with para (a) of subs (1), which uses

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the expression "incur a debt". The liability to which para (a) of subs (5) refers is, for the purposes of this case, a liability incurred by the Association because of the breach of para (a) of subs (1). In other words, what is recoverable under subs (5)(a) is any liability incurred by the Association because it incurred a debt to Arrow in excess of the amount then available in its funds for the repayment of that debt.

150. In the present case, there is no evidence that the Association has incurred any liability because it incurred a debt to Arrow in excess of the amount then available to it in its funds for the repayment of that debt. Nor would one expect to find that the Association incurred any liability, for the purposes of subs (5)(a), in circumstances where, on the evidence, Australand in fact, and pursuant to the undertaking that it had given, paid debts incurred by the Association from time to time.

151. Thus, I conclude, the Association is not entitled to recover any amount — whether for one month's instalment of the management fee, or more — from Australand pursuant to subs (5)(a).

152. The claim pursuant to subs (5)(b) must also fail. The Association has not proved any such liability or loss. Again, the evidence indicates that Australand, true to its undertaking, met the Association's obligations until the Association was in a financial position to do so.

153. It follows that the Association has not made good its claim for relief pursuant to s 23(5).

Analysis — future liability

154. In *Hawkins and Others* v *Bank of China* (1992) 26 NSWLR 562, Gleeson CJ (with whom Sheller JA agreed) pointed out at 572 that the word "debt" may include a contingent liability. On the same page, his Honour said that a debt may be "incurred" by "the undertaking of an engagement to pay a sum of money at a future time, even if the engagement is conditional and the amount involved uncertain." As his Honour had pointed out earlier on the same page, "[t]he words "incurs" and "debt" are not words of precise and inflexible denotation. … [T]hey are to be applied in a practical and commonsense fashion, consistent with the context and with the statutory purposes."

155. The statutory context in this case includes s 24 of the CLM Act. That section contemplates that associations may enter into long term management agreements, subject only to adequate disclosure or ratification. If Mr Corsaro's submission is to be accepted, any association that does enter into long term management agreements must at the same time pay into its administrative fund an amount sufficient to cover the whole of that association's present and future liabilities under such an agreement. I do not believe that the legislature intended that this should be done.

156. In *Bondlake,* Giles JA at para [37] identified the policy underlying s 113(1)(b) of the SSM Act as being to protect those who became proprietors of lots in the strata plan "from burdensome dealings undertaken by the developer prior to the Owners Corporation coming under the control of the lot owners." Similar considerations would apply to s 23(1)(a) of the CLM Act. There may also be an additional purpose: to protect third parties to whom an association incurs debts during the initial period.

157. Neither purpose requires more than that debts that are, or become, due and payable during the initial period be covered by the administrative fund. In this case, Arrow could not have demanded payment of anything more than the instalment due on the signing of the management agreement, and (as they fell due for payment) monthly instalments thereafter. There was no need for the administrative fund to make provision for amounts that would not fall due for payment within the initial period.

158. It may be that, for the purposes of s 23(1)(a) of the CLM Act, the Association incurred a debt to Arrow as each monthly instalment fell due in accordance with the terms of the management agreement. But even if it did, the only relevance of this can be to the claim under s 23(5). What I have said in paras [149] to [151] above would apply equally to any such claim for subsequent monthly instalments.

159. Australand relied on other matters in answer to this aspect of the Association's case.

[140535]

The conclusion to which I have come makes it unnecessary to consider them.

Conclusion

160. Issue 10 should be answered "yes, at least as to the first month's instalment of the Regular Duties Fee payable under the management agreement" and issue 11 should be answered "no".

Issues 12 to 15, 19, 20, 24 to 27: effectiveness of the assignment; estoppel

161. One might think that if (as I have concluded is the case) the management agreement terminated at the end of the Association's first AGM on 28 July 1999, there was nothing left thereafter that could be the subject of the deed of assignment made on about 30 June 2000. However, Arrow and Bondlake submitted that this result does not follow, for a number of reasons. One group of reasons relates to the estoppel cases that they allege against the Association.

162. Arrow and Bondlake relied on estoppel by representation and conventional estoppel (including estoppel by deed). Further, issue 19 refers to promissory estoppel; it is difficult to see a clear basis for this in the defences of Arrow and Bondlake.

Estoppel by representation

163. Arrow and Bondlake allege that the Association made a number of representations expressly, both in writing and orally, and impliedly, including by conduct.

164. The representations alleged by Arrow are as follows (para 18 of its amended defence to the amended summons):

> "(a) At all material times between 28 July 1999 and 30 June 2000, the plaintiff represented to the first defendant that:
>
> (i) The SMA was binding and enforceable upon each of the plaintiff and the first defendant, and
> (ii) The first defendant was bound to perform the contractual obligations imposed upon it under the SMA; and
> (iii) The SMA had been ratified on 28 July 1999 by the plaintiff and, or in the alternative, had its effect disclosed for the purposes of s24 of the Community Lands Management Act 1989."

165. The representations alleged by Bondlake are as follows (para 18 of its amended defence to the amended summons):

> "18. Further,
>
> (a) At all material times from 30 June 2000, the plaintiff represented to the second defendant that
>
> (i) The SMA has [sic] binding and enforceable upon each of the plaintiff and the second defendant, and
> (ii) The second defendant was bound to perform the contractual obligations imposed upon it under the SMA, and,
> (iii) The SMA had been since 28 July 1999 a binding and enforceable document."

166. In each case, the amended defence particularises in some detail the material relied upon to support the allegation that the relevant representations were made. Speaking at a level of some generality, I think that the evidence supports the proposition that the first and second (but not the third) of the representations alleged by Arrow were made, and that all three of the representations alleged by Bondlake were made.

167. It is not necessary, however, to undertake a detailed analysis of the evidence leading to the conclusion that I have just expressed. That is because, for both Arrow and Bondlake, the only evidence of reliance came from Mr Veron. For the reasons that I have given, I do not accept that aspect of his evidence. Thus, reliance being an essential element of the defence (as in this case it is) of estoppel by representation, in each case that defence fails.

Promissory estoppel

168. As I have indicated, there is no clear "pleading" (to use an inaccurate but convenient term) of a defence of promissory estoppel. The first and second defendants' outline of contentions, filed shortly before the commencement of the hearing, suggested that promissory estoppel was relied upon as an alternative to conventional estoppel. However, the first and second defendants' final submissions appeared, if I may say so, to confuse the question of promissory estoppel with that of conventional estoppel (see paras 99

to 122 of those submissions, noting in particular the categorisation of the alleged promissory estoppel in paras 99 and 100).

169. In view of this confusion, I do not propose to express a concluded view on the defence of promissory estoppel. If it were intended thereby to refer to the defence of estoppel by representation, then I refer to what I have said above. If it were intended thereby to refer to the defence of estoppel by convention (including by

deed), then I refer to the following section of these reasons. If it were intended to refer to something separate and distinct, then I have to say that the submissions for the first and second defendant leave me entirely ignorant as to what that might be.

Estoppel by convention

170. Again, the defences did not plead separately and distinctly the facts relied upon in support of the defence of estoppel by convention.

171. In their final written submissions, Arrow and Bondlake stated the basis of the conventional assumption as follows:

> (1) As between the Association and Arrow:
>
> > (a) The assumption by each of them, to the knowledge of the other, from 28 July 1999 to 30 June 2000 (the effective date of the deed of assignment), that their relationship was governed by the terms of the management agreement;
> > (b) Performance by each of them, to the knowledge of the other, of their respective obligations under the management agreement on the basis that it continued to govern the relationship between them; and
> > (c) The recitals in, terms of and execution of the deed of assignment.
>
> (2) As between the Association and Bondlake:
>
> > (a) The recitals in, terms of and execution of the deed of assignment.
> > (b) From 30 June 2000, the assumption by each of them, to the knowledge of the other that their relationship was governed thereafter by the terms of the management agreement as made applicable by the deed of assignment; and
> > (c) Performance by each of them, to the knowledge of the other, of their respective obligations under the management agreement as so made applicable on the basis that it governed the relationship between them.

172. Further, and separately, Arrow and Bondlake relied on the defence of estoppel by deed, arising out of the terms of the recitals in the deed of assignment.

173. The Association took no point as to the inadequacy of the pleading of this aspect of the estoppel case. The statement of agreed issues makes it plain that the Association regarded estoppel by convention and estoppel by deed as being available for argument. It sought to meet those arguments on their merits.

174. The doctrine of estoppel by convention is well understood. It was dealt with very recently by the Court of Appeal (speaking through Tobias JA) in *Ryledar Pty Ltd & Anor* v *Euphoric Pty Ltd* [2007] NSWCA 65 at para [193] and following. Brereton J discussed the principles in detail in *Moratic Pty Ltd* v *Lawrence James Gordon & Anor* [2007] NSWSC 5 at paras [30] and following. His Honour's analysis was referred to, with evident approval, by Tobias JA in *Ryledar* at paras [199] to [201].

175. It is not necessary to go into detailed analysis of the doctrine. Neither its existence nor its substance was in dispute; the dispute was to whether it applied in this case.

176. In **Estoppel by Conduct and Election** (Thomson, 2006), the Hon K R Handley AO QC explained the doctrine of estoppel by convention thus at 115 (omitting citations):

> "When parties make a statement of fact or of mixed fact and law the conventional basis of their transaction, without giving cross warranties, both are estopped from questioning its truth for the purposes of that transaction. Estoppels by convention can be created ad hoc, expressly, by a course of dealings, or by other acts and declarations. In such a case "there must be some mutually manifest conduct by the parties" with the intention of affecting their legal relationship. … This is a form of estoppel by representation which does not depend on the representee's reliance on the truth of the
>
> [140537]
>
> conventional facts. The representation is not necessarily that the convention is true but that it has been mutually adopted and each party relies on its adoption when they enter into the transaction. A distinctive feature of this form of estoppel is its mutuality … ".

177. In this case, it cannot be disputed that the Association and Arrow conducted their relationship between 28 July 1999 and 30 June 2000 on the basis that it was regulated by the terms of the management agreement. The Association made a number of demands on Arrow for performance of the agreement (perhaps more accurately, for performance of the agreement as the Association perceived that it should operate). Those demands are explicable only on the basis that the Association thought that the agreement was in force, that it was entitled to the benefit of Arrow's promises (as the Association understood them) in it and that Arrow was bound to perform accordingly.

178. Arrow sought to justify its performance under the agreement. Further, on two occasions (each involving numerous letters and attendances) it sought the Association's consent to the assignment of the agreement — firstly to Max Management, and secondly to Bondlake. Again, those actions are consistent only with a belief that the agreement remained in force, that Arrow was bound to perform it and that Arrow was entitled to the benefit of the terms relating to assignment.

179. The Association dealt with those requests for consent on their merits. It did not suggest to Arrow and the prospective assignees that there was nothing to assign, because the management agreement had come to an end. In each case, as I have said, it gave consent — although on conditions — the validity of some of which were the subject of disagreement.

180. Again, the payment and receipt of the remuneration under the agreement can be attributed only to a belief by each party that it was in force. No one suggested that the relationship was one merely from month to month, or ad hoc.

181. More generally, there is no ground for concluding that either party had any occasion whatsoever, during the period in question, to question the continuing validity and effect of the agreement. Neither of them turned their minds to this topic (I have already said that I do not accept Mr Veron's evidence that might suggest that Arrow, through him, did so).

182. All this was confirmed on or about 30 June 2000 when (having negotiated its terms) the Association and Arrow, and Bondlake as well, entered into the deed of assignment. Quite apart from the terms of the recitals to that deed, it is impossible to understand how it could have been made on any assumption other than that the management agreement was in force and effective according to its terms.

183. Further, and as between Arrow and Bondlake, it is clear that each of them entered into the deed of assignment on the basis that it related to a valid management agreement that had effect, and would continue to have effect, according to its terms. There is no other reason for making the deed; and there is no other explanation of the recitals in it.

184. Put shortly, the conventional basis of the dealings between the Association and Arrow from 28 December [sic] 1999 to 30 June 2000 was that the management agreement was in force, valid and effective; and the conventional basis of the transaction between the Association and Bondlake was that the management agreement was in force, valid and effective on 30 June 2000 and would continue so (to some extent modified by the terms of the deed of assignment) thereafter according to its terms.

185. Notwithstanding my view of Mr Veron's evidence, I cannot conceive that he would have permitted Arrow and Bondlake to enter into the deed of assignment had he been told that the conventional basis of the dealings between Arrow and the Association was in law incorrect, because of the operation of s 24(2) of the CLM Act.

186. It is plain that Arrow and Bondlake would each suffer detriment if the Association were now permitted to depart from that convention. Arrow would suffer detriment because it would be exposed to an action for return of the consideration paid to it by Bondlake in connection with the deed of assignment, and perhaps to an action for damages. Bondlake would suffer detriment because it would lose the benefit of the agreement. Whilst it might have remedies as

[140538]

against Arrow, there may well be a question as to Arrow's ability to satisfy any judgment recovered against it.

187. Thus, I conclude, the defence of estoppel by convention is made good.

Issue 15

188. I do not think that issue 15 is intended to relate to the estoppel by convention. But if it is, I do not think that anything relevant for present purposes flows from the Association's notification to Arrow and Bondlake of its current belief that the management agreement had come to an end on 28 December 1999. That is because the relevant detriment was established, at the latest in each case, when the deed of assignment was made. Subsequent notification of a change of position on the Association's part cannot undo that detriment; and permitting the Association to act on its current state of mind would crystallise the consequences of that detriment.

Estoppel by deed

189. The doctrine of estoppel by deed antedates, but is now a subset of, the doctrine of estoppel by convention. In the case of estoppel by deed, the conventional or assumed basis of dealing is that appearing on the face of the deed: customarily, from such facts as may be recited in the deed. Handley explains the doctrine thus at 109 (again omitting citations):

> "This type of estoppel is created when a deed contains one or more statements of specific fact which are adopted as the basis of the transaction. Such a statement is commonly made in a recital but can appear in the operative provisions. … The statement must be certain to every intent, without any ambiguity."

190. In the present case, the basis on which the parties contracted in the deed of assignment is explained clearly, and in my view without ambiguity, in the recitals, which I repeat for convenience:

> "A. The Transferor is the site manager under the Agreement.
> B. The Transferor wants to assign to the Transferee all of the interests, rights and obligations of the Transferor under the Agreement.
> C. The Community Association agrees to the assignment."

191. The "Transferor" is Arrow; the "Agreement" is the management agreement; and the "Transferee" is Bondlake.

192. The first recital is consistent only with the existence of the management agreement, in full force and effect according to its terms, as at the date on which the deed was made (or, if they be different, as at its effective date 30 June 2000). Thus, the existence, validity and effect of the management agreement is made the basis of the deed of assignment. The operative provisions of the deed reflect that:

> (1) The assignment effected by clause 2;
> (2) The consent, and prospective release of Arrow, given by the Association pursuant to clause 3;
> (3) The assumption of responsibility by Bondlake pursuant to clause 4; and
> (4) The mutual indemnities given between Arrow and Bondlake pursuant to clause 5.

193. Detriment, in the relevant sense, is established for the reasons given in para [186] above.

194. Thus, if it were necessary to do so (ie, if my conclusion as to conventional estoppel in the wide sense were incorrect), I would conclude that the Association is estopped by its deed from disputing the continued existence and validity, according to its terms, of the management agreement.

Estoppel in the face of a statute

195. The parties devoted some attention, both on paper and in oral address, to this topic. However, it does not seem to me to have any relevance. Section 24(2) of the CLM Act does not render illegal or void an agreement of the kind referred to in subs (1) that continues beyond the term of the first AGM without either disclosure or ratification in accordance with subs (2). It provides, in a simple and straightforward way, that in those circumstances the agreement will terminate at the end of the first AGM. There is no reason why an association and a manager, having made such an agreement and having recognised at the first AGM that it was void, could not contract immediately after the AGM on the same terms.

196.

[140539]

There is nothing in the policy underlying s 24 that even suggests, let alone requires, the conclusion that an agreement whose termination the section effects should be stigmatised as illegal, void or otherwise offensive to public policy so as to bring into play the somewhat uncertain (as to their application) principles relating to estoppel in the face of a statute. If, as I have suggested is the case, it would be open to parties to renew a management agreement, on identical terms, it must be open to them to achieve the same result through a conventional assumption adopted as the basis of their dealings thereafter.

197. I therefore conclude that the issues presently under consideration should be answered as follows:

(1) Issue 12: no, because estoppel by convention or by deed is made out.
(2) Issue 13: does not arise.
(3) Issue 14: does not arise.
(4) Issue 15: does not arise; but if it did, I would answer it "no".
(5) Issue 16: does not arise; but if it did, I would answer it (on the basis of my conclusions as to the expert evidence) "The evidence does not permit an assessment to be made.".
(6) Issue 19: yes, as to conventional estoppel.
(7) Issue 20: yes.
(8) Issue 24: unnecessary to answer.
(9) Issue 25: unnecessary to answer.
(10) Issue 26: unnecessary to answer.
(11) Issue 27: yes, as to conventional estoppel.

Issues 21, 22 and 23: characterisation of the deed of assignment

198. I said in para [161] above, that Arrow and Bondlake raised several answers to the Association's claim that the management agreement terminated immediately after the first AGM. One group of answers depended on estoppel; and I have dealt with this aspect of the defences. The other group of answers depended on the characterisation of the deed of assignment as bringing into existence, either on its terms as properly construed or by operation of the doctrine of novation, a fresh or separate agreement between the Association and Bondlake on the terms of the management agreement as varied by the deed of assignment.

199. On the view to which I have come as to the estoppel defences, it is not necessary to answer these issues. Since they raise questions of law, and involve no issues of fact other than those that I have found (which are in substance non contentious), I do not think that it is profitable to investigate them further.

200. Accordingly, I answer each of issues 21, 22 and 23: "does not arise".

Issue 28: true value of the services under the management agreement

201. For the reasons that I gave in dealing with the expert evidence (see in particular my conclusions at para [105] above), it is plain that the true value of the services provided under the management agreement, from at least the fourth year onwards, was less than the Regular Duties Fee paid from time to time; and it is likely that this situation will continue into the future for the life of the management agreement (including any options for renewal). However, the evidence does not permit an assessment to be made of the amount of the excess.

202. Issue 28 should be answered accordingly.

Issues 29 to 32: contravention of the *Trade Practices Act*

203. I have concluded, in considering the question of conventional estoppel (including estoppel by deed), that the Association in its dealings with Arrow and Bondlake did conduct itself on the basis that the management agreement was in force and effective. It follows from my findings on that aspect of the estoppel case that:

(1) As between the Association and Arrow, the management agreement must be taken to have been effective between 12 December 1998 and 30 June 2000; and
(2) As between the Association and Bondlake, the management agreement (as made applicable by the deed of assignment) must be taken to have been effective from 30 June 2000 and, subject to

termination in accordance with its terms or some other supervening disabling factor, to continue to be effective in accordance with its terms.

204.

[140540]

On that basis — ie, in effect, that the Association is held to the relevant common assumptions — I do not think that any question arises of contravention of the *Trade Practices Act.* It follows that each of issues 29 to 30 should be answered "does not arise".

Issues 1 and 2:

205. I now return to the question of the fiduciary and common law duties alleged against Australand.

Australand's duties to the Association

206. The Association alleged the following in its contentions (paras 10, 11 and 33):

> "10. By entering into the site management agreement with Arrow, the Association incurred a debt during the 'initial period' for an amount in excess of the amount then available for repayment of the debt from the administrative fund or sinking fund.
>
> 11. By deed of assignment dated 30 June 2000 Arrow purported to assign the rights, interests and obligations under the site management agreement to the second defendant (**'Bondlake')** in circumstances when because of its earlier termination, Arrow was not in a position to make any assignment to Bondlake and Bondlake has no entitlement by virtue of any assignment from Arrow to receive payment from the Association on the basis that the site management agreement is in existence.
>
> …
>
> 33. The developer was able to influence and control the Association's decisions up and until the first annual general meeting. In the circumstances alleged in this summons the developer owed a fiduciary or alternatively a common law duty to the Association as follows:
>
> (a) A duty to act with absolute candour and honesty to the Association.
> (b) A duty not to place itself in a position of conflict or to profit from contracts entered into between the Association and Arrow, without proper disclosure.
> (c) A duty to act in the best interests of the Association in the exercise of a power or discretion affecting the Association's interests.
> (d) A duty not to act to the detriment of the Association.
> (e) A duty of disclosure to enable the Association to make an informed and impartial decision about whether to enter into the site management agreement."

207. Australand's response was as follows (paras 7, 8 and 29):

> "7 In answer to paragraph 10, the third defendant:
>
> (a) admits sub-paragraphs (a), (b) and (c);
> (b) says that the third defendant was able to exercise control over the plaintiff as provided by and subject to the limits set out in:
>
> (i) the community management statement registered with DP 270108 (**'Community Management Statement');**
> (ii) the Community Lands Management Act 1989 (NSW); and
> (iii) As otherwise provided for by law; and
>
> (c) otherwise denies the paragraph.
>
> 8. The third defendant denies paragraph 11.
>
> 29. In answer to paragraph 33, the third defendant:
>
> (a) refers to and repeats its answer to paragraph 10 of the Amended Summons; and
> (b) otherwise denies the paragraph."

208. In essence, the Association's case was that Australand, as developer of the community scheme, stood in a position vis-à-vis the Association analogous to that of a promoter vis-à-vis the company promoted. It relied on the judgment of Else-Mitchell J in *Re Steel and Others and The Conveyancing (Strata Titles) Act* 1961 (1968) 88 WN (Pt 1) (NSW) 467, and on an article by Mr David Bugden, **Management Rights — Are Developers Promoters?** (1996) QLSJ 281.

209. Australand's submissions on this point were somewhat coy. It did not really engage with the proposition that it was in substance a promoter, and therefore owed the Association duties of the kind held to have been owed by promoters towards the companies that they promote. Instead, its submissions focussed

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more on the reasons why there was no breach of any duty that might be owed.

The decision in Re Steel

210. The question for decision in *Re Steel* was whether an administrator should be appointed to a body corporate (to use the terminology relevant at the time). At a time when the developer of the strata plan controlled the body corporate, it made arrangements for the management of the body corporate, which effectively secured that management to nominees or representatives of the promoter. Other proprietors alleged that there were "irregularities in the conduct of the affairs of the body corporate and in the charging and payment of maintenance and other expenses" and a want of full disclosure (Else-Mitchell J at 469).

211. Else-Mitchell J said at 469 that it was clear that the developer "was in the position of a promoter of the strata title enterprise and, as such, that company had a duty to ensure that full disclosure was made to the strata lot holders, apart altogether from the statutory duties cast on it as a member of the council under the [applicable] by laws … ". In my view, his Honour's characterisation of the role of a developer of a strata (or community) scheme is as much applicable today as it was in 1968.

212. Although his Honour concluded that the developer was in the position of a promoter, and as such owed a duty of full disclosure to proprietors, his Honour was concerned with the subsequent conduct of the developer "as self designed [sic: obviously, self-designated] administrator". (His Honour's reference to "a duty to ensure that full disclosure was made" might require further consideration, having regard to the current view that fiduciary duties are proscriptive rather than prescriptive: see para [216] below. But since his Honour's findings of breach appear to relate to breaches of the applicable by-laws — see para [214] below-nothing of present significance turns on this.) His Honour had earlier concluded that the developer, through its control of the body corporate, appointed itself "as administrator for the body corporate under the supervision of" someone who appears to have been the principal of the developer.

213. His Honour found that the developer had not made appropriate disclosure in relation to the affairs of the company. However, that appears to have been non disclosure in the course of acting as a manager, not non disclosure in relation to transactions between the developer (as promoter) and the body corporate.

214. Further, his Honour's findings were, for the main, cast in terms of breach of by laws then applicable (either under the legislation or as adopted by the body corporate). The gravamen of his Honour's finding, and the reason why he held that an administrator should be appointed, appear at pages 470–471. His Honour said that those who managed the affairs of the body corporate (on behalf of the developer):

> " … are at least in a position analogous to company directors; they may even have a higher fiduciary duty, and when they are promoters as well this duty has a dual basis. It is plain that the respondents have failed to recognise that it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct … .
>
> There is no doubt in my mind that … there have been breaches of the fiduciary duty which flows from membership of a council of a body corporate … ."

215. Thus, I think, the decision in *Re Steel* gives little guidance for the application of the principles relating to fiduciaries in the circumstances of this case, where the breach alleged relates specifically to the developer's conduct as promoter.

Fiduciary obligations: the principles

216. It is, and for many years has been, accepted that a fiduciary relationship exists between the promoter of a company and the company promoted. See (by way of example only) *Tracy and Others* v *Mandalay Proprietary Limited* (1953) 88 CLR 215. However, to say that one person stands in a fiduciary position vis-à-vis another is to begin, not to end, the enquiry: see the observation of Frankfurter J in *Securities and Exchange Commission* v *Chenery Corporation* (1943) 318 US 80 at 85, 86, cited with approval by the majority (McHugh, Gummow, Hayne and Callinan JJ) in *Pilmer and Others* v *Duke Group Limited (In Liquidation) and Others* (2001) 207 CLR 165 at 198–199 [77]. Their Honours earlier at 197–198 [74] had referred with approval to the observation of Gaudron and McHugh JJ in *Breen* v *Williams* (1996) 186 CLR 71 at 113, that the obligations of a fiduciary are proscriptive — "not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict" — and not positive (or prescriptive): "positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."

[140542]

217. Any analysis of the nature and content of a fiduciary duty must take into account the nature of the relationship and the facts of the particular case. See Gibbs CJ in *Hospital Products Limited* v *United States Surgical Corporation and Others* (1984) 156 CLR 41 at 73; and see Mason J in the same case at 102.

218. Clearly, any application in this case of the principles relating to fiduciaries must take account of the way in which the legislature has sought to impose duties of disclosure in certain cases, and to provide for the consequences of non disclosure. But it does not follow from the legislative scheme that all principles relating to the obligations of fiduciaries have been excluded. In particular, I think, nothing in that scheme excludes the basic principle that a fiduciary should not benefit from its position.

219. In *Consul Development Pty Limited* v *D.P.C. Estates Pty Limited* (1975) 132 CLR 373, Gibbs J stated the rule, and its basis, as follows at 393:

> " … the rule that a person in a fiduciary position is not entitled to make a profit without the knowledge and assent of the person to whom the fiduciary duty is owed is not limited to cases where the profit arises from the use of the fiduciary position, or of the opportunity or knowledge gained from it. The basis of the rule is that a person in a fiduciary position may not place himself in a situation where his duty and his interest conflict."

220. His Honour said at 394 that "[w]here the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered injury or loss."

221. In *Kak Loui Chan* v *Zacharia* (1984) 154 CLR 178, Deane J (with whom Brennan and Dawson JJ agreed) referred at 198 to what he called the "fundamental rule" that a fiduciary should not put itself in a position where its interest and duty would or might conflict. However, as his Honour noted, "[t]he equitable principle governing the [fiduciary's] liability to account is concerned not so much with the mere existence of the conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, entering into a transaction or engagement 'in which he has, or can have, a personal interest conflicting … with the interests of those whom he is bound to protect'." (The quotation comes from Lord Cranworth LC in *Aberdeen Railway Co* v *Blaikie Brothers* (1854) 1 Macq 461 at 471.)

222. Deane J then pointed out at 198–199 that the "fundamental rule" embodied two themes. His Honour said:

> "The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge relating from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. … Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of

conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or

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(ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. … [I]t is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed."

223. In *Warman International Limited and Another* v *Dwyer and Others* (1995) 182 CLR 544, the High Court of Australia (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) stated at 557–558 that:

> (1) The liability of a fiduciary to account does not depend on detriment to the plaintiff or dishonesty or lack of good faith on the part of the fiduciary.
> (2) A fiduciary must account for a profit or benefit obtained either when there was actual or possible conflict between duty and interest or by reason of the fiduciary position, or the use of opportunity or knowledge derived from it.
> (3) It matters not that the plaintiff was unwilling, unlikely or unable to make the profit taken by the fiduciary, nor that the fiduciary acted honestly and reasonably.

Application to this case

224. In the present case, significant factors include the following:

> (1) Development of community schemes takes place within a legislative structure (including the CLD Act, the CLM Act and where applicable the SSM Act) that imposes a substantial degree of regulation on the activities of associations during the initial period;
> (2) When the agreement between Australand and Arrow was made, and when the management agreement was made, Australand owned all the unit entitlements in the community scheme;
> (3) The Association's intention to enter into a management agreement generally of the kind that was in fact made was disclosed (although insufficiently for the purposes of s 24(2)(a) of the CLM Act) in the community management statement;
> (4) The decision taken at the inaugural SGM to enter into the management agreement was disclosed in the minutes of that SGM;
> (5) The community management scheme was available on search to any intending purchaser, and the records of the Association (including, no doubt, its copy of the management agreement) were likewise available on search to intending purchasers; and
> (6) What was not available on search to intending purchasers was the detail of the agreement between Australand and Arrow, including Arrow's payment of $190,000 for the rights conferred by the management agreement.

225. As I have said in para [211] above, I accept, by analogy with the reasoning of Else-Mitchell J in *Re Steel*, that it is appropriate to regard the developer of a community scheme as being, vis-à-vis the community association, in a position analogous to that of a promoter of a company. It follows that the relationship between the developer and the community association is a fiduciary relationship. Having thus got to the beginning of the enquiry (see para [216] above), it is necessary to consider the incidents of that relationship.

226. If one returns to the five duties alleged by the Association in para 33 of its contentions (see para [206] above), it may be seen that the first of itself offers no meaningful content by which the standard of Australand's dealings, in relation to the management agreement, could be assessed. The second does, and I do think that Australand owed the Association a duty of the kind alleged. The third is prescriptive rather than proscriptive, and for that reason cannot be accepted. The fourth may be accepted, but adds little if anything of substance to the second. The fifth is misconceived, for the reason given in para [241] below.

227. The management agreement was made a few days after the registration of the community plan for Balmain Cove. (The community plan was registered on 27 November 1998 and the management agreement was made on 2 December 1998.) It is common ground that Australand controlled the Association on 2 December 1998. Australand's representative, Mr Crews, was the only person, apart from Australand's solicitor Ms Laws of Mallesons, who attended the inaugural SGM at which, among other things,

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the Association was authorised to enter into the management agreement.

228. The terms of the management agreement were negotiated between Australand and Arrow. In my view, the inference that Australand, when it negotiated the terms of that agreement, had regard to its own interests is inescapable. Arrow agreed to pay Australand a consideration — effectively, a premium (as for convenience I shall hereafter call that consideration) — for causing the Association to enter into the agreement. There are three possible explanations for this:

> (1) The revenue stream fixed by the agreement itself, in the form of the Regular Duties Fee, was perceived to be sufficiently valuable to justify the payment of a premium for the opportunity to earn it; or
> (2) The additional remuneration that might be earned by reference to the agreement — including the revenue that might be derived from performance of the Letting Services — was so perceived (see para [233] below); or
> (3) The combination of those actual and possible revenues was so perceived.

229. For present purposes, it does not seem to me to matter which of the three explanations is correct. Whichever is correct, the opportunity to earn the revenue — the opportunity for which the premium was paid — was an opportunity derived from entry into the management agreement. The management agreement was made by the Association, not by Australand. If a premium was to be paid for the making of that agreement, it should have been paid to the Association and not to Australand.

230. Because the consideration for the Association's entry into the management agreement was paid to Australand and not to the Association, it was in Australand's interests to ensure that the terms of that agreement were sufficiently generous to justify the consideration. However, Australand's duty to the Association required that the management agreement be made on the best terms commercially available to the Association.

231. There was a clear conflict between Australand's interest and its duty. Australand's interest was to extract the maximum price from Arrow. That conflicted, or might conflict, with its duty to the Association: to get the benefit of management services at the most reasonable terms commercially available. Further, to the extent that the management agreement provided for an "excessive" remuneration (see para [105(4)] above), Australand acted to the detriment of the Association in causing it to enter into the management agreement on the terms contained in that agreement.

232. There can be no doubt that Australand made a profit by causing Arrow to enter into the management agreement. In substance, Australand sold to Arrow the benefit of the rights created (or that would be created) pursuant to the management agreement. Australand did this by causing the Association, for a payment not to it but to Australand, to give away its right to secure management services on the open market, and on such terms (including as to remuneration and duration) that it might be able to negotiate. In this context, it is worth bearing in mind that, whatever may be the shortcomings in the expert evidence, it is plain, following from what I have said in para [105] above, that the management agreement is more than generous to the manager. Indeed, it can hardly be supposed that Arrow would have agreed to pay $190,000 for the rights unless it thought it were getting the opportunity to make a reasonable return not just on the cost to it of performing its obligations under the agreement but also on the premium of $190,000 that it paid.

233. I should mention that Mr Veron sought to explain this by saying that the real value of the management agreement lay not in the remuneration for the Regular Duties, but in the opportunity to provide "Letting Services". Although there is no doubt that the management agreement does entitle the manager to perform those services (see clause 9), there is no evidence of their extent or profitability. There is no reason to treat this evidence in any way differently to Mr Veron's other evidence; but even if (contrary to what I have said in para [37] above) I were to accept it, it would not assist Australand, for the reasons given in paras [228] to [230] above.

234. Thus, I conclude that:

> (1) Australand put itself in a position where its interest conflicted with its duty to the Association;

(2) Australand thereby breached the fiduciary duty that I have found it owed to the Association (see para [226] above); and
(3) Australand garnered a profit for itself, in the form of the premium of $190,000, through its exploitation of its control of the Association.

Disclosure

235. In some cases, what is *prima facie* a breach of the fiduciary duty not to make a profit may be cured by adequate disclosure. Australand did not suggest that it had disclosed to the Association the relevant terms — including, specifically, the consideration payable and paid — of its agreement with Arrow for the "sale" of the management rights. It did however rely on disclosures in relation to the management agreement that, it submitted, were made to prospective purchasers.

236. The question thus arises as to what is meant by "adequate disclosure" in the specific context. To my mind, that question is not to be answered either in the abstract or simply by reference to cases such as those involving sales by the promoter to the company of the promoter's own property (see for example the seminal case of *Emile Erlanger and Others* v *The New Sombrero Phosphate Company and Others* (1878) 3 App Cas 1218). The first step is to identify those to whom the "proper disclosure" is required to be made. The second is to consider, by reference to the specific duty and the particular facts of the case, what it is that should be disclosed. That exercise is to be undertaken bearing in mind that the question is not whether there is a duty to disclose but, rather, whether such disclosure as has been made negates an existing breach of duty (see para [241] below).

237. Further, where there is a relevant statutory scheme, an examination of the nature and sufficiency of the disclosure should take into account the statutory scheme, including in particular in this case the requirements of s 24 of the CLM Act.

238. Australand submitted that it was open to it to make adequate disclosure either by disclosure of all relevant facts to a completely independent board of directors (which did not occur in this case), or by such disclosure to the existing and potential members of the Association. It relied on what Austin J said in *Aequitas* v *A.E.F.C.* (2001) 19 ACLC 1006 at 1060 [293], where his Honour accepted the statement of principle in the 6th Edition of Gower, **Principles of Modern Company Law**:

> "The position therefore seems to be that disclosure must be made to the company either by making it to an entirely independent board or to the existing or potential members as a whole. If the first method is employed the promoter will be under no further liability to the company, although the directors will be liable to the subscribers if the information has not been passed on … . If the second method is adopted disclosure must be made in the prospectus, or otherwise, so that those who are all or become members, as a result of the transaction in which the promoter was acting as such, have full information regarding it. A partial or incomplete disclosure will not do; the disclosure must be explicit."

239. In essence, Australand submitted that adequate disclosure was made to prospective purchasers of the terms of the management agreement, and that no more was required. It relied on:

(1) The statements in clause 43 of the community management statement, this being a document required to be, and that the evidence suggests was in fact, attached to contracts for sale; and
(2) The proposition that the management agreement itself was disclosed to purchasers because it was annexed to the minutes of the inaugural SGM.

240. It is I think likely that intending purchasers would have become aware of the existence of the management agreement, and that they could have ascertained its terms had they so desired. However, none of the disclosures that was made would have alerted any prospective purchaser to the fact that Arrow considered the rights given to it by the management agreement sufficiently valuable to pay $190,000 to Australand for Australand's service in causing the Association to enter into the management agreement.

241. It is necessary to bear in mind the role of informed consent in this context. As the majority (Brennan CJ, Gaudron, McHugh and

Gummow JJ) put it in *Maguire and Another* v *Makaronis and Another* (1997) 188 CLR 449 at 467, a fiduciary has "no duty as such … to obtain an informed consent … . Rather, the existence of an informed consent would … negate what otherwise was a breach of duty."

242. Informed consent would require, at a minimum, the disclosure of all relevant information: *Queensland Mines Limited* v *Hudson* (1978) 52 ALJR 399 at 403. I say "at a minimum" because, as the majority pointed out in *Maguire* at 466, "[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given … ."

243. In *Fexuto Pty Ltd* v *Bosnjak Holdings Pty Ltd and Others* (2001) 37 ACSR 672, Spigelman CJ said at 693 [124] that the word "relevant" in this context "imports … an objective standard." On this approach, disclosure of the premium of $190,000 would be material if, viewed objectively, that information could bear in a rational way on a prospective purchaser's consideration of the terms of the management agreement.

244. Australand submitted that it was not necessary for prospective purchasers to know of the payment of the premium. It said that what was relevant to them was "full information about the present value and future liabilities of the … Association" (final submissions, para 73). It relied on the statement by Hutley JA in *Walden Properties Ltd* v *Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 847 that "a person subject to a fiduciary duty to provide information can escape liability by showing that the information which he failed to disclose could not have caused any change in the attitude of the principal."

245. There are difficulties in the application of this observation to the facts of the present case. Firstly, what Hutley JA said was predicated on the existence of "a fiduciary duty to provide information". For the reasons given by the majority in *Maguire* at 467 (see para [241] above), this is not such a case; it is instead a case where a breach of a negative or proscriptive duty may be overcome by the provision of appropriate information. Secondly, as Spigelman CJ pointed out in *Fexuto* at 694 [134], Hutley JA's formulation "appears to focus on issues of causation, not informed consent", and therefore raises the application of the reasoning in *Brickenden* v *London Loan & Savings Co* [1934] 3 DLR 465.

246. Nonetheless, I think, what Hutley JA said in *Walden* may be taken as stating in effect a negative test of relevance: information may be regarded as irrelevant if its disclosure would not have caused any change in attitude. On this analysis, his Honour's observation lends some support to the approach that I have stated in para [243] above.

247. Australand's submission fails to take account of the fact that the subject of the assessment is the management agreement as a whole, and not just "the present value and future liabilities of the … Association". Prospective purchasers could well wish to understand not only the benefits and obligations that the management agreement conferred and imposed on the Association, but also the value of those benefits to the Association. I think that it could well be material to an assessment of the management agreement to know that the original manager perceived the income streams that might flow under it as sufficiently valuable to warrant the payment of a substantial premium for the grant of the agreement. A purchaser armed with that information could well conclude that the Association might be overpaying for the benefits that it would receive under the agreement, and that his or her liability (by way of levies) might be inflated to accommodate that overpayment.

248. It is one thing to say that levies are high because of the wide range and high quality of the services provided. It is quite another to say that levies are high because payment for such services as are provided is being made at an inflated rate. Whilst it may be accepted that the ultimate question for a prospective purchaser is the amount of the levies, that cannot be extricated from the purposes for which the levies are paid, and the value of the underlying benefits.

249. In substance, Australand's approach to this question does not focus on the nature of the breaches of fiduciary duty that I have found. It focuses on one aspect of that breach — the

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management agreement — but ignores the other aspect — the agreement with Arrow, including payment and receipt of a premium for Australand's services in causing the Association to enter into the management agreement. Australand's submissions assume that the only relevant disclosure required is in relation to the

terms of the management agreement. They do not address what seems to me to be the critical feature: that the management agreement had its genesis in a separate agreement undertaken by Australand in breach of its fiduciary duty to the Association.

250. Thus, I conclude, the breach of duty that I have found is not negated by disclosure.

Unanimous consent

251. Australand appeared to rely alternatively on the doctrine of unanimous consent. It submitted that there had been full disclosure to its current "member" — ie, itself — at the time of the impugned conduct. No doubt, Australand knew (as prospective purchasers did not) the full details of the transaction. Australand accepted that the doctrine of unanimous consent may not be applicable to a breach of fiduciary duty alleged against a promoter. However, it submitted, the general principle relating to unanimous consent should apply in this case.

252. There is no doubt that the unanimous consent of shareholders in a company may authorise or validate an action of the directors of that company which otherwise would be voidable, as involving a breach of fiduciary duty. See (to cite one case out of many) *Pascoe Ltd (in liq)* v *Lucas* (1999) 33 ACSR 357 at 386 [264] and following, where Lander J (with whom Millhouse and Duggan JJ agreed) discussed the rule, its application and exceptions to it. His Honour pointed out at 387 [270] that there was no need for a formal decision of the shareholders; informal consent could be sufficient; and this is so *a fortiori* where the corporation has but one shareholder.

253. The only "unanimous consent" that might be inferred in this case was that given by Australand at the time it owned all the unit entitlements in the community scheme. But, as the promoter cases make clear, the consent of the promoter does not excuse a breach of fiduciary duty. That was the whole point of the decision in *Erlanger.* The reason why that is so was explained by Lord O'Hagan in *Erlanger* at 1255 as depending on the obligation to have "careful regard to the protection of future shareholders."

254. Australand's submissions on this point depended on the proposition that the full disclosure that was required to be made was full disclosure only of the terms of the management agreement. For the reasons that I have given above, I do not accept that submission. Full disclosure required revelation of the fact that Arrow had paid a premium of $190,000 to Australand for Australand's services in causing the Association to enter into the management agreement.

255. It is therefore not necessary to explore in detail the extent to which, or the ways in which, the principles relating to unanimous consent might qualify the principles relating to promoters' duties. It is sufficient to observe that if disclosure by the defaulting fiduciary promoter to itself is sufficient, the promoter cases could not have been decided as they were.

Conclusions

256. Thus, I conclude:

(1) Australand was in substance the promoter of the security scheme;
(2) In that capacity, Australand was obliged not to permit its own interest to conflict with its duty to the Association;
(3) Australand breached that duty by receiving the premium of $190,000 for causing the Association to enter into the management agreement; and
(4) That breach of duty has not been negated by disclosure to prospective members of the Association;
(5) Nor has it been negated by the unanimous consent of the members of the Association at the time the breach occurred.

257. On that basis, it is not necessary to consider the alternative common law duty of care (the subject of issue 2).

258. Issue 1 should be answered "yes, as to the duties alleged in paras (b) and (d) but not otherwise"; issue 2 should be answered "does not arise"; and issue 3 should be answered "yes, as to the fiduciary duties identified in the answer to issue 1".

Issues 4, 5, 6 and 6A: equitable compensation, account of profits, damages

259. The Association submitted that it was entitled to receive from Australand:

> (1) Equitable compensation, being the loss suffered by the Association from entry into the management agreement; and
> (2) An account of the profit made by Australand when it caused the Association to enter into the management agreement.

260. It is clear that the range of remedies for breach of fiduciary duty includes both equitable compensation and account of profits. See **Meagher, Gummow and Lehane's Equity Doctrines and Remedies** (4th Edition, Meagher, Heydon and Leeming, 2002) at [5-245], [5-260]. However, as the Court pointed out in *Warman* at 559, the remedies are in the alternative (I omit citations):

> "Ordinarily a fiduciary will be ordered to render an account of the profits made within the scope and ambit of his duty. Of course, if the loss suffered by the plaintiff exceeds the profits made by the fiduciary, the plaintiff may elect to have a compensatory remedy against the fiduciary. That election will bind the plaintiff."

261. In the present case, there are two difficulties with the remedy of equitable compensation. The first relates to s 24(2) of the CLM Act. The second relates to the less than satisfactory state of the expert evidence.

262. The effect of s 24(2) is that the management agreement terminated at the end of the first AGM. It is at least arguable that the loss to which equitable compensation might be directed should stop when, in accordance with s 24(2), the management agreement terminated. (By reason of Australand's undertaking, there was no loss up until this time.) The Association did not address this difficulty in its submissions.

263. The second question is one of proof. The claim for equitable compensation is framed (see prayer 5 of the amended summons) as a claim for "the difference between the amount found as the true benefit received and the amount actually paid" for the services rendered to the Association under the management agreement. The deficiencies in the expert evidence are such that it is not possible to assess "the true benefit received" (or, perhaps more accurately, the value of that true benefit). Nor does the evidence permit any assessment to be made on the basis of comparison with an "arm's length" agreement. (Nor, for that matter does the expert evidence permit the quantification of the present value of the amounts paid and payable under the management agreement according to its terms.)

264. Thus, in my view, the appropriate remedy is an account of profits. That is a remedy appropriate to secret commission cases (see eg *Reading* v *Attorney General* [1951] AC 507); the present case is in many ways similar to the secret commission cases. Further, as pointed out in para [220] above, it is not necessary, before awarding an account of profits, to demonstrate that the beneficiary has suffered loss equal to the amount of the profit made by the fiduciary — or, indeed, any loss at all.

265. It is unnecessary to consider the question of damages for breach of a common law duty of care; but the difficulties of proof to which I have adverted in connection with equitable compensation would apply equally in this context also.

266. Thus, I conclude that issue 4 should be answered "no"; issue 5 should be answered "yes"; issue 6 should be answered "does not arise"; and issue 6A should be answered "does not arise".

Summary of conclusions

267. For convenience I set out each of the issues, together with its answer:

> (1) Whether the third defendant ("Australand"), when it caused the plaintiff (the "Association") to enter into the Site Management Agreement (the "SMA") with the first defendant ("Arrow") on 2 December 1998, owed the Association a fiduciary duty to:
>
> (a) Act with absolute candour and honesty to the Association;

(b) Not to place self in a position of conflict or to profit from contracts entered into between the Association and Arrow, without proper disclosure;
(c) Act in the best interest of the Association in the exercise of a power or

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discretion affecting the Association's interests;
(d) Not to act to the detriment of the Association; and
(e) To disclose relevant matters to the Association to enable it to make an informed and impartial decision about whether to enter into the SMA.

Answer: Yes, as to the duties alleged in paras (b) and (d), but not otherwise.

2. Whether Australand as at 2 December 1998 owed the Association a duty of care to avoid it suffering economic loss.

Answer: Does not arise.

3. If the answer to questions 1 and/or 2 is yes, did Australand's conduct in causing the Association to enter into the SMA with Arrow breach its fiduciary duty and/or its common law duty?

Answer: Yes, as to the fiduciary duties identified in the answer to issue 1.

4. If the answer to question 3 is yes, in so far as breach of fiduciary duty is concerned, is the Association entitled to equitable compensation from Australand being the difference between the amount payable under the SMA and an amount payable under an agreement entered into at arm's length as at 2 December 1998?

Answer: No (but on the basis that the evidence does not permit any such quantification).

5. If the answer to question 3 is yes, in so far as breach of fiduciary duty is concerned, is Australand also liable to account to the Association for the profit of $190,000 it made by causing the Association to enter into the SMA?

Answer: Yes (save for the word "also").

6. If the answer to question 3 is yes, in so far as breach of common law duty is concerned, is Australand liable in damages to the Association for economic loss, the measure being the difference between the amounts paid by the Association under the SMA and the amounts that would have been paid on an arm's length transaction entered into as at 2 December 1988 [sic: obviously, 1998]?

Answer: Does not arise.

6A. If:

(a) the Site Management Agreement terminated; and
(b) the first and second defendants establish that the plaintiff is not entitled to rely on that fact;

then the question is whether the loss suffered by the plaintiff is caused by the actions of the third defendant or its own actions.

Answer: Does not arise.

7. (a) Was the effect of the SMA disclosed in the Association's Community Management Statement registered on 27 November 1998 within the meaning of s 24(2)(a) of the Community Land Management Act, 1989 (the "CLMA")?

Answer: No.

(b) Was the SMA ratified at the first Annual General meeting of the plaintiff?

Answer: No.

8. If the answer to question 7(a) and (b) is no, then did the SMA terminate at the end of the Association's first annual general meeting on 28 July 1999?

Answer: Yes.

9. If the answer to question 8 is no, then why not?

Answer: Does not arise.

10. By entering into the SMA, did the Association incur a debt during the "initial period" for an amount in excess of the amount then available for repayment of the debt from the administrative fund or the sinking fund of the Association?

Answer: Yes, at least as to the first month's instalment of the Regular Duties Fee payable under the management agreement.

11. If the answer to question 10 is yes, is Australand liable to the Association pursuant to s 23(5)(a) or (b) of the CLMA?
Answer: No.
12. Was the assignment of the SMA from Arrow to Bondlake on 30 June 2000 ineffective?
Answer: No.
13. If the SMA terminated on 28 July 1999, can the conduct of the Association pleaded

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in paragraphs 18 and 19 of Arrow's Response and paragraphs 18 to 20 of the second defendant's ("Bondlake") Response give rise to the alleged estoppels?
Answer: Does not arise.
14. If the answer to question 13 is no, were the payments made by the Association to Arrow and Bondlake made under a mistake of law requiring Arrow and Bondlake to make restitution to the extent of the payments exceeding the true benefit received by the Association?
Answer: Does not arise.
15. If the answer to question 13 is yes, do the estoppels cease to have any operation from the time when Arrow and Bondlake were on notice that the Association believed the SMA had been terminated?
Answer: Does not arise; but if it did, it should be answered "No".
16. If the SMA terminated on 28 July 1999, what is the value of the true benefit of the services received by the Association from 2 December 1998 to date?
Answer: Does not arise; but if it did, it should be answered "The evidence does not permit an assessment to be made".
17. In relation to 7(b) above, does the term "ratification" in s 24 include implied ratification?
Answer: Unnecessary to decide.
18. If yes to question 17, does the conduct of the plaintiff amount to ratification in accordance with s 24 ?
Answer: Unnecessary to decide; but if it were, it would be answered "No".
19. Did the conduct of the plaintiff and the first defendant prior to and after 28 July 1999, create an estoppel (promissory or conventional) which either (a) precludes the plaintiff from now asserting that the SMA was not unenforceable at all times prior to the execution of the deed of assignment on or about 20 June 2000, or (b) precludes the plaintiff from now asserting that the SMA was not unenforceable at all times after 31 August 1999?
Answer: Yes, as to conventional estoppel.
20. If yes to question 19(a) or (b), will the first defendant suffer detriment if the plaintiff is permitted to depart from that conduct?
Answer: Yes.
21. Was an agreement made on 30 June 2000 between the plaintiff and the second defendant that in consideration of the plaintiff paying to the second defendant the regular duties fee, the second defendant would perform the obligations under the SMA as if it was named "site manager" in the SMA?
Answer: Does not arise.
22. Was there a separate and new agreement created by the novation of the SMA by 30 June 2000.
Answer: Does not arise.
23. Was there a separate and enforceable agreement between the plaintiff and the second defendant made on or about 30 June 2000 by deed that the second defendant would perform the obligations under the SMA as if it was named the "site manager" in the SMA?
Answer: Does not arise.
24. Did the following:

(a) The assignment of the SMA from the first defendant to the second defendant effective 30 June 2000;
(b) The plaintiff's consent to that assignment; and
(c) The continued operation of the SMA subsequent to the assignment,

create an assumption that the SMA was valid and enforceable and capable of assignment?
Answer: Unnecessary to answer.
25. If yes to question 24, has the second defendant relied upon the assumption to its detriment?
Answer: Unnecessary to answer.
26. If yes to question 24, is it unjust to allow the plaintiff to depart from the assumption?
Answer: Unnecessary to answer.
27. Did the second defendant and the plaintiff in executing the deed of assignment on or about 30 June 2000 conduct

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themselves on the common assumption that the deed of assignment created a new agreement between the plaintiff and the second defendant such that an estoppel (promissory or conventional) now prevents the plaintiff from denying that assumption?
Answer: Yes, as to conventional estoppel.
28. Has the plaintiff established that the true value of the services provided under the SMA was other than the regular duty fee paid by the plaintiff from time to time?
Answer: Yes, in that the evidence does show that from about the fourth year of the term of the management agreement the Regular Duties Fee was excessive; but the evidence does not permit an assessment to be made of the extent to which it was excessive.
29. Has the plaintiff contravened the Trade Practices Act 1974 (Cwth) ("TPA") by conduct comprising representations to the first and/or second defendants that the SMA is binding and enforceable;
Answer: Unnecessary to answer.
30. If the answer to question 29 is yes:

(a) Is the first defendant entitled to relief under sections 80, 82 or 87 of the TPA? and
(b) Is the second defendant entitled to relief under s 80, s 82 or s 87 of the TPA? or
(c) In respect of the second defendant, that it was additionally bound to perform the duties and obligations of the SMA under a fresh agreement as if it was named as the site manager in the SMA and was entitled to receive the remuneration there-under.

Answer: Does not arise.
31. If the answer to either 30(a) or 30(b) is yes, what relief is either the first defendant or second defendant entitled?
Answer: Does not arise.
32. In the event that an injunction in favour of either the first or second defendant is declined in the exercise of the Court's discretion, although the basis of an injunction is made out, is either the first or second defendant entitled to equitable damages?
Answer: Does not arise.

Relief

268. The relief claimed by the amended summons included:

(1) A declaration that the management agreement "came to an end" at the conclusion of the first AGM, by operation of s 24 of the CLM Act.
(2) A declaration that there was nothing that could have been assigned by Arrow to Bondlake pursuant to the deed of assignment.
(3) A declaration that Bondlake has and had no right to provide services to the Association, and the Association has no corresponding obligation to pay Arrow, "under the [deed of] assignment or otherwise".
(4) A declaration of the true benefits received by the Association from Arrow and Bondlake.
(5) Equitable compensation representing the difference between the true value of those benefits and the amounts actually paid.
(6) A declaration that Australand owed the Association fiduciary and common law duties of care.
(7) A declaration that Australand breached those duties.
(8) Damages for breach of duty.

(9) An account of profits, with an order for payment.

269. The parties' submissions did not deal in detail with the Association's various claims for relief.

270. As to the first declaration sought: I have concluded that the effect of s 24(2) of the CLM Act is that the management agreement did terminate at the end of the first AGM. However, since I have concluded that the Association is estopped from asserting this, a declaration to the effect prayed would lack utility. For the same reason, no declarations should be made as sought by prayers 2 and 3 of the amended summons.

271. As to prayers 4 and 5: for the reasons that I have indicated, the evidence does not

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permit an assessment of the relevant amounts. Thus (as to prayer 4) no declaration should be made; and (as to prayer 5) no order can be made. In addition, as to prayer 5, there is a problem flowing from the estoppel (as raised by issue 6A).

272. I have concluded that Australand did owe the Association a fiduciary duty, that it breached that duty by, for reward to itself, causing the Association to enter into the management agreement, and that the breach has not been negated by adequate disclosure. I have not concluded that Australand owed or breached any common law duty of care. Again, there seems to me to be no utility in making a declaration of breach, particularly in circumstances where the appropriate remedy is an account of profits, where the amount of the profit is clear and where it is not necessary, for the taking of those accounts, to make a declaration setting out the terms of the duty and its breach.

273. As to prayers 8, 9 and 10: there should be no award of damages. There should however be an account of profits and an order for payment.

274. The result would appear to be that the proceedings should be dismissed as against Arrow and Bondlake, but that the Association should succeed against Australand to the extent just indicated. In the ordinary way, costs should follow the relevant events. However, I think, the appropriate course is to give the parties an opportunity to consider these reasons, and to direct the parties to bring in short minutes of order to give effect to these reasons. If the parties cannot agree on the form of the orders to be made, or as to costs, then I will hear further argument.

Order

275. Thus, I make the following orders:

(1) Stand the proceedings over for mention at 9.30 am on Wednesday 20 June 2007.
(2) Direct the parties to bring in short minutes of order to give effect to these reasons.
(3) Reserve for further consideration the question of costs.
(4) Direct any party seeking orders for costs to notify the party or parties against whom the orders are sought of the orders sought and in brief the reasons why they are sought; any such notification to be given within 14 days of the date of publication of these reasons; a copy of any such notification to be delivered to my associate.

THE OWNERS OF STRATA PLAN NO 3397 v TATE

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(2008) LQCS ¶90-139

Court citation: #2007] NSWCA 207

New South Wales Court of Appeal

16 August 2007

Community schemes — Management — By-laws — Exclusive use by-laws — By-law giving proprietor of strata lot exclusive use of one of four lifts in building — By-law requiring proprietor to pay all maintenance costs in relation to relevant lift and 25% of costs relating to lift system generally — Proprietor pays sums specified in by-law, but owners corporation also claiming contribution from proprietor for lift system costs in quarterly levy notices — Whether owners corporation liable to repay contributions levied in quarterly notices — Whether by-law capping proprietor's liability for lift system costs at 25% — Whether contract law principles applicable to construction of by-laws — Strata Titles Act 1973 (NSW) (repealed), s 58(5), (7).

A 44-storey building in Sydney comprised a motel and residential units. The motel was lot 1 in the relevant strata plan and included a ground-floor lobby, a car-parking level and motel accommodation on levels 6–15 of the building. The unit entitlement of lot 1 was 19.382% of the total number of units in the strata scheme.

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The building was serviced by four lifts. The motel had de facto exclusive use of lift 4. Later, its exclusive use of the lift was formalised in a special by-law (by-law 21) made under s 58(7) of the now-repealed Strata Titles Act 1973 (NSW). By-law 21 read as follows:

> "The proprietor for the time being of lot 1 shall be entitled to the exclusive use and enjoyment of the lift known as Lift No. 4 on the following terms and conditions: —
>
> > (i) The Body Corporate shall be responsible for the proper maintenance and keeping in a state of good and serviceable repair and the cleaning, replacement and running costs of the lift;
> > (ii) Such proprietor shall pay to the Body Corporate such sums as are identified to it by the Body Corporate for the repair, maintenance, renewal, replacement and running costs of such lift being:—
> >
> > > (a) those attributed directly to Lift No. 4;
> > > (b) One quarter of the costs attributed to the running and routine maintenance, servicing and repair of the lift system.
> > > …"

Tate (the proprietor) purchased the motel. Thereafter, he received special levy notices from the body corporate/owners corporation for expenses in relation to the lift system, pursuant to by-law 21. He paid the amounts levied. He also made general contributions to the administrative and sinking funds in accordance with the levy notices issued to all proprietors every three months. The special levy notices required the proprietor to pay 25% of the lift system costs (by-law 21(ii)(b)). The general, quarterly levy notices required the proprietor to pay 19.382% of the total contributions levied for the strata scheme in accordance with his unit entitlement.

The lift system costs were levied in the quarterly levy notices. Therefore, the proprietor, in addition to paying 25% of the lift system costs pursuant to by-law 21(ii)(b), was also required to pay a further 19.382% of the same costs. The proprietor contended that by-law 21 capped his liability for the lift system costs at 25% and, therefore, that he had paid too much. He sued the owners corporation in the Supreme Court of New South Wales to recover the alleged overpayments as money had and received by the owners corporation to the use of the proprietor.

The proprietor's proceedings were successful. The trial judge, construing by-law 21 as a contract for the exclusive use and enjoyment of lift 4, held that the mutual intention of the owners corporation and the proprietor for the time being of lot 1 was that: (1) all costs relating to lift 4 were to be paid solely by the proprietor; (2) 25% of all costs attributable to the lift system were to be paid by the proprietor; and (3) the remaining 75% of the lift system costs were to be paid by the remaining proprietors of the strata scheme. Central to his Honour's determination of the parties' mutual intention was the "surrounding circumstance" of the motel's prior de facto exclusive use of lift 4. His Honour held that it could not have been intended that the proprietor would have to contribute 44.382% (25% + 19.382%) of the lift system costs merely to convert the de facto exclusive use of lift 4 to an actual legal entitlement to exclusive use.

The owners corporation appealed against the trial judge's decision to the New South Wales Court of Appeal.

Held: Appeal allowed.

Per McColl JA (with whom Mason P agreed):

1. By-laws may be characterised as either delegated legislation or statutory contracts. They do not deal with commercial rights, but, rather, with the governance of strata schemes. Therefore, an exclusive use by-law should be construed so that it is consistent with its statutory context and a tight rein should be kept on having recourse to surrounding circumstances.

2.

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Special by-law 21 dealt only with the proprietor's liability to contribute to the costs of lift 4 of which exclusive use was being obtained. This was consistent with the statutory scheme. The by-law said nothing about relieving the proprietor from liability to contribute to the maintenance of the remaining lifts in the system. The burden of meeting those costs arose because of the proprietor's unit entitlement of 19.382% and that liability continued. The primary judge's interpretation of the by-law did not have regard to these considerations and unduly favoured the proprietor at the expense of the other proprietors in the strata scheme.

Per Harrison J (with whom Mason P agreed):

3. By-law 21 consisted of two parts. Firstly, it granted the proprietor the exclusive use and enjoyment of lift 4. Secondly, it set out a mechanism for the calculation of the price, or consideration, that the proprietor was required to pay for the continued use and enjoyment of the exclusive right. That price was calculated, in the case of by-law 21(ii)(a), as the costs directly attributable to lift 4 and, in the case of by-law 21(ii)(b), as an arithmetical function of the total cost of maintenance of all the lifts in the building.

4. Therefore, payment of a price for the exclusive use of lift 4 did not mean that the proprietor was "overpaying" just because he was required also to contribute, via his quarterly levies, to the cost of the upkeep of the other three lifts in the building. The proprietor became and remained liable for the payment of both 25% of the costs of the lift system in accordance with by-law 21, as well as his proportionate 19.382% of the remaining 75% of such costs as one of several proprietors of the owners corporation.

5. It followed that the proprietor had been overcharged, but only by an amount equal to 19.382% of his 25% share of the costs of the lifts as a whole, for which he was otherwise levied in accordance with by-law 21.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

GA Sirtes (instructed by Robinson & Davies Pty Ltd) for the owners corporation.

MD Young (instructed by Andreones) for the proprietor.

Before: Mason P, McColl JA and Harrison J.

[**Editorial comment:** .At the time of writing, exclusive use by-laws are dealt with in Queensland in s 170–178 of the Body Corporate and Community Management Act 1997 and in the several regulation modules as follows:

- Body Corporate and Community Management (Standard Module) Regulation 2008, s 173–175.
- Body Corporate and Community Management (Accommodation Module) Regulation 2008, s 171–173.
- Body Corporate and Community Management (Commercial Module) Regulation 2008, s 129–131.
- Body Corporate and Community Management (Small Schemes Module) Regulation 2008, s 107–109.]

Full text of judgment below

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Mason P, McColl JA and Harrison J:

Mason P: I agree with Harrison J and with the additional remarks of McColl JA as to the approach to interpretation of by-laws.

2. **McColl JA**: This case concerns the question of the proper construction of an exclusive use by-law relating to common property made in 1989 pursuant to s 58(7) of the *Strata Titles Act 1973*, since re-named the *Strata Schemes (Freehold Development) Act 1973* (the "1973 Act"). It involves the proper characterisation of such a by-law and the principles which should apply in its interpretation. The ability to make exclusive use by-laws in respect of the common property of strata schemes continues under Ch 2, Div 4 of the *Strata Schemes Management Act 1996* (the "Management Act").

3. I have had the benefit of reading Harrison J's judgment in draft. I agree with the reasons Harrison J has given for disposing of the cross appeal. I agree with the orders his Honour proposes on the appeal for the following reasons.

4. I gratefully adopt his Honour's recitation of the background facts and shall only repeat them to the extent necessary to give content to my reasons.

The primary judgment

5. Both counsel who appeared before the primary judge submitted the Court should approach the construction of Special By-Law 21 on the basis that it created contractual rights of exclusive use and enjoyment under s 58(7) of the 1973 Act "which should be interpreted in the ordinary way". His Honour accepted this submission, referring to *North Wind Pty Ltd* v *Proprietors — Strata Plan 3143* [1981] 2 NSWLR 809. He then interpreted it by reference to its language and what he inferred were the surrounding circumstances in which it was made, an exercise directed to ascertaining the mutual intention of the parties to Special By-Law 21.

6. The primary judge took as his starting point the appellant's entitlement to levy contributions determined by it in accordance with s 59 and s 68(i), (j), (k) and (p) of the 1973 Act. He next considered the development history of the Park Regis building. The precise passage appears in Harrison J's judgment at par [91]. In summary, he referred to the fact that when the development was approved in 1966, or thereabouts, lifts 1 and 2 were only intended to serve the residential units and not the Park Regis Motel and its guests. He also had regard to the fact that by 1989 there had been no change in relation to the non-use of lifts 1 and 2 by the motel and its guests and that lift 4 did not go to the residential floors and the proprietor of that lift already had exclusive, *de facto* use of it. On that basis his Honour inferred that the intention of the proprietor of Lot 1 and the remaining owners in the strata plan was that the former would get exclusive use of lift 4 in substitution for the *de facto* exclusive use which had been enjoyed up to that point of time.

7. His Honour next referred to the respondent's submission that:

> "…[W]hen By-law 21 was made it could not have been intended that Lot 1 would have to contribute 44.38 per cent (or something in that order) of the overall running costs of the lift system in order merely to convert the de facto exclusive use of Lift 4 to an actual legal entitlement to exclusive use, particularly when employees of the Park Regis Motel and its guest had hardly ever used Lifts 1,2 and 3. In my opinion there is merit in this submission."

8. His Honour then analysed the sub-clauses of Special By-Law 21, noting the potential overlap between category (ii)(a) and category (ii)(b) costs, an overlap avoided in his opinion by the category (ii)(a) requirement that the appellant identify the costs directly attributable to Lift 4 before they could be claimed. He noted that category (ii)(a) costs included costs for the renewal and replacement of Lift 4.

9. His Honour's critical finding was expressed as follows:

> "It follows from the above analysis that when the parties to By-law 21 made it, their mutual intention was that in order for the plaintiff to have exclusive enjoyment of Lift 4:

1. All costs for the renewal and replacement of Lift 4 identified to the proprietor of Lot 1 by the defendant were to be paid exclusively by that proprietor; none of such costs would therefore be directly payable by the remaining proprietors of Strata Plan 3397.
2 All costs for the repair, maintenance and running costs directly attributable to Lift 4 identified to the proprietor of Lot 1 by the defendant were to be paid exclusively by that proprietor; none of such costs would therefore be payable by the remaining proprietors of Strata Plan 3397.
3. Twenty-five per cent of all costs attributable to the running and routine maintenance servicing and repair of the lift system were to be payable by the proprietor of Lot 1.

As a matter of commonsense, it must follow that the parties who made By-Law 21 intended that 75 per cent of the balance of all such costs would be payable by the remaining proprietors of Strata Plan 3397. This gives By-Law 21 a commercial, businesslike interpretation. Otherwise, it would mean that on top of the liability to pay the 25 per cent of all costs attributable to the routine maintenance servicing and repair of the lift system, the proprietor of Lot 1 would still be required to contribute a substantial amount towards such costs based on Lot 1's unit entitlement of 1004 out of the aggregate of 5780 merely to convert exclusive de facto use of Lift 4 to a legal entitlement of exclusive use. Plainly, that cannot have been the intention of the parties who made By-Law 21."

Submissions

10. Mr G Sirtes, who appeared for the appellant on appeal, but not at trial, submitted that it could not have been the intention of those who made Special By-Law 21 to exempt the proprietor of Lot 1 who was obtaining exclusive use of Lift 4, which was only one part of the common property, from meeting statutory obligations as a lot owner in relation to another part of the common law property (the lift system maintaining lifts 1-3), which was not included within the scope of the Special By-Law. In other words he submitted that after Special By-Law 21 was made, the proprietor of Lot 1 had to meet the payments specified in it, but those payments did not impinge upon the obligations that proprietor had as a lot owner in respect of lifts 1-3.

11. He emphasised the statutory background to Special By-Law 21. He submitted that the body corporate did not have statutory authority to relieve anyone from their obligations in relation to common property other than that referred to in an exclusive use by-law and that a by-law which purported to do so would be ultra vires.

12. Mr Sirtes also submitted that it was not appropriate to seek to discern the meaning of Special By-Law 21 by applying principles of contractual interpretation. Rather, he contended, such principles have limited application in the case of a contract passed against the background of a statutory regime involving third parties.

13. Mr Sirtes illustrated the difference between the parties' respective positions by what he described as the following "crude example", which operated on the assumption that in any given year the costs of lift maintenance for all four lifts was $100,000.

14. On that assumption, as found by the primary judge, Special By-Law 21 limited the respondent's total contribution for lift maintenance of all four lifts to 25%, i.e. $25,000 and he was exonerated from paying any amount towards the remaining $75,000, the burden of which fell on the remaining lot owners.

15. The appellant argued, however, that Special By-Law operated in the following manner:

(a) of the $100,000 lift costs, the respondent was liable to pay 25% pursuant to Special By-Law 21;
(b) of the remaining $75,000.00, the respondent was liable to contribute $14,250, 19.38% of $75,000.00, as a lot owner required to maintain the building pursuant to Part 3, Chapter 3 of the Management Act.

16. In total on the appellant's example, and on the approach for which it contended, the respondent was liable to contribute $39,250.00 of the costs of maintaining the lifts.

17. Mr M Young, who appeared for the respondent, contended that Special By-Law 21 should not be understood as involving a statutory right, but having regard to the fact that it operated as a covenant under the Act, operated, and should be interpreted, as a contract. Accordingly he argued that "if detailed semantic and syntactical analysis" of the by-law "led to a conclusion that flouted business commonsense, it must be

made to yield to business commonsense": *Antaios Cia Naviera SA* v *Salen Rederierna AB* [1985] AC 191 (at 201) per Lord Diplock. He contended that there could be no apparent commercial justification for a by-law which led to the proprietor of Lot 1 paying 44.382% of the cost of the lift system, merely for the privilege of conveying de facto exclusive use of Lift 4 into a legal entitlement thereto: cf *MFI Properties Ltd* v *BICC Group Pension Trust Ltd* [1986] 1 All ER 974 (at 977) per Hoffmann J.

18. Mr Young submitted that, properly understood, Special By-Law 21 was the exclusive source of the respondent's obligation to contribute to the costs of all lifts in the lift system and capped his liability to contribute to those costs at 25%.

19. As to Mr Sirtes' example, he pointed out that this was not, in fact, how the appellant had charged the respondent. Rather than the second calculation Mr Sirtes postulated (14(b) above), the appellant had taken the figure of $100,000 as the starting point for its second calculation, thus leading to the respondent being charged 44.328% of the costs of the lift system, an interpretation the primary judge had properly rejected.

20. Mr Sirtes conceded in reply that the appellant had not charged the respondent in accordance with his example, but contended this went to quantum only and the appellant's fundamental argument, that the respondent's liability was not capped at 25%, had been consistently maintained.

Legislative Framework

21. In 1989, when Special By-Law 21 was made, the proprietors for the time being of Strata Scheme 3397 constituted a body corporate with the powers, authorities, duties and functions conferred or imposed on it by or under the 1973 Act, or the by-laws: s 58.

22. The proprietors were obliged to pay administrative levies raised by the body corporate by way of contributions to meet its actual or expected liabilities incurred or to be incurred under s 68(1)(b) or for the payment of insurance premiums or any other liability: s 68(1)(j), 1973 Act. The proprietors were also obliged to contribute to amounts determined by the body corporate in accordance with s 68(1)(k) which amounts were to be paid into a sinking fund established pursuant to s 68(1)(m).

23. Once the body corporate had determined s 68(1)(j) and (k) contributions it levied those contributions on proprietors by serving notice in writing of the contributions payable by them in respect of their respective lots: s 59(1). The contributions were payable by the proprietors, in shares proportional to the unit entitlements of their respective lots: s 59(3).

24. Special By-Law 21 was made in accordance with s 58(7). That provision, and relevant ancillary provisions, provided:

> "**58**(1) Except as provided in this section the by-laws set forth in Schedule 1 shall be the by-laws in force in respect of each strata scheme.
>
> ….
> (5) Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the body corporate and the proprietors and any mortgagee in possession (whether by himself or any other person), or lessee or occupier, of a lot to the same extent *as if the by-laws had been signed and sealed by the body corporate and each proprietor and each such mortgagee, lessee and occupier respectively and as if they contained mutual covenants to observe and perform* all the provisions of the by-laws.
>
> …
> (7) With the written consent of the proprietor or proprietors of the lot or lots concerned, the body corporate may, pursuant to a special resolution, make a by-law —
>
> (a) conferring on the proprietor of a lot specified in the by-law, or the proprietors of several lots so specified-
>
> (i) a right of exclusive use and enjoyment of; or
> (ii) special privileges in respect of,

the whole or any specified part of the common property, upon conditions (including the payment of money, at specified times or as required by the body corporate, by the proprietor or proprietors of the lot or lots concerned) specified in the by-law; or
(b) amending, adding to or repealing a by-law made in accordance with this subsection.

(7AA) A by-law referred to in subsection (7) shall either —

(a) provide that the body corporate shall continue to be responsible for the proper maintenance, and keeping in a state of good and serviceable repair, of the common property or the relevant part of it; or
(b) impose on the proprietor or proprietors of the lot or lots concerned the responsibility for that maintenance and upkeep,

and in the case of a by-law that confers rights or privileges on more than one proprietor, any money payable by virtue of the by-law by the proprietors concerned —

(c) to the body corporate; or
(d) to any person for or towards the maintenance or upkeep of any common property,

shall, except to the extent that the by-law otherwise provides, be payable by the proprietors concerned proportionately according to the relative proportions of their respective unit entitlements.

….

(7B) a plan lodged under section 8 for registration as a strata plan is accompanied by an instrument, in a form approved under the Real Estate Property Act 1900 containing the terms of a proposed by-law of the kind referred to in subsection (7) —

(a) a by-law in those terms shall be deemed to have been made, and to take effect, on registration of the plan; and
(b) the by-law so made may be amended, added to or repealed in the same way as a by-law made by the body corporate in accordance with subsection (7).

(8) A by-law referred to in subsection (7), while it remains in force, continues to operate for the benefit of, and (subject to section 70(3)) is binding upon, the proprietor or proprietors for the time being of the lot or lots specified in the by-law.

(9) To the extent to which such a by-law makes a person directly responsible for the proper maintenance, and keeping in a state of good and serviceable repair, of any common property, it discharges the body corporate from its obligations under section 68(1)(b).

(10) Any moneys payable by a proprietor to the body corporate under a by-law referred to in subsection (7) or pursuant to subsection (9A) may be recovered, as a debt, by the body corporate in any court of competent jurisdiction." (emphasis added).

25. As I shall later explain, s 58(5) is an important guide to the interpretation of Special By-Law 21. It is not clear that s 58(8) added to s 58(5); it may be that it would facilitate the beneficiary of the exclusive use by-law enforcing it against third parties. Nothing appears to turn upon its inclusion in s 58 for the purposes of the present interpretative exercise.

26. A "special resolution" was a resolution passed at a duly convened meeting of a body corporate and against which not more than one-quarter in value of votes was cast, ascertained in accordance with cll 11(3) and (4) of Pt 1 of Schedule 2 or Cll 12(3) and (4) of Pt 2 of Schedule 2: s 3, 1973 Act. A person was entitled to vote in respect of any lot if he or she was the proprietor of the lot shown on the strata roll: cl 2(1), Pt 1 of Schedule 2. Clauses 11(3) and (4) of Pt 1 of Schedule 2 or cll 12(3) and (4) of Pt 2 of Schedule 2 (in respect to proprietors other than the original proprietor) provided that each person had one vote in respect of each lot in respect of which he or she was entitled to vote.

27. Part 5 of the 1973 Act, Disputes, created a scheme for the resolution of disputes in connection with strata schemes. It permitted the appointment of a Strata Titles Commissioner (s 97) and a Strata Titles Board, the latter being constituted by a Magistrate: s 98A. Section 120A enabled the Board to make orders with respect to exclusive use by-laws, either prescribing that they be made, amended or repealed. An order under s 120A, when recorded in accordance with s 141 in the Register of the Registrar-General, had effect, subject to any order of a superior court, as if its terms were a by-law: s 120A(4).

28. At the time Special By-Law 21 was made the proprietor of Lot 1 (the respondent's predecessor in title) had a unit entitlement of 1004 units of the total of 5,780 units, or 19.382%, in the strata scheme. Special By-Law 21 was registered at the Land Titles Office on 8 November 1981 in accordance with subs 58(7B).

Consideration

29. The appellant is "a statutory corporation, created by Act of Parliament for a particular purpose [and] is limited, as to all its powers, by the purposes of its incorporation as defined in that Act": *Humphries* v *Proprietors Surfers Palms North Group Titles Plan 1955* [1994] HCA 21; (1994) 179 CLR 597 at 604 per Brennan and Toohey JJ; *Margiz Pty Ltd* v *Proprietors Strata Plan No 30234* (1993) 30 NSWLR 364 at 372; see *Ridis* v *Strata Plan 10308* [2005] NSWCA 246; (2005) 63 NSWLR 449 (at [116] ff).

30. At the time the Special By-Law was made the appellant was the occupier of the common property in Strata Plan No 3397 by virtue of its management and control of the use of that area pursuant to s 54(3) and s 68(1)(a): *Puflett* v *Proprietors of Strata Plan No 121* (1987) 17 NSWLR 372 at 375 per Lee J; that position continues under s 61(1)(a) of the Management Act: see *Ridis* v *Strata Plan 10308*(at [117]). As Holland J explained in *Jacklin* v *Proprietors of Strata Plan No 2795* [1975] 1 NSWLR 15 (at 24):

> "The legislation takes the common property as a whole and treats each proprietor as having an undivided beneficial interest in every part of it, *whether or not that part is susceptible of any use or enjoyment by that proprietor or of greater use or enjoyment by that proprietor than by any other. Similarly, with respect to the provision of funds for the repair and maintenance of all or any part of the common property, the legislation provides for only one fund with contributions to be levied proportionately on all proprietors irrespective of any individual proprietor's use and enjoyment thereof*. Thus the ownership and the financial burden of common property is to be held and shared by all proprietors in common in shares according to their respective unit entitlements. Consistently with this unity of approach, the duty of control, management, administration, repair and maintenance of common property is imposed by the legislation upon the body corporate. This duty is necessarily owed to each and every proprietor. *In my opinion, there flows from the scheme of the legislation as an incident of proprietorship of a lot a right in each proprietor to have the body corporate's duty performed in relation to all of the common property at the cost and expense of all proprietors in proportion to unit entitlements*. As the duty is not only to repair and maintain but also to control, manage and administer, the right of each proprietor includes a right to have the whole administration of repairs and maintenance of common property carried out by the body corporate by its servants and agents." (emphasis added).

31. As this passage indicates, at the time Special By-Law 21 was made the obligations of the proprietors of the body corporate reflected their unit entitlement, but bore no necessary relationship to their use or enjoyment of any part of the common property. Proprietors were obliged to contribute to the repair and maintenance of the common property whether or not they had, as a matter of fact, exclusive, partial or no use or enjoyment of it. To apply that proposition to the present case, all proprietors in the appellant were obliged to contribute to the maintenance and repair of Lift 4 even though, as the Park Regis was constructed, the lift primarily served the Motel floors, although it could also be used to access the car park on level 3.

32. Section 58(7) permitted a body corporate (i.e. the proprietors of the strata scheme) to alter that situation by passing a special resolution to make a by-law granting exclusive *de jure* use of a part of the common property to one, or several, proprietors. Section 58(7AA) mandated that any such by-law should either provide that the body corporate continued to be responsible for the maintenance and repair of the common property or the relevant part of it, or impose that responsibility on the proprietor or proprietors obtaining the benefit of the exclusive use by-law. If the beneficiary of the exclusive use by-law assumed that responsibility, the body corporate was discharged from its obligations under s 68(1)(b): s 58(9). It was left to the parties

to determine whether the by-law would contain any other provisions, dealing, for example, with the renewal or replacement of the common property with which it dealt. In this case, the parties agreed that the direct costs renewal [sic] or replacement of Lift 4 were to be paid by the proprietor of Lot 1. Thus, to that extent, the body corporate was relieved of its s 68(1)(c) responsibility for Lift 4 and could not levy the other proprietors to contribute to such costs.

33. The primary judge reached his conclusion by applying principles of contractual interpretation, apparently unconstrained by the statutory framework in which Special By-Law 21 was made. For the reasons that follow, in my view that was not the correct approach and led his Honour into error. The question of the proper approach to interpreting the by-law turned on the nature of by-laws made under the 1973 Act.

34. There appear to be at least two available, and not necessarily inconsistent, views of the proper characterisation of strata scheme by-laws.

35. One is that such by-laws are delegated legislation, being instruments "made under an Act": s 3, *Interpretation Act 1987*. According to D Pearce and S Argument, *Delegated Legislation in Australia*, 3rd ed, Butterworths, 2005 (at [1.7]), "[t]he term by-law is used to describe the legislation of a body having a limited geographical jurisdiction, and is the expression most commonly used for the primary legislative instruments made by local government authorities". In *Re Taylor* [1995] 2 Qd R 564 (at 570), speaking in the context of exclusive use by-laws in a strata title scheme, Dowsett J said it was "the nature of a by-law that it deals with matters of internal regulation and operates in a particular context".

36. If by-laws constitute delegated legislation, then they should be interpreted in accordance with principles of statutory interpretation: *Collector of Customs* v *Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389 at 398. The statutory context will therefore be the first point of reference in interpreting the purpose or object underlying the Act (or instrument): *One.Tel Ltd* v *Australian Communications Authority* [2001] FCA 54; (2001) 110 FCR 125 (at [64]) per Hill J.

37. Although this case does not concern the validity of Special By-Law 21, it is appropriate to refer briefly to principles by which the validity of delegated legislation is determined to test the parties' respective contentions as to its meaning. Critically, delegated legislation is subject to the inconsistency principle, that is to say it is invalid if it contradicts or is repugnant to, or inconsistent with, the Act under which it is made: Pearce and Argument (at [19.1]). The learned authors quote in support of this proposition the "most frequently cited statement of the law relating to repugnancy", being Channell J's statement in *Gentel* v *Rapps* [1902] 1 KB 160 (at 166) that:

> "A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. *It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. …Again, a by-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence*; but if it adds something not inconsistent, that is not sufficient to make the by-law as repugnant…" (emphasis added)

38. Shepherdson J concluded that strata scheme by-laws were delegated legislation in *Dainford Ltd* v *Smith* (1984) Q ConvR ¶54-140 when considering model by-laws in force in respect of a building unit plan made pursuant to s 30(2) of the *Building Units and Group Titles Act 1980* (Qld), a provision relevantly on all fours with s 58(2) of the 1973 Act.

39. *Dainford* concerned the question whether a vendor of a home unit who had contracted to grant to the proprietor for the time being of the unit the exclusive use of a car parking space on part of the common property pursuant to a by-law made under s 30(7) of the *Building Units and Group Titles Act* (relevantly on all fours with s 58(7) of the 1973 Act), had repudiated the contract because the by-law did not designate the car space directly or by reference to an identification otherwise made before or at the time of the making of the by-law. By-law 40 provided that "the proprietor for the time being of each lot in the building shall be entitled to the exclusive use … of the car space or spaces the identifying number or numbers of which shall be notified in writing by [the vendor] to the Council of the Body Corporate within twelve months after the date of registration of the Plan". The purchasers argued by-law 40 was invalid because it effected an unauthorised delegation of legislative power.

40. The Queensland Court of Appeal (Campbell and Shepherdson JJ, Campbell CJ dissenting) held the by-law was not a valid exercise of the s 30(7) power because the body corporate had sub-delegated to the vendor the power to identify the car space attached to the unit. That decision was reversed on appeal, *Dainford Ltd* v *Smith* [1985] HCA 23; (1985) 155 CLR 342 (Gibbs CJ, Wilson and Dawson JJ, Mason and Brennan JJ dissenting). All members of the Court approached the case on the basis that by-law 40 was an exercise of statutory power to be interpreted in accordance with principles relevant to delegated legislation: see Gibbs CJ (at 347 – 348), Mason J (at 351 – 352), Wilson J (at 355 – 359), Brennan J (at 361 – 363).

41. Wilson J, however, observed (at 359) that:

> "… it may be questioned whether the power conferred by s 30(7) is properly to be regarded as a delegation to the body corporate of legislative power. The by-laws which are made in exercise of that power are not of general application; they bind only the body corporate itself and the proprietors and any mortgagee in possession, lessee or occupier of a lot to the extent described in s 30(5). However, the matter need not be pursued."

42. The question Wilson J posed was taken up by Dowsett J in *Re Taylor*, albeit without reference to *Dainford*. In *Re Taylor* the Registrar of Titles challenged the validity of exclusive by-laws purportedly made pursuant to s 30(7) of the *Building Units and Group Titles Act 1980* (Qld). The body corporate applied for a determination of their validity. Dowsett J first considered whether the by-laws were properly so described. In concluding they were, he said (at 567):

> "The Shorter Oxford Dictionary defines 'by-law' as, 'a law or ordinance dealing with matters of local or internal regulation, made by a local authority, or by a corporation or association'. A similar view was expressed by Lindley L.J. in *London Association of Shipowners and Brokers* v *London and India Docks Joint Committee* [1892] 3 Ch. 242 at 252 as follows:
>
> > 'A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called 'by-laws', whether they be valid or invalid in point of law …'
>
> Clearly, by-laws have their operation within an identifiable and limited environment. Section 30(5) of the Act provides that by-laws made pursuant to s 30 bind persons other than owners of units." (emphasis added)

Section 30(5) was in the same terms as s 58(5).

43. Having concluded the by-laws were properly so described, Dowsett J held (at 569 – 570) that they must be construed in the context of the authorised functions of the body in question and the legislation conferring the power to make them. He held, applying the inconsistency principle, that s 30(7) could not be invoked to extend the powers or functions of the body or to contradict a provision of the Act, at least in the absence of express or necessarily implied authority to do so. He concluded the exclusive use by-laws were invalid because they were inconsistent with express provisions of the Act.

44. The by-laws with which *London Association of Shipowners and Brokers* v *London and India Docks Joint Committee* [1892] 3 Ch 242 dealt were purportedly made pursuant to s 83 of the *Harbours, Docks, and Piers Clauses Act 1847* (10 & 11 Vict. c. 27) which enabled the company to make by-laws under its common seal for the use of its docks and property. The by-laws relevantly did not have effect unless confirmed in accordance with s 85; notices had to be given before they were confirmed (ss 86 and 87), and, when confirmed, they had to be published as directed by s 88. Once they were duly made, confirmed, and published, the by-laws become binding on all parties (s 89). They could only be altered by other by-laws similarly made and confirmed: see judgment (at 251 – 252).

45. It was of that power that Lindley LJ said (at 252), immediately before the passage Dowsett J quoted:

> "This power of making by-laws is something very different from the power which every owner of property has of making agreements with those persons who may desire to use it."

46. Exclusive use by-laws under the 1973 Act had both qualities to which Lindley LJ referred: they bound all those referred to in s 58(5) whether or not, in the case of proprietors of the strata scheme, they voted in favour of them and they had to be agreed to by at least 75% of those entitled to vote in respect of the common property in which they had a proprietary interest.

47. The presence of s 58(5) suggests an alternative characterisation of strata scheme by-laws, namely that they are a statutory contract, deemed to exist by statute and constituted by the "bundle of rights and liabilities" created by the 1973 Act, the model by-laws and any special by-laws, such as Special By-Law 21, made pursuant to s 58: cf *Sons of Gwalia Ltd* v *Margaretic*; *ING Investment Management LLC* v *Margaretic* [2007] HCA 1; (2007) 81 ALJR 525 at [30] per Gleeson CJ; at [191], [203], [205] per Hayne J (with whom Gummow J generally agreed).

48. Section 58(5) is clearly modelled on the deemed covenant provisions adopted in corporations law to ensure the memorandum and articles of association of a company bound "the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all": see *Australian Coal & Shale Employees' Federation* v *Smith* (1937) 38 SR (NSW) 48 at 54-55, cited by McHugh and Gummow JJ in *Bailey (as executrix of the estate of the late Dr Harry R Bailey)* v *New South Wales Medical Defence Union Ltd* [1995] HCA 28; (1995) 184 CLR 399 at 434.

49. Section 58(5) is in substantially the same terms as s 33(1) of the *Companies Act 1961* as in force at the time the 1973 Act was enacted. That subsection provided:

> **"33.**(1) Subject to this Act, the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

50. In *Bailey* (at 433 – 440), McHugh and Gummow JJ discussed the development of such legislative provisions. They observed (at 435) that "[i]n so far as the memorandum and articles, pursuant to such legislative provision, constitute a contract between the company and its individual members or between the members inter se, [it] is of an unusual type". This was because, inter alia, its terms could be varied by special resolution without the agreement of both parties to the variation, the articles could not be rectified even if they did not reflect the common intention of the original signatories and they could only be amended with statutory authority. Their Honours cited (at 437) with apparent approval, Cussen J's statement in *Land Mortgage Bank of Victoria Ltd* v *Reid* [1909] VLR 284 at 288 – 289 that:

> "… the primary function of the articles [is] similar to that of by-laws, namely the provision of a series of enactments to govern the company in the administration of its affairs and to bind members in that respect whilst they [are] members."

51. After referring (at 437 – 438) to the line of authorities holding that that the memorandum and articles have no direct contractual effect insofar as they purport to confer rights or obligations on a member, otherwise than in the capacity of a member, their Honours observed (at 439):

> "…[T]he broad trend of authority referred to above, particularly since Hickman , has been to identify the subject matter of the 'statutory contract', so far as concerns the relations between the corporation and the members, not as commercial rights but as the government of the corporation and the exercise of the constitutional powers of the corporation."

52. Finally, their Honours distinguished (at 439) between a "statutory contract" and a "special contract", describing the latter as "a contract which is constituted otherwise than solely by the articles unsupplemented by any external facts…[one] which, in truth, is ordinary rather than 'special' in nature". The latter, in their Honours' view, was the proper description of the policy of professional indemnity insurance provided by the New South Wales Medical Defence Union Limited to Dr Bailey, in accordance with the terms of its articles of association. Brennan CJ, Deane and Dawson JJ (at 414) preferred to characterise the policy as a "special contract", which they described as "distinct from the covenants … deemed to arise from the articles under the relevant companies legislation".

53. In *North Wind*, Rath J appears to have understood s 58(5) to mean that an exclusive use by-law had the effect of a statutory contract. *North Wind* concerned the question whether the registered proprietor of a lot in a strata plan, who had the exclusive use and enjoyment of an area which formed part of the common property pursuant to a by-law made under s 58(7) of the 1973 Act, could obtain an injunction to restrain the defendant which had constructed, or was constructing, works which encroached into the air space above the exclusive use area. The defendant argued (see 811) that the Court had no jurisdiction to determine the issues raised by the summons because the 1973 Act contained detailed provisions dealing with disputes. It relied upon the principle that where a statute creates an obligation and enforces performance in a specified manner, the general rule is that performance cannot be enforced in any other manner: *Doe d Murray, Bishop of Rochester* v *Bridges* (1831) 1 B & Ad 847 (at 859); 109 ER 1001 (at 1006).

54. Rath J held (at 814) that the rights and obligations arising under the by-law were not within the principles stated in *Doe d Murray, Bishop of Rochester* v *Bridges*. In his Honour's opinion the by-law had contractual effect because of the mutual covenants in s 58(5) and the Act contemplated the enforcement of those rights and obligations by the ordinary provisions of the law, including injunctive relief. He could find nothing in the Act which indicated that the statutory dispute provisions were exclusive of common law and equitable remedies, or inconsistent with the jurisdiction of the ordinary courts in regard to the enforcement of covenants and contractual rights. While he concluded, therefore, that the Court had jurisdiction, he declined to exercise it for discretionary reasons. His Honour did not discuss the principles which might apply to the interpretation of the by-law.

55. Subsequent decisions have held that Rath J's characterisation of the exclusive use by-law as having contractual effect did not preclude the conclusion that such by-laws also confer a proprietary right, even though their "detailed articulation stems from the by-laws": see *Young & Anor* v *Owners – Strata Plan No 3529 & Ors* [2001] NSWSC 1135; (2001) 54 NSWLR 60 (at [14] – [18]) per Santow J (as his Honour then was); *White* v *Betalli* [2006] NSWSC 537 (at [60]) per White J.

56. As I explained earlier in these reasons, the parties and the primary judge proceeded on the basis that because Rath J identified an exclusive use by-law as having contractual effect, the usual principles of contractual interpretation applied. However not all principles of contractual interpretation apply unreservedly to statutory contracts.

57. In *National Roads and Motorists' Association Ltd* v *Parkin* [2004] NSWCA 153; (2004) 60 NSWLR 224 Ipp JA (with whom Santow and Bryson JJA agreed) considered the extent to which such principles apply in construing the statutory contract formed by the articles of association of the National Roads and Motorists' Association Limited ("NRMA").

58. In *NRMA*, NRMA disputed the validity of two resolutions contained in a requisition calling the general meeting (and, hence, the validity of the requisition) on the grounds that they were ambiguous, alternatively, uncertain. It brought proceedings seeking a declaration that the requisition was void and that the directors of NRMA were therefore not required to call and hold the general meeting. Its argument, in substance, was that the objects and powers of a company must be defined in plain and unambiguous terms, that the proposed resolutions were ambiguous and that the mere existence of the ambiguities, because they concerned a proposed alteration to the constitution that would limit the company's powers, rendered the resolutions void: see Ipp JA (at [34]). It argued that the Court should approach the question whether the proposed resolutions were ambiguous in accordance with the "stringent" test laid down by Lord Wrenbury in *Cotman* v *Brougham* [1918] AC 514 (a case dealing with legislation that concerning the objects specified in the memorandum of a company), rather than the "forgiving" test in *Upper Hunter County District Council* v *Australian Chilling and Freezing Company Limited* [1968] HCA 8; (1968) 118 CLR 429: see Ipp JA (at [31], [36]).

59. Ipp JA held (at [78], [88]) that the *Upper Hunter* test should be applied to determine which of two possible meanings was to be given to the words of a clause in the statutory contract constituted by the articles of association.

60. Ipp JA (at [72]) noted that the NRMA rendered its services in competition with other commercial entities and that its constitution must be construed in that context. Accordingly he applied (at [68], [75]) the "general principle" concerning the construction of articles of association, to regard them as a business document and construe them "so as to give them reasonable business efficacy, where a construction tending to that

result is admissible on the language of the articles, in preference to a result which would or might prove unworkable": *Holmes* v *Keyes* [1959] Ch 199 (at 215) per Jenkins LJ.

61. Although his Honour held (at [71]) that *Egyptian Salt and Soda Co Ltd* v *Port Said Salt Association Ltd* [1931] AC 677 was "fundamentally contrary to the proposition that there should be a special rule of construction relating to the powers of a company", he did not regard all the usual principles of contractual interpretation as applying unreservedly to the articles. He held (at [86]) that extrinsic evidence should not be used in construing the company's constitution. In doing so he followed the approach in *Egyptian Salt and Soda Co Ltd* where Lord Macmillan observed (at 682) that:

> "It must be borne in mind that the purpose of the memorandum is to enable shareholders, creditors and those who deal with the company to know what is its permitted range of enterprise, and for this information they are entitled to rely on the constituent documents of the company. They have not access to other sources of information such as the antecedent transactions which the learned judge invokes, and have no means of knowing, for example, 'that the intention of the promoters that the company should not export salt was known to the defendant company,' a circumstance which the learned judge adduces. *The intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it*." (emphasis added)

62. Ipp JA also referred to *Bratton Seymour Service Co Ltd* v *Oxborough* [1992] BCLC 693 in which it was held was held that "the articles of association of a company constitute a statutory contract with its own distinct features". Steyn LJ held (at 698) that "neither the company nor any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances." Dillon LJ was of the same view, as, too, was Sir Christopher Slade although the latter also held (at 699) that "evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein".

63. *National Roads and Motorists' Association Ltd* v *Parkin* was applied by Finn J in *Lion Nathan Australia Pty Ltd* v *Coopers Brewery Ltd* [2005] FCA 1812; (2005) 56 ACSR 263. *Lion Nathan* concerned the interpretation of the phrase "any transfer of shares" in article 38 of Coopers Brewery Ltd's Articles of Association. As originally adopted, Coopers' articles did not contain a definition of "transfer", however such a definition was inserted at an extraordinary general meeting in 1995.

64. Finn J considered that the question of interpretation turned on the text of the article, as well as "the surrounding circumstances known to [Coopers and its members] and to the purpose and object of [Art 38]", referring to *Pacific Carriers Ltd* v *BNP Paribas* [2004] HCA 35; (2004) 218 CLR 451 at [22]. He concluded that he could take the surrounding circumstances into account even if the article was not ambiguous or susceptible of more than one meaning, although as the following passages from his judgment reveal, he applied a caveat to their use.

65. In reaching his conclusion, Finn J considered the extent to which principles of contractual interpretation applied to the contract constituted by the memorandum and articles of association, saying:

> "[73] (ii) Nonetheless, [the statutory contract] is not a contract which in all respects attracts those principles which are applicable to contracts in general or to commercial contracts in particular. The reason for this is that corporate constitutions historically have served public purposes going beyond the mere delineation of the rights and obligations of the contracting parties for their benefit. So, for example, the memorandum of association in times past served the important purpose of enabling creditors and those who dealt with a company to know what was 'its permitted range of enterprise and for this information they are entitled to rely on the constituent documents of the company': *Egyptian Salt and Soda Ltd* v *Port Said Salt Assn* [1931] AC 677 at 682. As in other fields where contractual documents serve public purposes beyond those of the parties themselves … the bifurcated functions so performed by a company's memorandum and articles has lead to the exclusion of … principles ordinarily applied to contracts.
> [74] (iii) The function of a company's constitution in informing those who dealt with it or who acquired shares in it, has in the past influenced in a direct way the principles of construction that have been applied to the constitution and, in particular, to the extent to which extrinsic materials were admissible as an aid to interpretation. *Because third parties who dealt with a company would*

not have had access to information (other than the constitution itself) which might reveal the true meaning of a provision in the constitution, '[t]he intention of the framers of the [constitution] [had to] be gathered from the language in which they have chosen to express it': *Egyptian Salt and Soda Co Ltd* at 682.

…
[78] (vii) Until very recently there has been considerable controversy as to whether in the interpretation of contracts evidence of surrounding circumstances was admissible only if it first appeared that the language of the contract was ambiguous or whether it is admissible at the outset for the purpose of ascertaining the meaning of contractual language in its context … For the purposes of Australian law, while the above controversy took some time to be stilled: cf *Royal Botanic Gardens and Domain Trust* v *South Sydney City Council* (2002) 186 ALR 289 at [39]; it must now be accepted that the meaning of commercial contract is to be construed objectively by reference to what it conveys to a reasonable person: but see McLauchlan, '*Objectivity in Contract*' (2005) 24 UQLJ 481. This normally 'requires consideration not only of the text of the documents, but also the surrounding circumstances known to [the parties], and the purpose and object of the transaction': *Pacific Carriers* at [22]: see also Peden & Carter '*Taking Stock: the High Court and Contract Construction*' (2005) 21 JCL 172 at 180. …
[79] (viii) The approach to contractual construction affirmed in *Pacific Carriers* marks another step in the convergence in organising principles governing the construction of contracts and of statutes. It is now well settled in this country that, irrespective of the provisions of s 15AB of the *Acts Interpretation Act 1901* (Cth):

> '… the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.'

See *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. While what constitutes 'context' for the purposes of statutory construction and 'surrounding circumstances' (or 'the matrix of facts') for contractual construction will differ significantly given the differing end purposes of construction in each case, what is common to both is the recognition that meaning is contextual: what a document or statute conveys to a reasonable person is what, against the relevant background, the words used by the parties in one case, the legislature in the other would reasonably be understood to have meant… *Though the principles of statutory construction are not directly relevant to the present matter, in their congruence with the principles of contractual construction they reinforce my view that the Pacific Carriers' principles provide the appropriate approach that ought be adopted in the construction of the pre-emptive rights regime of Coopers' articles. Nonetheless I do recognise that a tight rein may well need to be kept on what should count as 'surrounding circumstances' when construing at least aspects of a company's constitution*. In taking the above approach I probably am doing no more than applying to the construction of articles of association the new understanding of what was conveyed by Mason J in *Codelfa*, earlier cases having applied a more limited understanding of what Mason J said to the construction of articles: see eg *Buche* v *Box Pty Ltd* (1993) 31 NSWLR 368 at 374." (emphasis added).

66. Applying his "tight rein" approach, the only surrounding circumstances Finn J considered were the pre-1995 articles, and the materials supplied to the 1995 extraordinary general meeting: see *Lion Nathan* (at [92]).

67. Finn J's judgment was approved on appeal in *Lion Nathan Australia Pty Ltd (ACN 008 596 370)* v *Coopers Brewery Ltd (ACN 007 871 409) and Others* [2006] FCAFC 144; (2006) 156 FCR 1 (Weinberg, Kenny and Lander JJ).

68. Weinberg J accepted (at [56]) "the case for restraint in using surrounding circumstances as an aid to the construction of a corporate constitution remain[ed] a powerful one" and "that the rules of construction applicable to ordinary contracts should be applied with great caution when construing a company's constitution". He then said:

> "[57] Despite the changes to company legislation to which Finn J referred, the statutory contract which s 140 of the *Corporations Act* deems to exist is, as his Honour recognised, very different from an ordinary contract. There are a number of sound reasons for adopting a different approach to its interpretation. It is a deemed contract, created by statute, without the normal elements of a contract having to be established, and without the usual defences being available to a defendant. Unlike ordinary contracts, it cannot be rectified, the rationale for that prohibition being so that third parties can be confident in relying upon it.
> [58] In addition, as a number of cases have noted, a corporate constitution is by its nature more likely to be read and relied upon by a third party than an ordinary contract. …
> [59] That is not to say that a court can never have regard to extrinsic material when construing a corporate constitution. Even absent ambiguity or uncertainty, context is always relevant. Some 'surrounding circumstances', particularly those that are likely to be well-known, not just to members of the company, but also to relevant third parties, are very much part of that context."

69. Kenny J also accepted (at [97] – [101]) that the articles could be interpreted in accordance with principles of contractual interpretation applicable to commercial contracts, but noted that a court's consideration of surrounding circumstances is "necessarily more constrained in the case of a corporate constitution than in the case of an ordinary commercial contract". Her Honour said:

> "[123] Lion Nathan has not persuaded me that the principles for construction as stated in *Pacific Carriers* and *Toll* have no application to corporate constitutions. It is true that the constitution of a company is a commercial contract, with special characteristics. *A corporate constitution has what I have called a public dimension. It serves a public purpose and third parties will rely on it from time to time. It is not merely a private record of a private bargain; rather, a corporate constitution has statutory force*: compare *Re Blue Arrow Plc* [1987] BCLC 585 at 590 per Vinelott J. While these considerations cannot be disregarded, they do not, it seems to me, provide a sufficient justification to remove corporate constitutions entirely from the range of commercial documents governed by the principles for construction outlined in *Pacific Carriers* and *Toll*.
> [124] *A court can and should take account of the special characteristics of a company's constitution, both generally and specifically, in the manner in which it applies these general principles. That is to say, it may be proper to place greater store by the constitutive text in construing a company's constitution as opposed to a private contract*: compare *Stanham* v *National Trust of Aust (New South Wales)* (1989) 15 ACLR 87 at 91 per Young J. Further, in accordance with these general principles, reference is properly made to the surrounding circumstances, although the range of these circumstances may be more limited in this context than as regards some other commercial documents. *In particular, the special or public dimension of a corporate constitution may sometimes constrain the ambit of the matters to which a court has regard*." (emphasis added)

70. Lander J expressed similar views to Weinberg and Kenny JJ: see especially [232], [255] and [259].

Conclusion

71. The following propositions emerge from the foregoing discussion:

> 1. By-laws are the "series of enactments" by which the proprietors in a body corporate administer their affairs; they do not deal with commercial rights, but the governance of the strata scheme: *Bailey*;
> 2. By-laws have a public purpose which goes beyond their function of facilitating the internal administration of a body corporate; cp, *Parkin, Lion Nathan;*
> 3. Exclusive use by-laws may be inspected by third persons interested in acquiring an interest in a strata scheme, whether, for example, by acquiring units, or by lending money to a lot proprietor; such persons would ordinarily have no access to the circumstances surrounding their making; their meaning should be understood from their statutory context and language: *NRMA*; *Lion Nathan*.
> 4. By-laws may be characterised as either delegated legislation or statutory contacts: *Dainford*; *Re Taylor*; *Bailey*; *North Wind*; *Sons of Gwalia;*
> 5. Whichever be the appropriate characterisation, exclusive use by-laws should be interpreted objectively by what they would convey to a reasonable person: *Lion Nathan*;

6. In interpreting exclusive use by-laws the Court should take into account their constitutional function in the strata scheme in regulating the rights and liabilities of lot proprietors *inter se*: *Parkin*; *Lion Nathan*.

7. Unlike the articles of a company, there does not appear to be a strong argument for saying exclusive use by-laws should be interpreted as a business document, with the intention that they be given business efficacy: cf *NRMA* (at [75]). That does not mean that an exclusive use by-law may not have a commercial purpose, and be interpreted in accordance with the principles expounded in cases such as *Antaios Cia. Naviera S.A.*, but due regard must be paid to the statutory context in so doing;

8. An exclusive use by-law should be construed so that it is consistent with its statutory context; a court may depart from such a construction if departure from the statutory scheme is authorised by the governing statute and if the intention to do so appears plainly from the terms of the by-law:*Re Taylor*;

9. Caution should be exercised in going beyond the language of the by-law and its statutory context to ascertain its meaning; a tight rein should be kept on having recourse to surrounding circumstances: *Lion Nathan*.

72. The question of whether the by-laws constitute delegated legislation or a statutory contract was not fully argued. As the foregoing discussion reveals, the decision on their characterisation may be a distinction without a substantial difference from the interpretative perspective. It is not appropriate to express a final view on these issues. It is sufficient to say that on either approach the interpretation of Special By-Law 21 had to be approached on a basis which was consistent with the statutory scheme and that caution had to be exercised in considering surrounding circumstances.

73. The primary judge did not, with respect, apply the approach I have outlined. Again, it should be noted that his Honour approached the issue of interpretation on the basis for which both parties contended and his attention was not drawn to the authorities to which I have referred. However it was erroneous to apply principles of contractual interpretation unconstrained by the statutory framework under which Special By-Law 21 was made. The primary judge interpreted Special By-Law 21 in a way which was inconsistent with the 1973 Act, and in a manner, in my opinion, which was not authorised by that legislation.

74. Special By-Law 21 was made in the context of a statutory scheme which operated on the premise that lot proprietors shared the financial burden of the common property without regard to their entitlement to use any particular part of it. Further, s 58(7) only permitted an exclusive use by-law to impose conditions in respect of the common property with which it dealt. Thus Special By-Law 21 imposed extra obligations to contribute to the costs of Lift 4 on the proprietor of Lot 1 and, to that extent, relieved the other proprietors of their liability to maintain that part of the common property.

75. Special By-Law 21 dealt only with that proprietor's liability to contribute to the costs of Lift 4 of which exclusive use was being obtained. That was an appropriate exercise of the s 58(7) power which was consistent with the statutory scheme. Special By-Law 21 said nothing about relieving the proprietor of Lot 1 from liability to contribute to the maintenance of the remaining lifts in the lift system. The burden of meeting those costs arose because of that proprietor's unit entitlement of 19.382% and that liability continued. The fact that the proprietor of Lot 1 may have no need to access the remaining lifts was irrelevant: *Jacklin*. The primary judge's interpretation did not have regard to these considerations and, in my view, unduly favoured the proprietor of Lot 1, at the expense of the other proprietors.

76. The other reason I have difficulty with the primary judge's conclusion lies in his premise that Special By-Law 21 required a commercial, businesslike interpretation. While the by-law may have had a beneficial commercial effect for the proprietor of Lot 1, viewed objectively it was not a commercial transaction. Rather it was an adjustment of statutory obligations which conferred a proprietorial estate upon the proprietor of Lot 1 in respect of Lot [sic] 4 and, conversely, deprived the remaining proprietors in the strata scheme of the proprietary interest they had hitherto had in that part of the common property. The proprietorial nature of the by-law was indicated by its registration. The public nature of the by-law called for the interpretative exercise to focus on its language and statutory context rather than inferred intentions drawn from the *de facto* position concerning Lift 4 prior to the making of Special By-Law 21.

77. Finally I observe that in taking surrounding circumstances into consideration, the primary judge drew inferences from the original development approval in 1966 and the layout of the strata scheme in relation to lifts. No evidence was led before the primary judge concerning the actual making of Special By-Law 21. The papers and minutes of the meeting at which it was made were not tendered: cf *Lion Nathan* per Finn J (at [92]). It cannot be assumed that the surrounding circumstances his Honour considered relevant were so regarded by those who made Special By-Law 21. Consistently with the "tight rein" approach, those matters should not have been taken into account.

78. **Harrison J**: The respondent purchased Lot 1 in Strata Plan 3397 in November 1990 and sold it in February 2004. Lot 1 is known as the "Park Regis Motel" and is part of a 44-storey building known as the "Park Regis" building at 27 Park St, Sydney. The appellant is the Owners Corporation, which manages the Strata Scheme under the ***Strata Schemes Management Act 1996*** ("the Act").

79. When the respondent purchased Lot 1, it had the benefit of Special By-Law 21. That by-law had been registered at the Land Titles Office on 8 November 1989 in accordance with the provisions of s 58(7) of the ***Strata Titles Act 1973***. It is in the following terms:

> "SPECIAL BY-LAW 21
>
> The proprietor for the time being of lot 1 shall be entitled to the exclusive use and enjoyment of the lift known as Lift No. 4 on the following terms and conditions:—
>
> (i) The Body Corporate shall be responsible for the proper maintenance and keeping in a state of good and serviceable repair and the cleaning, replacement and running costs of the lift;
> (ii) Such proprietor shall pay to the Body Corporate such sums as are identified to it by the Body Corporate for the repair, maintenance, renewal, replacement and running costs of such lift such costs being: –
>
> (a) those attributed directly to Lift No. 4;
> (b) One quarter of the costs attributed to the running and routine maintenance, servicing and repair of the lift system.
>
> (iii) Such proprietor shall not cause or permit any lift mechanic or maintenance contractor to interfere with the operation of the lift or carry out any repairs, maintenance, renewal or replacement unless that mechanical contractor is approved or retained by the Body Corporate."

80. It is uncontroversial, and his Honour, the trial judge, found that the intention of Special By-Law 21 was to give the proprietor of Lot 1 exclusive use and enjoyment of Lift 4 on the terms and conditions set out above.

81. Sometime in late 2001, the respondent formed the view that certain amounts paid by him from time to time to the Body Corporate as levies, which it had raised, purportedly in accordance with By-Law 21(ii), had been incorrectly calculated and that as a result he had made an overpayment. He sued to recover the overpayments as money had and received by the appellant to the use of the respondent and as moneys paid under a mistake of law. He also sought restitution, upon the basis that the appellant had been unjustly enriched by demanding and keeping the overpayments.

82. His Honour found in favour of the respondent and gave judgment in the amount of $179,399.24. The significant issue in the court below was the proper construction of Special By-Law 21. That remains the principal issue in this Court.

Background

83. The Park Regis building comprises a basement, ground floor and 43 upper floors. Approaching the building from street level, there are two separate entrances and lobby areas – one for the residential premises and the other for the motel. There are four lifts in the building in two pairs of two.

84. The area comprising Lot 1 is a small storage area at basement level, an area on the ground floor (described in the Strata Plan as "level 1"), extensive car parking spaces on level 2, some further car parking on level 3, and the motel accommodation that is located on levels 6-15 (inclusive) of the building. The other

levels in the building from 16-44 (inclusive) are residential apartments with a pool and laundry facility on the roof.

85. During the period of the respondent's ownership of the Park Regis Motel, Lift 4 served the basement, ground floor, levels 2 and 3 and levels 6-15. As his Honour noted, the respondent, as owner of Lot 1, did not strictly speaking have the exclusive use of Lift 4 in the sense that, occasionally, people other than motel guests or employees of the motel used it to gain access to the car park on level 3. In addition, motel guests occasionally used Lifts 1 and 2 to gain access to the roof level, or to come down from it, and the respondent admitted, for the purpose of the proceedings, that throughout the period 6 November 1998 until 25 February 2004, some employees and guests of the motel used Lift 3 as well.

86. The appellant did not request payments from the respondent pursuant to By-Law 21 until 19 March 1998. On that day it issued a levy notice requiring payment by the respondent of arrears of moneys due pursuant to By-Law 21 for the period 1 October 1996 to 1 March 1998. This was the first such notice received by the respondent. He paid it in full and continued to pay all similar levy notices that he received thereafter until he sold Lot 1 in February 2004.

87. The unit entitlement of Lot 1 was 1004 units out of a total of 5780 units in the Strata Scheme, or 19.382 per cent. The respondent made quarterly contributions to the Administrative Fund and Sinking Fund at this rate in accordance with levy notices issued to him from time to time.

88. It was the respondent's case in the court below that between 1 April 1998 and 1 July 2003, when all owners in Strata Plan 3397 were levied by the appellant, the levies included amounts relating to the lift system (including Lift 4), so that when the respondent paid his levies he was, in effect, complying with his obligations under By-Law 21 to the tune of 19.38 per cent. The respondent says, therefore, that by virtue of the [sic] By-Law 21, levies made upon him, such as the one on 19 March 1998, he was overcharged, because the By-Law 21 levy notices purported to claim from him 25 per cent of the running costs of the lift system, including Lift 4. The respondent contended that, in these circumstances, he was charged for and paid 44.382 per cent of the lift costs in relation to the whole building, including Lift 4, when, upon a proper construction of By-Law 21, he should not have been charged more than 25 per cent in total.

89. Counsel for the parties in the Court below urged upon his Honour, and he accepted, that he should approach the construction of By-Law 21 upon the basis that it had created contractual rights of exclusive use and enjoyment under s 58(7) of the ***Strata Titles Act* 1973** which should be interpreted in what is Honour described as "the ordinary way". See *North Wind Pty Ltd* v *Proprietors – Strata Plan 3143* [1981] 2 NSWLR 809.

90. His Honour then observed (at 9-10): –

> "The Court must therefore consider the chosen language of and the surrounding circumstances in which By-Law 21 was made in order to determine, objectively, the mutual intention of the parties. As a starting point, the surrounding circumstances included the [appellant's] entitlement to levy contributions determined by it in accordance with s 59 and s 68(i), (j), (k) and (p) of the **Strata Titles Act 1973.** These provisions also governed the establishment of the [appellant's] administrative fund and the [appellant's] sinking fund. It is not in dispute that, in 1989, at the time when Special By-Law 21 was made, the [appellant] was entitled to include in its levies made on each of the owners in Strata Plan 3397 in accordance with the above provisions, amounts relating to actual or expected liabilities relating to the lift system in the Park Regis, including Lift 4."

91. His Honour then proceeded to record what he referred to as "the other surrounding circumstances" which he took into account. His Honour said this at page 10: —

> "Although the Sydney City Council's development approval was not in evidence, from all of the evidence, it may be safely inferred that, in 1966, or thereabouts, when the development was approved, lifts 1 and 2 were only intended to serve the residential units and not the Park Regis Motel and its guests. The evidence establishes that in 1989 there had been no change in relation to the non-use of Lifts 1 and 2 by the motel and its guests. In 1989, Lift 4 still did not go to the residential floors and the proprietor of Lift 4 already had exclusive, de facto use of it. The Court therefore infers, and so finds, that what was intended on 16 October 1989 by the proprietor of Lot 1 and the remaining owners in

Strata Plan 3397 when they made By-Law 21, was that the proprietor of Lot 1 would get exclusive use of Lift 4 in substitution for the de facto exclusive use which had been enjoyed up to that point at that time".

92. The respondent submitted in the court below that when By-Law 21 was made, it could not have been intended that Lot 1 would have to contribute 44.382 per cent of the overall running costs of the lift system in order merely to convert the de facto exclusive use of Lift 4 to an actual legal entitlement to exclusive use, particularly when employees of the Park Regis Motel and its guests had hardly ever used Lifts 1, 2 and 3.

93. His Honour accepted that submission and proceeded to explain why he did so. He referred to the terms of the by-law. He said that before the appellant could recover from the respondent sums directly attributed to Lift 4, being repair, maintenance, renewal, replacement and running costs of that lift, in accordance with By-Law 21(ii)(a), it was obliged to identify those repair, maintenance and running costs which were directly attributable to Lift 4. His Honour said that, on the evidence, with one irrelevant exception, the appellant did not do this. The appellant merely sent to the respondent levy notices that captured his liability for the category (b) costs. His Honour observed that that was not surprising, given the inference that he drew on the evidence, that the lift maintenance company did not have a separate maintenance contract with the appellant for Lift 4, but only a contract for the maintenance of the lift system as a whole.

94. His Honour also observed that costs for the renewal and replacement of Lift 4 were included in category (a). He said, in his opinion, that the respondent was liable for such renewal and replacement costs of Lift 4 over and above those costs for which he was liable in respect of category (b) and the other category (a) costs to which he referred.

95. His Honour's conclusions were then set out at pages 12-13. It is convenient for present purposes to record them in full as follows:—

"It follows in my opinion from the above analysis that when [sic] the parties to By-Law 21 made it their mutual intention was that, in order for the plaintiff to have the exclusive use and enjoyment of Lift 4:

> 1. All costs for the renewal and replacement of Lift 4 identified to the proprietor of Lot 1 by the [appellant] were to be paid exclusively by that proprietor; none of such costs would therefore be payable by the remaining proprietors of Strata Plan 3397.
> 2. All costs for the repair, maintenance and running costs directly attributable to Lift 4 identified to the proprietor of Lot 1 by the [appellant] were to be paid exclusively by that proprietor; none of such costs would therefore be payable by the remaining proprietors of Strata Plan 3397.
> 3. Twenty-five per cent of all costs attributable to the running and routine maintenance servicing and repair of the lift system were to be payable by the proprietor of Lot 1. *As a matter of common sense, it must follow that the parties who made By-Law 21 intended that 75 per cent of the balance of all such costs would be payable by the remaining proprietors of Strata Plan 3397. This gives By-Law 21 a commercial, businesslike interpretation. Otherwise, it would mean that on top of the liability to pay the 25 per cent of all costs attributable to the routine maintenance servicing and repair of the lift system, the proprietor of Lot 1 would still be required to contribute a substantial amount towards such costs based on Lot 1's unit entitlement of 1004 out of the aggregate of 5780 merely to convert exclusive de facto use of Lift 4 to a legal entitlement of exclusive use. Plainly, that cannot have been the intention of the parties who made By-Law 21*. (Emphasis added — see below)

The appellant's submissions

96. The appellant's contentions in this Court include the identification of errors said to have been made by his Honour in the italicised portion of the extract set forth in the preceding paragraph.

97. The appellant argued that his Honour's interpretation of By-Law 21 was impermissible according to its plain meaning. It argued that the by-law was confined to the payment of levies by the owner of Lot 1 *in relation to Lift No 4.* The by-law said nothing about the pre-existing obligations of the lot owner to continue to pay levies imposed upon it in the normal course of events. It said nothing about the lot owner's obligation to pay levies for the maintenance of lifts 1, 2 and 3. The appellant argued that his Honour, in effect, interpreted

By-Law 21 as if it were an exclusion clause, limiting the respondent's statutory obligation to contribute to the upkeep of the common property.

98. The appellant also argued that his Honour was erroneously influenced by what he saw to be the lack of commercial sense in an owner of Lot 1 agreeing to pay 25 per cent of the costs incurred for the upkeep of all lifts, in return for the exclusive use of Lift 4 (whilst remaining liable for the payment of 19.382 per cent of the costs of the other three lifts), if all that he was to secure in return was a formalisation of the pre-existing de facto exclusive use of that lift. The appellant contends that, in this way, his Honour imputed an intention on the part of those who agreed to the by-law that it could not have meant that an owner of Lot 1 would be required to contribute something in the order of 44.382 per cent to the overall running costs of the lift system. In any event, the appellant submitted that the terms of By-Law 21 were sufficiently clear to obviate any need to resort to a consideration of surrounding circumstances as an aid to interpretation.

99. If it were the case that his Honour was justified in considering surrounding circumstances, the appellant submitted that his Honour erred by failing properly to consider what a reasonable person would have understood the words of the by-law to mean. In this respect, the appellant argued that his Honour approached the matter purely from the perspective of an hypothetical owner of Lot 1, instead of attempting to discern the objective intention of the parties.

100. Finally, the appellant contended that his Honour failed to have proper regard to the obligations imposed upon the respondent by the relevant provisions of the Act. The appellant argued that his Honour failed to have regard to the difference between liabilities imposed upon the respondent having the benefit of the exclusive use of Lift 4 (pursuant to s 53 of the Act) and his ongoing and separate liability for contributions as a lot owner pursuant to Divs 1 and 2 of Pt 3 of Ch 3 of the Act.

101. In this respect, the appellant argues that the "paramount obligation" of a lot owner is to pay amounts levied as contributions to the administrative and sinking funds. Section 76 of the Act requires an Owners Corporation to levy such contributions on each person liable. By-Law 21, by way of comparison, deals with the grant of the exclusive use and enjoyment of Lift 4 to the proprietor of Lot 1, and with the terms and conditions upon which such use and enjoyment is granted. The terms of By-Law 21 do not say, and should not be interpreted to mean, that the owner of Lot 1 is, or has been, in some way released from the obligations, imposed by law on all of the proprietors, to contribute to the repair and maintenance of the other three lifts.

The respondent's submissions

102. The respondent identified what is said to have been the issue for his Honour in the following terms: did the by-law mean that the respondent had to pay 25 per cent extra (or 44.382 per cent in total) of "the costs attributed to the running and routine maintenance, servicing and repair of the lift system" ie 25 per cent **extra** to the 19.382 per cent he was already paying as part of his administrative fund levy for the same thing, or did it mean, as his Honour found, and the respondent contended, that he was literally required to pay 25 per cent of the "running and routine maintenance, servicing and repair of the lift system"?

103. The respondent submitted that his Honour's interpretation of the by-law correctly followed proper principles of construction and that, read in the ordinary way in accordance with modern authority, his Honour's analysis in the italicised portion of his judgment reproduced at par [20] above "is impeccable".

104. The respondent submitted that the owner of Lot 1 and the Owners Corporation, at the time of making the by-law, must be taken to have known that, in terms of unit entitlement, the owner of Lot 1 was already paying 19.382 per cent of the very costs referred to in (ii)(b) of the by-law through administrative fund levies. The respondent emphasised that the by-law does not say an "extra" one-quarter of the costs; it says "one-quarter", which was precisely the fraction of those costs that the respondent maintained he should have been paying. The respondent submitted that if the parties had intended that 44.382 per cent of such costs should have been paid, clear language to that effect would have been required.

The Statutory Regime

105. In 1989 the ***Strata Titles Act 1973*** included the following relevant provisions:-

58 (1) Except as provided in this section the by-laws set forth in Schedule 1 shall be the by-laws in force in respect of each strata scheme.
(7) With the written consent of the proprietor or proprietors of the lot or lots concerned, the body corporate may, pursuant to a special resolution, make a by-law:

> (a) conferring on the proprietor of a lot specified in the by-law, or the proprietors of several lots so specified:
>
> > (i) a right of exclusive use and enjoyment of; or
> > (ii) special privileges in respect of,
>
> the whole or any specified part of the common property, upon conditions (including the payment of money, at specified times or as required by the body corporate, by the proprietor or proprietors of the lot or lots concerned) specified in the by-law; or
> (b) amending, adding to or repealing the by-law made in accordance with this subsection.

(7AA) A by-law referred to in subsection (7) shall either:

> (a) provide that the body corporate shall continue to be responsible for the proper maintenance, and keeping in a state of good and serviceable repair, of the common property or the relevant part of it; or
> (b) impose on the proprietor or proprietors of the lot or lots concerned the responsibility for that maintenance and upkeep,

and in the case of a by-law that confers rights or privileges on more than one proprietor, any money payable by virtue of the by-law by the proprietors concerned:

> (c) to the body corporate; or
> (d) to any person for or towards the maintenance or upkeep of any common property,

shall, except to the extent that the by-law otherwise provides, be payable by the proprietors concerned proportionately according to the relative proportions of their respective unit entitlements.
(9) To the extent to which such a by-law makes a person directly responsible for the proper maintenance, and keeping in a state of good and serviceable repair, of any common property, it discharges the body corporate from its obligations under s 68(1)(b).
(10) Any moneys payable by a proprietor to the body corporate under a by-law referred to in subsection (7) or pursuant to subsection (9A) may be recovered, as a debt, by the body corporate in any court of competent jurisdiction.
59(1) A body corporate may levy the contributions determined by it in accordance with s 68(1)(j) and (k) and contributions referred to in s 68(1)(p) by serving on the proprietors notice in writing of the contributions payable by them in respect of their respective lots.
(7) Any contribution levied under this section:

> (a) becomes due and payable to the body corporate in accordance with the decision of the body corporate to make the levy;
> (b) …

68(1) A body corporate shall, for the purposes of the strata scheme concerned, but subject to the provisions of any development statement affecting common property and to the operation of this Act in relation to the development statement:

> (a) control, manage and administer the common property for the benefit of the proprietors;
> (b) properly maintain and keep in a state of good and serviceable repair:
>
> > (i) the common property; and
> > (ii) any personal property vested in the body corporate;

(c) where necessary, renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the body corporate;

…
(j) not later than fourteen days after the constitution of the body corporate and from time to time thereafter, determine subject to subsection (3) the amounts necessary to be raised by way of contributions for the purpose of meeting its actual or expected liabilities incurred or to be incurred under paragraph (b) or for the payment of insurance premiums or any other liability of the body corporate, other than amounts referred to in paragraph (k) or (p);
(k) from time to time after the expiration of one month after the constitution of the council or one year after the constitution of the body corporate, whichever first happens, determine subject to subsection (3) the amounts necessary to be raised by way of contribution for the purpose of meeting its actual or expected liabilities:

(i) …
(ii)…
(iii) under paragraph (c); and …

Consideration

106. In my opinion, Special By-Law 21 is not ambiguous or uncertain. Its words and their meaning are as clear when read in isolation as they are when read by the hypothetical reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time Special By-Law 21 was formulated.

107. For presently relevant purposes, the by-law consists of two parts. First, it grants to the proprietor of Lot 1 for the time being exclusive use and enjoyment of the lift known as Lift No 4. Secondly, it sets out a mechanism for the calculation of the price, or consideration, which the proprietor of Lot 1 will be required to pay for the continued use and enjoyment of that exclusive right.

108. For reasons which no doubt seemed logical and sensible to those involved at the time, that price, or consideration, was not set as a fixed sum. There may have been a number of reasons for taking this approach, such as a desire to maintain a relationship between that price, or consideration, and costs which the Owners Corporation might have been expected to incur to repair and maintain the lifts in the building on an annual basis. Whatever may have been the reason, or reasons, for choosing this method of calculation, or even if there were no reasons, they form no part of the present enquiry.

109. In my opinion, because the by-law (unfortunately) expresses the price, or consideration, to be paid by the proprietor for the time being of Lot 1, for the exclusive use and enjoyment of Lift 4, not as a fixed sum, but in terms of **costs**, there has arisen a tendency, evident in some of the arguments in this Court and in the Court below, to treat the payment of the price, or consideration, as discharging what is in truth a separate and different obligation upon the proprietor for the time being of Lot 1 to pay levies raised by the Owners Corporation in the normal course. This tendency has, perhaps understandably, been heightened by the fact that levies raised in this way are clearly, or at least usually, calculated by reference to the actual or anticipated outgoings of the Owners Corporation, including, relevantly, costs incurred for the repair and maintenance etc of lifts. It has been suggested that the obligation to pay both the price, or consideration, and the obligation to pay levies in the normal course, amount (unfairly) to a double payment.

110. The various formulations of the respondent's case before his Honour would appear to have arisen in this way. Whether described as an overpayment, or as money had and received, or as resulting in an unjust enrichment, they all proceed upon the basis that the respondent has paid twice for the same thing.

111. For the reasons that follow, I do not think that this is correct. The original parties to the formulation of the by-law could no doubt have calculated the price, or consideration, not as a function of costs but as a fixed sum, possibly with annual CPI increases. The proprietor for the time being of Lot 1 would have been obliged to pay that sum for the continued exclusive use and enjoyment of Lift 4, and could not have been heard to complain that he also had an obligation to pay other levies raised by the Owners Corporation from time to

time. Indeed, the words of clause (ii) of the by-law speak in terms of "such sums as are **identified**" to the proprietor of Lot 1 by the Body Corporate. In my opinion, the use of that word serves clearly to emphasise that the obligation upon the proprietor of Lot 1 is not an obligation to pay **those costs**, but to pay a price, or consideration, calculated conveniently, but in any event irrelevantly, by reference to those costs.

112. Inherent in the respondent's arguments would appear to be the proposition that the by-law somehow operates, or should operate, as a partial exoneration or discharge of his obligation to contribute his share of the costs of the Owners Corporation by the payment of other levies calculated by reference to his unit entitlement in the ordinary way. In my opinion, the terms of By-Law 21 do not have this effect, and if they were intended to have this effect they should have said so.

113. The fact that the proprietor of Lot 1 has become entitled to maintain a right to the exclusive use and enjoyment of Lift 4 by paying a price calculated, in the case of (ii)(a), as the costs directly attributed to Lift 4, and in the case of (ii)(b), as an arithmetical function of the total cost of maintenance of all lifts in the building, does not mean that he is "overpaying" just because he is required, in addition to the payment of those sums, to contribute via his annual levies, to the cost of the upkeep of the other three lifts in the building. The obligations discharged by the payment of those two sums are different obligations and do not overlap.

114. I have already referred at par [90] to that part of his Honour's judgment where he refers to the need for the court to consider the chosen language, and the surrounding circumstances in which By-Law 21 was made, in order to determine, objectively, the mutual intention of the parties. These principles were not a matter of dispute between the parties in this appeal. See, for example, *Pacific Carriers Ltd* v *BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]; *Toll (FGCT) Pty Ltd* v *Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; *Ryledar Pty Ltd* v *Euphoric Pty Ltd* [2007] NSWCA 65 [103] – [106].

115. In *Ryledar* (supra) [107] – [108] Tobias JA said the following:

> [107] The primary judge accepted (at [30]) that it was not necessary for him to find that the language of a contract was ambiguous before considering its meaning as may be revealed in the context and purpose of the transaction commonly known to its parties: *Lion Nathan Australia Pty Ltd* v *Coopers Brewery Ltd* (2005) 223 ALR 560 at 573-574 [78].
> [108] His Honour then continued:
>
> > "31. However, that does not mean that when the Court begins the task of construction it puts the words of the document aside and endeavours first to ascertain the commonly known factual context and purpose of the transaction, often only by resolving a strenuous contest between the parties. The Court does not, once it has found the commonly known factual context and purpose, then look at the words of the contract and, if they do not readily accommodate the context and purpose so found, force them to do so by a process of interpretation.
> > 32. When the Court is construing a commercial contract, it begins with the words of the document: there it often finds expressed the factual context known to both parties and the common purpose and object of the transaction. But the court is alive to the possibility that what seems clear by reference only to the words on the printed page may not be so clear when one takes into account as well what was known to both parties but does not appear in the document. When that is taken into account, the words in the contract may legitimately have one or more of a number of possible meanings. It is then the Court's task to identify which of the possible meanings represents the parties' contractual intention.
> > 33. However, when a party to a contract argues that the known context and common purpose of the transaction gives the words of the contract a meaning which, by no stretch of language or syntax they will bear then, in truth, one has a rectification suit, not a construction suit.
> > 34. That is the case here. …

116. When one has regard to the circumstances in this case, in my opinion they include, and persuasively suggest, that the proprietor of Lot 1 at the time when the by-law was formulated was demonstrably intent upon converting an informal, exclusive use of Lift 4 into a legal and enforceable right to the same thing. The

disadvantages of the former, and the significant advantages of the latter, seem to me to be so obvious as to require no elaboration. The readjustment and entrenchment of the right of exclusive use and enjoyment of Lift 4 by the proprietor of Lot 1 was patently valuable to that proprietor, particularly having regard to the type of business conducted at those premises. The payment of a price to secure it, over and above the proportionate cost of maintaining Lift 4, would appear to me, as a matter of "common sense", to conform to "a commercial, businesslike" approach.

117. The relevant statutory provisions also reinforce this. Special By-Law 21 is a by-law made in accordance with s 58(7) of the Act conferring on the proprietor of Lot 1 a right of exclusive use and enjoyment of a specified part of the common property. The by-law provides that the body corporate should be responsible for the proper maintenance and keeping in a state of good and serviceable repair of Lift 4, as well as its cleaning, replacement and running costs in accordance with the alternative described in s 58(7AA)(a) of the Act. Conversely, but significantly, the by-law does not impose on the proprietor of Lot 1 the responsibility for that maintenance or upkeep in accordance with s 58(7AA)(b). Section 58(9), therefore has no application in the present case and does not operate to discharge the body corporate from its obligations under s 68(1)(b) to maintain the lift, or to keep it in a state of good and serviceable repair.

118. However, as a condition — indeed, the only condition — for the conferring on the proprietor of Lot 1 of a right of exclusive use and enjoyment of Lift 4 pursuant to s 58(7)(a)(i), the proprietor of Lot 1 was obliged to pay money as "specified in the by-law". The moneys specified in the by-law as payable by the proprietor of Lot 1 are the costs attributed directly to Lift 4 and one quarter of the costs attributed to the running and routine maintenance, servicing and repair of the lift system. These monies could be recovered by the body corporate from the proprietor of Lot 1 as a debt in accordance with s 58(10) of the Act.

119. Therefore, to the extent that the body corporate, by the express terms of By-Law 21, retained its s 68(1)(b) responsibility for the proper maintenance and keeping in a state of good and serviceable repair and the cleaning, replacement and running costs of Lift 4 (ie "the lift"), it retained the corresponding responsibility to pay for it. However, as a condition of the grant of excusive use and enjoyment of Lift 4 on the proprietor of Lot 1, it required and obliged that proprietor, and that proprietor agreed, by the terms of the by-law, to pay the cost of meeting that responsibility. The body corporate thereby became entitled to recover it from the proprietor of that lot as a debt pursuant to s 58(10). No other levy upon proprietors of the strata scheme was necessary and they all became thereby relieved of any burden of the costs of Lift 4 as long as the proprietor of Lot 1 complied with the terms of the by-law.

120. Nothing in the terms of the by-law, and nothing in the Act, relieved either the body corporate of its obligation to meet the costs of repair, maintenance, renewal, replacement and running for the remaining three lifts, or the proprietor of Lot 1 of its obligation to continue to contribute its proportionate share of such costs of the remaining three lifts, in accordance with levy notices issued by the body corporate from time to time for this purpose. In my opinion, this meant that the respondent became and remained liable for the payment of both 25 per cent of the costs of the lift system for the building in accordance with Special By-Law 21, as well as his proportionate 19.382 per cent of the remaining 75 per cent of such costs as one of several proprietors in the Owners Corporation.

The Cross Appeal

121. The respondent has filed a cross appeal in which he seeks to argue that his Honour erred in the way in which he dealt with the respondent's claim for interest. In light of the view I have formed about the result of this appeal, the precise issue raised on the cross appeal does not need to be considered. However, by reason of a concession made by the appellant concerning an amount that it now says is repayable to the respondent, it becomes necessary to revisit that issue. This is explained below.

122. One of the principal matters dealt with by the respondent in his submissions is what is said to be an error in the way that the appellant's submissions purport to treat one of his Honour's significant findings. The relevant passage to which attention is drawn is to be found at p 16 of his Honour's judgment, and is as follows:-

> "In addition, I am comfortably satisfied that when the [respondent] received a levy notice, not only was he being charged one quarter of the costs attributed to the running and routine maintenance, servicing

and repair of the lift system as a whole, pursuant to By-Law 21, but as part of his administration levies, he was being charged at least 19.38 per cent as well for costs which were identical."

123. In order to expose the error, the respondent drew attention to certain paragraphs of the applicant's submissions in this Court in which $100,000 is assumed, by way of example, to represent the total cost for one year to maintain all four lifts in the building. In the context of this example, the appellant argued that the Owners Corporation approached the respondent's obligations in the following manner:

> 48.1 from the $100,000 lift costs, it levied 25 per cent of these costs to the respondent pursuant to his obligations under By-Law 21;
> 48.2 from the remaining $75,000, it struck a levy against the respondent, as a lot owner required to maintain the building pursuant to Part 3 of Chapter 3 of the Act, of a further sum of 19.38 per cent of $75,000 (i.e. $14,250).

124. Relying upon the passage quoted at par [47], the respondent submitted that this analysis is erroneous. The respondent submitted that the relevant portion of the example set forth in par [48.2] should read, "from the **same $100,000**, it struck a levy against the respondent … of a further sum of 19.38 per cent of $100,000 (i.e. **$19,380**)".

125. In the respondent's submission, this is a significant difference for the reason that, if it is correct, the respondent was being levied 44.382 per cent of the whole costs attributed to the running and routine maintenance, servicing and repair of the lift system as a whole, a circumstance tending to suggest (according to this submission) that the appellant's interpretation of the by-law was, in effect, uncommercial and that his Honour's opinion of the by-law, as one in need of "a commercial, businesslike interpretation", ought to be adopted. The respondent maintained that submission in this Court as supporting his Honour's conclusions. Indeed, the respondent argued, relying upon *Coulton* v *Holcombe* (1986) 162 CLR 1, that the appellant ought to be bound by the conduct of its case in the Court below and, in effect, ought not to be permitted in this Court to argue for some less onerous and burdensome alternative interpretation of the by-law.

126. However, as will by now be apparent from what appears above, I am of the opinion that his Honour's interpretation of the by-law is incorrect. It follows from this result, therefore, that the respondent has been overcharged, but only by an amount equal to 19.382 per cent of his one-quarter share of the costs of the lifts as a whole, for which he was otherwise levied, for the excusive use and enjoyment of Lift 4, in accordance with the terms of By-Law 21. According to the appellant's concession, the amount of that overcharge is $18,758.14.

127. The respondent sought to argue on the cross appeal that his Honour should have awarded interest on the whole of the amount overpaid. The effect of the conclusion I have come to, having regard to the appellant's concession, is that the respondent's arguments on the question of interest may be conveniently transposed to the smaller sum.

128. The respondent argued in this Court that his Honour fell into error in awarding interest only from the date of a letter written by the respondent to the Owners Corporation on 9 September 2002 in which, as his Honour found, the respondent "was making clear to the body corporate that they had overcharged him". He argued that the primary purpose of an award of interest is compensatory and is payable, and ought to have been awarded, in any circumstances where the respondent had been kept out of his money or denied the opportunity to earn interest upon it or otherwise to utilise his overcharged payments from the date or dates he made them. The respondent argued that his Honour's discretion miscarried.

129. The respondent offered, in his submissions in this Court, to bring in an updated calculation of interest. Such interest would ordinarily run from the date upon which the cause of action arises. In the present case, being an action to recover money paid under a mistake, that would mean that interest would run from the respective dates upon which the appellant received the overpaid amounts.

130. The appellant made no submissions in this Court on the cross appeal. Even having regard to the discretionary nature of a judicial decision concerning the award of interest under the statute, I can see no reason why the respondent would not have become entitled to an award of interest on the amount found by his Honour to have been overcharged or, correspondingly, to an award of interest on such smaller sum as the appellant now concedes was overpaid, in circumstances where its appeal to this Court were allowed.

Costs

131. It was submitted on behalf of the respondent that, whatever the outcome of the present appeal, this Court should not dismiss the plaintiff's case in the court below as the appellant did not challenge the finding that it had overcharged the respondent, but instead sought merely to argue that the extent of the overcharging was less that found by Rolfe DCJ. Even though the appellant's submissions in reply do not concede that contention, they do not put it directly in issue either. However, the appellant's Notice of Appeal asked for an order that the respondent pay three quarters of the appellant's costs of the trial, presumably based upon an estimation of the time occupied by the issue of interpretation of the by-law. Counsel for the respondent did not propose a smaller proportion. In my opinion, those proportions are appropriate.

Orders

132. In my opinion, this Court should make the following orders:

(1) Appeal allowed with costs.
(2) Cross appeal allowed with costs.
(3) Judgment and orders of Rolfe DCJ of 17 November 2005, save order 3(c) be set aside.
(4) In lieu thereof, judgment for the respondent for $18,758.14 plus interest, such interest to run from the date of the overpayments.
(5) Appellant to pay one-quarter of the respondent's costs of the trial before Rolfe DCJ, and, pursuant to s 229 of the ***Strata Schemes Management Act 1996*** , such costs to be payable by contributions levied in relation to lots other than lots owned by the respondent.
(6) Respondent to pay three quarters of the appellant's costs of the trial before Rolfe DCJ.
(7) The appellant and the respondent to have a certificate under the ***Suitors' Fund Act 1951*** if otherwise entitled.

WHITE v BETALLI & ANOR

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(2008) LQCS ¶90-140

Court citation: [2007] NSWCA 243

New South Wales Court of Appeal

14 September 2007

Community schemes — Management — By-laws — Special by-laws — Special by-law giving owner of one lot right to store watercraft on part of another lot — Whether by-law valid — Whether legislation permits making of by-laws giving one lot owner the right to use and occupy part of another owner's lot — Whether any power to make such by-laws displaced by specific power to create easements and restrictions as to user in conveyancing legislation — Whether other lot owner's registered, indefeasible title free of right given by by-law — Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Unions of Australia (1932) 47 CLR 1 considered — Strata Schemes Management Act 1996 (NSW), s 43 — Conveyancing Act 1919 (NSW), s 88B — Real Property Act 1900 (NSW), s 42(1).

A strata scheme was situated beside Port Hacking in Sydney. It consisted of two lots. A free-standing house occupied each lot. Lot 1 was the higher of the two lots and faced the street. Lot 2 was behind lot 1 and had frontage to the waters of Port Hacking.

[140579]

A special by-law, promulgated by the developer of the strata scheme, was registered along with the relevant strata plan. It said:

> "The Registered Proprietors for the time being of Lot 1 shall have the right to store small watercraft within the area denoted (A) on the sketch annexed to [the strata plan]."

The area in question consisted of approximately 15m² of lot 2.

The owner of lot 2 (White) undertook landscaping work in and around the watercraft storage area. The effect of this work was to reduce the area to approximately 8m² and to make it more difficult for the owners of lot 1 (the Betallis) to move watercraft between the storage area and the water.

In due course, White commenced proceedings against the Betallis in the Supreme Court of New South Wales, seeking: (1) a declaration that the special by-law was *ultra vires* and of no force or effect; and (2) an order restraining the Betallis from storing watercraft on lot 2. The Betallis cross-claimed in the proceedings, seeking a declaration that the by-law was valid and an order that White restore the storage area to its former condition.

The Supreme Court dismissed White's proceedings and gave judgment to the Betallis on the cross-claim. White appealed to the New South Wales Court of Appeal.

On appeal, White argued that:

- the by-law, made pursuant to the general power to make by-laws in s 43 of the Strata Schemes Management Act 1996 (NSW) (the Management Act), effectively created an easement or restriction as to user which benefited the Betallis and burdened her. However, the specific power to create easements and restrictions as to user is found in s 88B of the Conveyancing Act 1919 (NSW). Therefore, in accordance with the principle enunciated in *Anthony Hordern & Sons Ltd* v *Amalgamated Clothing and Allied Trade Unions of Australia* (1932) 47 CLR 1, which precludes reliance on a general statutory power where a specific power is given, the by-law was null and void
- the by-law was invalid because the power to make by-laws in the Management Act cannot be used to give one lot owner the right to use and occupy part of another owner's lot;
- the by-law was not recorded on the folio for lot 2 and, therefore, pursuant to s 42(1) of the Real Property Act 1900 (NSW), she held her interest in lot 2 free from any interest the Betallis allegedly had by virtue of the by-law. The only relevant entries in the second schedules of the folios for lot 2 and the common property were: (1) in the lot 2 folio, "Interest recorded on [the registered folio for the common property]"; and (2) in the common property folio, "Attention is directed to the strata scheme by-laws filed with the strata plan".

Held: (per Santow and Campbell JJA; McColl JA dissenting) Appeal dismissed.

The by-law and s 88B of the Conveyancing Act

Per Santow JA (with whom Campbell JA agreed):

1. The "Anthony Hordern principle" is, in reality, no more than a presumption in aid of construction, applicable in construing a particular provision conferring power as opposed to general provisions of the same instrument which might otherwise confer the same power. It has nothing to say to two particular and distinct sets of provisions conferring distinct though overlapping powers, especially when in different, albeit connected, statutory instruments.

2. Here there were two distinct statutory regimes for the creation of what was in the nature of an easement or restrictive covenant. Each had its own distinct mode of application, subject to distinct conditions and giving rise to distinct consequences affecting attributes of the easement or restrictive covenant created under each regime. Therefore, the Anthony Hordern principle did not apply in the present case.

[140580]

Per McColl JA:

3. The by-law conferred exclusive use and enjoyment of the watercraft storage area on the Betallis, leaving White with no right to use that section of lot 2. A by-law which purports to have that effect is not an easement because it purports to confer rights of occupation that substantially deprive the owner of the affected lot of proprietorship. In those circumstances, the by-law did not satisfy the fourth condition for a valid easement in *Re Ellenborough Park* [1956] Ch 131 — namely, that the right claimed must be capable of forming the subject matter of a grant. Therefore, the by-law did not create an interest of the sort caught by s 88B of the Conveyancing Act, in which case the Anthony Hordern principle could not be invoked.

Validity of by-laws permitting use and occupation of another lot

Per Santow JA:

4. The restriction under the by-law constituted a matter "appropriate to the type of strata scheme concerned", for which by-laws could be made under s 43(1) of the Management Act. Furthermore, s 43(2), providing that "[s]ubsection (1) does not limit the matters for which by-laws may be made", was also available to be called into aid had it been necessary to extend the scope for by-laws beyond those in the list in subsection (1).

Per McColl JA (dissenting):

5. The by-law effectively conferred exclusive use and enjoyment of the watercraft storage area on the Betallis. It did not confer any benefit on White. On the contrary, she was burdened with the costs of maintaining that part of her lot for the Betallis advantage. Nothing in the Management Act, or in the history of strata titles legislation, supports the conclusion that the by-law-making powers permit a by-law to be made which has this effect.

6. To the extent that by-laws can affect the rights of individual proprietors, it is because the by-law is presumed to operate for the benefit of the strata scheme as a whole. The by-law in this case did not operate for the benefit of the strata scheme as a whole. It operated only for the benefit of the Betallis, to the detriment of White.

Per Campbell JA:

7. Nothing in the notion of a by-law prevented there being a by-law entitling the owners of the lot located away from the water frontage to store a boat within the defined area immediately adjacent to the waterfront but within the lot located on the water frontage. And nothing in the particular legislative framework that governed the strata plan in question detracted from the validity of the by-law.

8. The strata scheme here was little different to a subdivision into two freehold parcels on which free-standing houses were constructed. In the way in which it used the strata title legislation to achieve this functional end, it was a distinct oddity and quite different to the situation with which the strata titles legislation is usually concerned. These were relevant matters in deciding what counted as "matters appropriate to the type of strata scheme concerned" within the meaning of s 43 of the Management Act.

The by-law and indefeasibility of title

Per Santow JA (with whom Campbell JA agreed):

9. Even were it insufficient for the Real Property Act register merely to incorporate by reference a relevant strata scheme by-law filed with the strata plan (as happened here), a proposition which could not be accepted, the actual by-law had, in fact, been sufficiently "recorded in the folio" of the register, within the meaning of s 42(1). Registration did include in a folio "interests and ... entries" in respect of the by-law.

Per Campbell JA:

10. From the instant of its creation, the proprietary right of the owner of lot 2 was subject to the right created by the by-law. Therefore, the by-law was no more an

[140581]

infringement on the proprietary rights of the owner of lot 2 than is the right of the owner of a dominant tenement to exercise, on the land of another, rights that have been created by an easement.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

BW Rayment QC and R Tregenza (instructed by Andreones Pty Ltd) for White.

PWJ Gray SC and PE Koroknay (instructed by David Le Page) for the Betallis.

Before: Santow, McColl and Campbell JJA.

Full text of judgment below

[140582]

[140583]
[140584]
[140591]
[140615]
[140614]
[140613]
[140612]
[140590]
[140587]
[140585]

Santow JA, McColl JA and Campbell JA:

[140586]

ORDERS

(1) Leave to appeal granted.
(2) Appeal dismissed.
(2) Appellant to pay the respondent's costs.

Santow JA, McColl JA and Campbell JA:

Santow JA:

INTRODUCTION

The appellant, owner of Lot 2 in a two-lot strata scheme, challenges the validity of a by-law (by-law 20) purporting to give the respondent owners of Lot 1 a watercraft storage area on the appellant's lot. The appellant Lynda Margaret White sought leave to appeal and a concurrent hearing.

2. By-law 20 purported to provide access for Lot 1 to use a specified watercraft storage area on the adjoining Lot 2, the latter being a waterfront lot. By-law 20 if valid, was created as a by-law when adopted by and lodged with the strata plan registered by the Registrar General for the strata scheme as in force at the date of lodgement. This could only be pursuant to s 43 of the *Strata Schemes Management Act* 1996 ("*SSMA*"). Thus it was not a by-law made by the owners' corporation relating to common property (compare s 52 *SSMA*). Nor was it registered as a statutory easement under s 88B of the *Conveyancing Act 1919* that being said by the appellant to be its vice. Rather it was associated with such a registered easement being the right of footway allowing the respondents access over Lot 2 to its waterfront on Port Hacking.

3. The question of validity ultimately turns on the answer to two questions:

Question One: was s 88B of the *Conveyancing Act 1919* the only available source of power for creating what was, if validly created, in the nature of an easement or restrictive covenant? In particular was the "*Anthony Hordern* principle" applicable that,

> "when the Legislature expressedly gives a power by a particular provision which prescribes the mode in which it should be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

Anthony Hordern & Sons Ltd v *Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

Question Two: was the purported by-law rendered invalid under s 43(4) SSMA due to inconsistency with s 42 *Real Property Act 1900* (NSW), on the basis that Lot 2 could not be said to be burdened by the interest in favour of Lot 1 where that interest was not recorded on the folio of Lot 2?

4. The trial judge concluded these two questions in favour of the respondents Christopher Nadir Betalli and Nicole Lee Puckeridge. His Honour accordingly ordered restoration of the watercraft storage area to its former condition so as to remove certain obstructing landscaping works held to be in breach of by-law 20.

5. There are some ancillary issues in relation to these questions which I deal with under "Disposition" below.

SALIENT FACTS

6. The salient facts are essentially undisputed. There are however some issues of interpretation of what was recorded on the register to which I shall make reference later.

Nature of the land and Strata Plan in question

7. Strata Plan 67662 divides land located on Marina Crescent, Gymea Bay into the two lots. That land extends down from Marina Crescent to a frontage to Crown land at mean high watermark for Port Hacking which then extends further into Port Hacking.

8. The appellant is the owner of Lot 2 in SP67662. The respondents are the owners of Lot 1.

9. Lot 2 is the lower lot, fronting onto the Crown land. There is a right of footway over Lot 2 in favour of Lot 1, allowing the respondents as owners of Lot 1 access to Port Hacking.

By-law 20 and the challenge to it

10. A special by-law (by-law 20) was purported to be made under s 52 *SSMA*. That by-law provided that the registered proprietors of Lot 1 had the right to store small watercraft within a specified area of Lot 2. That area comprised approximately 15 square metres. It was thus in place from the time the strata plan was registered having been promulgated by the developer. It was never sought, through the owners' corporation, to introduce such a provision later via an amendment to the by-laws; that is to say **after** the creation of the lots in the strata plan.

11. Various disputes arose between the appellant and the first respondent concerning the first respondent's use of the watercraft storage area and the validity generally of by-law 20.

[140593]

12. Subsequent to the failure of mediation to resolve these disputes, the appellant undertook landscaping work on the area designated by by-law 20 as the watercraft storage area. Landscaping encompassed installation of wooden steps, erection of retaining walls and planting of native plants in a constructed earth bank. These works caused the area available for storage to be reduced to approximately 8 square metres and increased the difficulty with which watercraft may be placed in and removed from the storage area.

The dispute in the proceedings below

13. In the proceedings below, the appellant sought a declaration that by-law 20 was *ultra vires* and of no force or effect, and an order restraining the respondents from storing watercraft on Lot 2.

14. The respondents filed a cross-claim, successfully seeking a declaration that by-law 20 was valid and consequential relief, including removal of the wooden steps and retaining wall, and restoration of the watercraft storage area to its former condition.

15. The trial judge considered the principal issue to be the validity of by-law 20 and determined that it was valid as a by-law. His Honour answered the two questions earlier posed in the negative. The trial judge therefore did not have to determine whether, in the event of a finding of invalidity, the appellant was estopped from preventing the respondents storing a boat in the watercraft storage area. This would have been on the basis of certain alleged representations by the appellant and her solicitor in July 2004 indicating that there was no objection on their part to the storage of a small or inflatable boat in that area. The reasoning of that judgment otherwise emerges in the discussion under "Disposition" below.

DISPOSITION

16. By-law 20 is in the following terms:

"The Registered Proprietors for the time being of Lot 1 shall have the right to store small watercraft within the area denoted (A) on the sketch annexed to this instrument."

17. The instrument in question is designated SP 67662 being the relevant strata plan for the two lots.

18. SP 67662 refers to a "

[140594]

right of footway, itself created pursuant to s 88B of the Conveyancing Act 1919 and s7(3) of the Strata Schemes (Freehold Development) Act 1973". That right of footway is in favour of Lot 1 to the rear of Lot 2. As the trial judge made clear at [7], the purpose of the right of footway and of by-law 20 is plain, namely to give the owners of Lot 1 access to the water at Port Hacking and a space on which to store a small boat near the water.

19. The by-law was expressed to be made under s 52 of *SSMA*. It was and remains common ground that that section provided no authority for the by-law. Section 52 provides that an owners' corporation may make by-laws to which Div 4 of Part 5 of Chapter 2 applies if certain conditions are satisfied. That category of by-law relates to the conferment of the right of exclusive use or enjoyment of common property or special privileges in respect of common property, neither being the case here.

20. Nor, as was common ground, was s 46 applicable, relating as it does to by-laws made by an owners' corporation in accordance with a special resolution.

21. The question then became under what source of power was by-law 20 capable of being promulgated. This is when, indubitably,

[140596]

[140595]

by-law 20 purported to create what was in the nature of an easement or restrictive covenant. According to the appellant, the legislature had expressly given that power (to create what was in the nature of an easement or restrictive covenant) by another particular provision, effectively "*in the same instrument*", namely s 88B of the *Conveyancing Act*. Section 88B prescribed with particularity the mode in which that power should be exercised and the conditions and restrictions which must be observed. It thereby was said to exclude the operation of general expressions in the *SSMA*, such as s 43 to achieve the same object.

22. The appellant thus invoked what I have earlier by way of shorthand called the "

[140597]

Anthony Hordern principle". In *Anthony Hordern & Sons Ltd* v *Amalgamated Clothing and Allied Trade Unions of Australia* (supra) an award of the Commonwealth Court of Conciliation and Arbitration granting preference to unionists was struck down. This was on the ground that the provisions of that order did not conform with the conditions which s 40 of the *Commonwealth Conciliation and Arbitration Act 1904* prescribed as regards as giving preference to members of organisations. The question thus becomes whether that principle applies to the by-law-making power under *SSMA*.

23. The relevant provisions of s 88B of the *Conveyancing Act 1919* are set out below:

88B Creation and release of easements, profits à prendre and restrictions on use of land by plans

(1) …… .
(2) A plan shall not be lodged in the office of the Registrar-General for registration or recording under Division 3 of Part 23 unless it indicates in the manner prescribed in respect of the plan by regulations made under this Act or the *Real Property Act 1900*:

(a) what easements, if any, are intended to be created:

(i) burdening land comprised in the plan and appurtenant to any existing roads shown on the plan, and
(ii) appurtenant to any roads to be vested upon registration of the plan,

(b) what easements, if any, referred to in section 88A are intended to be created burdening land comprised in the plan and in whose favour those easements are intended to be created,
(c) what other easements or profits à prendre, if any, are intended to be created appurtenant to or burdening land comprised in the plan, and
(c1) what easements or profits à prendre, if any, appurtenant to or burdening land comprised in the plan are intended to be released or partially released, and
(d) what restrictions on the use of land or positive covenants, if any, are intended to be created benefiting or burdening land comprised in the plan.

(3) On registration or recording under Division 3 of Part 23 of a plan upon which any easement, profit à prendre, restriction or positive covenant is indicated in accordance with paragraph (a), (b), (c) or (d) of subsection (2) then, subject to compliance with the provisions of this Division:

(a) any easement so indicated as intended to be created as appurtenant to any existing public roads shown in the plan or any roads to be vested in the council upon registration of the plan shall be created and shall without any further assurance vest in the council by virtue of such registration and of this Act,
(b) any easement so indicated as intended to be created pursuant to section 88A shall be created and shall without any further assurance vest in the relevant prescribed authority referred to in that section by virtue of such registration and of this Act,
(c) any other easement, profit à prendre or any restriction on the use of land (not being a restriction as to user of the type that may be imposed under section 88D or 88E) so indicated as intended to be created shall:

(i) be created,
(ii) without any further assurance and by virtue of such registration or recording and of this Act, vest in the owner of the land benefited by the easement or profit à prendre or be annexed to the land benefited by the restriction, as the case may be, notwithstanding that the land benefited and the land burdened may be in the same ownership at the time when the plan is registered or recorded and notwithstanding any rule of law or equity in that behalf, and
(iii) not be extinguished by reason of the owner of a parcel of land benefited by such easement, profit à prendre or restriction holding or acquiring a greater interest in a separate parcel of land burdened thereby, and

(d) any restriction on the use of land or positive covenant that is of the type that may be imposed under section 88BA, 88D or 88E and is so indicated as intended to be created takes effect as if it had been so imposed.

……"

24. The plan is to be lodged in the office of the Registrar General for registration or recording of, relevantly, easements or other restrictions on the use of land. Such a plan is one lodged pursuant to Div 3 of Part

[140598]

23 being relevantly s 195A of that Division and Part, but also, relevantly to the present case, includes a plan lodged pursuant to s 7(3) of the *Strata Schemes (Freehold Development) Act 1973*. The latter is in the following terms:

"(3) The provisions of section 88B of the *Conveyancing Act 1919* apply to a strata plan and a strata plan of subdivision in the same way as they apply to a plan referred to in that section relating to land under the provisions of the *Real Property Act 1900*, except in so far as that section authorises the creation or release of easements, or the creation of restrictions on the use of land or positive covenants burdening or benefiting land not under those provisions."

25. The exception above is not applicable this not being old system land.

26. At the time of registration of a strata plan, s 7(3) enables the creation of easements or restrictions on the use of land burdening or benefiting lots or common property in a strata plan. It thereby extends to strata plans the procedure set out in s 88B of the *Conveyancing Act* 1919, so long as the land is held under the provisions of the *Real Property Act 1900*, as is this land; see "Strata Titles" by Neville Moses and others (Thompson Law Book Company) at 603.

27. The authors of the above work explain that the procedure represented a marked improvement on that adopted under the earlier 1961 *Strata Titles Act*. This was in overcoming the considerable delays which were frequently encountered when local councils insisted on the creation of easements **before** approving a strata plan. That usually necessitated the preparation of a further plan and involved delay pending its registration. Because of the terms of s 88B(3)(c), notwithstanding the rules of law or equity to the contrary, the result will not differ should the dominant and servient tenements be vested in the same owner, as is the case where a developer wishes to create restrictions in the nature of easements or restrictive covenants at the inception of the strata plan.

28. The appellant then sought to invoke the Registrar General's supervision of the registration process and the essential requirements for the creation of, relevantly, a restriction on use. The appellant did so in order to establish that the regime with its administrative outworking, under s 88B was a distinct and particular one. This was to demonstrate that s 88B did indeed satisfy the *Anthony Hordern* principle in its detailed prescription of the mode in which the relevant power to register such a restriction is regulated and supervised. The detailed procedure for such registration is set out in "Baalman & Wells Land Titles Office Practice" edited by Ticehurst (LBC) at 397–400. In particular, the restriction must comply with s 88(1) of the *Conveyancing Act* so as to clearly indicate:

> (a) the land to which the benefit of the restriction is appurtenant;
> (b) the land which is subject to the burden of the restriction;
> (c) the persons (if any) having the right to release, vary or modify the restriction other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary or modify the restrictions; and
> (d) the persons (if any) whose consent to a release, variation or modification of the restriction is stipulated for.

29. The way in which restrictive covenants under s 88B may be varied or released is likewise prescribed in some detail; see Baalman and Wells at 401 and following.

30. The appellant's argument invoking the *Anthony Hordern* principle seeks to overcome the difficulty that the *Conveyancing Act* does not constitute the same instrument as the relevant strata titles legislation. She does so by invoking s 7(3) of the *Strata Schemes (Freehold Development) Act* as effectively constituting the one regime in a broad statutory sense.

31.

[140599]

The appellant likewise contends that the power expressed in detailed prescriptive terms in s 88B is to be contrasted with a general power to create by-laws lacking any such detailed prescription under the strata titles legislation.

32. It is however at this point that the argument breaks down. This is because it can be clearly shown that the strata titles legislation creates an alternative mode for creating what is in the nature of an easement or restrictive covenant, with its own detailed prescription distinct from that under the *Conveyancing Act*. That mode has its own quite distinct legal requirements and consequences such as how one alters a particular restriction.

33. In this analysis it must be remembered that the "*Anthony Hordern* principle" is in reality no more than a presumption in aid of construction applicable in construing a particular provision conferring a power as opposed to general provisions of the same instrument which might otherwise confer the same power. It has nothing to say to two particular and distinct sets of provisions conferring distinct though overlapping powers more especially when in different albeit connected statutory instruments.

34. I need to turn to the distinct particularities in mode of exercise of the by-law-making power and in particular to the distinct conditions and restrictions which attend the creation of a by-law purporting to create what is in the nature of an easement or restrictive covenant under the strata titles legislation and specifically *SSMA*.

35. Division 1 of Part 5 of *SSMA* is headed "What by-laws apply to a strata scheme?".

36. Section 41 then deals with new strata schemes in the following terms:

> "**41 What by-laws apply to new strata schemes?**
>
> (1) This section applies to strata schemes that came into existence after the commencement of this section.
> (2) The by-laws in force for a strata scheme are the by-laws adopted by or lodged with the strata plan registered by the Registrar-General for the strata scheme, as in force at the date of lodgment, subject to any amendment, repeal or addition recorded by the Registrar-General under section 48."

37. Section 41 is accompanied by a note in the following terms:

> **"Note**. Section 8 of the *Strata Schemes (Freehold Development) Act 1973* and section 7 of the *Strata Schemes (Leasehold Development) Act 1986* require that when a strata plan is submitted for registration it must be accompanied by the proposed by-laws for the strata scheme. Those by-laws are registered with the strata plan."

38. Section 43 in the same Division, is in the following terms:

> **"43 What can by-laws provide for?**
>
> (1) By-laws may be made in relation to any of the following:
>
> safety and security measures
>
> ……
>
> matters appropriate to the type of strata scheme concerned.
> (2) Subsection (1) does not limit the matters for which by-laws may be made.
>
> ……
> (4) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law."

39. I agree with the trial judge's conclusion that the proposed restriction under by-law 20 did constitute a matter "*appropriate to the type of strata scheme concerned*" (see judgment [38]-[39]). I also agree with the trial judge that s 43(2) could be called in aid were that necessary as extending the scope for by-laws beyond that in the list. Thus there is no threshold difficulty in by-law 20 providing as it does for the right to store small watercraft in the limited area. While it may affect the exercise or enjoyment by the appellant of her land, I do not consider that it is incompatible with the appellant's right of possession; compare *Wright* v *Macadam* [1949] 2 KB 744(CA) and *Copeland* v *Greenhalf* [1952] Ch 488. The area in question is a small one, it allows the continued use by the appellant of the affected area, though subject to the respondent's right to store a small watercraft within the designated area. Thus even were the traditional constraints applicable to easements to be imported to the strata titles legislation, I would not consider this requirement to be contravened that an easement must not be incompatible with the servient owner's right of possession.

40. The

trial judge at [37] sets out what in his view are the only limitations on the power of the owner of land being subdivided by a strata scheme of subdivision after 1 July 1997 to make by-laws:

> "[37] In my view, the only limitations on the power of the owner of land being subdivided by a strata scheme of subdivision after 1 July 1997 to make by-laws are:

(a) the need for the consent of mortgagees and other holders of security under ss 8(4C) and 16 of the Strata Schemes (Freehold Development) Act;
(b) the express restrictions and prohibitions in s 49 of the Strata Schemes Management Act;
(c) the need to avoid inconsistency with any Act or law; and
(d) that the provision is made for a proper purpose and fairly falls within the concept of a by-law, that is, the regulation of the rights and responsibilities of lot owners, occupiers, or the owners corporation, in respect of the lots, or the lots and common property, for the strata scheme."

41. The trial judge then quotes from the second reading speech of the New South Wales Minister for Fair Trading on the introduction of the Bill which became the *Strata Schemes Management Act (Interpretation Act 1987* (NSW), s 34(2)(f)), where in introducing the Bill the Minister said:

"… one of the major initiatives in this Bill is to allow more flexibility in the use of by-laws, and to encourage the adoption of by-laws more appropriate to the nature of individual strata schemes. Too often in the past, bodies corporate simply accepted the by-laws included in the legislation without giving any thought to how well they fitted their scheme …

… there will now be a range of models from which by-laws can be selected depending upon the type of scheme involved. Six models are to be available and these will relate to the special aspects of residential schemes, mixed use schemes, commercial retail schemes, industrial schemes, hotels-resorts and retirement villages. The models will be in the regulations.

The contents of the models will reflect the types of matters which need to be addressed in the various types of strata developments. A strata scheme will not be able to be registered unless one of the models or alternative custom designed by-laws are selected …

I am hoping that there will be a more conscious effort made by developers to tailor by-laws to fit individual circumstances. There is a great opportunity for some innovation and I believe that it will be of great benefit to people if they could buy into a strata scheme where the by-laws reflected particular aspects of that scheme's approach to day-to-day issues. The model by-laws would ensure there is a range of selection available, … However, there will still be room for further refinement where a strata scheme wants to make variations of the models …" (NSW Legislative Assembly, Parliamentary Debates (Hansard), No 254, 13 November 1996 at 5921)."

42. I agree with the trial judge's view that this is confirmatory of there being, as the strata titles legislation indicates, a broad capacity under that legislation to create by-laws, subject only to there being no incompatibility or inconsistency with any Act or law. Thus, the trial judge correctly concludes that certain restrictions in a by-law are precluded by s 49. This exemplifies the distinctness of the regime for by-laws in imposing specific constraints on what by-laws may do. Here by-law 20 would clearly conform to s 49, as it contains no restriction preventing dealings or restricting children or preventing the keeping of a guide dog. Section 49 also precludes a by-law resulting from an order being changed save by unanimous resolution.

43. Section 88B on the other hand is itself a distinct regime where *prima facie* such an easement or restrictive covenant would not be so constrained, save to the extent public policy would intervene.

44. It is significant that under Division 2 headed "How are the by-laws enforced?" s 44 provides as follows:

"**44 Who is required to comply with the by-laws?**

(1) The by-laws for a strata scheme bind the owners corporation and the owners and any mortgagee or covenant chargee in possession (whether in person or not), or lessee or occupier, of a lot to the same extent as if the by-laws:

(a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, lessee and occupier, and
(b) contained mutual covenants to observe and perform all the provisions of the by-laws.

……"

45. The effect of s 44 is to bind those specified including the relevant owners. This is as if the by-laws were the subject of mutual covenants to observe and perform their provisions signed and sealed by the owners' corporation and each owner as well as by mortgagees, etc. That again is distinct from the s 88B regime which actually requires that there be a covenant restricting the use of the servient land and otherwise satisfying the distinct requirements for a valid restriction to which I have earlier made reference.

46. The appellant sought to rely upon s 47 of *SSMA* which is in the following terms:

> "**47 Can an owners corporation add to or amend the by-laws?**
>
> An owners corporation, in accordance with a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property for the strata scheme, make by-laws adding to, amending or repealing the by-laws for the strata scheme."

47. In particular, the appellant contends that, based on the reasoning of the trial judge quoted below, it would follow that if a by-law could operate as a restriction on use of the land when created at the inception of the strata scheme, it could likewise be introduced by an addition or amendment to existing by-laws. It would thus, it is said, operate oppressively on someone who had acquired a strata lot before such addition or amendment took effect. This is what I call a "floodgates" argument.

48. I should quote the reasoning of the trial judge on this matter:

> "[44] By-laws frequently interfere with the rights of property of an owner of a lot. In *Sydney Diagnostic Services Pty Ltd* v *Hamlena Pty Ltd* (1991) 5 BPR 11,432, the Court of Appeal upheld the validity of a by-law which prohibited a proprietor or occupier of a lot from engaging in any enterprise other than the practice of medicine, but excluding the practice of pathology. It was held that the power in s 58(2) of the Strata Titles Act enabling by-laws to be made for the purpose of, inter alia, the use of lots, extended to regulating what activities could and could not be conducted on each lot. The Court (at 11,443 and 11,434) rejected the argument that s 58(2) of the Strata Titles Act (the predecessor to s 47 of the Strata Schemes Management Act) only permitted the making of "non-discriminating by-laws" which equally affected all lots.
> [45] As by-laws may be made which substantially interfere with the right of an owner of a lot to use the lot, it is hard to see why it should be contrary to the "scheme" of the Strata Schemes Management Act for a by-law to confer on one lot owner the right to use part of another lot. It may be that if such a by-law were made by the owners corporation, it could lead to injustice. As the Court of Appeal said of the same argument in *Sydney Diagnostic Services* v *Hamlena*, the remedy against such an injustice may be found in two quarters. One is that an owners corporation can only exercise the power to make a by-law for proper purposes. The second is to be found in the power of an adjudicator to make orders revoking an amendment to a by-law made by an owners corporation pursuant to s 157 of the Strata Schemes Management Act, or orders declaring a by-law made by an owners corporation to be invalid pursuant to s 159 of the Act.
> [46] No question of such an injustice arises in relation to the original by-laws which accompany the registration of the strata plan, as a person who buys a lot in the strata scheme is on notice of the rights and obligations created and imposed. In the present case, the consequence of the by-law being invalid would be a windfall to the plaintiff, who bought her property knowing that her use of it was subject to the rights of the owner from time to time of lot 2 to use the watercraft storage area, and a corresponding detriment upon the defendants who bought their land in the expectation of being able to enforce the rights provided by the by-law."

49. The appellant's argument really amounts to saying that such a by-law could operate oppressively if it could create restrictions on user. The oppression concededly is not from a by-law operating at the inception of a strata plan, since a purchaser would know what he or she was buying. Rather it is said to arise when introduced by later amendment after purchase. The trial judge correctly refuted that contention, pointing to the safeguards available to challenge such an amendment to a by-law. This could be by challenging the amendment as a fraud on the power or as a use of a by-law so amended for other than its proper purpose.

Other safeguards include invoking the power of an adjudicator to make orders revoking such an amendment pursuant to s 157 of *SSMA* or obtaining orders declaring such a by-law as amended to be invalid pursuant to s 159.

50. Finally, I would adopt what is said by the trial judge at [47]–[48] in regard to s 50 of *SSMA*:

> "[47] Section 50 of the Strata Schemes Management Act imposes restrictions on by-laws which may be made by an owners corporation during the "initial period". That is the period commencing when the owners corporation was constituted and ending on the day on which there are owners of lots, other than the original owner, whose unit entitlements are at least one-third of the aggregate of the unit entitlement. Subsection 50(1) provides:
>
> '**50 Restrictions on by-laws during initial period**
>
> (1) An owners corporation must not, during the initial period, make, amend or repeal a by-law in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, owners or in respect of one or more, but not all, lots.'
>
> [48] The implication from s 50(1) is that after the initial period, an owners corporation may make a by-law in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, owners, or in respect of one or more, but not all, lots, if the by-law is otherwise authorised by s 47. It is hard to see why that implication would not extend to authorising an owners corporation making a by-law under s 47 that conferred a right in respect of one lot and imposed a correlative obligation in respect of another lot."

51. In sum, I consider that the *Anthony Hordern* principle does not apply to the present case. Here there are two distinct statutory regimes for the creation of what is in the nature of an easement or restrictive covenant. Each has its own distinct mode of application, subject to distinct conditions and gives rise to distinct consequences affecting, though not radically, attributes of the easement or restrictive covenant created under each regime. Those distinct attributes are illustrated by the greater entrenchment of a s 88B easement or restrictive covenant compared to one created by by-law.

Inconsistency with s 42 of the Real Property Act?

52. Section 42 of the *Real Property Act* relevantly provides:

> "42(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:
>
> …"

There follow five exceptions, none of which is relevant to the present case.

53. I agree with the trial judge's conclusion that the appellant's contention that the by-law is inconsistent with s 42 of the *Real Property Act* cannot be dismissed on the ground that the by-law merely has contractual effect; it clearly represents a proprietary interest.

54. The trial judge, by the reasoning set out below, concluded that:

> (a) there was no relevant inconsistency between the by-law and the Register having regard to the entries made, though these consisted of an entry directing attention to the strata scheme by-laws filed with the strata plan rather than setting these out; and
>
> (b) with the reservation that the matter had not been argued and need not be decided, the statutory contract under s44 of *SSMA* provides an exception to indefeasibility in the same way as personal rights arising from contract between the registered proprietor and a person claiming an interest in land under a contract for the registered proprietor are enforceable, notwithstanding s 42.

55. I set out the trial judge's reasons below:

[65] The plaintiff's estate in lot 2 is therefore subject to such other estates, and to such entries, as are recorded in the folio to her lot. Section 32(1)(c) of the Real Property Act authorises the Registrar-General to record on a folio:

'such particulars, as the Registrar-General thinks fit, of

(i) other estates or interest, if any, affecting the land; and
(ii) other information, if any, that relates to the land or any estate or interest therein and is included in that record pursuant to this or any other Act (including an Act of the Parliament of the Commonwealth) or an instrument made under any such Act.'

These particulars are recorded in the Second Schedule to the relevant folio of the Register (F Ticehurst, Land Titles Office Practice (NSW), 'Folios of the Register', Lawbook Co, 2005 at [205.600]).

[66] The Second Schedule to the folio for lot 2 contains the entry "Interest recorded on registered folio CP/SP67662". The Second Schedule for the folio of the common property, folio CP/SP67662, contains three notifications as follows:

'1. Reservations and conditions in the Crown grant(s)
2. Attention is directed to the strata scheme by-laws filed with the strata plan
3. Deed 280488 land excludes minerals.'

[67] The purpose of the Second Schedule is to record interests or reservations which affect the title to the land. The entry directing attention to the strata scheme by-laws filed with the strata plan is a record made on the folio CP/SP67662 of interests created by the by-laws. It follows that the interest created in favour of the registered proprietors from time to time of lot 1 over lot 2 pursuant to by-law 20 is recorded on the folio to lot 2 and is the subject of the entry on the folio to lot 2. Therefore, there is no relevant inconsistency between the by-law and the Register.

[68] Even if the interest created by by-law 20 was not recorded on the folio to lot 2, or was not the subject of an entry on that folio, it would not follow that by-law 20 was ultra vires, that is, made without power. It would not follow from the omission of the Registrar-General to record that interest on the folio to lot 2 that the by-law was inconsistent with s 42 of the Real Property Act, and therefore invalid because of s 43(4) of the Strata Schemes Management Act. Rather, the question would be whether the plaintiff held her land free of the interest created by the by-law which was not recorded on, or the subject of an entry on, the folio to lot 2. The question would then arise whether the statutory contract under s 44 of the Strata Schemes Management Act provides an exception to indefeasibility in the same way as personal rights arising from a contract between the registered proprietor and a person claiming an interest in land under a contract with the registered proprietor are enforceable, notwithstanding s 42. This matter was not argued, and need not be decided, having regard to my conclusion that the interest created by the by-law is recorded in, or is the subject of an entry upon, the folio to lot 2."

56. The respondent on appeal developed an argument which amounted to a contention that the actual by-law had in fact been "*recorded in the folio*" of the Register within the meaning of s 42(1) of the *Real Property Act*, doing so by reference to an annexures F and H of the affidavit of Mr David Tremain of 11 November 2006, he being a registered surveyor.

57. The respondents contend that by virtue of the relevant provisions including definitions of the *Real Property Act* read with the *Strata Schemes (Freehold Development) Act* and in the events that happened, both the strata plan itself and the instrument by which the special by-law 20 was registered were not only required to be registered in the Register but were both so registered, these constituting annexures F and H to the Tremain affidavit.

58. The steps in this reasoning are as follows. The Register is defined in s 3(1)(a) of the *Real Property Act* as "*the Register required to be maintained by s 31B(1)*".

59. The *Real Property Act* refers to the Register in these terms:

"31B The Register

(1) The Registrar-General shall cause a Register to be maintained for the purposes of this Act.
(2) The Register shall be comprised of:

(a) folios,
(b) dealings registered therein under this or any other Act,

……
(3) The Register may be maintained in or upon any medium or combination of mediums capable of having information recorded in or upon it or them.
(4) The Registrar-General may, from time to time, vary the manner or form in which the whole or any part of the Register is maintained."

60. These provisions should be read with the *Strata Schemes (Freehold Development) Act*, of which ss6(1) and 6(2) read as follows:

"6 Construction of Act

(1) This Act shall be read and construed with the *Real Property Act 1900* as if it formed part thereof.
(2) The Real Property Act 1900 applies to lots and common property in the same way as it applies to other land except in so far as any provision of that Act is inconsistent with this Act or is incapable of applying to lots or common property.

……"

61. I agree that this means that the definition of the "the Register" in the

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Real Property Act will thus apply to folios registered for strata plans, thus linking to s 31B of the *Real Property Act* quoted above which directs the Registrar General to keep a register of folios, dealings and other records.

62. With respect to Torrens Title land generally the Registrar General creates a folio in the Register recording a description of the land to which it relates and certain particulars as to the estate or interest held in the land by the named proprietor or owner, etc; s 32(1).

63. By s 32(2) of the *Real Property Act*, it is provided that s 32(1) does not apply in respect of the folio of the Register constituted under s 22 or s 23 of the *Strata Schemes (Freehold Development) Act*.

64. Section 22 of the *Strata Schemes (Freehold Development) Act* requires the Registrar General to create a separate folio stating that there is no common property, and containing certain other details relating to the administration of a strata scheme, where there is no common property. Section 23 of that same Act requires the creation of a folio for the common property of strata plans where there is common property.

65. It follows that s 32(1) will thus still apply to the folio in the Register for each individual lot in the strata scheme, as there is no exclusion or separate provision in relation to individual lots.

66. I have earlier set out what is comprised in the Register, as distinct from the folio, pursuant to s 31B(2) of the

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Real Property Act. From this it is apparent that it includes both folios and dealings registered under the *Real Property Act* or any other Act. This encompasses the record required to be kept pursuant to s 32(7), being the requirement that the Registrar General "*shall maintain a record of all dealings recorded in, or action taken in respect of, a computer folio, and such other information, if any, relating to the folio as the Registrar General thinks fit*".

67. "*Dealing*" is defined in s 3 of the *Real Property Act* as follows: "*Any instrument other than a grant or caveat which is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act or any Act of the Parliament of the Commonwealth required or permitted to be made*".

68. It follows that both the strata plan itself and the instrument by which the special by-law 20 was registered are required to be registered in the Register. These, as I have said, were so registered as evidenced by the Tremain annexures F and H. The latter contains the actual by-law.

69. I should add that a document recording a by-law, or change of by-law, is under s 48 *SSMA* a "*dealing*": *Mulwala & District Services Club* v *Owners Strata Plan 37724* (2000) 50 NSWLR 458 per Young J.

70. Reverting to s 42 of the *Real Property Act*, exceptions to indefeasibility for a registered property of an estate or interest in land recorded in a folio of the Register include "*such other estates and* ***interests and such entries***, *if any, as are recorded in that folio*" [emphasis added].

71. An interest is sufficiently "*recorded in the folio*" of the Register of the land if the folio states the registration number of the dealing creating it and identifies the interest (if only in generic terms): *Bursill Enterprises Pty Ltd* v *Berger Bros Trading Pty Ltd* (1971) 124 CLR 73 at 77-8, 92-3; see also Butt, "Land Law", 5th edition (2006) para [2079].

72. I should add that Annexure H itself contains a notification of registration at the foot thereof; see Tremain affidavit pp25-6.

73. It follows from the foregoing that even were it insufficient for a Register to merely incorporate by reference a relevant strata scheme by-law filed with the strata plan, a proposition which I would not accept, the registration here did actually include in a folio the interest or entries in respect of by-law

[140605]

20.

74. It is thus not necessary to consider the proposition contained in the judgment at [68] quoted above. This is insofar as it relies upon s 44 of *SSMA* as providing an exception to indefeasibility on the supposition that the Registrar General had omitted to record the relevant interest so as to invoke s 42(1) by reason of the by-law being inconsistent therewith.

OVERALL CONCLUSION

75. I consider that by-law 20 was validly created and that the declarations and orders made in consequence were correctly made.

ORDERS

76. Accordingly I would propose orders as follows:

(1) Leave to appeal granted.
(2) Appeal dismissed.
(3) Appellant to pay the respondent's costs.

77. **McColl JA**: This case concerns the question whether the power to make by-laws in the *Strata Schemes Management Act 1996* (the "Management Act") can be used to confer a right on one proprietor in a strata scheme to use or occupy part of the lot of another proprietor. In this case by-law 20 purported to confer on the respondents the right to use part of the appellant's lot, measuring approximately 15 square metres, to store watercraft.

78. I have had the benefit of reading Santow JA's reasons in draft. I agree with his Honour that leave to appeal should be granted. However I differ with his Honour's proposal as to the disposition of the appeal.

79. In my opinion by-law 20 is invalid. The Management Act does not expressly authorise the

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making of a by-law conferring a right on one proprietor in a strata scheme to use or occupy part of the lot of another proprietor. Nor can the power to make such a by-law be implied.

Legislative framework

80. The long title of the Management Act is "an Act to provide for the management of strata schemes and the resolution of disputes in connection with strata schemes; and for other purposes". The objects of the

Management Act reflect its long title: see s 3. The owners corporation has the principal responsibility for the management of the strata scheme: s 8(2). It is constituted by the owners of the lots from time to time in a strata scheme: s 11(1) and has the functions conferred or imposed on it by or under the Management Act or any other Act: s 12.

81. Part 5 of the Management Act deals with the making of by-laws. It appears in Chapter 2 of the Act which is headed, "Management of Strata Schemes". According to the Introductory Note to Part 5, it "deals with by-laws for a strata scheme governing such things as the behaviour of residents of the scheme and the use of common property". The Note does not form part of the Management Act (s 7), but being set out in the document containing the text of the Act as printed by the Government Printer, may be considered in its interpretation: s 34(2)(a), *Interpretation Act 1987*.

82. Part 5, Div 1 deals with the by-laws which apply to a strata scheme. Pursuant to s 41 the by-laws in force for the strata scheme for lots 1 and 2 were the by-laws adopted by or lodged with the strata plan registered by the Registrar-General for the strata scheme, as in force at the date of lodgement, subject to any amendment, repeal or addition recorded by the Registrar-General under section 48.

83. Part 5, Div 1, s 43 provides:

"**43 What can by-laws provide for?**

(1) By-laws may be made in relation to any of the following:

safety and security measures

details of any common property of which the use is restricted

the keeping of pets

parking

floor coverings

garbage disposal

behaviour

architectural and landscaping guidelines to be observed by lot owners

matters appropriate to the type of strata scheme concerned.
(2) Subsection (1) does not limit the matters for which by-laws may be made.
(3) The regulations may prescribe model by-laws which may be adopted as the by-laws for a strata scheme.
(4) A by-law has no force or effect to the extent that it is inconsistent with this or any other Act or law."

84. Part 5, Div 3 deals with the amendment or repeal of by-laws. Section 47 permits an owners corporation, in accordance with a special resolution, for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property for the strata scheme, to make by-laws adding to, amending or repealing the by-laws for the strata scheme.

85. Part 5, Div 3 also restricts the making of by-laws. Thus s 49(1) provides:

"**Restrictions on by-laws**

(1) By-law cannot prevent dealing relating to lot

No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot."

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86. In addition s 49 provides that by-laws cannot change a by-law resulting from an order made under Chapter 5 (Disputes And Orders Of Adjudicators And Tribunal), cannot prohibit or restrict persons under 18 years of age occupying a lot and cannot prohibit or restrict the keeping on a lot of a dog used as a guide or hearing dog by an owner or occupier of the lot or the use of a dog as a guide or hearing dog on a lot or common property.

87. Section 50(1) provides:

"(1) An owners corporation must not, during the initial period, make, amend or repeal a by-law in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, owners or in respect of one or more, but not all, lots."

88. Part 5, Div 4 makes special provisions for by-laws conferring certain rights or privileges. It enables an owners corporation to make by-laws conferring on the owner of a lot specified in the by-law, or the owners of several lots so specified, (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or (b) special privileges in respect of the whole or any specified part of the common property (including, for example, a licence to use the whole or any specified part of the common property in a particular manner or for particular purposes): s 51(1).

89. A by-law made pursuant to s 51 must provide for the maintenance of the common property as follows:

"54 By-law must provide for maintenance of property

(1) A by-law to which this Division applies must:

(a) provide that the owners corporation is to continue to be responsible for the proper maintenance of, and keeping in a state of good and serviceable repair, the common property or the relevant part of it, or
(b) impose on the owner or owners concerned the responsibility for that maintenance and upkeep.

(2) Any money payable under a by-law to which this Division applies by more than one owner to the owners corporation or to any person for or towards the maintenance or upkeep of any common property is payable by those owners proportionately according to the relative proportions of their respective unit entitlements unless the by-law otherwise provides.
(3) To the extent to which a by-law to which this Division applies makes a person directly responsible for the proper maintenance, and keeping in a state of good and serviceable repair, of any common property, it discharges the owners corporation from its obligations to maintain and repair property under Chapter 3."

90. Title to lots in a strata scheme is dealt with in *Strata Schemes (Freehold Development) Act 1973* (the "Freehold Development Act"), the long title to which is, relevantly, "[a]n Act to facilitate the subdivision of land into cubic spaces and the disposition of titles thereto". The Freehold Development Act enables land, including the whole of a building, to be subdivided into lots, or into lots and common property, by the registration of a plan as a strata plan: s 7(2). The provisions of s 88B of the *Conveyancing Act 1919* apply to a strata plan and a strata plan of subdivision in the same way as they apply to a plan referred to in that section relating to land under the provisions of the *Real Property Act* 1900: s 7(3).

91. Registration of the strata plan creates both the strata title lots comprised therein and any common property: ss 7, 8, Freehold Development Act. Once the strata plan is registered, the common property vests in the owners corporation constituted under s 11 of the Management Act: s 18, Freehold Development Act.

92. Each lot is owned by a proprietor, being the person for the time being recorded in the Register kept by the Registrar-General as entitled to an estate in fee simple in that lot: definition of "proprietor", s 5, Freehold Development Act.

93. A plan intended to be registered as a strata plan must indicate that specified model by-laws prescribed by the regulations made under the Management Act were proposed to be adopted for the strata scheme and that other specified by-laws are proposed to be adopted for the scheme: s 8(4B), Freehold Development Act. If a strata plan indicates that by-laws other than the model by-laws prescribed by the regulations made under the Management Act are to be adopted for the strata scheme, the plan must be accompanied by the by-laws specified: s 8(4C). The by-laws proposed for a strata scheme have no effect until the strata plan (and any proposed by-laws that are required to accompany it) are registered, however, registration does not give effect to by-laws that were not lawfully made: s 8(4D), Freehold Development Act.

94. At the time Strata Plan 67662 was registered, the model by-laws for different types of strata schemes were set out in Schedule 1 of the *Strata Schemes Management Regulation 1997* (see now cl 27, Sch 1 – 6, *Strata Schemes Management Regulation 2005*). The model by-laws for residential schemes were adopted on the registration of the strata plan for lots 1 and 2: see SP67662, Sheet 1 of 4. Those by-laws largely dealt with behavioural matters such as noise, parking of vehicles, appearance of lots. Clause 19 provided:

"

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19 Provision of amenities or services

(1) The owners corporation may, by special resolution, determine to enter into arrangements for the provision of the following amenities or services to one or more of the lots, or to the owners or occupiers of one or more of the lots:

(a) window cleaning,
(b) garbage disposal and recycling services,
(c) electricity, water or gas supply,
(d) telecommunication services (for example, cable television).

(2) If the owners corporation makes a resolution referred to in clause (1) to provide an amenity or service to a lot or to the owner or occupier of a lot, it must indicate in the resolution the amount for which, or the conditions on which, it will provide the amenity or service.

Note: Section 111 of the Act provides that an owners corporation may enter into an agreement with an owner or occupier of a lot for the provision of amenities or services by it to the lot or to the owner or occupier."

95. I will return to the significance of this by-law.

Statement of the case

96. The facts are not in dispute and can be reproduced from the reasons of the primary judge, White J: *White* v *Betalli & 1 Or* [2006] NSWSC 537; (2006) 66 NSWLR 690 (at [2] – [19]):

"**Background**

2 Strata plan SP 67662 was registered on 11 April 2002 by a Mr and Mrs Thompson. The strata plan divided land then known as lot 36 in DP 215533 at Marina Crescent, Gymea Bay, into two strata lots. The plaintiff owns lot 2 in SP 67662. The defendants own lot 1. A house is constructed on each lot.

3 The two lots lie between Marina Crescent to the west and Port Hacking to the east. The northern boundary of both lots abuts a reserve. Lot 1 is the higher lot, with street frontage to Marina Crescent. It lies to the west of lot 2. Lot 2 is the lower lot, with frontage to Crown land at mean high watermark and thence to the water. There is a right of footway in favour of lot 1 to the rear, or eastern end, of lot 2. The rear of lot 2 is steeply sloping ground. From its boundary at mean high watermark there is a strip of Crown land. This was formerly grassed

and is now partially landscaped. On this land there is a seawall dividing the land and the water at Port Hacking.
4 The strata plan adopted residential model by-laws 1–19, plus two special by-laws, 20 and 21. These by-laws were said to be made under s 52 of the *Strata Schemes Management Act 1996* (NSW). The present dispute concerns by-law 20. It provides:

> "The registered proprietors for the time being of lot 1 shall have the right to store small watercraft within the area denoted (A) on the sketch annexed to this instrument."

5 The area denoted "A" abuts the Crown land at mean high watermark at its eastern end. This boundary is irregular in shape. The northern boundary of the area marked "A" coincides with the boundary of lot 2 and extends four metres. The western boundary of the area is three metres long. Its southern boundary is over four metres long, reflecting the irregular eastern boundary. A copy of a survey sketch of the area is attached to these reasons. All of the area denoted "A" on the sketch annexed to the by-law is on lot 2.
6 The owner of lot 1 has access to the watercraft storage area via the right of footway. At the eastern end of lot 2, the right of footway extends across the whole of the lot, except for a boatshed which is on the south-eastern corner of the lot. This boatshed belongs to lot 2, save for a portion of it which encroaches onto Crown land below the mean high watermark. That portion of the boatshed is common property. By-law 21 provides that the portion of the boatshed that extends beyond the mean high watermark is for the exclusive use, and is to be maintained by, the registered proprietor of lot 2.
7 The purpose of the right of footway and of by-law 20 is plain. The purpose is to give the owners of lot 1 access to the water at Port Hacking, and a space on which to store a small boat near the water.
8 Lot 2 is known as 2 Marina Crescent, Gymea Bay. The plaintiff bought this property on or about 13 April 2002. Lot 1 is known as 2A Marina Crescent. This land was initially bought in or about August 2002 by a Mr and Mrs Dedda. On or about 31 March 2004, the defendants exchanged contracts to purchase lot 1 from Mr and Mrs Dedda. They moved into the property on 29 June 2004.
9 After they moved in, the first defendant, Mr Betalli, put a 3.5 metre boat and trailer in the watercraft storage area. The trailer was connected to a sapling by a winch. The plaintiff and her husband objected to this, pointing out that there was no right to store a trailer. The plaintiff also complained that the boat and trailer extended outside the storage area and were not stored safely. On 16 July 2004, the solicitors for the plaintiff, Benetatos White, wrote to Mr Betalli. They contended that the boat then stored on lot 2 was not a small watercraft but a medium sized boat. They demanded that the defendant remove the boat, the trailer and the winch. Benetatos White also stated that the plaintiff had no issue with the storage of small watercraft by Mr Betalli in accordance with the terms of by-law 20.
10 After receiving this letter, Mr Betalli asked the plaintiff if she would have any objection to an inflatable boat being put in the watercraft storage area. She said she did not, provided the boat fitted in the designated area, was safe, and did not cause damage.
11 Following this conversation, Mr Betalli purchased an inflatable boat.
12 On 8 August 2004, the boat and trailer then being stored in the watercraft storage area were removed. In about late August 2004, the inflatable boat was put in the watercraft storage area and secured to a tree. The plaintiff's husband helped with this.
13 It might have been hoped that this would be the end of the issue. However, that was not the case.
14 In December 2004, the plaintiff advised Mr Betalli that she had received a letter from the Department of Lands indicating that the by-law for the storage of the boat was invalid, because it was on her property and not common property. She advised him that she proposed to call an annual general meeting of the body corporate so that the by-law could be removed. On 27 January 2005, she convened that meeting. The meeting was held on 12 February 2005. However, the resolution to repeal by-law 20 on the ground of its not being valid was not passed. The defendants voted against that resolution.
15 A mediation was held on 5 May 2005, but it failed to resolve the dispute.

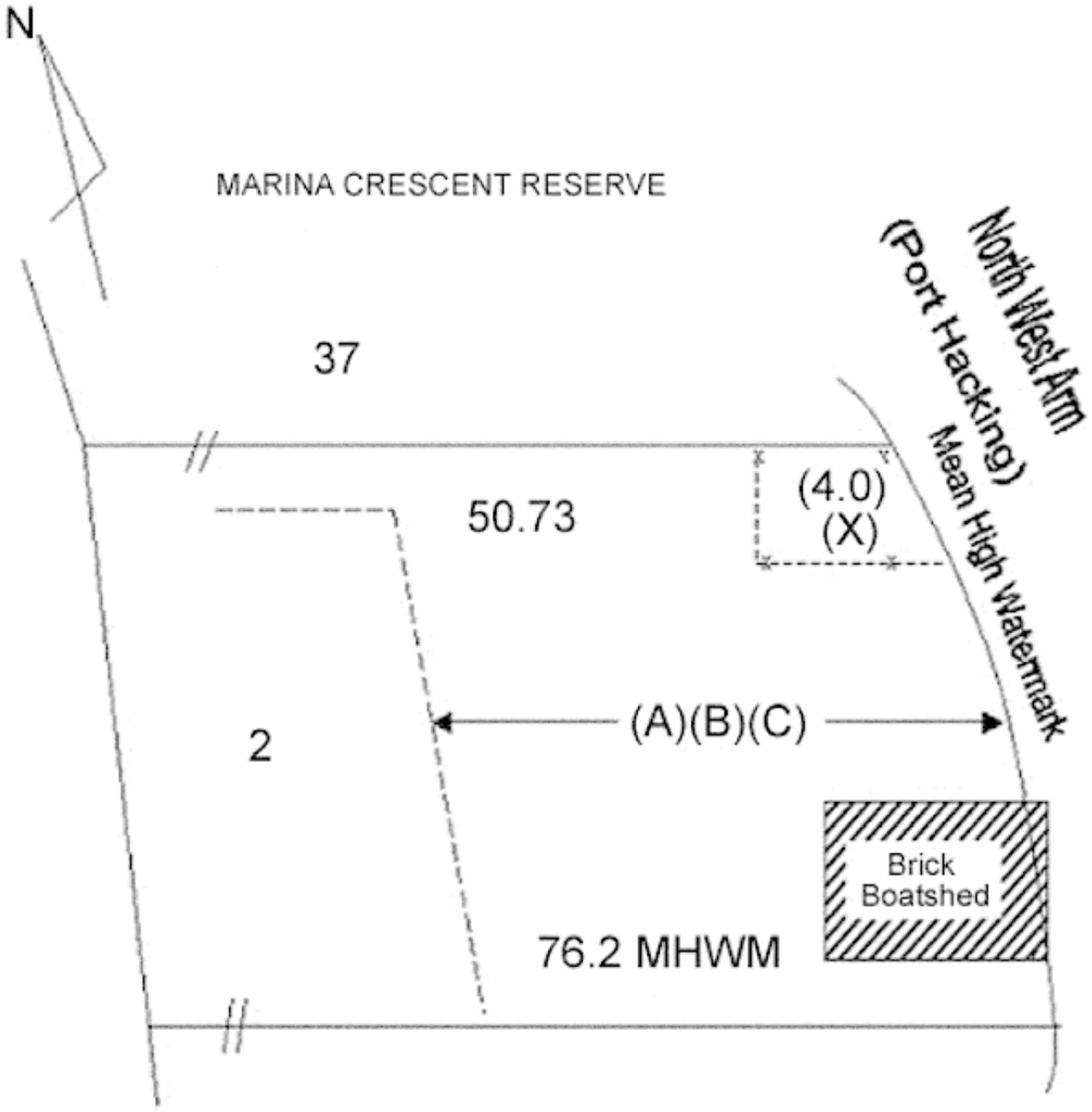
16 On the weekend of 4 and 5 June 2005, without prior notice, the plaintiff caused a retaining wall to be constructed in the watercraft storage area. At or about this time, she also caused steps to be built extending down to the water's edge. These were wooden steps which joined up with existing concrete steps. However, the steps also extended into the watercraft storage area. Associated with these works, the plaintiff carried out landscaping work, involving the construction of an earth bank on which native plants were planted, and which appears then to have been covered with wood chips. This work was done partly on the watercraft storage area and partly on the Crown land.

17 The result of these works is that the area which can physically be used for the storage of watercraft has been substantially reduced. Before the work was carried out, the watercraft storage area was about fifteen square metres. It was a grassed area which extended at its southern edge to the bottom concrete step. At its eastern edge, which was the boundary of lot 2, there was an earth and grass bank which led over the grassed strip of Crown land to the seawall. After the work was carried out, the effective area for storing a boat was effectively the area within the retaining walls. These walls were about 0.6 metres high and were positioned well inside the watercraft storage area. They extended about 0.7 metres into the adjacent reserve so that the practical storage space extended into the reserve and outside the boundary of lot 2. Within the confines of lot 2, the area now physically available for the storage of a boat is limited to an area of about four metres by two metres.

18 The construction of the retaining wall and steps, and the landscaping, has made it more difficult for a boat to be taken down to the water from the watercraft storage area. A boat now has to be lifted over the retaining wall and across the garden which has a steeper incline than existed previously as a result of the earth fill which has been put on the site. The plaintiff said in evidence that there has been no change in the incline, but I do not accept this evidence. The change is apparent from the photographs.

19 Mr Betalli continued to store the inflatable boat in the watercraft storage area until November 2005. After the construction of the retaining wall and the steps in June 2005, it was difficult to drag the boat over the retaining wall and down to the water and back again without assistance. In November 2005, he replaced that boat with a 3.5 metre aluminium boat because the inflatable had a deflated keel and floor."

97. Lot "A" (albeit identified by the letter "X") was set out in the plan reproduced below which was attached to the primary judge's reasons:



(A) - EASEMENT TO DRAIN WATER VARIABLE WIDTH
(B) - EASEMENT FOR SERVICES VARIABLE WIDTH
(C) - RIGHT OF FOOTWAY VARIABLE WIDTH
(X) - WATERCRAFT STORAGE AREA - VIDE SPECIAL BY-LAW 20 SP 67662

98. In the proceedings the appellant claimed a declaration that by-law 20 was ultra vires and of no force or effect and an order restraining the respondents from storing watercraft on lot 2. The respondents filed a cross-claim seeking a declaration that the by-law was valid and consequential relief, including an order that the appellant be required to remove the wooden steps and retaining wall constructed in the watercraft storage area, and restore that area to its former condition.

99. It was common ground before the primary judge, and in this Court, that no section of the Management Act expressly conferred power on the owner of land to be subdivided into a strata scheme to make by-laws: primary judgment at [33]. The primary judge concluded that that power was to be inferred from the combination of ss 41 and 43 of the Management Act and s 8(4C) of the Freehold Development Act: see primary judgment at [33] – [36].

100. After referring to those provisions, the primary judge concluded (at [37]):

> "[T]he only limitations on the power of the owner of land being subdivided by a strata scheme of subdivision after 1 July 1997 to make by-laws are:
>
> (a) the need for the consent of mortgagees and other holders of security under ss 8(4C) and 16 of the *Strata Schemes (Freehold Development) Act*;
> (b) the express restrictions and prohibitions in s 49 of the *Strata Schemes Management Act* ;
> (c) the need to avoid inconsistency with any Act or law; and
> (d) that the provision is made for a proper purpose and fairly falls within the concept of a by-law, that is, the regulation of the rights and responsibilities of lot owners, occupiers, or the owners corporation, in respect of the lots, or the lots and common property, for the strata scheme."

101. He held (at [38]) that the subject matter of by-law 20, the provision of a storage area for small watercraft for the benefit of the upper lot, was an appropriate matter to be regulated by a by-law (s 43(1)). In his Honour's opinion (at [38]) whether or not by-law 20 was authorised under s 43(1) of the Management Act being "in relation to … matters appropriate to the type of strata scheme concerned", it would be valid, provided it was not inconsistent with s 49, or any other Act or law: see s 43(4).

102. His Honour (at [39]) did not consider that s 43(1) should be construed

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narrowly or at too high a degree of generality. Thus, in his view:

> "The present strata scheme could be classified as a residential scheme of a type, being a subdivision of land next to water into a small number of residential lots and common property. The storage of boats belonging to the occupier of any lot in such a subdivision is a matter appropriate to that type of scheme."

103. The primary judge then turned to determine whether by-law 20 was inconsistent with any other provision of the Management Act, or any other Act or law. He opined (at [40]) that if by-law 20 was not authorised by s 43(1), that subsection was "not an exhaustive statement of the power of the original owners to make by-laws to accompany the registration of the strata plan and the by-law is otherwise within the scope and object of the Act." His Honour did not identify any other source of power for original owners to make by-laws to accompany the registration of the strata plan. The argument has proceeded in this Court on the basis that ss 41 and 43 were the critical provisions to which regard should be paid in determining the validity of by-law 20.

104. His Honour found confirmation (at [41]) for his view in the Second Reading Speech of the New South Wales Minister for Fair Trading on the introduction of the Bill which became the Management Act (New South Wales Legislative Assembly, *Parliamentary Debates*, (Hansard) 13 November 1996, 5916 at 5921). In her speech the Minister elaborated on the proposition that:

> "… one of the major initiatives in this Bill is to allow more flexibility in the use of by-laws, and to encourage the adoption of by-laws more appropriate to the nature of individual strata schemes."

105. The primary judge then considered s 47 of the Management Act, on the premise (at [42]) that there was no reason to think that the power of the original owner to make by-laws which accompany the strata plan on its registration should be any narrower than the power of the owners corporation to make by-laws. He noted (at [44]) by reference to the decision in *Sydney Diagnostic Services Pty Ltd* v *Hamlena Pty Ltd* (1991) 5 BPR 11,432 that "by-laws frequently interfere with the rights of property of an owner of a lot", then observed:

> "45 As by-laws may be made which substantially interfere with the right of an owner of a lot to use the lot, it is hard to see why it should be contrary to the 'scheme' of the *Strata Schemes Management Act* for a by-law to confer on one lot owner the right to use part of another lot."

106. His Honour also implied (at [48]) from s 50 that after the initial period an owners corporation may make a by-law in such a manner that a right is conferred, or an obligation imposed, on one or more but not all owners, or in respect of one or more but not all lots, if the by-law is otherwise authorised by s 47. He concluded that "[i]t is hard to see why that implication would not extend to authorising an owners corporation making a by-law under s 47 that conferred a right in respect of one lot and imposed a correlative obligation in respect of another lot."

107. Finally the primary judge (at [50]) inferred that, but for the restrictions in s 49(1), a by-law could be made which would have the effect of doing any of the things which that section prohibits, an inference reinforced by *Hamlena Pty Ltd* v *Sydney Endoscopy Centre Pty Ltd* (1990) 5 BPR 11,436 where Young J (as his Honour then was) said of the equivalent provision in the *Strata Titles Act 1973* (the "1973 Act"):

> "S 58(6) prevents a by-law being made which would restrict the devolution of a lot. This subsection seems to me to envisage the possibility that were it not for its existence, there would be power within s 58 to pass a by-law limiting the right to assign a lot."

108. The primary judge concluded (at [51]) that:

> "51 If, but for s 49(1), a by-law could validly restrict the transfer or lease of a lot, *there cannot be anything intrinsically wrong in a by-law interfering with the property rights of an owner in fee simple of a lot*." (emphasis added)

109. The primary judge accordingly held that by-law 20 was validly made pursuant to s 43 of the Management Act and, therefore, enforceable. He also held that the construction and landscaping work undertaken by the appellant within the watercraft storage area was done in breach of the by-law. He ordered the appellant to remove the wooden steps and the retaining wall and restore the watercraft storage area to its former condition. He also restrained the appellant from preventing or impeding the cross-claimants from storing small watercraft within the watercraft storage area.

110. The primary judge's conclusions meant it was unnecessary to determine the respondents' alternative claim to be entitled to store their boat on the subject area by reason of the appellant being estopped from departing from her representations that the defendants could use the watercraft storage area to store a boat, provided the boat was a small watercraft which fitted within the storage area and did not cause damage: see primary judgment (at [70] – [73]). The respondents have not sought to agitate the estoppel argument in this Court by way of Notice of Contention.

Submissions on appeal

111. Mr B W Rayment of Queens Counsel, who appeared for the appellant on appeal with Mr R Tregenza, but not below, advanced two principal submissions. The first was that by-law 20 was a nullity by virtue of the principle enunciated in *Anthony Hordern & Sons* v *Amalgamated Clothing & Allied Trades Union of Australia* [1932] HCA 9; (1932) 47 CLR 1.

112. Mr Rayment submitted that the application of the *Anthony Hordern* principle had the consequence that the specific power to create easements in s 88B of the *Conveyancing Act 1919* precluded the creation of an easement using the general power in s 43 of the Management Act.

113. Mr Rayment acknowledged that there might be doubt about whether the interest created by by-law 20 was an "easement strictly so-called" but contended that even if it was not, it created an interest within s 88B(2)(d) of the *Conveyancing Act*. He contended that by-law 20 created both a restriction on the use of lot 2 as it prevented the appellant from building structures in the watercraft storage area which interfered with the respondents' right of storage and amounted to a positive covenant to permit the respondents to bring a boat onto the appellant's land and leave it there.

114. Mr P Gray of Senior Counsel who appeared for the respondents with Ms P Koroknay, submitted that it was debateable whether the right by-law 20 created was capable of being created by an easement. He referred to *Copeland* v *Greenhalf* [1952] Ch 488.

115. Next he contended that, in any event, the appellant's attempt to invoke the *Anthony Hordern* principle must fail first, because this was not a case of comparing a general and a specific power, but of comparing

2 specific powers and secondly, because the powers referred to were not in "the same instrument". He accepted, however, that the power

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to create easements for the purposes of strata schemes was part of the same legislative scheme as the power to create by-laws.

116. Mr Rayment's second argument was that by-law 20 was invalid because the power to make by-laws in the Management Act could not be used to confer a right on the respondents to use and occupy part of the appellant's lot.

117. Mr Gray submitted that this Court had already ruled in *Sydney Diagnostic Services Pty Ltd* v *Hamlena Pty Ltd* that an owners' corporation could make by-laws which restricted the occupation a lot owner could carry on from one or more but not all lots in a strata plan. He contended that by-law 20 was another illustration of the valid exercise of that power. He also argued that the appellant's submissions failed to acknowledge the High Court's recognition of the power of a body corporate "to interfere with the rights of proprietors in respect of their lots" by means of by-laws, relying upon *Humphries* v *Proprietors Surfers Palms North Group Titles Plan 1955* [1994] HCA 21; (1994) 179 CLR 597 at 615 per McHugh J.

118. Mr Gray also argued that it could be inferred from the fact that s 50 restricted the making of a by-law during the initial period which conferred a right or imposed an obligation on one or more, but not all, owners or in respect of one or more, but not all, lots, that after the initial period an owners corporation could make such by-laws. *A fortiori*, he contended, so too could a developer under s 43 at the stage of the original lodgement of the strata plan.

Validity of by-law 20

119. The effect of the primary judge's ruling is that the appellant is not permitted to do anything on the watercraft storage area that might prevent or impede the respondents from storing small watercraft there. The respondents can store watercraft on the watercraft storage area in a manner that precludes the appellant from having physical access to that part of her land. A logical extension of his Honour's ruling is that she cannot enter the watercraft storage area if her entry interferes with the respondents exercising their by-law 20 rights.

120. By-law 20 effectively, therefore, confers exclusive use and enjoyment of the watercraft storage area on the respondents. It does not confer any benefit on the appellant. She has no right to use that section of lot 2, save, it might be assumed, that she has a "right", probably better expressed as a "duty", to maintain it to ensure its continued availability to the respondents to store watercraft. Thus she is burdened with the costs of maintaining that part of her lot for the respondents' advantage.

121. In my opinion nothing in the Management Act, or in the history of strata title legislation, supports the conclusion that the by-law making powers permit a by-law to be made which has this effect.

122. Strata title involves the ownership of individual parcels (lots) of floor and airspace. The concept was pioneered in the *Conveyancing (Strata Titles) Act 1961* (the "Strata Titles Act"), the long title to which was, relevantly, "An Act to facilitate the subdivision of land in strata and the disposition of titles thereto". It was intended to "give a satisfactory system of title to a flat or a home unit": Second Reading Speech to the Conveyancing (Strata Titles) Bill, New South Wales Legislative Assembly, *Parliamentary Debates*, (Hansard) 21 February 1961 at 2524.

123. The Strata Titles Act was passed at a time when "absolute ownership of flats in the sense that one may 'own' a cottage", did not exist: *Strata Titles*, A F Rath, P J Grimes and J E Moore, The Law Book Company Ltd, 1966, ("Rath et al", at p xi). According to Macfarlan J's Foreword, Mr Rath and Mr Grimes were associated with the drafting of the Strata Titles Act, "practically from the beginning". Rath et al pointed out that before the Strata Titles Act was passed, "a variety of schemes existed calculated to secure to flat-dwellers the nearest practical equivalent to ownership". All had their disadvantages. Home-unit companies systems, for example, the most common scheme associated with flat-ownership, whereby ownership of specified shares carried with it the right to occupy particular parts of a building, fell short of giving the practical equivalent to ownership. Courts would not recognise the shareholder as the owner of his or her flat

and, accordingly, the owner could not pursue the normal legal remedies of a land-owner, such as trespass, ejectment etc: Rath et al (at xii); see also *Tittman* v *Traill* (1957) 74 WN (NSW) 284; *Wilson & Anor* v *Meudon Pty Ltd & Anor* [2005] NSWCA 448 per Bryson JA (at [61] – [65]).

124. The committee which drafted the Strata Titles Act identified two problems it was expected to solve. First, to provide conclusive title for various parts of a building and secondly, and consequentially, to formulate a code for living in close community: Rath et al, at xiii. It was the latter problem which the drafters described as the "harder, by far" and which they sought to regulate by what they described as "house-rules" but, which, in the Strata Titles Act, were called "by-laws": Rath et al, at xiv, 31.

125. The Strata Titles Act enabled certificates of title to issue for individual parcels (lots) of floor and airspace in buildings shown on a registered strata plan: s 3(1). While the central concept of strata schemes is the ownership by individual proprietors of the cubic space within a building forming part of the parcel to which a strata scheme relates, as in the case of the present strata scheme, a lot may also include land: s 7(2), Freehold Development Act; see also *Woollahra Municipal Council* v *Local Government Appeals Tribunal & Renwyn Pty Ltd* 1975] 2 NSWLR 594.

126. Land in a strata plan that was not comprised in a lot was common property: s 2. The common property was held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective lots: s 9(1).

127. The strata title building was regulated by by-laws providing for the control, management, administration, use or enjoyment of the lots and the common property and had to include the by-laws in the First and Second Schedules: ss 13(1) and (2), Strata Titles Act. In their notes to s 13, Rath et al observed (at 31):

> "The management of the building is achieved by two means, first the setting up of a controlling body [the body corporate, s 14] and secondly the provision of rules, known as by-laws, relating to the structure of the controlling body *and the general administration of the building*." (emphasis added).

128. The First Schedule by-laws dealt with duties of the proprietor of a behavioural nature (repairing and maintaining lots, not using the lot in a manner which would cause a nuisance or a hazard to another occupier), duties of the body corporate and procedural matters relating to the body corporate. Clause 3(f) enabled the body corporate to grant a proprietor the right to exclusive use and enjoyment of common property, or special privileges in respect thereof, a power continued in Ch 2, Pt 5, Div 4 of the Management Act. The Second Schedule constrained a proprietor from using his lot for any illegal or injurious purpose, from making undue noise and from keeping pets if forbidden by the body corporate.

129. Section 13(3) provided, in substantially the same terms as s 49(1) of the Management Act, that a by-law could not prevent a dealing relating to lots. In an article written after the Strata Titles Bill had passed the first reading stage in the Legislative Assembly and while the second reading had been deferred to permit public comment, Rath described s 13(3) as a "fundamental provision" intended to ensure "that no alteration of the by-laws shall be capable of changing the structure of strata titles as virtually equivalent to surface titles": A. F. Rath, "Strata Titles in New South Wales", (1961) 3 *Sydney Law Review* 316 (at 320).

130. This brief description of the Strata Titles Act and the historical context in which it was enacted identifies the central constructs on which it is based. Lot proprietors were to have title to their lot, whether it be the cubic space within the building to which the strata scheme related or any land which formed part of their lot. By-laws were to be used to regulate the management of the building in the common interest of the proprietors. These core constructs have been continued as strata title legislation has evolved.

131. The Strata Titles Act was repealed by the *Strata Titles Act 1973* (the "1973 Act") which was passed, at least in part, to expand strata titles law to provide for day to day management issues arising in strata title schemes: *Review of the Strata Titles Act 1973*, Issues Paper, Strata Titles Act Review Committee, March 1992, at 3 (the "Issues Paper"). Section 58, the by-law making power, appeared in Part 4 dealing with "Management". Save as provided in s 58, the by-laws in Schedule 1 to the 1973 Act were the by-laws in force in respect of each strata scheme: s 58(1).

132. By-laws 1–11 in Schedule 1 dealt with procedural matters relating to the body corporate. By-laws 12 – 29 considerably expanded the 1961 by-laws dealing with behavioural issues. They were substantially reproduced in the model by-laws for residential schemes adopted by the Strata Schemes Management

Regulation 1997. In *Hamlena Pty Ltd* v *Sydney Endoscopy Centre Pty Ltd* (at 11,440) Young J (as his Honour then was) observed that to the extent the by-laws in Schedule 1 did not deal with the administration of the body corporate or the common property, "[they] related to conduct within a lot, that … would have some impact on the owners as a whole, but that is as far as one could take the matter."

133. Section 58(2), subject to an exception not presently relevant, enabled the body corporate, by special resolution, to make by-laws adding to, amending or repealing the by-laws in Sch 1 for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property the subject of the strata scheme.

134. Section 58(7) enabled the body corporate to grant a proprietor the right to exclusive use and enjoyment of whole or any specified part of the common property, or special privileges in respect thereof, on conditions (including the payment of money, at specified times or as required by the body corporate, by the proprietor or proprietors of the lot or lots concerned) specified in the by-law common property. An exclusive use by-law had to specify who was to be responsible for the maintenance of the common property to which it related: s 58(7A). The characterisation and construction of an exclusive use by-law relating to common property made pursuant to s 58(7) has been discussed recently in *The Owners of Strata Plan No 3397* v *Tate* [2007] NSWCA 207 at [34] ff.

135. In 1992 the Strata Titles Act Review Committee was established to review the management and disputes provisions of the 1973 Act. It was briefed to identify "the limitations of strata title law in adequately addressing the changing nature of modern strata schemes": Issues Paper at 2.

136. Several aspects of the *Report of the Strata Titles Act Review Committee* (March 1993) deserve mention. First, the Committee noted (at 21) that "the twenty-nine standard by-laws… cover the behavioural issues that decide whether a strata scheme is a desirable place to live in" and pointed out that "[m]ost disputes arising in strata schemes are about alleged breaches of the by-laws". It recommended (at 42 – 43) that the Act allow for compulsory and optional by-laws, and the development of model by-laws. To the extent the Report looked at specific by-laws, the two that occupied its attention were the keeping of animals, described as a "divisive and emotional issue", and the by-law on parking. I observe, parenthetically, that had by-laws been passed by that stage with the effect of by-law 20, one might infer the power to do so would have ranked at least equal to, if not above, concerns about keeping pets. Secondly, the Committee observed (at 42) that "reconstruction of the Act is likely to result in the standard by-laws being more logically located in the legislation". Finally, the Committee observed (at 42) that a requirement that by-laws be included when the strata plan was being developed, would ensure that "the model by-laws are properly used by developers."

137. The Issues Paper (at 16) identified the question whether the 1973 Act should be separated into two Acts, one dealing with title aspects and the other with management and disputes, for consideration. Although the Final Report did not refer to this issue, it was plainly adopted. The Management Act separated the provisions of the 1973 Act dealing with development and subdivision issues, from the provisions of the 1973 Act dealing with the management and administration of strata schemes. At the time the Management Act was passed the 1973 Act was re-named the *Strata Schemes (Freehold Development) Act 1973* on and from 1 July 1997: *Strata Schemes Management (Miscellaneous Amendments) Act* 1996, Sch 2.30; and see *Ridis* v *Strata Plan 10308* [2005] NSWCA 246; (2005) 63 NSWLR 449.

138. The significance of the amendments effected by the Management Act and its separation from the provisions of the 1973 Act dealing with development and subdivision issues was explained by the responsible Minister in the Second Reading Speech to the Strata Schemes Management Bill (New South Wales Legislative Assembly, *Parliamentary Debates*, (Hansard) 13 November 1996, at 5916):

> "A large segment of the New South Wales community is affected in some way by this legislation, either living in, owning or managing a strata title property. The benefits of this revised legislation will be far-reaching. There are now about 45,000 schemes housing perhaps a million people, and it is clear how significant these new laws are going to be. It is expected that a high proportion of all residential buildings constructed over the coming decades will reflect the tendency towards urban consolidation, and strata title is likely to be used in respect of smaller parcels of land … *Even the title of this Bill is significant. It is made clear by the use of the title Strata Schemes Management Bill, that this bill deals with the management and administration of strata schemes rather than the development and*

subdivision issue…. The management and dispute provisions will now stand alone under a separate statute. This will reduce confusion among the public on who administers the laws applying to quite different aspects of strata title schemes." (emphasis added)

139. It should be noted that while the owners corporation is the occupier of the common property by virtue of its management and control of the use of that area (s 61(1)(a); *Puflett* v *Proprietors of Strata Plan No 121* (1987) 17 NSWLR 372 at 375 per Lee J), the Management Act does not confer any express role on it in relation to a proprietor's use of the lot or lots owned by that person. It is "a statutory corporation, created by Act of Parliament for a particular purpose [and] is limited, as to all its powers, by the purposes of its incorporation as defined in that Act": *Humphries* v *Proprietors Surfers Palms North Group Titles Plan 1955* (at 604) per Brennan and Toohey JJ.

140. As Rath et al observed (at 3) of a body corporate, "[i]t is merely a statutory body comprising all lot proprietors and acting as a convenient agent to administer their common interests". That observation is equally applicable to an owners corporation.

141. The Management Act created a more comprehensive regime for by-laws in Ch 2, of the Management Act, headed "Management of Strata Schemes". That heading is taken to be part of the Management Act: s 35, *Interpretation Act*. The Introductory Note to Pt 5, specifies that it "deals with by-laws for a strata scheme governing such things as the behaviour of residents of the scheme and the use of common property" as well as "procedural requirements for the making of certain by-laws and [their] amendment or repeal". Section 43 enumerates the matters for which by-laws may provide. Section 49 specifies matters which cannot be dealt with in by-laws. Section 50 imposes restrictions on the by-laws which can be made during the initial period. Those provisions govern the power to make by-laws whether by a developer before the registration of the strata plan, or following its registration, by an owners corporation.

142. Most of the matters specified in s 43 deal with the behavioural issues which have been part of strata title scheme by-laws since 1961. However there are three new matters. First, the power to make a by-law in relation to the "details of any common property of which the use is restricted". Secondly, the provision permitting by-laws in relation to "matters appropriate to the type of strata scheme concerned" and thirdly, s 43(2) providing that subs 43(1) does not limit the matters for which by-laws may be made. The last two items were clearly inserted to give effect to the Review Committee's recommendation that there should be greater flexibility in by-laws. They are, it must be conceded, expressed in extremely general terms, as, too is the power (s 47) to make by-laws for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property for the strata scheme and the inhibition in s 50 on making by-laws conferring a right or imposing an obligation on one or more, but not all, owners or in respect of one or more, but not all, lots.

143. However even general words should not be construed without limitation, if to give them their "wide prima facie meaning would lead to results that would be contrary to the manifest policy of the Act looked at as a whole or would conflict with the evident purpose for which it was enacted": *Quazi* v *Quazi* [1980] AC 744 (at 808) per Lord Diplock, cited with approval by Spigelman CJ in *Deputy Commissioner of Taxation* v *Clark* [2003] NSWCA 91; (2003) 57 NSWLR 113 at [129]; see also *R* v *Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 (at [23] – [29]) per Spigelman CJ.

144. There is no express provision in the Management Act authorising a by-law which confers a right on one lot proprietor to use another proprietor's lot. In my opinion the general words in the provisions to which I have referred do not authorise such a by-law. The primary judge's conclusion that the power to make by-laws can be used to confer a right on one proprietor in a strata scheme to use or occupy part of the lot of another proprietor is inconsistent with the Management Act, both with its express terms and with its manifest and evident purpose.

145. The purpose of the Management Act was to permit owners corporations to manage strata schemes as a whole, not to confer rights on one proprietor at the expense of another. That purpose was emphasised in the Second Reading Speech. It can be discerned from the long title to the Act, the heading to Chapter 2 in which the by-law making provisions appear in Pt 5 and in the Introductory Note to Pt 5. It is consistent with the legislative history of strata titles legislation.

146. Returning to s 43, it is notable that the legislature thought it necessary to insert the power in s 43(1) to make a by-law in relation to the "details of any common property of which the use is restricted". In my opinion that indicates that the legislature thought it necessary to specify that head of by-law power to validate such a by-law. The absence of such a head of power to make a by-law relating to one proprietor's use of another's lot is a strong indication that there is no power to make a by-law having that effect.

147. The provision in s 43(2) that s 43(1) does not limit the matters for which by-laws may be made needs to be understood in context of the model by-laws set out in Schedule 1 to the Strata Schemes Management Regulation 1997. In addition to residential schemes, the model by-laws covered retirement villages, industrial schemes, hotel/resort schemes, commercial/retail schemes and mixed use schemes. While the model by-laws for each of these schemes dealt largely with behavioural matters, it can be inferred the legislature was concerned to ensure the flexibility the Review Committee had recommended. Section 43(2) ensured that result. Significantly, however, none of the model by-laws for any of the schemes expressly permitted a by-law enabling one lot proprietor to use another proprietor's lot.

148. In contrast, Ch 2, Pt 5, Div 4 makes elaborate provision for by-laws conferring a right of exclusive use and enjoyment of the whole or any specified part of the common property on the owner of a lot, or the owner of several lots. Part 5, Div 4 sets out the method for making an exclusive use by-law (s 52), explains the circumstances in which such a by-law may contain conditions (s 53), provides that such a by-law must detail the corporation, or person who is to be responsible for the maintenance of the common property the subject of the exclusive use by-law (s 54), explains its effect (s 55) and details the circumstances in which a by-law relating to parking may be made during the initial period despite s 50 (s 56).

149. The fact that the legislature saw it as necessary to spell out in such detail the circumstances in which one lot owner may obtain exclusive enjoyment of the whole or part of the common property is a strong contrary indication to an interpretation of the general words of s 43, s 47 or s 50, as permitting a by-law in terms of by-law 20. If the legislature intended that one or more lot proprietors could use another proprietor's lot, one would at least have expected provisions in similar terms to ss 52 – 55 to accompany that power.

150. The same reasoning applies to the inclusion of cl 19 in the model by-laws for residential schemes. The specification of the circumstances, including the conditions and costs, in which the owners corporation can enter into arrangements to provide amenities or services to the owners or occupiers of one or more lots but not all indicates a legislative intention that the general words in s 43, s 47 and s 50 could not support by-laws affecting individual lot owners.

151. I cannot draw the same comfort from s 49 of the Management Act as the primary judge (at [51]). As Rath explained the restraint on the power to make by-laws preventing dealings relating to lots was intended to secure, rather than detract from, a strata proprietor's right to unfettered title to a lot equivalent to that of a homeowner. A by-law which impinges on one proprietor's title to a lot by giving another proprietor the equivalent of property rights over part of it is inconsistent with that core construct of strata titles legislation.

152. Finally, I note that the primary judge's conclusion rested, at least in part, on the premise that a developer's power to make by-laws was no less than the power available to an owners corporation. The conclusion that an owners corporation could make a by-law like by-law 20 conflicts with the principle that a statutory power will not be interpreted as permitting interference with vested proprietary rights unless that intention is made manifest by express statement or necessary implication: *Clissold* v *Perry* [1904] HCA 12; (1904) 1 CLR 363 at 373.

153. The authorities on which the respondents rely do not, in my opinion, support their case. *Humphries* v *Proprietors Surfers Palms North Group Titles Plan 1955* concerned the validity of a management agreement entered into by the body corporate with the appellants under which, in consideration of a lump sum annual payment, they agreed to ensure that the property was properly maintained and administered and kept in good repair. One of the appellants' specific duties was to conduct a letting agency for the letting of townhouses on the property on behalf of such of the owners as required the service. The individual owners who took advantage of that service were not themselves required to remunerate the appellants, whose recompense was part of the lump sum annual payment. The High Court held that the body corporate had no power to enter into a contract to procure the provision of a letting service for particular lot proprietors or

occupiers and that the letting services provision was not severable from the remainder of the agreement which, accordingly, was wholly void.

154. On appeal, the appellants contended the body corporate had power to make the management agreement under the *Building Units and Group Titles Act 1980* (Qld) (the "Queensland Act"). They relied, in part, on the by-law making power conferred in s 30 which permitted a body corporate "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan" to amend the pro forma by-laws contained in the Third Schedule to the Queensland Act. The Third Schedule by-laws dealt in substantially the same terms with the behavioural matters the subject of cll 1 – 17 of the Strata Schemes Management Regulation 1997.

155. Brennan and Toohey JJ (at 603) rejected that submission. They regarded the Third Schedule as indicating the range of by-laws which might be made, saying:

> "Whatever the scope of that power may be, it does not avail the appellants in this case. There was no by-law made which might have authorised the body corporate to secure the provision of the services of a letting agency for the proprietors of the individual lots. *In general, the Third Schedule does not authorise a body corporate to provide services to individual lots* although cl 10 impliedly authorises a body corporate to provide a garbage disposal service for individual lots. If cl 10 is an exception to the general scheme of the Third Schedule, *the exception is explicable by the common interest of all proprietors and occupiers in the removal of garbage from any part of the premises*." (emphasis added)

156. It should be inferred from this passage that their Honours were of the view that the by-law making power authorised the body corporate to secure the provision of the services of a letting agency for the proprietors of the individual lots, if such an agreement was in the common interest of all proprietors.

157. Deane and Gaudron JJ referred to s 37(1)(a) and s 27(3) (relevantly in substantially the same terms as s 61(1)(a) and s 12 of the Management Act) and concluded (at 608):

> "Wide though those powers of control, management and administration may be, they are confined to the common property. They simply do not extend to the making of a contract binding the body corporate to pay 'remuneration' to the proprietor of a particular unit or townhouse as consideration for the conduct by that proprietor 'from his unit' of a letting agency whose services would be available to any proprietors who desired, as individuals, to lease their townhouses. *Entry into such a contract is neither an incident of, nor reasonably necessary for, the control, management or administration of the common property*." (emphasis added).

158. Their Honours did not refer to s 30(2) of the Queensland Act which empowered the body corporate to make by-laws, inter alia, for the purpose of the control, management, administration, use or enjoyment of the lots as well as the common property. However, they agreed (at 608 – 609) with Brennan and Toohey JJ and McHugh J's conclusions that there was no other provision of the Act which either expressly or impliedly authorised the body corporate to enter into such a contract or to expend its funds in the payment of such remuneration, nor was there any by-law of the body corporate which conferred such authority.

159. McHugh J concluded (at 612) that nothing in the Queensland Act, expressly or by implication, authorised a body corporate to enter into the management agreement. Further in his Honour's view (at 614) the exclusivity provisions of the management agreement were inconsistent with the right of other proprietors to conduct lawful businesses from their lots. The implication to be drawn from the Queensland Act was that a body corporate had no power to enter into an agreement giving exclusive rights to a particular person in relation to the use of the lots and common property which carried with it the implied power to prevent proprietors from enjoying those rights.

160. McHugh J (at 615 ff) found comfort for his conclusion that the general powers conferred by ss 27 and 37 did not authorise the making of the agreement in s 30(2) of the Act which provided:

> "Save where otherwise provided in subsections (7) and (11), a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in the Third Schedule or any by-laws made under this subsection."

161. His Honour interpreted that provision to mean:

> "[T]he body corporate can interfere with the rights of proprietors in respect of their lots only by means of by-laws *passed in accordance with the Act*." (emphasis added)

162. His Honour observed that the specific by-laws in the Third Schedule to the Queensland Act did not authorise the making of the agreement and that the body corporate had not exercised the power conferred by s 30(2) to make a by-law giving it power to enter into the management agreement.

. 163 McHugh J's observation concerning the by-law making power was part of his reasoning and appears to have been endorsed by Deane and Gaudron JJ (at 609). Section 30(2) of the Queensland Act was in substantially the same terms as s 47 of the Management Act upon which the primary judge relied. His Honour did not, with respect, explain why s 30(2) authorised a by-law under which the body corporate could enter an agreement which, inter alia, divested individual proprietors of their rights to let their own premises. It might be inferred, however, that, like Brennan and Toohey JJ, he thought such a by-law would be valid if it was in the common interest of all proprietors in the strata scheme.

164. *Humphries* is important for two reasons. First, it emphasises the necessity to have recourse to contextual considerations to determine the ambit of general words such as "for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan". Secondly, it underlines the proposition that to the extent by-laws can affect the rights of individual proprietors, it is because the by-law is presumed to operate for the benefit of the strata scheme as a whole. McHugh J's comment that "the body corporate can interfere with the rights of proprietors in respect of their lots only by means of by-laws passed in accordance with the Act" said no more than the Management Act itself. At the end of the day it is still necessary to determine the ambit of the power in s 47 to make by-laws which entrench on the rights of individual proprietors.

165. The other case on which the respondents rely, *Sydney Diagnostic Services Pty Ltd* v *Hamlena Pty Ltd* also illustrates the proposition that by-laws which operate for the benefit of the strata scheme as a whole are authorised.

166. *Sydney Diagnostic* concerned the by-law power in s 58(2) of the 1973 Act. The building covered by the strata plan was a medical centre. The body corporate purported to pass a by law which confined the conduct of the medical practice of pathology to two lots (5 and 6) in the strata plan. The respondent, which carried on the business of pathology on lot 35 contended the by-law was invalid because s 58(2) of the 1973 Act did not permit a discriminatory by-law.

167. In holding that the by-law was valid, Meagher JA (with whom Mahoney and Priestley JJA agreed) said (at 11, 434):

> "…[T]he words of the section do bear their prima facie meaning. Since plurals include singulars, Parliament must have intended bodies corporate to have power to pass by laws regulating 'the use' of each lot in a strata plan, and it must have been apparent to Parliament when arming bodies corporate with this power that it extended to regulating what trades, avocations and activities could and could not be conducted on each lot. This is particularly so when it is remembered that the Act was passed at a time when it was not uncommon for business and commercial buildings to be built with a view to different avocations being practised in different lots."

168. *Sydney Diagnostic* supports the proposition that in a commercial strata scheme, by-laws can be passed which requires one lot to be used by its proprietor in a particular way to ensure a "mix" of uses regarded as appropriate by the necessary majority of members of the owners' corporation. Such a by-law would be expressly authorised now by the power in s 43 to make by-laws appropriate to the type of strata scheme concerned. Meagher JA reached his conclusion by giving the words "for the purpose of …the use of a lot" their literal meaning. However he also had regard to the historical context in which the by-law making power was adopted, a context in which buildings were constructed for special purposes, and by-laws ensuring that the right "mix" was maintained operated for the benefit of the strata scheme as a whole.

169. By-law 20 does not operate for the benefit of the strata scheme as a whole. It operates only for the benefit of the respondents, to the detriment of the appellant. *Sydney Diagnostic* does not, in my opinion, support the conclusion that by-law 20 is valid.

170. In my opinion by-law 20 is inconsistent with the Management Act and, accordingly, has no force and effect: s 43(4).

Anthony Hordern

171. The conclusion that by-law 20 is invalid is sufficient to dispose of the appeal. However while I agree with Santow JA that the *Anthony Hordern* submission should be rejected, I do so for different reasons.

172. In *Anthony Hordern* (at 7), Gavan Duffy CJ and Dixon J (as his Honour then was) formulated the core principle that:

> "When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."

173. That principle, as explained by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs* v *Nystrom* [2006] HCA 50; (2006) 81 ALJR 1 (at [54]) is based on the notion:

> "…that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise."

174. The *Anthony Hordern* principle is a manifestation of the maxim *expressum facit cessare tacitum* (when there is express mention of certain things, then anything not mentioned is excluded: *Nystrom* (at [54])). In *Wilcox, Judge of the Federal Court, Re*; *Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511 (at 64) the Full Federal Court (Black CJ, Cooper and Merkel JJ) said the maxim was usually applied to reconcile or read down by implication a general power which was inconsistent with a specific power in the same instrument or enactment and had little, if any, applicability to powers expressly conferred in separate enactments, even, apparently, if they were part of the same legislative scheme. It has been said that there appears to be no reason for this qualification: Pearce & Geddes, *Statutory Interpretation in Australia* 6th ed at 4.31.

175. As Gummow and Hayne JJ demonstrated in *Nystrom* (at [56] – [59]) in their analysis of the post-*Anthony Hordern* cases, the question whether the maxim applies turns on the construction of the provisions in question. After reviewing the authorities their Honours said (footnotes omitted):

> "[59] Anthony Hordern and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the 'same power', or are with respect to the same subject-matter, or whether the general power encroaches upon the subject-matter exhaustively governed by the special power. However, *what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power*. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions." (emphasis added)

See also *Deputy Commissioner of Taxation* v *Dick* [2007] NSWCA 190 per Santow J (at [121]) and per Basten JA (at [140]).

176. In order to invoke the *Anthony Hordern* principle, it is necessary that the appellant first establish that by-law 20 created an interest of the sort caught by s 88B of the *Conveyancing Act*. It is at this point that I disagree, with respect, with Santow JA as to the nature of the interest created by by-law 20. In my view by-law 20 did not create an easement or other interest caught by s 88B.

177. There are four conditions necessary to create a valid easement. There must be a dominant and servient tenement, the easement must "accommodate" the dominant tenement, the same person must not own and occupy the dominant and servient tenements and, finally, the right claimed as an easement must be capable of forming the subject matter of a grant: *Re Ellenborough Park* [1956] Ch 131 at 163.

178. In *Re Ellenborough Park* (at 164) Evershed MR said of the fourth condition:

> "The exact significance of this fourth and last condition is, at first sight perhaps, not entirely clear. As between the original parties to the 'grant' it is not in doubt that rights of this kind would be capable of taking effect by way of contract or licence. But for the purposes of the present case, as the arguments made clear, the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; *whether, if and so far as effective, such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession*; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements." (emphasis added)

179. The requirement that the right conferred by the grant must not amount to exclusive possession of the servient tenement was encapsulated by Lopes LJ in *Reilly* v *Booth* (1890) 44 Ch D 12 (at 26) as follows:

> "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to the law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case; it is property that passes."

180. The same conclusion was reached in *Bursill Enterprises Pty Ltd* v *Berger Bros Trading Co Pty Ltd* [1971] HCA 9; (1971) 124 CLR 73 (at 91) by Windeyer J (with whom Barwick CJ agreed on this point).

181. There is a line of authority holding that the fourth condition is not satisfied where the right claimed is to store goods on another's land.

182. In *Copeland* v *Greenhalf* the defendant and his father before him had carried on business as wheelwrights for fifty years or so. Their home and workshop adjoined a road and in part confronted a strip of land on the opposite side of the road, some 150 feet long and of a width varying from fifteen to thirty-five feet, which gave access from the road to an orchard. During the whole of the fifty years the defendant and his father had placed vehicles, wheels, and other articles on the land on the opposite side of the road to await repair or removal after repair. They had also from time to time carried out repairs to vehicles on the land. They had always left a way to permit access to and from the orchard from and to the road. On a claim by the plaintiff, the owner in fee simple of the orchard and the strip of land, for an injunction to restrain the defendant from continuing to place articles on the land, the defendant contended that he was entitled to an easement so to use the land by virtue of the *Prescription Act*, 1832, s 2.

183. Upjohn J (as his Lordship then was) held (at 812) that the right claimed by the defendant went "wholly outside any normal idea of an easement, that is, a right of the occupier of a dominant tenement over a servient tenement". He continued:

> "*This claim really amounts to a claim to a joint user of the land by the defendant*. Practically he is claiming the whole beneficial user of the strip of land on the south-east side of the track so that he can leave there as many or as few lorries as he likes for any time that he likes and enter on it by himself, his servants and agents, to do repair work. In my judgment, that is not a claim which can be established as an easement. *It is virtually a claim to possession, if necessary to the exclusion of the owner, or, at any rate, to a joint user*, and no authority has been cited to me which would justify me in coming to the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that for this claim to succeed it must really amount to a right of possession by long adverse possession. I say nothing, of course, as to the creation of such rights by grant or by covenant." (emphasis added)

184. Brightman J followed *Copeland* in *Grigsby* v *Melville and Another* [1972] 1 WLR 1355, holding that an easement of unlimited storage within a confined space could not exist in law. It has been said that the major significance of *Grigsby* is "that it extends the principle of *Copeland* v *Greenhalf* beyond prescriptive easements to all easements, however acquired": A J Bradbrook and M A Neave, *Easements and Restrictive Covenants in Australia*, (Second Edition, Butterworths, 2000, at [1.9]). This comment would appear also to support the authors' observation (ibid) that there is no logical reason why a stricter test should apply to prescriptive easements than those created by express or implied grant: cf *Mercantile General Life Reassurance Co* v *Permanent Trustee* (1988) 4 BPR 9534.

185. There are differing views as to whether *Copeland* is inconsistent with the Court of Appeal's decision in *Wright* v *Macadam* [1949] 2 KB 744 in which it was held that a permission given by the landlord of a flat to his tenant to use a coal shed on his property to store such coal as might be required for the domestic purposes of the flat was a right or easement recognised by law. Upjohn J did not refer to *Wright*. Bradbrook and Neave (at [1.9]) regard the decisions as inconsistent and point out, correctly, that *Copeland* has been preferred in Australia. Campbell J (as his Honour then was) was not persuaded that there was any inconsistency in *Lolakis* v *Konitsas* [2002] NSWSC 889; (2002) 11 BPR 20,499 (at [25]).

186. Bradbrook and Neave's observation that *Copeland* has been preferred in Australia is based on King J's decision in *Harada* v *Registrar of Titles* [1981] VR 743 which concerned the question whether an easement was created by a "notice to treat" in the following terms:

> "… [to] empower the Commission to enter upon and clear the said land of timber and undergrowth and of any other obstructions and to lay and erect thereon such apparatus and appliances as are required for the purposes of transmitting electricity *and will bind the owner not to build on the easement area and not to interfere with the use of the easement or grow trees or erect any structure thereon*. The transmission wires will be at the lowest point about 22 feet above the ground." (emphasis added)

187. King J held (at 752) that the fourth condition for the grant of an easement was not present. He said:

> "… *the restriction on the owner not to build on the easement area and not to erect any structure thereon goes much further than a prohibition of interference with the enjoyment by the SEC of its rights*. I think that if the rights the subject of the notice to treat were acquired the plaintiff would be left with very few rights over her property and could do little more with it than move over it and park cars on it. I think that the rights sought go far beyond those appropriate to an easement, and that for this reason also the rights sought to be acquired by the SEC do not fall within the category of a common law easement. They would really amount to rights to joint user by the SEC of the plaintiff's land: *Copeland* v *Greenhalf*, [1952] 1 Ch 488, at p. 498." (emphasis added)

188. *Copeland* and *Harada* were followed in *Clos Farming Estates Pty Ltd (Recs and Mgrs Apptd) (ACN 003 435 256)* v *Easton and Another* [2002] NSWCA 389; (2002) 11 BPR 20,605 (at [40], [42], [45] – [46]) (per Santow JA, Mason P and Beazley JA agreeing). Santow JA observed (at [45]) that in order to determine whether the fourth condition has been established, it is necessary to assess the degree to which the rights conferred interfere with the servient owner's exclusive possession of the site. He added (at [46]) that the fact that "the rights conferred only touch part of the lot is insufficient to preclude the finding that the rights so vastly interfere with the servient owners' rights, were they exercised, as to preclude them constituting an easement".

189. The question whether a grant of rights over another's land fails the fourth condition required for an easement is one of fact. In *Pennant Hills Golf Club Ltd* v *Roads and Traffic Authority of New South Wales* [1999] NSWCA 110; (1999) 9 BPR 17,011 for example, the respondent was granted the right to use the appellant's land to secure underground rock anchors as part of the construction work for the M2 expressway. The effect of the grant prevented the appellant from making any changes to the design or topography of the golf course which intruded into that part of the land in which the rock anchors were to be embedded. The Court (Stein JA, Handley and Giles JJA agreeing) held (at [20]) that the grant did not "wholly" deprive the appellant of its property rights in the land, nor (at [22]) "purport to vest unlimited or unconstrained rights in the respondent…nor…give it any right of possession beyond that…necessary to house the rock anchors". The Court did not refer to *Harada*.

190. As I have already said, by-law 20 confers exclusive use and enjoyment of the watercraft storage area on the respondents, leaving the appellant with no right to use that section of lot 2. A by-law which purports to have that effect is not an easement because it purports to confer rights of occupation on the respondents that substantially deprive the appellant of proprietorship.

191. In those circumstances by-law 20 does not satisfy the fourth condition in *Re Ellenborough Park*.

192. Mr Rayment's alternative *Anthony Hordern* contention was that by-law 20 created a restrictive covenant which could only be created in accordance with s 88B. He advanced this argument with little enthusiasm. He did not articulate how a by-law which required the appellant to permit the respondents to store watercraft on

her land came within the necessary conditions of a restrictive covenant, the first of which is that the covenant be negative in character: as to which see *Marquess of Zetland* v *Driver* [1939] Ch 1; *Pirie* v *Registrar-General* [1962] HCA 58; (1962) 109 CLR 619, the leading modern authorities on the *Tulk* v *Moxhay* doctrine (the genesis of the modern law of restrictive covenants), *Forestview Nominees Pty Limited and Another* v *Perpetual Trustees WA Limited* [1998] HCA 15; (1998) 193 CLR 154(at [9]). In my opinion by-law 20 did not create a restrictive covenant which might have attracted the operation of s 88B.

193. For these reasons I would reject the *Anthony Hordern* argument. However the conclusion that by-law 20 did not create an easement because it failed the fourth *Ellenborough Park* condition, underline why it is invalid.

Orders

194. I propose the following orders:

1. Grant leave to appeal.
2. Appeal allowed with costs.
3. Set aside the orders of White J on 30 June 2006.
4. In lieu of the orders made by White J:

(a) Declare that by-law 20 in strata plan 67662 is made ultra vires and is of no force or effect;
(b) Order that the first and second respondents be restrained from storing watercraft on the land comprised in lot 2 of strata plan 67662.
(c) Order that the first and second respondents pay the appellant's cost of the proceedings before White J.

195. **Campbell JA**: The term *"by-law"* is an ancient expression in English law. Its antiquity can be gauged from the fact that its etymological origin is in the Danish word *"by"* (sometimes spelt *"byr"*), meaning a town. Thus, in etymological origin, a by-law is a law applicable only to a local community.

196. Harding, *A Social History of English Law* (Penguin Books, London, 1966) says that in the 13th century

> "… the disputes of the peasantry, the bye-laws necessary for fruitful agriculture, the substance of daily life, were still matters for the landlord and were transacted in his manorial court." (p 70)

197. Such by-laws were at one stage customary, and not necessarily written. Stoljar, *Groups and Entities* (Australian National University Press, Canberra, 1973) records:

> "Such by-laws (i.e. the laws of a *by* or *tun* or township or village) begin to be recorded, though at first only sporadically, when manorial rolls begin in the thirteenth century; and they are recorded often at the express request of the villagers themselves who then declare the by-laws to have been by 'all the tenants', or by 'the community', or '*plebiscitum ville*', thus also indicating their customary independence of the lord, at least as regards their own communal affairs." (p 21)

198. The range of topics covered by by-laws was wide. Stoljar, op cit, page 21, gives as examples:

> "For example, only those might be allowed to glean who were too young or too old to reap; or neighbours might be forbidden to carry off sheaves as it was difficult to say whether they had come by them "well and truly" or had got them "without leave". Some by-laws even deal with hired labour, specify a maximum wage etc., thus anticipating 'in a remarkable way the Statute of Labourers of 1351' …".

199. Stoljar gives other examples at p 20 – 21 of a medieval by-law requiring farm produce to be carted only by day and then *"openly through the midst of the town and not secretly by back ways"*, and another by-law that dealt with

> "a problem posed by an obdurate or unco-operative villager, one who would neither properly work his tenement nor 'do any neighbourliness to his neighbours'."

200. Medieval guilds, when created by royal franchise, made their own by-laws. The by-laws of mediaeval guilds covered, according to Stoljar, op cit, page 26,

"… unfair practices such as overcharging, forestalling, including unfair competition among themselves; even to prevent guildsmen from acting as agents for outsiders…".

201. Likewise, when burgesses of towns began to seek royal charters of incorporation in the fifteenth century, the *"… right to make by-laws … [was] eagerly sought by those applying for charters …"* (Stoljar, op cit, page 33). (See also Harding, op cit, page 249. According to Walker, *The Oxford Companion to Law* (Oxford University Press, New York, 1980), entry *"Bye-law",* page 163,*"A common-law corporation has implied power to make bye-laws incidental to and within the purposes of its constitution …".*

202. Harding, op cit, page 229 sketches how by-laws came to be incorporated into a wider legal fabric:

"Statute was neither an independent, nor the earliest, form of legislation. But it came to control the other forms. The powers of rule-making it can now delegate to officials and bodies outside Parliament are the successors to the many independent modes of legislation in medieval England. The bye-laws of the manor, the regulations of the city companies and other corporations, the rules of the Common Law Courts — all these were only slowly brought under the surveillance of Parliament. The judgment of any court made a sort of law, and every considerable medieval baron had a court … This local law-making of medieval England was first brought under the control of the king in his council, as powers to be granted and censored by charter and letters-patent. So, in 1575, for the sake of quiet between the university and city of Oxford, 'places necessary to be ordered always by the order and authority of the Privy Council', the government had certain orders written into 'the common book of the said University and the city'."

203. When statute came to create bodies to carry out particular functions, and delegated powers to them, the pre-existing concept of the by-law was pressed into service. For example, the ***Companies Clauses Consolidation Act 1845 (Imp)*** permitted companies regulated by that Act to make by-laws, and made provision in section 127 for the manner of proof of those by-laws. The case law provides examples of by-laws made by railway companies (*Motteram* v *Eastern Counties Railway Company* (1859) 7 CB (NS) 58; 141 ER 735), and of by-laws made under the ***Public Health Act 1875 (Imp)*** (*Andrews* v *Wirral Rural District Council* [1916] 1 KB 863). See also *R* v *Powell* (1854) 3 E & B 377; 118 ER 1183; *Johnson* v *Barnes* (1873) LR 8 CP 527.

204. It is that ancient notion of a by-law that the New South Wales legislature chose to adopt, without definition or explanation, when first enacting legislation concerning strata titles in 1961: section 13 ***Conveyancing (Strata Titles) Act 1961***. It has appeared in legislation governing strata titles ever since. Such legislation creates a statutory framework within which a type of local community can be created and administered. It is a type of community where co-ownership, and the physical proximity of the spaces that the owners are entitled to occupy, create the opportunity for both cooperation and conflict. It is a type of community that was new in 1961, though it had some analogies with the communities that had previously existed through the creation of home unit companies under the Companies Act, or allowing for individual occupation of apartments in a building through a tenancy in common scheme.

205. There is nothing in the notion of a by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered.

206. The particular local community that was created under the strata plan in question in the present case involves only two lots of land in separate ownership. However, they are located in a part of Sydney where access to the water is a significant benefit to a lot of land. Nothing in the notion of a by-law prevented there being a by-law entitling the owner of the lot that was located away from the water frontage to store a boat within a defined area immediately adjacent to the waterfront but within the lot located on the water frontage. And, as Santow JA has demonstrated, nothing in the particular legislative framework that governs the strata plan in question detracts from the validity of the by-law that is the subject of this litigation.

207. Subject to one matter, I agree with the reasons of Santow JA, and with the orders he proposes. That one matter concerns whether the rights that by-law 20 conferred upon the respondents' lot could have been validly created as an easement. In my view, it is not necessary to decide that question. Even if those rights

could have been validly created as an easement, the reasoning of Santow JA explains why the ***Anthony Hordern*** principle would not suffice to make the by-law invalid. And if, as McColl JA has concluded, those rights could not have been created as an easement, no question would arise of inconsistency between section 88B ***Conveyancing Act 1919*** and the provisions governing the creation of by-laws for strata schemes, and that provides a different reason why the ***Anthony Hordern*** principle does not have the effect of making the by-law invalid. I would say, however, that the rights conferred by by-law 20 on the owner of lot 1, concerning the watercraft storage area, are extensive, but not as extensive as an exclusive right of possession. The proprietor of lot 2 can still use that area to whatever extent is consistent with the proprietor of lot 1 using it to store a watercraft, at such times as the proprietor of lot 1 might want.

208. There are some additional matters that I should state to explain why I do not, with respect, agree with the reasoning of McColl JA. First, there are some provisions of the ***Strata Schemes (Freehold Development) Act 1973*** that are not set out in either of the other judgments. Section 5 of that Act defines a *"strata scheme"* as meaning:

> "(a) the manner of division under this Act, from time to time, of a parcel into lots or into lots and common property and the manner of the allocation under this Act, from time to time, of unit entitlements among the lots, and
> (b) the rights and obligations, between themselves, of proprietors, other persons having proprietary interests in or occupying the lots and the body corporate, as conferred or imposed by this Act or by anything done under the authority of this Act and as in force from time to time."

209. In spelling out the content of that definition, section 5 defines a *"lot"* as meaning:

> "… one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot."

210. It defines a *"parcel"* as meaning:

> "(a) except as provided in paragraph (b), the land from time to time comprising the lots and common property the subject of a strata scheme, and
> (b) in relation to a plan lodged for registration as a strata plan, the land comprised in that plan."

211. It defines *"common property"* as meaning:

> "… so much of a parcel as from time to time is not comprised in any lot."

212. The effect of these definitions is that, once a strata scheme has been registered, the entirety of the legal rights in the land that has been made subject to the strata scheme are divided into either lots, or common property.

213. The drawings that are part of the strata plan in the present case divide the surface area of the land into two separate areas, lot 1 and lot 2. There is a minuscule amount of common property identified on that plan, comprising a wall that is a party wall between the carport available for use by lot 2, and the house and courtyard erected on lot 1. If one looks just at the drawings on the plan, it looks like the sort of plan that effects a subdivision of land that is not intended to create a strata scheme. The way in which this particular plan is able to create the *"cubic spaces"* that are essential for the existence of a *"lot"* in the ***Strata Schemes (Freehold Development) Act*** is by a note that provides *"Lots 1 & 2 are limited in height and depth to 30m above and below the upper surface of their respective ground floors."* The plan makes clear that, at the time of lodgment of the plan, there was already a residence constructed on each of lot 1 and lot 2 – no doubt it would be those residences that fixed the location of the *"respective ground floors"*. In so far as the land that had been made subject to the strata plan conferred rights in the airspace more than 30 m above the upper

surface of the ground floors, and in the subterranean space more than 30 m below those floors, those rights would pass, upon registration of the strata plan, into the common property.

214. Thus, from the point of view of the rights likely to be of significance to an ordinary house occupier, this particular subdivision was little different to a subdivision into two freehold parcels on which freestanding houses were constructed. In the way in which it used the strata title legislation to achieve this functional end, it was a distinct oddity, and quite different to the situation with which the strata titles legislation is usually concerned, where the functional objective is to enable separate titles to be created to different parts of the one building. These are, it seems to me, relevant matters in deciding what count as *"matters appropriate to the type of strata scheme concerned"*, within the meaning of section 43 ***Strata Schemes Management Act 1996***.

215. Section 6 ***Strata Schemes (Freehold Development)*** provides:

> "(1) This Act shall be read and construed with the **Real Property Act 1900** as if it formed part thereof.
> (2) The **Real Property Act 1900** applies to lots and common property in the same way as it applies to other land except in so far as any provision of that Act is inconsistent with this Act or is incapable of applying to lots or common property."

216. The proprietary right of the registered proprietor in relation to a lot in a strata scheme is, thus, the right set out in section 42 ***Real Property Act*** (quoted in the judgment of Santow JA at [**52]). For the reasons given by Santow JA, the limitation that by-law 20 imposes upon what may be done with the appellant's lot operates as either *"estates and interests … recorded in that folio"* or *"entries … recorded in that folio",* within the meaning of section 42. Thus, the proprietary right of the appellant in her lot is subject to by-law 20. Further, from the instant of its creation Lot 2 has been subject to by-law 20. To say that by-law 20 permits one lot proprietor to use another proprietor's lot suggests that the by-law infringes proprietary rights – but the proprietary right of the owner of Lot 2 has always been subject to the right created by by-law 20. The by-law is no more an infringement on the proprietary rights of the owner of Lot 2 than is the right of the owner of a dominant tenement to carry out on the land of another rights that have been created by an easement.

217. It is not necessary, in the present case, to decide whether it would be open to an owners corporation to resolve to adopt a by-law like by-law 20 after the creation of the lots in the strata plan. While the trial judge drew some comfort from his view that it would be possible for an owners corporation to pass such a resolution, the rest of his reasoning can stand without that part.

218. I am not prepared to conclude that by-law 20 does not operate for the benefit of the strata scheme as a whole. The strata plan is one that enables two houses and associated facilities to be separately owned on land where formerly only one land title existed. It arranges the land so that both lots can have car parking immediately adjacent to the street, and, through by-law 20, also makes provision for both lots to have boat parking immediately adjacent to the water. In my view, arranging the land use in that way can be seen as being for the benefit of both lots. Including by-law 20 in the strata plan as registered was part of the developer making available to potential purchasers the advantage of both car and boat parking, for a dwelling constructed on a smaller parcel of land.

219. I do not doubt the principle that general words should not be construed in their full generality if there is a context, such as the policy of the Act in which they appear, that is not consistent with giving the words as wide a meaning as they might have outside that context. However, I do not, with respect, find a general policy, in the various pieces of legislation that govern strata titles, that is inconsistent with according to the words *"matters appropriate to the type of strata scheme concerned"* in section 43(1) a meaning sufficiently wide to permit by-law 20 to be validly enacted. I do not regard the model by-laws as limiting by implication the kinds of topics with which a by-law can validly deal, when section 8(4B) and (4C) ***Strata Schemes (Freehold Development) Act*** specifically contemplates that by-laws different or supplementary to the model by-laws might be adopted. In the form they had at the date of registration of this strata plan (11 April 2002) they provided:

> "(4B) A plan intended to be registered as a strata plan must indicate in the relevant panel of the approved form:

(a) that specified model by-laws prescribed by the regulations made under the **Strata Schemes Management Act 1996** are proposed to be adopted for the strata scheme and, if those model by-laws contain one or more alternative versions of any by-law, that the specified version of that by-law is proposed to be adopted, or

(b) that other specified by-laws are proposed to be adopted for the scheme.

(4C) If a strata plan indicates that by-laws other than the model by-laws prescribed by the regulations made under the **Strata Schemes Management Act 1996** are proposed to be adopted for the strata scheme, the plan must be accompanied by the by-laws specified. The by-laws must be in the form approved under the **Real Property Act 1900** and must be signed by the persons required to sign the strata plan under section 16(1)."

220. As mentioned earlier, I agree with the orders proposed by Santow JA.

LEE & ANOR v SURFERS PARADISE BEACH RESORT PTY LTD

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(2008) LQCS ¶90-141

Court citation: [2008] QCA 29

Supreme Court of Queensland, Court of Appeal

26 February 2008

Community schemes — Development — Off-the-plan sales — Disclosure statements — Purchasers buy apartment in proposed community titles scheme "off the plan" — Disclosure statement given to purchasers leaves details of proposed caretaking and letting agreement blank — Vendor refuses to give further statement to correct alleged inaccuracies of first statement — Purchasers purport to cancel contract and do not complete — Vendor terminates contract and retains deposit — Whether vendor's termination valid — Whether vendor obliged to give further statement — Whether purchasers' purported cancellation valid — Whether purchasers materially prejudiced by inaccuracies in statement if required to complete — Body Corporate and Community Management Act 1997s 213, 214.

Surfers Paradise Beach Resort Pty Ltd (the vendor) built a residential, commercial and retail complex at Surfers Paradise. The residential portion of the complex was subdivided to create a community titles scheme pursuant to the Body Corporate and Community Management Act 1997 (Qld) (the Act).

During construction of the complex, and before creation of the community titles scheme for the residential lots, the Lees (the purchasers) contracted to purchase one of the lots "off the plan".

[140616]

Upon executing the contract, the purchasers received, among other things, a "first statement" (later called a "disclosure statement") pursuant to s 213(1) of the Act and a draft caretaking and letting agreement between the body corporate and the letting agent (referred to in the draft agreement as "the resident caretaker"). Under s 213(2)(c), any authorisation of a person as a letting agent for a proposed scheme must include "the terms of the authorisation" and s 213(4) requires the disclosure statement to be "substantially complete". Despite this, several matters were left blank in the draft agreement. The draft did not specify: (1) the identity of the proposed letting agent/resident caretaker; (2) the dates between which the agreement was to run; (3) the lot number of the resident caretaker's unit; or (4) the parts of the common property that the letting agent/resident caretaker would occupy for a tour desk, staff, a brochure stand, signage and the like.

In due course, the community scheme was established and a caretaking and letting agreement, now including all the information left blank in the draft agreement, was executed.

Prior to completion of the contract of sale between the vendor and the purchasers, the purchasers alleged that the vendor was obliged to furnish a "further statement" under s 214(2) of the Act, rectifying what they considered to be the "inaccuracies" in the first statement. They contended that a further statement was required because the first statement would not have been accurate if now given as a first statement (s 214(1)(b)).

The vendor did not give a further statement and the purchasers purported to cancel the contract under s 214(4) of the Act. Among other things, that subsection provides, in para (b), that a buyer may cancel the contract if "the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the first statement was, or has become, inaccurate".

Under the contract, the time set for completion had become essential. Therefore, when the purchasers failed to complete on the date fixed for completion, the vendor purported to terminate the contract.

The purchasers commenced proceedings against the vendor in the Supreme Court of Queensland for a declaration that the vendor's termination was invalid and for an order for the return of the deposit under the contract of sale. However, the Supreme Court dismissed the proceedings. The trial judge considered that the blanks in the draft agreement made the first statement incomplete, but not inaccurate. Therefore, the vendor had not been obliged to furnish a further statement under s 214 of the Act. His honour declared that the contract had been validly terminated and that the deposit had been rightly forfeited to the vendor.

The purchasers appealed against the trial judge's decision to the Court of Appeal.

Held: (per McMurdo P and Dutney J; Jerrard JA dissenting) Appeal dismissed.

Per McMurdo P:

1. The changes between the draft letting agreement contained in the first statement under s 213 of the Act and the final agreement invoked s 214(1)(b) of the Act. But that alone did not entitle the purchasers to cancel the contract. The purchasers did not plead or otherwise establish that they would have been materially prejudiced if compelled to complete the contract given the inaccuracies in the statement (s 214(4)(b)). Therefore, they did not establish an entitlement to cancel the contract under s 214.

Per Jerrard JA (dissenting):

2. From the date of the executed letting agreement, the first statement would no longer have been accurate if given then as a first statement. Accordingly, the vendor was obliged to give a further s 214 statement to the purchasers, as the purchasers claimed at the time.

3. Because the obligations imposed by s 214 on the vendor were imposed on it as a contracting party, and when not complied with, could result in the purchasers having the right to cancel the contract, the vendor was obliged to show that it was ready, willing and able

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to perform those obligations before being able to claim a right to terminate. It did not demonstrate that readiness and, instead, disputed its obligation to deliver a further statement

4. The purchasers were not obliged to settle without receipt of the further statement. Thus the vendor's entitlement under the contract to terminate upon the purchasers' failure to comply with an obligation under the contract (ie to settle) had no application. Instead, the contract was terminated without default by the purchasers. Therefore, pursuant to the contract, the purchasers were entitled to receive the deposit and any interest on it.

Per Dutney J:

5. None of the variations between the draft letting agreement contained in the first statement and the final agreement were obviously materially prejudicial to the purchasers.

6. Notwithstanding that the contents of the first statement were given contractual effect by s 215 of the Act, the limitation on the right to rescind in s 214(4)(b) rendered inessential an inaccuracy not materially prejudicing the purchasers. This was because the same statute which made the statement part of the contract also limits the extent to which rescission is available for what becomes a breach of a contractual warranty. Therefore, notwithstanding the vendor's breach of a non-essential term, the vendor retained the right to terminate for fundamental breach by the purchasers.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

RJ Douglas SC and P Kronberg (instructed by Mark Treherne & Associates) for the purchasers.

BD O'Donnell QC and GD Sheehan (instructed by Gadens Lawyers) for the vendor.

Before: McMurdo P, Jerrard JA and Dutney J.

Full text of judgment below

McMurdo P: Because the relevant facts, issues and provisions of the *Body Corporate & Community Management Act* 1997 (Qld) ("the Act") are set out in the reasons for judgment of Jerrard JA, my reasons for dismissing the appeal can be relatively briefly stated.

2. The appellants entered into a contract with the respondent to purchase a residential apartment in a proposed community titles scheme in the landmark Gold Coast highrise building, Q1. The appellants applied for a declaration that the respondent's termination of the contract was invalid. They contended this was so because of the respondent's failure to comply with the Act. The primary judge dismissed their application and instead declared that the contract had been validly terminated and the deposit paid under the contract rightly forfeited to the respondent.

3. Jerrard JA has set out the differences between the draft letting agreement contained in the disclosure statement required to be made by the respondent under s 213 of the Act and the final letting agreement that came into effect upon the commencement of Q1's community titles scheme. I agree with his Honour's reasons for concluding that those changes invoked s 214(1)(b) of the Act. The changes had the result that "the disclosure statement would not be accurate if now given as a disclosure statement". That conclusion is consistent with the ordinary meaning of the words used in s 214. It is also consistent with the primary object of the Act (s 2) and the relevant secondary objects of the Act (s 4(b),(g) and (h)).

4. But that alone did not entitle the appellants to cancel the contract. Section 214(4) of the Act entitled them to do so only if all of the matters set out in s 214(4)(a), (b) and (c) were met. The appellants acted to cancel the contract before settlement (s 214(4)(a)). The primary judge made no finding as to whether the appellants would be materially prejudiced if compelled to complete the contract given the extent to which the disclosure statement had become inaccurate (s 214(4)(b)). The appellants in any case did not plead material prejudice in their Points of Claim in support of their application before the primary judge. Additionally, s 214(4)(c) assumes that the seller has given the buyer a further statement and requires any cancellation to be made effective

[140618]

by written notice given to the seller within 14 days of the further statement. The appellants did not establish that s 214(b) or (c) applied in their case. It follows that they did not establish an entitlement to cancel the contract under s 214.

5. It may be possible that a purchaser becomes entitled to a further statement under the Act only after the settlement date of the contract. The Act does not necessarily leave such a purchaser unprotected. Section 217 of the Act allows a purchaser to cancel the contract if it has not already settled (s 217(a)) and at least one of the situations set out in s 217(b)(i)-(iv) applies. In my view, consistent with the objects of the Act, the legislature can be taken to have intended that s 217(b)(iv) applies where information disclosed in the disclosure statement, required by the Act to be rectified by a further statement, is inaccurate.

6. Before enabling a buyer to cancel a contract, s 217 also requires a third condition to be met, namely, that because of a difference or inaccuracy under s 217(b) the buyer would be materially prejudiced if compelled to complete the contract. As I have noted, the appellants did not plead that issue at first instance; and nor have they placed any material before this Court to demonstrate material prejudice. The primary judge specifically made no finding in this respect.[1] Despite White J's observations in *Celik Developments Pty Ltd v Mayes*,[2] I am far from persuaded on the present material that the differences between the draft letting agreement and the final letting agreement would materially prejudice the appellants if they were compelled to complete the contract (s 214(4)(b) and s 217(c)). But in any case, it is impossible to express a concluded view on this because it was neither pleaded at first instance nor asserted or demonstrated on appeal. The appellants have not established an entitlement to cancel the contract under s 217.

7. The appellants at the hearing developed two new grounds of appeal. The first was that it was an implied term of their contract with the respondent that each party comply with statutory requirements, including those imposed by the Act. In rejecting that ground, it is sufficient to observe that the necessary requirements to imply such a term, set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*,[3] and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,[4] have not been met in the present case.

8. The appellants' second newly developed ground of appeal was that this Court should not enforce a contract which is illegal because it breaches statutory obligations. If the legislative purpose of the Act can be fulfilled without finding a contract between parties void and unenforceable, the contract will be construed as valid: see *Fitzgerald v FJ Leonhardt P/L*,[5] *Tonkin v Cooma-Monaro Shire Council*[6] and *QuestCrown Pty Ltd v Insignia Towers (Southport) P/L*.[7] The Act aims to provide an appropriate level of consumer protection for owners and prospective buyers of lots included in community title schemes (s 4(g)) and to promote economic development by establishing sufficiently flexible administrative and management arrangements for community title schemes (s 4(b)). Those objects are not met by allowing a buyer to avoid a contract in the absence of establishing material prejudice resulting from the changes to the disclosure statement. See also s 213(7), s 214(4)(b) and s 217(c). The appellants have not pleaded nor established material prejudice. This ground of appeal is also without merit.

9. Under the contract between the appellants and the respondent, the appellants were required to complete their contractual obligations on 14 October 2005. The Act did not relieve them of that obligation. Their failure to settle meant that the respondent was entitled to terminate the contract.

10. The primary judge's orders were correctly made. The appeal should be dismissed with costs.

Jerrard JA: This is an appeal from orders made in the Trial Division of this Court on 27 April 2007, dismissing an originating application filed by the appellants on 19 February 2007, and declaring that on 8 December 2005 the respondent Surfers Paradise Beach Resort Pty Ltd had validly terminated a contract of sale dated 8 February 2003. The learned judge also declared that the respondent was entitled to forfeit a deposit paid by the appellants pursuant to the contract, together with any accrued interest, and ordered that the appellants pay the respondent's costs of and

[140619]

incidental to the proceedings, assessed on the standard basis. The litigation concerned the provisions of the *Body Corporate and Community Management Act* 1997 (Qld) ("the BCCM Act").

12. The contract of sale between the appellants and the respondent was in respect of a Proposed Lot No 3703 in a residential, commercial and retail complex being constructed at Surfers Paradise, and known as "Q1". The following description of the relevant facts is taken from the judgment of the learned trial judge:

"[6] … It was developed by a joint venture between the respondent which owned the land on the one hand and Sunland Group Limited ("SGL") and Camryville Pty Limited (a wholly owned subsidiary of SGL) on the other. The residential tower has been subdivided to create a community titles scheme pursuant to the *BCCM Act*.
[7] While the complex was still under construction, and before the creation of the community titles scheme for the residential tower, the applicants agreed to purchase one of the residential apartments (described as lot 3703) "off the plan" for $940,000. On executing the contract on 8 February 2003 they received two bound books of documents required to be given to them under various statutes. Of present relevance were –

(i) Disclosure statement under the *Corporations Act 2001* (Cth) made by the respondent on 19 July 2002;
(ii) Disclosure statement under the *BCCM Act* made by the respondent on 19 July 2002;
(iii) Pro forma Caretaking and Letting Agreement "Q Tower" between the Body Corporate for Q Tower CTS # and an unnamed Resident Caretaker;
(iv) Contract of sale.

They paid an initial cash deposit of $1,000 and subsequently provided a bank guarantee for the balance deposit of $93,000.
[8] In June 2003 the respondent sold the caretaking and letting rights for the residential tower to Sunland Hotels and Resorts Pty Ltd ("SH & R"), a wholly owned subsidiary of SGL. When the community titles scheme was established more than 15 months later, a Caretaking and Letting Agreement between the Body Corporate for Q1 CTS 34498 and SH & R was executed on 30 September 2005."

13. SH & R had written to the appellants on 16 September 2004, advising them that if they intended to place their apartment into what SH & R described as "Our Q1 Letting Pool", it was a prerequisite that the appellants purchase a "Q1 Homeware and Furniture Package." That required, inter alia, reviewing, signing, and returning two copies of what was described as the Q1 Furniture & Homeware Package "Supply Agreement", and also required that the appellants read a "Product Disclosure Statement" supplied by SH & R.

14. The cost of the Q1 Furniture & Homeware Package was $49,900. The learned trial judge found that when the appellants signed the contract in February 2003, they were unaware of any requirements that they buy a furniture package from the resident caretaker, if they wanted to holiday let the apartment through the proposed letting pool. The judge was satisfied that it was the appellants' intention to holiday let the apartment. The appellants were unable to on-sell their apartment, and by a facsimile dated 30 September 2005 the solicitors for the respondent advised the appellants' solicitors that completion was due on 14 October 2005. The appellants' solicitors suggested that the respondent was obliged to provide an amended disclosure statement under the *BCCM Act*. The respondent did not do so, and completion did not take place on 14 October 2005 or at all. On 8 December 2005 the respondent purported to terminate the contracts, and resold the apartment.

15. The appellant argued to the learned trial judge that the Product Disclosure Statement and the Apartment Management Agreement provided to them by SH & R were relevant to the respondent's obligations under each of s 213 and s 214 of the *BCCM Act*. Those sections relevantly provide:

[140620]

"**213 Statement to be given by seller to buyer**

(1) Before a contract (the **contract**) is entered into by a person (the **seller**) with another person (the **buyer**) for the sale to the buyer of a lot (the **proposed lot**) intended to come into existence as a lot included in a community titles scheme when the scheme is established or changed, the seller must give the buyer a statement (the **first statement**) complying with subsections (2) to (4).
(2) The first statement –

(a) must state the amount of annual contributions reasonably expected to be payable to the body corporate by the owner of the proposed lot; and
(b) must include, for any engagement of a person as a body corporate manager or service contractor for the scheme proposed to be entered into after the establishment of the scheme, or proposed to be continued or entered into after the scheme is changed –

(i) the terms of the engagement, other than any provisions of the code of conduct that are taken to be included in the terms under section 118; and
(ii) the estimated cost of the engagement to the body corporate; and
(iii) the proportion of the cost to be borne by the owner of the proposed lot; and

(c) must include, for any authorisation of a person as a letting agent for the scheme proposed to be given after the establishment of the scheme, or proposed to be continued or given after the scheme is changed, the terms of the authorisation; and
(d) must include details of all body corporate assets proposed to be acquired by the body corporate after the establishment or change of the scheme; and
(e) must be accompanied by –

(i) the proposed community management statement, and
(ii) if the scheme to be established or changed is proposed to be established as a subsidiary scheme — the existing or proposed community management statement of each scheme of which the proposed subsidiary scheme is proposed to be a subsidiary; and

(f) must identify the regulation module proposed to apply to the scheme; and
(g) must include other matters prescribed under the regulation module applying to the scheme.

(3) The first statement must be signed by the seller or a person authorised by the seller.
(4) The first statement must be substantially complete.
(5) The seller must attach an information sheet (the **information sheet**) in the approved form to the contract—

(a) as the first or top sheet; or
(b) if the proposed lot is residential property under the Property Agents and Motor Dealers Act 2000 — immediately beneath the warning statement that must be attached as the first or top sheet of the contract under section 366 of that Act.

(6) The buyer may cancel the contract if—

(a) the seller has not complied with subsections (1) and (5); And
(b) the contract has not already been settled.

(7) The seller does not fail to comply with subsection (1) merely because the first statement, although substantially complete as at the day the contract is entered into, contains inaccuracies

In this section—

residential property see the *Property Agents and Motor Dealers Act* 2000, section

17.

214 Variation of first statement by further statement

(1) This section applies if the contract has not been settled, and —

(a) the seller becomes aware that information contained in the first statement was inaccurate as at the day the contract was entered into; or
(b) the first statement would not be accurate if now given as a first statement.

(2) The seller must, within 14 days (or a longer period agreed between the buyer and seller) after subsection (1) starts to apply, give the buyer a further statement (the **further statement**) rectifying the inaccuracies in the first statement.
(3) The further statement must be endorsed with a date (the **further statement date**), and must be signed, by the seller or a person authorised by the seller.
(4) The buyer may cancel the contract if—

(a) it has not already been settled; and
(b) the buyer would be materially prejudiced if compelled to complete the contract, given the extent to which the first statement was, or has become, inaccurate; and
(c) the cancellation is effected by written notice given to the seller within 14 days, or a longer period agreed between the buyer and seller, after the seller gives the buyer the further statement.

(5) Subsections (1) to (4) continue to apply after the further statement is given, on the basis that the first statement is taken to be constituted by the first statement and any further statement, and the first statement date is taken to be the most recent further statement date."

16. The appellants argued to the learned trial judge, but not on this appeal, that the "authorisation" in s 213(2)(c) referred both to the authorisation by the body corporate, and to the authorisation by an owner of an individual lot, in the reference to any authorisation of a person as a letting agent for the scheme. The learned judge disagreed, holding that on the proper construction of s 213(2)(c), the respondent's obligation was only to disclose the terms on which the body corporate proposed granting an authorisation to a letting agent. The learned judge stated that neither the contents of the product disclosure statement, nor those of the apartment management agreement, related to the terms of the authorisation of the letting agent for the scheme. That was because they did not relate to the terms on which the body corporate proposed to authorise someone as the letting agent for the scheme. They related instead to the terms upon which SH & R would accept an appointment from an individual lot owner, to let an apartment. The appellants did not challenge that conclusion on this appeal.

17. The appellants maintained on this appeal submissions also advanced below, regarding s 214. Those submissions pointed to the differences between the draft or pro-forma caretaking and letting agreement supplied to them with the contract on 8 February 2003, and the terms of the executed caretaking and letting agreement. Those differences included that the identity of the proposed agent was not inserted in the draft, nor were the dates between which the agreement was to run. Nor was the lot number of the resident caretaker's unit specified in the draft agreement, as it was in the executed one, and nor were the parts of the common property to be occupied by the resident caretaker disclosed in the draft statement.

18. The learned judge held that "inaccuracy" ordinarily connotes error, rather than incompleteness resulting from matters not yet being capable of ascertainment. The judge held that in the context of legislation which aimed to provide "an appropriate level" of consumer protection (a reference to s 3(A) of the *BCCM Act*), those differences were not "inaccuracies" for the purpose of s 214(2). The respondent was not thereby obliged to provide a further statement to the appellants under s 214(2). The appellants challenge that conclusion on this appeal. They contend that when information came to hand which rendered the first statement inaccurate, the respondent was obliged to provide a further statement, correcting the inaccuracy. That was said to follow from s 214(1)(b).

19.

[140622]

There were actually three versions of the caretaking and letting agreement. The first was the one supplied to the appellants on 8 January 2003. That was a draft agreement between the body corporate for Q Tower CTS and an unidentified entity, described as "the *Resident Caretaker*". Clause 1.1(x) of that draft agreement provided that the expression "term" meant the period of 15 years commencing from (*an undisclosed date*) and expiring on (*another undisclosed date*). Both dates were left blank. Clause 1.1(i) provided that the expression "*Further Term*" meant the period of 10 years commencing from (*a date left blank*) and expiring on (*a date left blank*). Clause 15 of that draft agreement provided that the resident caretaker must ensure that any written agreement entered into or to be entered into with any owner of a lot in the scheme relating to the letting of their lot included provisions as specified in Schedule E of CO 00/570 (Management Rights Schemes Class Order) (or any Class Order, other document, law or provision that replaces CO 00/570 from time to time). Clause 25 provided that the body corporate gave the resident caretaker the authority to occupy any part of the common property on level C of the building for the purposes of installing or placing, and if appropriate, manning, a tour desk, brochure stand, signage and other similar things.

20. The second such caretaking and letting agreement was an agreement in a form set out in Schedule 1 to an agreement dated 24 June 2003 entered into between the respondent (as *"Seller*") and SH & R (as "*Buyer"*) and SGL (as "*Guarantor*"), in which the respondent agreed to cause the body corporate to grant to SH & R the rights, title and interest in the buyer's caretaking and letting agreement on the terms of that agreement.

21. The buyer's caretaking and letting agreement, Schedule 1, purported to be between the body corporate for Q Tower CTS (the *Body Corporate*) and SH & R, as the Resident Caretaker. In that draft Clause 1.1(y) defined "term" as meaning the period of 15 years commencing from (*a date left blank*) and expiring on (*a date left blank*). Clause 1.1(i) described "*Further Term*" as meaning the period of 10 years commencing from (*a date left blank*) and expiring on (*a date left blank*). Clause 15 was in the same terms as before, but referred now to the provisions specified in Schedule CO 02/305 (Management Rights Schemes Class Order) (or any Class Order, other document, law or provision that replaces CO 02/305 from time to time). Clause 25 now had a Clause 25.2 and 25.3, and 25.2 referred to an attached plan which showed the area that the body corporate gave the resident caretaker the authority to occupy.

22. The third version of the caretaking and letting agreement in evidence was the one actually entered into between the body corporate Q1 CTS and SH & R, on 30 September 2005.

23. That agreement specified in clause 1.1(y) that the expression "term" meant the period of 15 years commencing from 18 October 2005 and expiring on 17 October 2020. Clause 1.1(h) provided that "*Further Term*" meant the period of 10 years commencing from 18 October 2020 and expiring on 17 October 2030. Clause 15 was in the same terms as in the second version of the caretaking and letting agreement, and clause 25 was considerably more detailed. It now described, by reference to two attached plans, the part of the common property which the body corporate authorised the resident caretaker to occupy.

24. Mr O'Donnell QC, senior counsel for the respondent, accepted that the terms of the respondent's engagement would include the commencing and ending dates. He submitted that the omission of those from the draft agreements supplied to the appellants in January 2003 rendered that draft incomplete, but not inaccurate. He accepted that if a seller disclosed only part of what a seller knew, in a first statement provided under s 213, the result might render the first statement inaccurate. Mr O'Donnell submitted that the first statement supplied under s 213 was not inaccurate because incomplete, pointing to the terms of s 213(7). He submitted that section provided that there could be substantial compliance with the requirements, in a first statement which contained inaccuracies.

25. He conceded that s 214 was expressed to require compliance with the obligation it imposed up until the date of the settlement of the contract, but submitted that once a scheme

[140623]

became established, as this one had been on 30 September 2005, neither s 213 nor s 214 could have any sensible application. That was because they referred back to a first statement as defined in s 213, which was expressed in prospective terms, about a "proposed" lot. He argued that once the scheme was established,

the *BCCM Act* gave a potential purchaser a separate route to get information about the scheme, under s 205. That section required a body corporate to give information to an interested person, which includes in its definition a prospective purchaser.

26. He referred to the provisions of s 215, making the first statement and any material accompanying it, and each further statement and other accompanying material, part of the provisions of the contract; and to the provision in s 216 that the buyer might rely on information in the first statement, and each further statement, as if the seller had warranted its accuracy. He then referred to the provision in s 217(b)(iv), providing that the buyer might cancel the contract if it had not already been settled, and if the information disclosed in the first statement, as rectified by any other further statement, was inaccurate, and if the buyer would be materially prejudiced if compelled to complete the contract, because of the difference or inaccuracy.

27. He argued that a seller aware of a change in circumstances after the first statement was given under s 213, and who did not give a further statement under s 214, created a problem for the seller because of the warranty of accuracy. He contended that s 214(1)(b) operated up to the time the scheme was established, but not later.

28. With respect to those submissions, they imposed a time limit on the application of s 214 which does not appear in the section, and which would affect the operation of s 217(b)(iv) and s 217(c). Those later sections assume that inaccuracy in a first statement is rectified by a further statement. The assumption is therefore that a further statement has been provided, correcting what was now inaccurate. On Mr O'Donnell's construction of s 214, that further statement would not need to be given once the scheme was established. That construction tends to frustrate the object of s 217 and its provisions, allowing a buyer to cancel. Those depend upon the provision of a further statement establishing the inaccuracy in a first one, and reflect the requirement in s 214 that such further statement has to be given if a first statement would not be accurate, if given now in its original terms.

29. There was no relevant difference between the draft caretaking and letting agreements provided to the appellant, and the one ultimately executed, in the amount of annual contributions reasonably expected to be payable by a lot owner, the terms of the engagement of SH & R as a body corporate manager or the terms of the authorisation given to it as the letting agent, the estimated costs of the engagement to the body corporate, the proportion of the costs be borne by the owner of the proposed lot, or the details of all body corporate assets proposed to be acquired by the body corporate.

30. Those were the matters expressly required to be stated or included by s 213(2)(b)(c), and (d). The information revealed in the executed agreement did not change any of those terms, but it did identify the parties to be bound by the terms, and the period of the engagement. Mr O'Donnell QC was correct in conceding that the period of the engagement was one of its terms, as indeed was the identity of the resident caretaker, and it followed that from 30 September 2005 — the date of the executed agreement — the first statement would no longer be accurate if given then as a first statement. It would be inaccurate because the identity of the resident caretaker, and the period of engagement of it, were both known to the respondent vendor. Indeed, the respondent had contracted with SH & R on 24 June 2003, promising to cause it to be the resident caretaker with a letting agreement. It knew the probable identity of that party since that date.

31. Further, the area the resident caretaker had authority to occupy was specified. A first statement which suggested as at 30 September 2005 that those matters were not settled would be inaccurate, not simply incomplete. Accordingly, the seller was obliged to give a further s 214 statement to the appellants, as they claimed at the time.

32.

[140624]

The respondent was accordingly in breach of a statutory obligation to the appellants, imposed with respect to their contract, and capable (if fulfilled) of giving the appellants a right to end the contract, in the circumstances described in s 214 and s 217. Mr O'Donnell QC argued that the respondent had 14 days, ending at midnight on 14 October 2005, to provide the information, whereas Mr O'Donnell QC contended that the buyers were required to complete by 5.00 pm on that date. That was when settlement was to occur, at the latest. Accordingly, he argued, when the appellant failed to complete at that moment, the respondent was not in breach of the Act at that time, (having some seven hours to go), and was entitled to terminate. He

submitted that right arose from Clause 7.1 of the contract entered into on 8 February 2003, giving the seller the right to terminate if the buyer failed to comply with any obligation under the contract.

33. Both counsel made submissions on a terminating party's obligation to establish that it was ready and willing to perform its obligations under the contract, referring to authority (including *Foran* v *Wight* (1990) 168 CLR 385 and *Bahr* v *Nicolay [No 2]* (1988) 164 CLR 604). Because the obligations imposed by s 214 on the respondent were imposed on it as a contracting party, and, when carried out, could result in the appellants having the right to cancel the contract, the respondent was obliged to show that it was ready, willing and able to perform that obligation before being able to claim a right to repudiate. It did not demonstrate that readiness, and the appeal record showed instead that it disputed, at the time, its obligation to deliver an amended disclosure statement. It asserted that in correspondence dated 14 October 2005.[8] The appellants were not obliged to settle without receipt of the further statement the respondent was obliged to give them. It follows that Clause 7.1 of the contract, entitling the seller to terminate upon the buyer's failure to comply with an obligation under the contract, has no application. That in turn means that the provisions of clause 2.4 of the contract applied in the appellant's favour. That read:

> "**2.4 Payment of Deposit**
>
> The party entitled to receive the Deposit and any interest on the Deposit is:
>
> (a) if the Contract settles – the Seller is entitled to the Deposit and the Buyer is entitled to the interest on the Deposit;
> (b) if the Contract is terminated without default by the Buyer – the Buyer; or
> (c) if the Contract is terminated owing to the Buyer's default – the Seller."

34. The contract was terminated by the seller without default by the buyer, and accordingly clause 2.4 provides, as Mr R Douglas SC submitted for the appellants, that they are entitled contractually to receive the deposit and any interest on it. That was the point of their prosecuting this appeal.

35. I would order that the appeal be allowed, the orders made on 27 April 2007 be set aside, and in lieu thereof it be ordered and declared that:

- the amended originating application filed by the applicants on 19 February 2007 be allowed;
- the respondent is not entitled to forfeit the deposit paid pursuant to the contract of sale dated 8 February 2003, together with any accrued interest, and declare that the appellants are entitled to the return of that deposit, together with accrued interest, from the respondent;
- the respondent pay the appellants' costs of and incidental to the proceedings (including the counter-claim and of this appeal), to be assessed on the standard basis.

Dutney J: I have had the advantage of reading the reasons for judgment of Jerrard JA. The facts are set out in his Honour's reasons and I will not repeat them.

37. I agree with his Honour's conclusions that the obligation in s 214 of the *Body Corporate and Community Management Act 1997* ("the Act") to furnish the purchaser with a further statement terminates only upon settlement and not when the scheme comes

[140625]

into existence. To conclude otherwise entirely ignores the plain language of the opening part of sub-section (1).

38. Regrettably, I am unable to agree with his Honour's ultimate conclusion as to the disposition of the appeal for the reasons which follow.

39. The changes between the draft agreement granting authorisation to a letting agent ("the draft agreement") contained in the first statement under s 213 and the final agreement that came into effect upon the commencement of the scheme ("the final agreement") were identified during the course of argument by senior counsel for the appellants as follows:

- The name of the agent is inserted in the final agreement
- The commencement date is inserted in the final agreement
- The expiry date of the agreement is inserted in the final agreement

• The number of the caretaker's unit is identified
• The number of the Class Order for the Management Rights Scheme has changed although the content of those statutory rules is unchanged
• The letting agent has been allocated exclusive occupancy of three areas of the common property. The area on Level A marked OA1 is a vacant space behind the lifts not allocated for car parking. The area marked OA2 is the corresponding space on level B of the car park. The area marked OA3 is a small area on the roof now designated for the placement of a satellite dish.

40. It is unnecessary for the reasons which follow to determine whether the effect of these omissions and changes, had they been known or applied at the time the first statement was provided to the appellants, would be to render the disclosure contained in the first statement inaccurate and therefore trigger the obligation on the respondent to provide a further statement pursuant to s 214(2). For the purposes of these reasons, I shall assume that they do render the first statement inaccurate.

41. Where the first statement was or has become inaccurate, s 214(4) permits the purchaser to rescind the contract provided each of subparagraphs (a) to (c) inclusive is satisfied. One of the prerequisites to the right to rescind is that the purchaser would be materially prejudiced if required to complete the contract in the light of the inaccuracies in the first statement. Section 214(4) appears to presuppose that a further statement is provided. The time for rescission is limited by the date the further statement is provided.

42. On the other hand, if no further statement is provided but the first statement as varied by any further statement is inaccurate (see s 217(b)(iv)), there is a separate right to rescind under s 217(d)(i). That right must be exercised not later than 3 days before the purchaser is otherwise required to settle. Sub-paragraphs (d)(ii) and (iii) of s 217 have no application in this case. By s 217(c) it remains a pre-requisite to the right to rescind that the inaccuracy would make it materially prejudicial to the purchaser if compelled to complete. Thus, there does not seem to be any practical difference between a right to rescind under either section.

43. None of the variations between the draft agreement and final agreement were obviously materially prejudicial to the purchasers.

44. It was not suggested by the appellants that the name of the letting agent was of any consequence to them. That the final agreement was to commence upon the scheme coming into existence was also not obviously materially prejudicial. The agreement could not sensibly commence any earlier. It was a long term agreement with a right of renewal. The appellants' intention was to let their unit. Provided the letting authorisation was in place when the appellants' contract was due for settlement, it is hard to see how their position was affected by the actual commencement date.

45. A change in the statutory designation of the Class Order without change to its content is immaterial.

46. The areas now allocated to the exclusive occupancy of the letting agent are small, out of the way, otherwise vacant and not previously designated for any particular use. The intended use of AO1 and AO2 is for storage.

47.

[140626]

Having regard to the wording of s 214(4) and s 217(c), it seems to me that the onus falls on the purchasers to prove that they would be materially prejudiced if required to settle given the changes that had taken place between the time they were provided with the first statement and the date for settlement.

48. The appellants pleading did not allege that any of the changes resulted in material prejudice. The appellants' case below was based on the proposition that they had been deprived of the opportunity to consider whether or not they would be prejudiced.

49. In written submissions in reply, the appellants asserted that the changes following the first statement and which obligated the giving of a further statement were not trivial having regard to their nature. This submission was made in the context of a submission that the imposing of the obligation to give a further statement in the circumstances was not unduly onerous on the respondent. This is different from a submission that enforcing the appellants' obligation to settle would be materially prejudicial. The latter submission was not open on the pleadings or the evidence.

50. Despite any wrongful assertion that it had no obligation to provide a further statement, the respondent's failure to do so did not result in any right on the part of the appellants to rescind the contract. Any right of rescission was based on the fact that the statement or statements provided were or had become inaccurate and on the appellants being able to demonstrate that they would be materially prejudiced if now forced to settle on the basis of the true facts. It follows that the purchasers' obligation to tender the purchase price in accordance with the terms of the contract was not conditioned on the receipt of the further statement.

51. The principles discussed in *Foran* v *Wight* (1990) 168 CLR 385 on which both parties relied afford no assistance to the appellants. The relief from the obligation to tender performance discussed in the case is prefaced on the intimation by the other party to the contract that such tender would be pointless because of the second party's inability or refusal to tender in exchange that which the first party was entitled to receive.

52. In this case, in the absence of material prejudice the appellants were entitled at settlement to receive no more than the respondent was prepared to give in exchange for payment of the purchase price. In this case, that was a conveyance of Lot 3703 in the residential complex Q1. At the time of contracting for the purchase of the lot, the appellants were aware that the body corporate would, by the time of settlement, have given a letting authorisation on terms not substantially different from those in fact granted to Sunland Hotels & Resorts Pty Ltd.

53. The correct approach to this case is illustrated by the judgment of the Court of Appeal in New South Wales in *Roadshow Entertainment Pty Ltd* v *CEL/Vision* (1997) 42 NSWLR 462 at 479-481 where the following passages appear:

> "As a general rule, a party in breach of a non-essential term is not prevented from rescinding for a fundamental breach or repudiation by the other party: see J. W. Carter, *Breach of Contract* 2nd ed. (1991) at 347 and Halsbury's Laws of Australia, vol 6 'Contract' (1992) par 110-9520, by the same author. The question is whether there is an exceptional qualification to this general rule which prevented Roadshow from rescinding. Such an exception or qualification might exist if there were a causal relationship between the breaches of non-essential terms by the party attempting to rescind, and the fundamental breach relied upon: see *Nina's Bar Bistro Pty Ltd (formerly Mytcoona Pty Ltd)* v *MBE Corporation (Sydney) Pty Ltd* (at 614, 620-621, 632); and compare *Suttor* v *Gundowda Pty Ltd* (1950) 81 CLR 418 at 440-442.
>
> …
>
> A party in breach of non-essential terms, who has not repudiated may rescind for fundamental breach: see *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *State Trading Corporation of India Ltd* v *Golodetz Ltd* (at 286-287) a party in breach of an essential but independent term may also rescind for fundamental breach: see *State Trading Corporation of India Ltd* v *Golodetz* (at 285-287); compare *Geraldton Building Co Pty Ltd* v *Christmas Island Resort Pty Ltd* (1992) 11 WAR 40 at 50-51. Roadshow, we consider, was not, by reason of its conduct, unable to terminate on the ground of CEL/Vision's repudiation."

[140627]

54. The test to apply to determine whether or not a term of a contract is to be regarded as essential is that set out in the judgment of Jordon CJ in *Tramways Advertising Pty Limited* v *Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 642 at 641-642:

> "The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor: *Flight* v. *Booth* ((1834) 1 Bing. (NC) 370, 377; 131 ER 1160, 1162-1163), *Bettini* v. *Gye* ((1876) 1 QBD 183, 188), *Bentsen* v. *Taylor, Sons & Co (No. 2)* ([1893] 2 QB 274, 281), *Fullers' Theatres Limited* v. *Musgrove* ((1923) 31 CLR 524, 537-538), *Bowes* v. *Chaleyer* ((1923) 32 CLR 159), *Clifton* v. *Coffey* ((1924) 34 CLR 434, 438, 440). If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight."

55. In my view, notwithstanding that the contents of the first statement are given contractual effect by s 215 of the Act, the limitation on the right to rescind in s 214(4)(b) and s 217(c) renders inessential an inaccuracy not materially prejudicing the purchaser. This is because the same statute which makes the statements part of the contract also limits the extent to which rescission is available for what becomes a breach of a contractual warranty.

56. Applying the principles to which I have referred to the facts of the present case, notwithstanding the respondent's breach of a non-essential term, the respondent retained the right to rescind for fundamental breach by the appellants. In this case the fundamental breach lay in failing to tender the purchase price on the date specified in the contract where time has been made of the essence by clause 1.4.

57. The argument for the appellants appeared to be that notwithstanding that it is now known that the inaccuracies in the first statement would not have given rise to a right to rescind the contract, they were nonetheless entitled to defer settlement upon becoming aware that there may have been such inaccuracies. I cannot accept that proposition. If the failure to provide the further statement was a non-essential breach of the contract, then absent a separate right to defer settlement I can see no basis for any moratorium on the vendor insisting on settlement in accordance with the contractual obligation.

58. There is no statutory moratorium. The statutory rights are limited in the way I have set out. Indeed, s 217(d)(i) appears to assume that settlement on the due date can be insisted upon if the purchaser has not otherwise rescinded.

59. An alternative argument was based upon illegality. It was submitted that the court should not lend itself to the enforcement of a contract where the respondent was in breach of a statutory obligation. Reliance was placed on *Fitzgerald* v *FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227, 229, 230.

60. In this case the principles enunciated in that case have no application. The terms of the contract did not require the seller to contravene s 214(2) in performing the contract and the non-delivery of the further statement was not something done by the respondent in performance of the contract.

61. Finally, it was submitted that a term that each party would comply with its obligations under the Act should be implied. I can see no reason to imply such a term. The Act itself provides remedies for non-compliance when the non-compliance is prejudicial to the other party, this argument must also fail.

62. I would dismiss the appeal with costs.

[140628]

Footnotes

1 See *Lee & Anor* v *Surfers Paradise Beach Resort Pty Ltd* [2007] QSC 93, [28].
2 [2005] QSC 224, [37]; BS no 6096 of 2005
3 (1977) 52 ALJR 20, 26.
4 (1982) 149 CLR 337, 347
5 (1997) 189 CLR 215, 227 (McHugh and Gummow JJ); [1997] HCA 17
6 [2006] NSWCA 50, [72].
7 [2007] QCA 378
8 Reproduced at AR 624.

MENNITI & ORS v WINN & ANOR

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(2008) LQCS ¶90-142

Court citation: [2008] QCA 66

Supreme Court of Queensland — Court of Appeal

Decision delivered on 28 March 2008

Conveyancing — Where sale contract was a standard REIQ contract for the sale of residential lots in a community titles scheme — Where s 206 of the Body Corporate and Community Management Act 1997 requires that a seller of a lot in a community titles scheme provide a disclosure statement — Appeal against finding that the purchasers were not entitled to terminate the contract for the vendors' non-compliance with s 206 of the Act — Where purchasers argued a different construction to s 206 from that of the primary judge — Body Corporate and Community Management Act 1997, s 206.

In 2005, the purchasers entered into a sale contract with the vendors of a block of units situated in Queensland. The vendors had retained ownership of all of the units in the building, and had managed the building and run the affairs of the body corporate informally, without complying with the requirements of the *Body Corporate and Community Management Act 1997*.

The sale contract was a standard REIQ contract for the sale of residential lots in a community titles scheme. The purchasers purported to terminate the contract, claiming they were entitled to do so as a result of the vendors' breaches of s 206 of the Act in respect of the disclosure statement they were given. In a number of instances, the vendors had inserted the words "not applicable" as answers to questions in the disclosure statement. By way of explanation, the notation on the disclosure statement stated "NB Body Corporate not being formally operated as all lots owned by [the vendors]".

The vendors countered that the purchasers' purported termination was a wrongful repudiation of the contract and advised that they were themselves electing to terminate the contract and would keep the deposit.

The purchasers initiated proceedings against the vendors, with the trial judge finding in favour of the vendors. The purchasers are now appealing against this decision.

Held: appeal dismissed. Indemnity costs awarded.

1. Section 206(1) of the Act requires the seller of a lot in a community titles scheme to give the buyer a disclosure statement. By virtue of s 206(2), the disclosure statement must "state", "identify", "list" and "include" information about specified matters concerning the body corporate and its affairs.

2. The purchasers have sought to argue on appeal that pursuant to s 206(2), the vendors were obliged to cause the body corporate to remedy any relevant non-compliance with statutory obligations imposed upon it by other provisions in the Act and then, secondly, to state information about that changed state of affairs in the disclosure statement.

[140629]

3. However, s 206(2) makes provision for matters to be stated by the seller in the disclosure document and is thus imposed on a person, who will not usually have any control over the body corporate.

4. Further, the plain words of s 206(2) make it clear that it is not possible to perceive any legislative intention to impose on a seller an obligation to ***create*** the kind of information required to be disclosed by s 206. If there is no information created by the body corporate in relation to a particular item mentioned in s 206, an answer of "not applicable" by a seller is accurate, and the seller's obligation of disclosure under s 206 is satisfied to that extent.

The purchasers' argument in this regard also fails to take into account that there is a clear legal distinction between a corporation and the individuals who control it. The body corporate is a legal person with its own obligations, separate and distinct from those of individual lot owners. Thus, the vendors were not under any obligation to ensure that the body corporate was in a position to provide responses in respect of the items listed in s 206(2) of the Act, despite the vendors managing the affairs of the body corporate.

5. Additionally, the evident policy of the Act in relation to the protection of buyers of lots, is that buyers should be told "what they are getting into" in terms of the state of the affairs of the body corporate. It is not that buyers should be given a guarantee that the affairs of the body corporate have been conducted in accordance with the Act.

6. Finally, the buyer has a right to terminate pursuant to s 206(7) if the seller does not provide a s 206(1) disclosure statement. However, the effect of s 206(4) and 206(8) is that even if the disclosure statement contains inaccuracies, it is still a "disclosure statement" for the purposes of s 206(1).

7. Indemnity costs should be awarded because none of the grounds of appeal were faintly arguable.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

CJ Carrigan (instructed by PHV Law Solicitors) for the appellants.

PL O'Shea SC, with JW Peden (instructed by Flower & Hart Lawyers) for the respondents.

Before: Keane, Muir and Fraser JJA.

Keane JA: I agree with the reasons of Muir JA, and with the orders proposed by his Honour. Because the making of an order for indemnity costs is somewhat out of the ordinary in terms of the practice of the Court,[1] I propose to state my reasons for concluding that the appellants' argument is so entirely lacking in substance as to warrant the making of an order for costs on the indemnity basis. Gratefully accepting the summary of facts and issues by Muir JA, I proceed directly to a consideration of the appellants' argument.

2. The appellants' argument on the appeal was that their purported termination of the contract was authorised by s 206(7) of the *Body Corporate and Community Management Act* 1997 (Qld) ("the Act") by reason of the respondent's "substantial non-compliance" with s 206(2) of the Act. This non-compliance was said to flow from the fact that the respondent's answers in the disclosure statement reflected the absence of information which should have been available had the affairs of the body corporate been properly administered.

3. The appellants urge that a broad view should be taken of the provisions of s 206(2) of the Act because they are intended to protect consumers. They emphasise that the objects of the Act include s 4(g) and (h), which are in the following terms:

> "(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community title schemes;
> (h) to ensure accessibility of information about community scheme issues".

4. The appellants' argument fails, however, to articulate how the objects of the Act alter the operation of the plain words of the Act. No matter how generous an operation the words of s 206(2) of the Act are given, it is not possible to perceive any legislative intention to impose

[140630]

on a lot owner an obligation to **create** the kind of information required to be disclosed by s 206.

5. Section 206 of the Act both creates, and determines the limits of, a vendor's obligation of disclosure of various categories of information. The generation and maintenance of these categories of information is an obligation imposed, not upon an individual lot owner (the vendor referred to in s 206), but upon the body corporate pursuant to s 93 to s 95, and s 143 to s 147 inclusive of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld). If there is no information created by the body corporate in relation to a particular item mentioned in s 206, an answer of "not applicable" by a vendor is accurate, and the vendor's obligation of disclosure under s 206 is satisfied to that extent.

6. The appellants' argument overlooks, both the role assigned by the Act specifically to the body corporate, and the crucial legal distinction between a corporation and the individuals who control it, a distinction that has been firmly established in our law since the decision of the House of Lords in *Salomon v Salomon & Co Ltd*,[2] and which is observed by the Act and its subordinate legislation. The body corporate is a legal person with its own obligations, separate and distinct from those of individual lot owners. The appellants' argument proceeds in disregard of this fundamental distinction.

7. The contention originally pleaded by the appellants in an apparent endeavour to overcome this problem was that the respondent had failed to exercise reasonable care to ensure that the body corporate was in a position to provide responses in respect of the items listed in s 206 of the Act. For the learned trial judge to have upheld that contention would have required her Honour to add to the obligation of disclosure expressly created by s 206 of the Act, an obligation to exercise care with a view to ensuring that they will be able to comply with this obligation of disclosure. Her Honour correctly rejected that contention.

8. The first problem with the argument put to the learned trial judge is that the Act does not confer a right of termination by reason of a lot owner/vendor's non-compliance with this super-added obligation. The second problem with the appellants' pleaded contention is that it depends upon the proposition that the respondent was under an obligation to all future purchasers to exercise reasonable care to ensure that the body corporate would be in a position to provide a fulsome disclosure of the matters referred to in s 206 of the Act. That proposition is not stated in the text of the Act, but is said to be an inference from the evident policy of the Act to protect purchasers of units. This process of reasoning is flawed technically, and also it misconceives the policy of the Act in relation to the protection of purchasers of units.

9. The technique of the common law, whereby a judge analyses past decisions to identify the principle which underlies and explains those decisions and then applies that principle to a new set of facts, does not apply to the interpretation of a statute. In the interpretation of a statute one does not seek to distil a general policy which one then applies without regard to the language of the statute. The striking of the relevant "policy balance" is effected by the words used by the legislature, not by the judge generalising the perceived policy of the statute according to his or her own lights.

10. In any event, the evident policy of the Act, in relation to the protection of purchasers of lots, is that purchasers should be told "what they are getting into" in terms of the state of the affairs of the body corporate: it is not that purchasers should be given a guarantee that the affairs of the body corporate have been conducted in accordance with the Act. To subject a lot owner's right of alienation of a lot to an obligation to use his or her voting entitlements to ensure that the body corporate has performed its statutory functions would be to fetter the proprietary rights of lot owners in a way which would be so startling, as a matter of policy, as to require the clearest expression of legislative intention. The Act gives not the faintest hint of any such intention. Further, while lot owners are entitled to participate in the management of the body corporate, the Act does not oblige individual lot owners to exercise their voting rights, and certainly not to ensure that the affairs of the body corporate are conducted in a particular way.[3]

11.

[140631]

On the hearing of the appeal, the appellants seemed to eschew reliance upon the assertion in their pleadings that the respondent was under some duty to potential purchasers of a lot to exercise reasonable care to ensure the quality of responses to the queries raised by s 206 of the Act. The appellants continued to urge, however, the proposition that a lot owner is obliged by the language of s 206(2), as understood in the light of other provisions of the Act, to bring about the state of affairs necessary to enable substantive responses to be made by way of disclosure.

12. There is simply no warrant for amending the language of the Act in the way the appellants would have it. The argument advanced for the appellants on appeal suffers from some of the same fundamental flaws as the pleaded case, in that it fails to recognise, first, that the functions of information creation and retention are not required by the Act to be performed by owners of individual lots, but by a separate legal person, the body corporate, and, secondly, that the entitlement of a lot owner to sell his or her lot is not made conditional upon the performance by the body corporate of its functions under the Act and applicable subordinate legislation.

13. In my respectful opinion, this appeal was always bound to fail. The pursuit of the appeal was distinctly unreasonable. The successful respondents have been obliged to incur the costs of resisting an appeal which was, as was said in *Smits v Tabone*; *Blue Coast Yeppoon Pty Ltd v Tabone*,[4] "wholly without any arguable merit." The respondents should, therefore, receive as full an indemnity for their costs as the Court is empowered to award. Accordingly, I am of the opinion that the appeal should be dismissed with the respondent's costs to be paid by the appellants on the indemnity basis.

Muir JA: The appellants entered into a written Contract dated 19 March 2005 under which they agreed to purchase from Professor & Mrs Chan a block of nine flats located at Toorak Road, Hamilton for a price of $2,715,000. Professor Chan became incapable of managing his financial affairs in 2004 and, since that time, the respondent, Ms Winn, pursuant to an order of the Guardianship and Administration Tribunal, acted as his administrator for all financial matters. Prior to the entering into of the Contract, the appellants were given a disclosure statement in respect of the property in purported compliance with the respondents' obligations under s 206(1) of the *Body Corporate and Community Management Act* 1997 (Qld).

15. By a letter from their solicitors dated 1 April 2005 to the respondents, the appellants purported to terminate the Contract in reliance on a number of alleged breaches of s 206 of the Act in respect of the disclosure statement. The Act applies, as a building units plan had been registered in respect of the building under the *Building Units and Group Titles Act* 1980 (Qld). The respondents' solicitors, in a letter to the appellants' solicitors dated 20 April 2005, gave notice that the respondents terminated the Contract in consequence of the appellants' alleged wrongful repudiation of it. Proceedings commenced by the appellants against the respondents on 31 May 2005 were tried in the Supreme Court in February and March 2007. The

appellants' claims were dismissed and judgment on the respondents' counterclaim in the sum of $663,311.23 was given in their favour.

16. The appellants appealed against these orders.

The issues for determination

17. The notice of appeal contains a number of grounds but the appellants' counsel, in his outline of submissions and in argument, identified the issues for determination as—

> (a) whether the respondents complied with s 206 of the Act in giving the appellants a disclosure statement for the sale of the property; and
> (b) if there was non-compliance with s 206, whether that entitled the appellants to terminate the Contract on 1 April 2005 pursuant to s 206(7) of the Act.

18. The questions for determination thus concern the construction of s 206 and the application of that provision to the disclosure statement provided by the respondents to the appellants in purported compliance with the respondents' obligations under s 206.

[140632]

The relevant provisions of the Act

19. Section 206 of the Act relevantly provides:

> "**206 Information to be given by seller to buyer**
>
> (1) The seller (the *seller*) of a lot included in a community titles scheme (including the original owner of scheme land, or a mortgagee exercising a power of sale of the lot) must give a person (the *buyer*) who proposes to buy the lot, before the buyer enters into a contract (the *contract*) to buy the lot, a disclosure statement.
> (2) The disclosure statement must—
>
> (a) state the name, address and contact telephone number for—
>
> (i) the secretary of the body corporate; or
> (ii) if it is the duty of a body corporate manager to act for the body corporate for issuing body corporate information certificates — the body corporate manager; and
>
> (b) state the amount of annual contributions currently fixed by the body corporate as payable by the owner of the lot; and
> (c) if the seller is the original owner and the contribution schedule lot entitlements for each lot included in the scheme are not equal — state the reason stated in the community management statement for the lot entitlements not being equal; and
> (d) identify improvements on common property for which the owner is responsible; and
> (e) list the body corporate assets required to be recorded on a register the body corporate keeps; and
> (f) identify the regulation module applying to the scheme; and
> (g) state whether there is a committee for the body corporate or a body corporate manager is engaged to perform the functions of a committee; and
> (h) include other information prescribed under the regulation module applying to the scheme.
>
> (3) The disclosure statement must be signed by the seller or a person authorised by the seller.
> (4) The disclosure statement must be substantially complete.

…
(7) If the contract has not already been settled, the buyer may cancel the contract if —

(a) the seller has not complied with subsection (1); or
(b) the seller has not complied with subsection (5) or (6), whichever is applicable.

(8) The seller does not fail to comply with subsection (1) merely because the disclosure statement, although substantially complete as at the day the contract is entered into, contains inaccuracies."

20. Paragraphs 4 (a), (f) and (g) of s 4 of the Act, upon which the appellants place reliance, provide:

"**4 Secondary objects**

The following are the secondary objects of this Act—

(a) to balance the rights of individuals with the responsibility for self management as an inherent aspect of community titles schemes;

…
(f) to provide bodies corporate with the flexibility they need in their operations and dealings to accommodate changing circumstances within community titles schemes;
(g) to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes;

…"

21. A copy of the disclosure statement is Annexure A to the primary judge's reasons. It is now reproduced:

ANNEXURE A

15/03/05

DISCLOSURE STATEMENT

Body Corporate and Community Management Act 1997 — Section 206

Body Corporate	Name of Body Corporate: Kevin Lodge Community Titles Scheme No: 3686 Lot No: 1–9 in BUP 11913	
Secretary of Body Corporate S206(2)(a)(i)	Name: Address: Telephone: Facsimile:	Not applicable
OR		
Body Corporate Manager S 206(2)(a)(ii)	Name: Address: Telephone: Facsimile:	Not applicable
	NB. Body Corporate not being formally operated as all lots owned by Huo Yen Francis Chan and Amy Chan Kung Wai Ying The insurance policy has endorsed upon it the following notation: *"It is hereby declared that Policies 1 — Building and common Area Contents, 2 — Legal liability, 6 — Office Bearers liability and 8 — Building Catastrophe insurance will exclude indemnity on all claims including resultant damage arising directly or indirectly whilst the building is vacant and undergoing renovations"*	
Annual Contributions S 206(2)(b)	Administrative Fund:	Nil
	Sinking Fund:	Nil

If Seller is original Owner and the Contribution Lot entitlements for each Lot in the Scheme are not equal — Reason stated in the CMS for the Lot Entitlements not being equal S 206(2)(c)		Not Applicable
Improvements on common property for which the Buyer to be responsible S 206(2)(d)		Not Applicable
Body Corporate Assets Required to be Recorded on Body Corporate Register S 206(2)(e)		Not Applicable

Regulation Module Applying to Scheme S 206(2)(f)	[Tick the relevant box] If no box is ticked, the Standard Regulation Module is taken to be designated as the applicable Regulation Module.	# Standard Regulation Module # Accommodation Regulation Module # Commercial Regulation Module # Small Schemes Regulation Module # Other Regulation Module (specify)
Is there a:— • Committee for the Body Corporate; or • Body Corporate Manager engaged to perform the functions of the committee S 206(2)(g)		No committee or manager. Body Corporate not being operated formally.
Information prescribed under applicable Regulation module S 206(2)(h)		
Signing	(*signed by Mrs Chan*) ..... 15-3-05 Seller/Person authorised by Seller Date	
Buyer's Acknowledgment	The Buyer acknowledges having received and read this statement from the Seller before entering into the contract. (*signed by L Menniti, S Menniti and P Menniti)* ..... 19-3-05 Buyer Date	

[140633]

[140635]

The appellants' criticisms of the primary judge's approach to the construction of s 206

22. The appellants' counsel, in his written submissions, criticised the primary judge's approach to the construction of s 206 as failing to:

(a) have regard to the secondary objects in paragraphs (a), (f) and (g) of s 4 of the Act;
(b) have regard to s 318 of the Act;
(c) construe the Act as a whole;

(d) have sufficient regard to the words "complying with" and "The statement must" in s 206(1) and s 206(2) respectively.

The correct approach to the construction of s 206(2)

23. It is difficult to discern what relevance paragraphs (a) and (f) of s 4 have to the construction of s 206. Section 318, which prevents persons from contracting out of the Act's provisions and from waiving rights under it, would also seem to provide no particular assistance in the construction of s 206. Paragraph (g) of s 4 shows that one of the objects of the Act, and one may safely infer, of s 206 is to afford protection to the purchasers of lots in a community titles scheme.

24. The meaning of a statutory provision is to be determined "by reference to the language of the instrument viewed as a whole"[5] . The Court's role is "to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute" and the process of construction "begins by examining the context of the provision that is being construed."[6]

25. Section 206 is in Pt 1 of ch 5 of the Act which is concerned with the sale of lots. Section 207 provides that a contract for the sale of a lot includes the disclosure statement and s 208 provides that the buyer may rely on the information in the disclosure statement "as if the seller had warranted its accuracy." Section 209 provides for the circumstances in which inaccuracies in a disclosure statement permit a buyer to cancel the contract. Part 2 of ch 5 is concerned with the sale of proposed lots. Part 3 implies warranties into contracts for the sale of lots and prescribes the circumstances in which a breach of warranty gives a right on the part of the buyer to terminate the contract. Division 2 of Pt 2 of ch 4 provides for access to a body corporate's records by purchasers of lots and other interested persons. By these sections and others, the Act makes quite specific provision for the protection of buyers of lots in community title schemes.

26. Section 14A(1) of the *Acts' Interpretation Act* 1954 (Qld) relevantly provides:

> "(1) In the interpretation of a provision of a Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation."

27. However, neither s 14A nor the purposive approach to construction, authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statutes.[7] The court's role is one of construction not legislation.[8] As subsequent discussion shows, the construction of s 206 advanced by the appellants is inconsistent with the grammatical or literal meaning of the words of s 206 and, far from best achieving the purpose of the Act, would be productive of some quite improbable results.

The disclosure statement

28. In a number of cases, the third column of the statement has been completed by inserting the words "not applicable". An explanation for these entries and some of the others is provided by the notation on the form:

> "NB Body Corporate not being formally operated as all lots owned by Huo Yen Francis Chan and Amy Chan Kung Wai Ying."

29. In her reasons the primary judge explained:

> "[6] Because they retained ownership of all of the units in the building, Professor and Mrs Chan managed the building and ran the affairs of the body corporate informally, without complying with the requirements of the *Body Corporate and Community Management Act*. They endeavoured to visit the property once a year. They left the payment of recurring expenses such as electricity, gardening, rubbish removal and the servicing of fire extinguishers to Harcourts, who met these expenses out of rent receipts. Communications with the insurer also went through Harcourts. Annual

> meetings of the body corporate were held in Hong Kong, but these were not always conducted as they should have been under the legislation. There was no administrative fund or sinking fund established, and no annual contributions were set. (footnotes removed)"[9]

The substance of the appellants' contentions concerning the alleged deficiencies in the disclosure statement

30. The appellants' contentions concerning non-compliance with s 206 proceed on the premise that the section imposes a positive obligation on the seller of a lot, not merely to do the things which the subsection (2) requires, but to complete the disclosure statement by inserting the information which would have been available for inclusion in the statement had there been compliance with the Act and the provisions of the *Standard Module*[10] . For example, s 9(5) of the *Standard Module* requires bodies corporate to have a secretary. The argument advanced is to the effect that if the subject body corporate had no secretary, the respondents as "seller" would be in breach of the requirements of s 206(2)(a) if the disclosure statement failed to state the name, address and contact telephone numbers for the non-existent secretary. In other words, the disclosure statement must be completed, not by reference to the true facts, but by reference to what the facts would have been had there been compliance with the legislation. It seemed to be argued in the alternative, at least by inference, that where there is no secretary and the information specified in s 206(2) cannot be inserted, the disclosure statement cannot comply with s 206(2)(a)(i).

Construction of s 206(2)

31. The appellants' construction of s 206(2) pays little or no attention to its terms. The subsection makes provision for matters to be stated in a document by the seller of a lot. The obligation is thus imposed on a person who, except in comparatively few cases, will have no control of the body corporate or its committee and who will thus be unable to ensure compliance by the body corporate with the requirements of the Act. It is thus unlikely that s 206(2) contemplated that a vendor would fail to meet the requirements of sub-section (2) by accurately stating the facts pertaining to that requirement. But the more obvious difficulty with the appellants' construction is that sub-section (2), in plain terms, merely requires the provision of the information which it specifies.

32. The role of s 206 is to provide information to enable the purchaser to make an informed decision on whether to proceed with the contract. The section imposes obligations on vendors, not on Bodies Corporate. It is thus an unlikely construction of s 206(2) that each of its requirements cannot be satisfied by a true statement of the factual position in relation to that requirement. It follows from the foregoing that where, for example, the disclosure statement requires the "name, address and contact telephone number for … the secretary of the Body Corporate" to be stated if there is no secretary, an appropriate entry in the disclosure statement will be "there is no secretary". So, too, with the requirement to state "the amount of annual contributions currently fixed by the Body Corporate as payable by the owner of the lot". If no such contributions have been fixed, irrespective of the requirements of the Act or the *Standard Module*, an appropriate response will be to the effect that none have been fixed.

33. The right of termination conferred by s 206(7) is conferred, relevantly, for non-compliance by the seller with s 206 (1). That sub-section requires the giving of the disclosure statement before the entering into of a contract for the sale and purchase of a relevant lot or lots. The effect of sub-sections (4) and (8) is that a document which does not comply fully with the requirements of sub-section (2) nevertheless meets the description of a "disclosure statement" for the purposes of sub-section (1) as long as it is "substantially complete as at the day the Contract is entered into". The fact that it contains inaccuracies does not prevent it from being a "disclosure statement" for the purposes of sub-section (1).[11]

34. The disclosure statement, with one exception, contained a response to each of the matters listed in s 206(2). The exception is that there is no entry with statement opposite "Information prescribed under applicable

Regulation Module." There was no such prescription.

The construction of s 206(2)(h)

35. One of the alleged inadequacies of the disclosure statement is that it fails to include "other information prescribed under the Regulation module applying to the scheme". It is common ground that the applicable module is the *Standard Module.* It provides that a body corporate must:

> "(a) prepare and keep a roll containing information including names and addresses of the original owner; the contribution schedule entitlement of each lot; the interest schedule lot entitlement of each lot; name and address of current owners of each lot; prescribed particulars relating to any mortgagee in possession of a lot.[12]
> (b) a register of Body Corporate assets;[13]
> (c) a register of each engagement by the Body Corporate of a person as Body Corporate Manager or Service Contractor and each authorisation of a person as a letting agent;[14]
> (d) a register recording each authorisation for a person as a letting agent;[15]
> (e) a register recording each authorisation for a service Contractor or letting agent to occupy a particular part of common property;[16]
> (f) a register of allocations made under any exclusive use by-law;[17] "

36. The appellants' contention is that all of the information required to be brought into existence and/or kept by the body corporate under s 143–s 147 inclusive, must be set out in the disclosure statement, or, at least, referred to in it. The argument misunderstands the obligation imposed by s 206(2)(h). That provision merely acknowledges the possibility that a section or sections in an appropriate module might prescribe that information additional to that already specified in s 206(2), be included in disclosure statements. If the appellants' contentions were to be accepted, it would follow that the disclosure statement would need to contain, not only the very substantial body of information required by s 143–147 of the *Standard Module*, but the information contained in the books, records, accounts, minutes and correspondence of the body corporate.[18] That would be an improbable construction of a provision which, on its face, is limited in scope and is designed to impart quite specific information of practical value to a purchaser of a lot. Another section of the Act, s 205, enables a purchaser to inspect body corporate records or to obtain copies of records.

Analysis of the disclosure statement and the adequacy of its content

37. In her reasons the primary judge set out the particulars of breach of s 206 listed in paragraph 5 (d) of the Amended Statement of Claim and her findings in respect of them are as follows[19] :

> "[45] …
>
> (i) *that there were no body corporate records, informal or otherwise*. Section 206 imposes no obligation to maintain records. In any event, there were body corporate records, many of them in evidence.
> (ii) *that there was no person listed as acting formally or informally for the management of the body corporate interests or property*. Section 206 does not require the statement to include this.
> (iii) *that there were no annual or any contributions fixed to be payable by the lots within the scheme*. The statement was correct.
> (iv) *that there was no identification of improvements or otherwise on the common property of the body corporate*. The statement was correct.
> (v) *that there were no body corporate assets listed*. There were none to be listed.
> (vi) *that there was no identification of the relevant regulation module applying to the scheme*. The *Standard Regulation Module* was identified.
> (vii) *that there was no listing of any person or persons acting formally or informally for the body corporate or who performed the functions of the body corporate committee*. Section 206 does not require the statement to include this.
> (viii) *that there was no s 206 Body Corporate and Community Management*

> *Act statement, formal or informal, available*. This is an extraordinary allegation in the face of exhibit 2. If it means that the statement was so defective as to be a nullity, I reject the contention.
> (ix) *that there were no details as to the insurance or insurance policy of the building apart from a notation allegedly endorsed thereon*. Section 206 does not require this. In any event, the endorsement on the policy was set out in the disclosure statement provided.
> (x) *that there was no aggregate interest schedule, formal or informal, available or in existence*. Section 206 does not require this.
> (xi) *that there was no lot entitlement schedule, formal or informal, available or in existence*. This is incorrect; it was part of the registered building units plan.
> (xii) *that there was no differentiation, formal or informal, between common and other property in the scheme*. This is incorrect; see the registered building units plan.
> (xiii) *that there was a body corporate in name only and for all intents and purposes did not operate as a body corporate, formally or informally or at all*. There was a body corporate and it did operate, albeit informally. For example, it held insurance cover and an electricity account.
> (xiv) *the defects pleaded in paragraph 4(d)(iii)*. This is incomprehensible.
> (xv)–(xxi) Doing the best I can to understand the structure of the pleading, these particulars all relate to non-disclosure of documents about the condition of the building, correspondence with the insurer, and rectification costs. None of them was required to be disclosed under s 206. (footnotes removed)"

38. In the above passage from her reasons, the primary judge carefully addressed each of the alleged breaches of s 206 particularised in paragraph 5 of the Amended Statement of Claim, even though the connection between some of the particulars and the requirements of s 206(2) were difficult to discern. Neither in his outline of submissions, nor in oral argument, did counsel for the appellants attempt to expose any errors in the primary judge's findings in relation to those particulars.[20] There is one qualification which, perhaps, ought be made to this statement.

39. Section 206(2) requires the statement to state the name, address and contact telephone number for the secretary of the body corporate or the body corporate manager where it was the duty of the body corporate manager to act for the body corporate for issuing body corporate information certificates.

40. It was argued that the respondent, Mrs Chan, was the secretary of the body corporate at relevant times and that there was a body corporate manager. Consequently, it was submitted, the disclosure statement should have been filled out accordingly. If the contention was correct the disclosure statement would have been inaccurate but it would not follow that it was not "substantially complete". The appellant's case did not rely on inaccuracies in the statement. This argument, therefore, cannot advance the appellant's case but even if it could, it has no sound foundation in fact.

41. There was no evidence to support the contention that there was a body corporate manager at the relevant time, let alone a manager whose duty it was to act for the body corporate for issuing body corporate information certificates.

42. The argument which relies on the failure to state the name, address and contact number of the secretary suffers from a few difficulties. No such allegation appears in the particulars of breach of s 206. Consequently, the primary judge was not invited to address the matter and she did not. The contention that Mrs Chan was the secretary at the date of the disclosure statement is inconsistent with the appellants' pleaded case: see paragraphs 5(d)(vii) and (xiii). Mrs Chan was not cross-examined on this point or even in relation to the accuracy of the contents of the disclosure statement.

43. The appellants' counsel conceded that the notes of the annual meeting dated 30 July 2004[21] was "the only document that potentially relates to the relevant year." In it Mrs Chan

was described as “chairperson” and a Mr Kevin Chan as “member”. The document made no reference to the body corporate secretary. The argument advanced, however, was that it could be inferred from the document’s failure to refer to a secretary or to any change in that regard that Mrs Chan continued as secretary. It was contended that “Notes of the Annual General Meeting”[22] on 10 December 2003 showed Mrs Chan to be the secretary. The document contained the entry:

> “DIRECTORS PRESENT:
>
> • Amy Chan, Chairperson
> • Francis HY Chan, secretary
> • Kevin Chan, member”

44. Paragraph 8 of the notes provided:

> “All **directors** agreed to stay on to be reappointed. Francis Chan will be the chairperson and Amy Chan will be the secretary, and Kevin Chan will remain director for the next term of service.” (emphasis added)

45. The terminology used and the participation of non-proprietors is consistent either with the respondent’s contention that the “Body Corporate [was] not being formally operated” or with the conclusion that the meeting, although relating to the subject Body Corporate, was a meeting of directors of another corporation. Whatever the participants in these two meetings intended, the meetings were not meetings of the proprietors of lots in a community titles scheme.

46. These documents do not make out a case not pleaded and not argued below.

47. After completing her analysis of the merits of the allegations of breaches of s 206 particularised in paragraph 5 of the Statement of Claim, the primary judge briefly discussed the scheme of the relevant provisions of the Act and concluded “… the disclosure statement was substantially complete.” There was no challenge to that finding except on the basis of the appellants’ erroneous construction of s 206 and as just discussed. It follows that the appellants have failed to establish a breach of s 206 which entitled them to terminate the Contract.

48. For the sake of completeness, however, it is proposed to consider paragraphs 5(d)(i) to (xiii) with a view to ascertaining whether the primary judge’s conclusions in paragraph [45] of her reasons are correct. The letter beside each Roman numeral below is a reference to the paragraph of s 206(2) to which the nominated particular appears to relate.

> (ii)(a) The evidence was to the effect that no committee of the body corporate was functioning, no body corporate manager had been engaged[23] , and Mrs Chan, for most purposes, managed the building in a general sense[24] . The allegation is not in respect of a requirement of the Act and the disclosure statement in respect of (a) is adequate.
> (iii)(b) The disclosure statement correctly stated “nil”. No annual contributions had been fixed.
> (iv)(d) The disclosure statement correctly stated, “not applicable”. The evidence did not disclose the existence of any improvements covered by (d).
> (v)(e) Again, “not applicable” was stated in the disclosure statement. “None” would have been a preferable description but the words used in the context of the wording of the form as a whole conveyed the same meaning. The evidence did not disclose the existence of any assets of the requisite class.
> (vi)(f) The primary judge’s findings are correct and unchallenged.
> (vii)(g) The response was “no committee or manager Body Corporate not being operated formally”. The response was accurate.
> (viii) The primary judge explained the oddity of this particular.
> (i)(ix)(x)(xi) and (xiii) None of these matters are mentioned in or required by s 206(2).
> (xii) This particular has nothing to do with s 206(2) and, as the primary judge pointed out, the allegation is wrong.

49. The respondents argue that the appellants neither pleaded nor conducted their case at trial on the basis of a right to terminate under s 206. It is submitted that had the case relying on s 206 been pleaded and argued on the trial, the respondents "would (and could) have dealt with that claim …".

50. The Amended Statement of Claim does not make out a case of termination of the Contract pursuant to s 206 paragraph (5)(d)

[140640]

which contains the particulars of the alleged breach of s 206, is itself a particular of an allegation that certain representations were false, misleading and deceptive and/or negligent. The only express allegation of termination is contained in paragraph 9 which states:

> "As a result of the breaches aforesaid, the plaintiffs, by letter dated 1 April 2005, had as it was entitled to so do;
>
> (a) terminated the Contract pursuant to and within the time limited for same under s 224 of the … Act;
> (b) demanded of the defendants the return of the deposit."

51. Paragraph 6 of the pleading, however, contains a discrete allegation of breach of s 206 in the manner particularised in paragraph 5(d). The trial commenced on 26 February 2007. On 8 February the solicitors for the respondents wrote to the solicitors for the appellants noting, accurately, that the relief claimed was based only on a purported termination under s 224 of the Act. The letter continued:

> "We put you on notice that we, and our clients, have prepared the defendants' case based on the claim as pleaded and, if your clients wish to raise matters so as to rely upon either s 206 or s 209, then we would expect that any amended pleading be provided to us by no later than 4pm on Friday 9 February 2007."

52. In his opening of the defendants' case, senior counsel for the respondents informed the primary judge that the appellants relied only on s 224 of the Act. Counsel for the appellants responded that s 206 was relied on as well. An argument then ensued. The letter of 8 February 2007 was tendered in the course of this debate. The primary judge was not invited to rule on the point and did not do so.

53. In their written submissions on the conclusion of the trial, counsel for the respondents maintained the position that the appellants made no claim under s 206 or s 209 of the Act. Unfazed by the respondents' stance that the appellants would be held to their pleaded case, the appellants' counsel addressed on the basis that the Contract had been terminated, inter alia, under s 206 of the Act. The primary judge, in her reasons, did not deal with the respondents' objection to the appellants straying outside their pleaded case, choosing to address the appellants' argument based on s 206 on its merits. Her Honour thus either implicitly did not uphold the respondents' contentions concerning the scope of the appellants' pleading in relation to s 206, or concluded that the appellants' argument had no merit and could thus be disposed of without the need to make a ruling.

54. Whether the appellants should have been permitted to argue that the Contract was terminated pursuant to s 206 at first instance and whether they should be permitted to raise that argument on appeal depends on whether, had the issue been raised properly at first instance, "evidence could have been given which by any possibility could have prevented the point from succeeding".[25] Senior counsel for the respondents argued, heroically in my view, that the respondents could well have adduced other evidence had they not met the appellant's pleaded case. Having regard to the scope of the pleaded allegations, I consider it improbable that an amendment to the pleading would have necessitated the calling of further evidence, assuming a conventional approach to the construction of s 206. The primary judge, it would seem, was of that opinion. However, in view of the fact that none of the grounds of appeal have been made out, it is unnecessary to delve further into the pleading question.

Conclusion

55. For the above reasons I would dismiss the appeal with costs. The costs should be on the indemnity basis; none of the grounds of appeal were faintly arguable[26] . The inadequacy of the appellants' case had

been exposed by the primary judge's reasons. The appeal, with the possible exception of the diversion in relation to the alleged failure to state the particulars of the secretary or manager, took the form of a construction argument which studiously ignored the words required to be construed. The diversion, as has been explained, was conspicuously lacking in any factual foundation. Nor was it within the case pleaded or advanced at first instance.

Fraser JA: The relevant statutory provisions, the issues in the appeal, and the factual

[140641]

background are set out in the reasons of Muir JA, which I have had the advantage of reading and with which I agree.

57. The critical issue concerns the construction of s 206(2) of the *Body Corporate and Community Management Act* 1997 (Qld).

58. The obligation imposed upon the seller of a lot by s 206(1) is to "give … a disclosure statement" which, as s 206(2) requires, must "state", "identify", "list" and "include" information about specified matters concerning the body corporate and its affairs.

59. The effect of the appellants' arguments is that, by those words, s 206(2) imposes obligations upon the seller, firstly, to cause the body corporate to remedy any relevant non-compliance with statutory obligations imposed upon it by other provisions in the Act and then, secondly, to state information about that changed state of affairs in the disclosure statement.

60. That propounded meaning of those words is not open. Their natural and literal meaning is to require only that the seller give the buyer information about the specified topics: if the body corporate is in breach of a relevant provision of the Act, so much will appear from the seller's disclosure statement. That meaning makes sense, it is not contradicted by any other provision, it gives effect to the object of consumer protection expressed in s 4(g) of the Act, and it is not inconsistent with any other object of the Act.

61. For those reasons and for the reasons given by Muir JA and Keane JA with which I agree, the construction of s 206 propounded by the appellants must be rejected. The appeal should be dismissed with costs.

62. In my opinion, those costs should be assessed on the indemnity basis. The learned trial judge rejected the construction propounded by the appellants because it was not what s 206 provided. In this appeal, the fundamental task for the appellant was to demonstrate error in that decision.[27] Presumably because of the hopelessness of that task, the appellants' counsel did not essay the attempt. No submission was made that explained how the words of s 206 could accommodate the construction the appellants propounded; nor did the appellants' counsel articulate any canon of construction or identify any authority that even arguably justified the substantial revision of s 206 necessary for success by the appellants. The particular arguments that were advanced in support of the appeal were hopeless, for the reasons given by Muir JA.

63. I also agree with the reasons of Keane JA for concluding that an indemnity costs order is appropriate here.

64. I agree with the orders proposed by Muir JA.

Footnotes

1 Cf *Smits* v *Tabone*; *Blue Coast Yeppoon Pty Ltd* v *Tabone* [2007] QCA 337 at [43]–[53].

2 [1897] AC 22.

3 Cf s 104 to s 111A and s 150 of the Act, and s 48 to s 49A inclusive of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld)

4 [2007] QCA 337 at [43]–[53]

5 *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

6 *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

7 *Saraswati* v *The Queen* (1991) 172 CLR 1 at 21.

8 *Newcastle City Council* v *GI0 General Ltd* (1997) 191 CLR 85 at 109.

9 Reasons paragraph [6].

10 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

11 *Body Corporate and Community Management Act* 1997 (Qld), s 206(8).

12 Section 143 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

13 Section 144 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

14 Section 145 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

15 Section 145 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

16 Section 146 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

17 Section 147 *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld).

18 See *Body Corporate and Community Management (Standard Module) Regulation* 1997 (Qld), s 149.

19 Footnotes have been omitted. The words in italics are quotations of the particulars in paragraph 5(d) of the amended statement of claim.

20 Reasons paragraph [45].

21 Record 485.

22 Record 483.

23 R313.

24 R238 and 261.

25 *Coulton* v *Holcombe* (1986) 162 CLR 1 at 7 and 8 referring to *Suttor* v *Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; and *Bloemen* v *The Commonwealth* (1975) 49 ALJR 219.

26 See *Smits* v *Tabone*; *Blue Coast Yeppoon Pty Ltd* v *Tabone* [2007] QCA 337 at [43]–[53].

27 *Allesch* v *Maunz* (2000) 203 CLR 172 at 180 – 181 [23], [2000] HCA 40.

CROWBAY P/L & ANOR v BODY CORPORATE FOR "SOUTHBANK CHAMBERS"

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(2008) LQCS ¶90-143 Court citation: [2007] QCA 453

Supreme Court of Queensland - Court of Appeal

Decision delivered on 21 December 2007

Community Schemes — Exclusive use by-laws — Where the respondent was a body corporate for a community title scheme in respect of four lots in a commercial building — Where the use of common property at the rear of the building was the subject of a dispute — Whether the District Court failed to correctly apply and interpret s 60 of the Body Corporate and Community Management Act — Body Corporate and Community Management Act 1997: s 60.

The applicants were the registered owners of Lot 3 in respect of a four lot commercial premises situated in Brisbane. Each lot received a right of exclusive use of an area situated at the rear of the property.

The first Community Management Statement recorded in respect of the premises contained a "community management statement notation" from the local government (being an endorsement by local government to the effect that it has noted the Community Management Statement). However, neither the second or the third Community Management Statement recorded for the scheme contained that notation.

By-law 15 set out in the first Community Management Statement provided for the exclusive use area to be used for car parking purposes only. The substance of the by-law essentially remained unchanged in the second Community Management Statement.

However, by-law 19 in the third Community Management Statement altered the way in which the common property was allocated into the exclusive use areas. Instead of one general area with designated car-parks, each occupier was allocated that part of the common property which abutted the rear of the unit he or she occupied, so that each had the use of a quarter of the common property. The by-law also removed the restriction on the use of the exclusive use area for car parking only.

Part (c) of by-law 19 did however, provide that:

> "(c) Owners may only use an exclusive use area for the purposes permitted by the town planning scheme of the local government and any other federal, state or municipal authorities having jurisdiction in that regard and shall ensure that all necessary consents, permits and approvals are obtained before commencing such use".

[140643]

The owners of Lot 1 subsequently indicated that they wished to operate a bar and restaurant on their lot, including on their exclusive use area. Their intention was discussed at an extraordinary general meeting held by the respondent body corporate and three resolutions were passed, being resolutions 2, 3 and 4. The applicants were the only dissenters. Resolution 2 consented to improvements being made to the exclusive use area of Lot 1. Resolution 3 consented to the use of Lot 1 and its exclusive use area as a bar and licensed premises and Resolution 4 consented to certain alterations to Lot 1.

Before the adjudicator, the applicants had argued that the third Community Management Statement was invalid on the basis that it did not have the relevant local government notation on it as required by s 60 of the *Body Corporate and Community Management Act 1997* (BCCM Act) and as a consequence, any motions passed by the body corporate in reliance on this Statement (ie resolutions 2 and 4) were also invalid.

Section 60(1) of the BCCM Act precludes the recording of a community management statement without a "community management statement notation". However, s 60(6) (as it existed at the relevant time) provided an exception to the above as follows:

> "Despite subsection (1), a new community management statement may be recorded without the endorsement on it of a community management statement notation if —
>
> > (a) there is no difference between the existing statement for the scheme and the new statement for any issue that the local government could have regard to for identifying an inconsistency mentioned in subsection (4) …"

Subsection 60(4) provided that:

> "(4) For a community titles scheme ***intended to be developed progressively*** , the local government is not required to endorse the notation on the proposed statement if there is an inconsistency between a provision of the statement and —
>
> > (a) a lawful requirement of, or an approval given by, the local government under the Planning Act; or
> > (b) the local government's planning scheme; or
> > (c) a lawful requirement of, or an approval given by, the local government under its planning scheme (emphasis added)."

The applicants argued that the exception to the requirement for a notation contained in s 60(6) did not apply, because the Community Management Statement had altered the car parking arrangements so as to contemplate tandem parking in each of the exclusive use areas. That meant that cars had to reverse onto the lane at the rear of the property in order to leave it. Those changes raised issues of conflict with the Brisbane City Council's Transport Access Parking and Servicing policy.

For the purposes of determining whether a s 60(6) exception applied, the adjudicator had identified two possible interpretations of s 60. The first was that s 60(6) required that regard be had to inconsistencies of the kind identified in s 60(4)(a), (b) and (c), whether or not the community title scheme was "intended to be developed progressively".

The second interpretation was that the reference to "an inconsistency mentioned in subsection [60](4)" encompassed the whole of 60(4) so that it applied only to schemes "intended to be developed progressively". If the second interpretation was favoured, no relevant inconsistency would arise in this case as the community title scheme was not intended to be developed in such a way.

The adjudicator expressed a preference for the second interpretation, but made findings for the purposes of the first interpretation. On the first interpretation, the adjudicator reached the conclusion that a notation was not required because the difference between the Community Management Statements was not of a kind that would fall for consideration in respect of the matters set out in s 60(4)(a)(b) or (c). It was found that the third Community

[140644]

Management Statement did not contemplate parking in the exclusive use areas at all. Instead, the adjudicator noted that a plain reading of by-law 19 suggested that it is was for each owner to determine how and for what purpose their exclusive use areas were to be used (subject to them ensuring that any use complied with the relevant planning scheme and that they had all relevant approvals).

The adjudicator also concluded that there was merit in the argument that part (c) of by-law 19, prevented the arising of any inconsistency and hence of any s 60(4) issue.

The applicants' subsequent appeal to the District Court was also unsuccessful. The applicants then sought leave to appeal from the District Court's decision.

Held: Application for leave to appeal dismissed.

1. The District Court determined that the adjudicator was correct in her conclusion that part (c) of by-law 19 by restricting the use of the exclusive use areas to purposes permitted by the town planning scheme, precluded the arising of any inconsistency, and hence of any s 60(4) issue.

However, the applicants correctly argued on appeal to this court that this conclusion incorrectly focused attention on whether inconsistency had been precluded by the effect of the by-law and not on whether there were relevant differences between the two community management statements which could give rise to s 60(4) issues. Part (c) of by-law 19 could not be conclusive against any possibility of an inconsistency of the s 60(4) kind. It was still possible that other parts of the new Community Management Statement might raise an issue of inconsistency meeting one of the s 60(4) descriptions. In concluding otherwise, the District Court and the adjudicator were in error.

2. Despite the above, the adjudicator's view in this regard was independent of, and did not detract from, the finding that a relevant difference had not been identified. In making that finding, the adjudicator correctly directed attention to what the differences between the Statements were, and whether they were such as to raise a s 60(4) point.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M K Conrick (instructed by D M Wright & Associates) for the applicants.

D J Kelly (instructed by Redchip Lawyers) for the respondent.

Before: McMurdo P, Holmes JA and Jones J.

McMurdo P, Holmes JA and Jones J:

Application for leave to appeal dismissed with costs

McMurdo P: The application for leave to appeal should be refused with costs for the reasons given by Holmes JA.

Holmes JA: The applicants seek leave to appeal from a decision of a District Court Judge upholding an adjudicator's determination made under s 289(2) of the *Body Corporate and Community Management Act 1997* (Qld). The respondent is the body corporate for a community title scheme in respect of four lots in a commercial building. The applicants have owned Lot 3 since 2003. At the rear of the building is common property; its use was the subject of the dispute before the adjudicator. The appeal for which the applicant sought leave raised, in essence, three grounds: that the learned judge below had erred in construction of s 60 of the *Body Corporate and Community Management Act* and had made wrong findings in consequence; that she had not given adequate reasons for her conclusions relating to s 60; and that she had erred in failing to set aside the adjudicator's decision as made in breach of the rules of natural justice.

The relevant legislative provisions

3. Under the *Body Corporate and Community Management Act*, a community management statement is integral to a community title scheme. It performs a number of functions, which include identifying the subject

property, providing schedules of lots which specify the entitlements and contributions applicable to each, and setting out the by-laws by which the community management scheme is administered and

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regulated.[1] A community management statement has no effect unless it is recorded by the Registrar of Titles under s 115K of the *Land Title Act 1994* (Qld).[2] However, the Registrar is under no obligation to examine a community management statement to ensure its compliance with the statute's requirements, and recording does not lead any presumption that the statement is valid or enforceable.[3]

4. Section 60(1) of the *Body Corporate and Community Management Act* precludes, with certain exceptions, the recording of a community management statement without a "community management statement notation": an endorsement by local government to the effect that it has noted the community management statement. It is one of the exceptions to that requirement which has presented difficulty here. At the time when this community management statement was recorded, s 60(6) provided:

> "(6) Despite subsection (1), a new community management statement may be recorded without the endorsement on it of a community management statement notation if —
>
> > (a) there is no difference between the existing statement for the scheme and the new statement for any issue that the local government could have regard to for identifying an inconsistency mentioned in subsection (4) …"

5. Subsection 60(4) provided:

> "(4) For a community titles scheme intended to be developed progressively, the local government is not required to endorse the notation on the proposed statement if there is an inconsistency between a provision of the statement and —
>
> > (a) a lawful requirement of, or an approval given by, the local government under the Planning Act; or
> > (b) the local government's planning scheme; or
> > (c) a lawful requirement of, or an approval given by, the local government under its planning scheme."

6. The language of s 60(6) does not make for an easy incorporation of the instances identified in s 60(4); but, in essence, the first subsection is directed at establishing whether any changes as between successive community management statements may have town planning implications to which the local government's attention should be drawn.

The community management statements

7. The first community management statement for this community title scheme was recorded in 1998. Its by-laws entitled the owners and occupiers of the lots in the scheme to "exclusive use and enjoyment for car parking" of areas identified on a schedule (Schedule E) and a sketch plan. The areas so identified were 10 designated car parks in the common property at the rear of the building. Each lot holder had two car spaces.

That community management statement was replaced by another in 2000,[4] the relevant by-law of which (By-law 19) did not alter the parking arrangement. However, Schedule E was changed slightly in its form and now bore a sub-heading

> "Exclusive use — car spaces
>
> Lots affected:"

The body of Schedule E then identified the lots and the exclusive use area allocated to each by reference to the sketch plan.

8. On 22 November 2002, the respondent body corporate approved another community management statement. By-law 19 was amended so as to alter the way in which the common property was allocated into exclusive use areas. Instead of one general area with designated car parks, each occupier was allocated that part of the common property which abutted the rear of the unit he or she occupied, so that each now had

the use of a quarter of the common property in the form of a long narrow strip of land. No reference was now made to car parking. Instead, the by-law provided:

> "19. EXCLUSIVE USE
>
> (a) The Owner holding a grant of exclusive use shall be responsible at the Owner's expense for the performance of the duties of the Body Corporate as defined in Section 123(2) of the Body Corporate and Community Management (Standard Module) Regulation 1997.
>
> [140646]
>
> (b) The Owner holding a grant of exclusive use under the by-law may authorise the reallocation of any such exclusive use area from that Owner to any other Owner of a Lot in the community titles scheme subject to notice in writing to the Body Corporate from both Owners.
> (c) Owners may only use an exclusive use area for the purposes permitted by the town planning scheme of the local government and any other federal, state or municipal authorities having jurisdiction in that regard and shall ensure that all necessary consents, permits and approvals are obtained before commencing such use".

Schedule E, however, remained unaltered. The new community management statement was recorded on 11 July 2003.

9. The third community management statement did not contain any community management statement notation. In 2006, conflict arose between the lot holders when resolutions (against which the applicants voted) were passed permitting the holder of Lot 1 to make certain alterations to its premises. The effect was to allow Lot 1's owner to use its exclusive use area as an adjunct to a bar it was proposing to establish on its premises, for which it had lodged a development application with the Brisbane City Council. The dispute was referred to an adjudicator for resolution under Part 9 of the Act, the applicants contending that the resolutions relating to the use of the exclusive use area and the lot itself for the purposes of the bar were null and void, because the community management statement on which the resolutions were based was itself invalid for non-compliance with s 60. They sought declarations accordingly.

The adjudicator's decision

10. The applicants' argument before the adjudicator (to which they adhere) was that the exception contained in s 60(6) did not apply, because the community management statement had altered the car parking arrangements so as to contemplate tandem parking in each of the exclusive use areas. That meant that cars had to reverse onto the lane at the rear of the property in order to leave it. Those changes raised issues of conflict with the Brisbane City Council's Transport Access Parking and Servicing (TAPS) policy. The relevant parts of the TAPS policy were said to be ss 3.4, 6.2.1 and 6.8.1, which, respectively, regulated the construction of driveways so as to provide minimum site distances on egress; regulated car park design so as to provide for appropriate site distances in areas of potential pedestrian and vehicle conflict; and required a minimum width of 2.3 metres in at least a quarter of the available car park spaces.

11. The adjudicator had the difficult task of construing s 60. She identified two possible interpretations. The first was that s 60(6) required that regard be had to inconsistencies of the kind identified in ss 60(4)(a), (b) and (c), whether or not the community title scheme was "intended to be developed progressively". The second was that the reference to "an inconsistency mentioned in ss 60(4)" embraced the whole of sub-s (4), so that it applied only to schemes "intended to be developed progressively"; since this was not such a scheme, no relevant inconsistency would arise.

12. The adjudicator expressed a preference for the second interpretation, but made findings for the purposes of the first:

> "If I were to apply the first interpretation, I am not entirely persuaded that a relevant issue exists. While the applicants suggest that the Third CMS 'contemplates tandem parking', I am not of the view that the Third CMS necessarily contemplates parking in the exclusive use areas at all. By-law 19 [does]

not indicate the exclusive use areas are intended for parking or for any other specific purpose. A plain reading of By-law 19 suggests it is for each owner to determine how and for what purpose their exclusive use areas is to be used, subject to them ensuring that any use complies with the relevant planning scheme and that they have all relevant approvals. Because the new By-law 19 does not specifically contemplate car parking, it arguably does not specifically contemplate tandem parking or any other particular form of parking arrangement."

She continued:

"Moreover, the applicants have provided no expert advice, other than their own opinion,

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that By-law 19 is contrary to a requirement or approval under the Planning Act or BCC planning scheme. Their claim is not supported by any opinion from an authority in planning law, or any evidence that the BCC considers that the Third CMS parking requirements are contrary to BCC requirements. They have also provided no evidence of the original development approval for the scheme and any requirements or approvals provided in respect of parking."

13. The adjudicator reached the view that no notation was required. Giving her reasons in point form, she dealt first with the second possible interpretation of s 60(6)(a), and then went on to say:

- "If the first interpretation of subsection (6)(a) is correct, the applicants have not sufficiently convinced me that the difference in the two CMS is an issue that the BCC could consider.
- I consider that there is merit in the argument that the provision of clause (3) of By-law 19 provides coverage to the BCC for any issues arising under the planning provisions."

She dismissed the application to invalidate the statement and the resolutions.

14. In the course of giving her determination, the adjudicator noted the content of a letter dated 8 September 2006 from the Brisbane City Council. The solicitors for the owners of Lot 1 had written to the Council asking for an opinion as to whether it considered there was a requirement that the community management statement be endorsed. Originally the Council had indicated that it would give an opinion, but it advised in the letter of 8 September that it considered it inappropriate to do so: the query concerned a matter under the *Body Corporate and Community Management Act*, it related to an already recorded community management statement, and any debate about whether the community management statement was valid and enforceable without a local government notation was up to the Body Corporate and did not concern the Council. The adjudicator expressed her regret that no opinion was forthcoming on whether the changes in the third community management statement were inconsistent with the planning scheme.

The appeal to the District Court

15. A person aggrieved by an adjudicator's order may appeal to the District Court, but only on a question of law.[5] On the District Court appeal, the parties agreed that the Certificate of Readiness they had filed identified the issues. Those issues included two which remain relevant on this application: whether the adjudicator had erred by concluding that a difference between community management statements for the purposes of s 60(6)(a) required an actual inconsistency, as opposed to a difference which could give rise to a relevant issue of inconsistency; and whether she had failed to observe the rules of natural justice. (In investigating an application the adjudicator is not bound by the rules of evidence but must observe natural justice.)[6] The relief sought was that the appeal be allowed, the adjudicator's decision set aside and orders substituted declaring the various resolutions and the community management statement null and void.

16. On appeal, the applicants made these arguments. The adjudicator's preferred interpretation of s 60(6)(a) was wrong. Although she had posed the correct question for the alternative interpretation, namely, "was there a difference between the third CMS and the second CMS for an issue that the local government could have regard to for identifying such an inconsistency?", she had in fact addressed whether the community management statement was inconsistent with the terms of the Town Planning Scheme requirements or approval. Car parking arrangements were an issue which fell within s 60(4). The adjudicator's receipt of the letter from the solicitors for Lot 1's owner, without advising the applicants, gave rise to a reasonable apprehension of bias.

17. The learned District Court judge (consistently with a concession by the respondent) concluded that the second interpretation of s 60(6)(a) considered by the adjudicator was not open. Adopting the first interpretation, she decided that the adjudicator's approach to s 60(6) was correct. As to the question of whether the adjudicator's decision

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had been made in breach of the rules of natural justice, her Honour observed that, while it might have been preferable had the letter been disclosed, it did nothing more than confirm the Council's position that resolution of the notation question was best left to the adjudicator. Its receipt did not give rise to any reasonable apprehension of bias.

The District Court judge's "findings"

18. On this application, the applicants argued that the District Court Judge had wrongly found that the difference between the second and third community management statements was that the third community management statement did not limit the use of exclusive use areas to car parking. The applicants sought to argue that the finding was wrong, because the sub-heading to Schedule E still referred to car parking; the relevant difference, it was said, was the introduction of new car parking arrangements, which conflicted with the provisions of the TAPS policy.

19. But her Honour's reference to the extent of the difference appears under the heading "Background Facts". It is no more than a reiteration of what the adjudicator had found. The learned judge did not make the finding; she could not have been asked to do so on an appeal limited to questions of law, and nothing in the Certificate of Readiness, said to identify the issues, suggests that she was. The content of the respective community management statements involved, in this case, no construction question. It was a matter of fact, as was establishing in what respect they differed. The adjudicator having made the finding of fact as to what the difference between the statements was — that the amended By-law 19 did not indicate the exclusive use areas were intended for parking or for any other specific purpose — no appeal lay from it; and it is certainly not open for agitation in this Court.

The construction of s 60(6)

20. The question of law for the District Court judge was as to the correctness of the adjudicator's application of s 60(6). It was no longer contended that the second interpretation was sustainable, so the controversy was limited to whether her approach to the combined operation of ss 60(4) and (6) was correct.

21. The relevant portion of her Honour's judgment is as follows:

> "While the argument put forward by Counsel for the appellant, at first blush, certainly holds some attraction, I am unable to accept that submission. It ignores in my mind, the true meaning of s 60(6) and s 60(4) and its' intended effect, particularly when regard is had to s 60 as a whole. In this instance, clause 3 of by-law 19 specifically states that owners may only use an exclusive use area for the purposes permitted by the town planning scheme of the local government and other relevant bodies and shall ensure that all necessary consents, permits and approvals are obtained before commencing such use. The adjudicator was of the view that clause by-law 19 therefore covered the situation, whether it was accepted or not, that the use of that area might include tandem car parking arrangements, a matter relevant under the local government town planning scheme, clause (3) of by-law 19 would cover that situation together with any other situation where the proposed use might be of a kind that a relevant government body could have regard to for identifying whether there was an inconsistency between that provision in the 3rd CMS and any of the matters set out in s 60(4)(a), (b) or (c). While there is no case authority relating to the interpretation of s 60 of the Act which may have been of assistance, I am of the view that the adjudicator was correct in her approach to s 60 and as such, did not fall into error as asserted."

22. The thrust of that passage seems to be that the adjudicator was correct in her conclusion that Clause 3 of By-law 19 (by restricting use of exclusive use areas to purposes permitted by the town planning scheme for which any necessary consents, permits or approvals had been obtained) precluded the arising of any inconsistency, and hence of any s 60(4) issue. The applicants say, with some justice, that the conclusion

suggests a focusing of attention, not on whether there were relevant differences between the two community management statements which could give rise to s 60(4) issues, but on whether

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inconsistency had been precluded by the effect of that clause.

23. By-law 19(3) could not, in my view, be conclusive against any possibility of an inconsistency of the s 60(4) kind. Whatever the sub-clause's practical effect, it was still possible that other parts of the new statement might raise an issue of inconsistency meeting one of the s 60(4) descriptions. In concluding otherwise, the learned judge and the adjudicator were, in my respectful opinion, in error. But the adjudicator's view in this regard was independent of, and did not detract from, her earlier conclusion that she was not satisfied that any relevant difference had been identified. In making that finding, she correctly directed her attention to what the differences between the statements were, and whether they were such as to raise a s 60(4) point.

24. Nor do I think that the reference to the applicants' having identified no conflict suggests that the adjudicator departed from that approach. It is true that the applicants were not required to identify inconsistency, as opposed to a difference between the statements in respect of an issue relevant to identifying inconsistency; but it is hard to see how the latter could be achieved without evidence as to what might give rise to an inconsistency. The observation as to the absence of that evidence does not demonstrate error.

The failure to give adequate reasons

25. The applicants complained that the learned District Court Judge had not provided sufficient reasons to explain why she preferred the adjudicator's interpretation of s 60 or why she had dismissed their argument that the adjudicator erred in approaching s 60 as if it required an actual inconsistency between the new statement and the relevant town planning scheme. There may be something to those complaints, but given the conclusion that the adjudicator made the necessary finding in accordance with the requirements of s 60(6)(a), they would not justify the granting of leave to appeal.

The natural justice argument

26. In respect of the natural justice argument, counsel for the applicants relied on statements in *Kanda* v *Government of Malaya*[7] and *Re JRL*; *Ex parte CJL*.[8] In the first, Lord Denning, delivering the Privy Council's opinion, said:

> "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them … It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so."[9]

27. In *Re JRL*, Mason J had this to say:

> "[T]he receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A failure to disclose that communication will seriously compromise the integrity of that process. On the other hand, although the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many, situations will be sufficient to dispel any reasonable apprehension that he might be influenced improperly in some way or other, subsequent disclosure will not always have this result. The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge."[10]

28. Here, as the learned District Court Judge observed, it would have been better had the adjudicator informed the applicants that she had received the letter before proceeding to give her decision. But the Council letter did no more than decline to express an opinion. It did not amount to evidence or statements affecting the applicants, and it did not seek to influence the outcome of the litigation. The concerns identified in *Kanda* and *Re JRL* do not arise. Her Honour was right to conclude that there was no breach of natural justice in an undisclosed receipt of the letter.

29.

[140650]

The application for leave to appeal raises no error of law warranting the intervention of this Court. I would dismiss it with costs.

Jones J: For the reasons expressed by Holmes JA I believe the application for leave to appeal should be dismissed.

Footnotes

1 See ss 66 and 46.

2 Sections 52 and 59 *Body Corporate and Community Management Act*. Section 115L(3) of the *Land Title Act*.

3 Section 115L(2) Land Title Act.

4 Section 54 of the Act permits the recording of a new community management statement.

5 Section 289(2)

6 Section 269

7 [1962] AC 322.

8 (1986) 161 CLR 342.

9 [1962] AC 322 at 337.

10 (1986) 161 CLR 342 at 351.

LEE PARKER PTY LTD v YOUNG

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(2008) LQCS ¶90-144 Court citation: [2007] QDC 006

District Court of Queensland

Decision delivered on 31 January 2007

Community Schemes — Dispute regarding selection of body corporate committee members — Whether owners of multiple lots entitled to nominate one eligible individual for each lot held — Whether Adjudicator erred in his interpretation of s 14(2) of Body Corporate and Community Management (Accommodation Module) Regulation 1997 — Whether Adjudicator wrongly relied on a passage in the explanatory notes to the 2003 amendments to s 14 without attempting to interpret the section itself — Body Corporate and Community Management (Accommodation Module) Regulation 1997: s 14(2).

The respondent was the co-owner of a lot in a community titles scheme and consequently a member of the body corporate. The applicant was the holder of a number of lots in the community titles scheme.

There was a long-standing dispute between the two parties about the composition of the body corporate committee. The respondent made two dispute resolution applications to the Commissioner for Body Corporate and Community Management, the second of which resulted in the orders made by an adjudicator to whom the commissioner referred the dispute. The orders declared invalid and ineffectual the election of persons nominated by the appellant to the committee and declared other persons to be the members.

On appeal to the District Court, one of the questions to be determined was whether the adjudicator erred in his interpretation of s 14 of the Body Corporate and Community Management (Accommodation Module) Regulation 1997 (since repealed — see the Editorial Comment below), which governed the body corporate.

Section 14 of the regulation provided the procedure for, and entitlement of members regarding nomination of candidates for election to the committee of a body corporate.

The adjudicator determined that a member could only nominate one individual for election regardless of how many lots the member held in the community titles scheme, unless insufficient nominations were received to fulfil the statutory requirements for the number of committee members.

[140651]

The appellant argued that in reaching this view, the adjudicator wrongly relied on a passage in the explanatory notes to the 2003 amendments to s 14, without attempting to interpret the section itself. It was also argued that the adjudicator failed to reach the proper conclusion as to the meaning of s 14. It was asserted that the correct interpretation of the section was that the right of nomination attached to each lot and that an owner of a multiple lot should receive a notice inviting nomination for each lot held.

Held: appeal allowed.

1. In interpreting a provision of a regulation, a decision maker may consider extrinsic material such as explanatory notes if:

- the provision is ambiguous or obscure — for the purpose of providing an interpretation
- the ordinary meaning leads to a manifestly absurd or unreasonable result — for the purpose of providing an interpretation that avoids that result, or
- for the purpose of confirming the interpretation conveyed by the ordinary meaning of the words.

In no circumstances can the explanatory notes be considered *instead* of interpreting the provision itself. The adjudicator in this case erred in placing reliance on the explanatory notes without first considering s 14 and then addressing whether consideration should be given to the explanatory notes and for what purpose.

2. Section 14(2) provided that:

> "The secretary must serve a notice on each lot owner shown on the body corporate's roll, inviting each lot owner —
>
> (a) if the lot owner is an individual — to nominate —
>
> (i) the lot owner; or
> (ii) another individual who is a lot owner or who may be nominated by the lot owner in accordance with section 11(1)(b)(i); or
>
> (b) if the lot owner is not an individual — to nominate an individual who is a lot owner or who may be nominated by the lot owner in accordance with section 11(1)(b)(ii) or (iii)."

The phrase "each lot owner" in s 14(2) was specific. It referred not to the identity of an owner but to its relationship to each lot. A notice needed to be served on the owner shown on the roll in respect of each lot, not on each individual or corporation that owned one or more lots. To mean the latter, a proper description would have been "each owner of one or more lots".

As the notice for each lot invited one nomination, it followed that for each lot held, the owner has a right to nominate one person. That was the ordinary meaning of the words of the section.

A proper reading of the explanatory notes to the 2003 amendment supports this interpretation. The explanatory notes to amendments to s 14 provided that "... a lot owner may... nominate only one individual ... This amendment ... limits the possibility of the committee being stacked by owners nominating multiple other people for election to the committee". It is clear that the

amendments were intended to prevent multiple nominations in relation to each lot but not that it was intended to restrict the nomination entitlements of the owner of more than one lot.

Editorial comment: The Body Corporate and Community Management (Accommodation Module) Regulation 1997 has been replaced by the Body Corporate and Community Management (Accommodation Module) Regulation 2008. Section 18 of the 2008 Regulation now clearly sets out a lot owner's right of nomination.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

[140652]

Mr W. Cochrane (instructed by Hynes Lawyers) for the Appellant.

No appearance by the Respondent.

Before: Kingham DCJ.

Kingham DCJ: As I indicated I would try to give these reasons quickly, I am reading them into the record.

Ms Young was the co-owner of a lot in a community titles scheme, Aarons, and as such a member of the Body Corporate for Aarons. Lee Parker Pty Ltd is the holder of a number of lots in Aarons.

There is a longstanding dispute between them about the management of the affairs of Aarons through its committee and in particular, the composition of its committee.

Ms Young made two dispute resolution applications to the Commissioner for Body Corporate and Community Management, the second of which resulted in the orders made by an Adjudicator to whom the Commissioner referred the dispute. The orders declared invalid and ineffectual the election of persons nominated by Lee Parker to the committee for Aarons and declared other persons to be the members.

Lee Parker appealed the orders asserting errors of law by the Adjudicator. In essence, those errors relate to the adequacy of the Adjudicator's reasons and his interpretation of the regulation which governs the management of this type of body corporate. Ms Young has since sold her interest in the scheme.

The questions which must be determined are:

1. Whether the Adjudicator erred in failing to give any or adequate reasons for his decision
2. Whether the Adjudicator erred in his interpretation of the relevant provisions of the regulation; and
3. If he erred in either respect, whether the matter should be referred back to the Adjudicator or whether his order should be set aside and substituted by an order of this Court.

As to the adequacy of the Adjudicator's reasons, counsel for Lee Parker asserted the Adjudicator gave no or inadequate reasons to support a number of the findings upon which the Adjudicator's orders were based. They related to the accuracy of the Body Corporate's submissions, whether steps taken to convene meetings and the outcomes of those meetings were valid, the legitimacy of Lee Parker's actions in nominating and voting for certain candidates; and the proper composition of the committee of the body corporate.

In essence, Lee Parker's complaint is that the Adjudicator's reasons do not disclose either the factual basis for or the reasoning which supported the various findings and orders complained of.

An Adjudicator is required to act quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the application at Section 269(2)(b) of the *Body Corporate and Community Management Act 1997*.

“A minimum of formality and technicality in a process must be balanced by fair and proper consideration of an application and must be read in conjunction with the Adjudicator's obligation to give reasons for orders made” (Section 274(2)(a)).

However, the reasons need not descend to a degree of particularity or sophistication that would be expected in a judicial proceeding (*Cypressvale Pty Ltd* v *Retail Shop Lease Tribunal* at 485). What is necessary is that the reasons provide an explanation for the orders made.

It is true that some of the Adjudicator's findings were not clearly expressed or adequately explained. For example, his assessment of the body corporate's submissions, his finding as to the Chairperson's non-

compliance with requirements for convening an extraordinary general meeting and his conclusion that meetings held on the 20th May 2005 and the 24th June 2005 are out of order and invalid.

With respect to that last of the findings, it should be noted that this was made in his earlier order which was not the subject of this appeal and appears to be of no relevance to these proceedings.

Returning to the other findings, when the reasons as a whole are assessed in the context

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of the Adjudicator's functions and statutory obligations, I am satisfied that he adequately explained the basis upon which he made his orders. On a fair reading of his reasons, it is clear enough that he based his orders on his finding that the nominations by Lee Parker of candidates for the committee were invalid. Likewise it is clear enough that this finding of invalidity was based on his interpretation of the Regulation which governs the nomination of committee members. Whether that interpretation and the finding based upon it is correct is a different question and one to which I will now turn.

The Regulation which governs this body corporate is the *Body Corporate and Community Management Accommodation Module Regulation 1997*. Section 14 provides the procedure for and entitlements of members regarding nomination of candidates for election to the committee of a body corporate. The Adjudicator took the view that a member can only nominate one individual for election regardless of how many lots the member holds in the community titles scheme, unless insufficient nominations are received to fulfil the statutory requirement for the number of committee members.

There are two questions raised by Lee Parker about the Adjudicator's decision. Firstly, whether he adopted the proper process in interpreting the Regulation, in particular the reliance he placed on a passage from the explanatory notes to 2003 amendments to that Regulation, and, secondly, whether he reached the proper conclusion as to the meaning of the relevant provision, in particular whether a multiple lot owner is confined to only one nomination regardless of the number of lots held.

As to the Adjudicator's process, counsel argued that, in reaching his view, the Adjudicator wrongly relied on a passage in the explanatory notes to the 2003 amendments to Section 14 without attempting to interpret the provision itself.

This submission has some force. In interpreting a provision of the Regulation, a decision maker may consider it extrinsic material such as explanatory notes, provided this is done in specified circumstances and for limited purposes. Those circumstances and purposes are:

- if the provision is ambiguous or obscure — for the purpose of providing an interpretation;
- if the ordinary meaning leads to a manifestly absurd or unreasonable result — for the purpose of providing an interpretation that avoids that result; or
- Otherwise, for the purpose of confirming the interpretation conveyed by the ordinary meaning of the words.

Further, in deciding whether to consider extrinsic material, the decision maker must have regard to the desirability of the provision being interpreted as having its ordinary meaning — Section 7 and 14B of *Acts Interpretation Act 1957*.

In no circumstances can the explanatory notes be considered instead of interpreting the provision itself. This is what counsel contends the Adjudicator did. In his reasons, the Adjudicator did not specifically rely on any particular provision of the Regulation. Rather, he repeated some three pages from his reasons from earlier order involving Aarons. In turn, those reasons cited a passage from the explanatory notes and annexed a letter, apparently addressed to another member of Aarons. The Adjudicator did not directly address the terms of Section 14 in any of that material.

The annexed letter did make an indirect reference to Section 14. It cited extracts from two other apparently unrelated orders which, said the Adjudicator, interpreted the equivalent provision of the Standard Module Regulation. However there is no indication in the Adjudicator's reasons, either for the first or the second order, that he considered the provision itself or its application to the matter before him. Nor is there any statement as to the circumstances in which and the purpose for which he considered the explanatory notes.

I am persuaded by the terms of the reasons themselves that the Adjudicator erred in placing reliance on the extracted portion of the explanatory notes without first considering Section 14 and then addressing whether consideration should be given to the explanatory notes and for what purpose.

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As to the proper interpretation of Section 14, counsel submitted that this was that the right of nomination attaches to each lot and that an owner of a multiple lot should receive a notice inviting nomination for each lot held.

Section 14 subsection (2) requires the secretary to serve a notice on each lot owner shown on the body corporate roll inviting them to nominate one person who fulfils the eligibility requirements for membership of the committee.

14(2) The secretary must serve a notice on each lot owner shown on the body corporate's roll, inviting each lot owner —

(a) if the lot owner is an individual — to nominate —

(i) the lot owner; or

(ii) another individual who is a lot owner or who may be nominated by the lot owner in accordance with section 11(1)(b)(i); or

(b) if the lot owner is not an individual — to nominate an individual who is a lot owner or who may be nominated by the lot owner in accordance with section 11(1)(b)(ii) or (iii).

The use of the descriptor “each lot owner” is specific. It refers not to the identity of an owner but to its relationship to each lot. A notice must be served on the owner shown on the roll in respect of each lot, not on each individual or corporation that owns one or more lots. To mean the latter, a proper description would be “each owner of one or more lots.”

As the notice for each lot invites one nomination it follows that, for each lot held, the owner has a right to nominate one person. That is, in my view, the ordinary meaning of the words of the section.

If I am wrong in that conclusion and the provision is ambiguous or obscure, a proper reading of the explanatory notes to the 2003 amendment supports the interpretation contended for.

It appears the Adjudicator failed to consider all relevant passages of the explanatory notes. The passage here relied upon appears at page 6 of the explanatory notes. It refers in general terms to the amendments and does not specify to which sections the statement related. The passage states relevantly:

> “An owner can nominate only one person for committee membership. This is to limit stacking of committees.”

From this general statement, the Adjudicator has, apparently, concluded that the mischief that the amendment sought to address was a single owner of multiple lots nominating more than 1 one individual for the committee.

A proper reading of the explanatory notes demonstrates this was not the mischief to which the amendments were said to be directed. The concern stated in the explanatory notes was that persons were being nominated and elected to committees who were not acting in the interests of owners and that owners could make multiple nominations.

To remedy this, amendments were made to the provisions dealing with eligibility for committee membership — section 11, and nominations to the committee — section 14.

The amendments to section 11 inserted requirements for eligibility for nomination. The explanatory notes to those amendments state, at pages 21 to 22:

> “This amendment deals with concerns raised by stakeholders of committee's being stacked. The effect of the amendment is that a committee will be more representative of the lot owners as it will consist only of persons who are lot owners or persons with a connection to lot owners such as a family member (eg mother, father, brother or sister), a director or secretary of a corporate owner or a person

appointed under a power of attorney to act for a lot owner. These amendments place significant restrictions on the persons that can be committee members."

Section 14 was amended so that body corporate members could only nominate those who fulfilled the eligibility requirements set out in section 11, and an owner of each lot could make only one nomination.

Explanatory notes to amendments to section 14 at page 23:

"This clause provides, in section 14(2), that a lot owner may, in response to a notice inviting nominations for election of the committee, nominate only one individual. If the owner is a corporation, the owner may

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nominate one individual who is a director, secretary or other nominee of the corporation. This amendment, and the amendment in clause 10, limits the possibility of the committee being stacked by owners nominating multiple other people for election to the committee."

It is worth noting that the reference to "owners nominating multiple other people for election" is general. That is, the section as it then stood allowed an owner of a single lot to make more than one nomination. It is clear that the amendments were intended to prevent multiple nominations in relation to each lot but not that it was intended to restrict the nomination entitlements of the owner of more than one lot.

My reading of those notes is reinforced by the terms of section 14 prior to the amendment. As it then stood, section 14 required the secretary to invite each lot owner to nominate an individual. The invitation to nominate, both before and after amendment, is to each lot owner. The relevant change of wording is from "an individual" to "one individual". That makes explicit the limit of one nomination for each lot as the use of the singular "an individual" includes the plural — section 32 Acts Interpretation Act.

Had it been intended also, to restrict the rights attaching to a lot because the owner holds another lot, that could easily have been stated. This is a significant restriction on the entitlements flowing from ownership, and it could be expected that such an amendment would be clear.

It follows from what I have said that if it was proper for the Adjudicator to consider the explanatory notes, I find he erred in failing to take into account all relevant passages of those notes and, in particular, those specifically pertaining to section 14.

Further, I find the Adjudicator has erred in his interpretation of section 14 of the Regulation. In deciding this appeal the Court has a power to confirm or amend the order appealed, set it aside and substitute a different order or refer the order back to the Adjudicator with appropriate direction, having regard to the question of law raised by the appeal — section 294. Counsel for Lee Parker submitted the appropriate relief in the circumstances of this case is to set aside the Adjudicator's order and substitute it with the orders sought in the notice of appeal.

Ms Young has sold her unit, no longer has any interest in the appeal and did not appear at the hearing; nor did any other lot owner. As there no longer appears to be any person with an interest in maintaining the Adjudicator's orders it would artificially maintain the dispute were the order referred back to the Adjudicator with directions.

There was no contest before me, nor apparently, before the Adjudicator, that individuals nominated by Lee Parker and elected at the extraordinary general meeting of Aarons held on 18 August 2005 met the eligibility requirements.

There is no evidence before me and nothing in the Adjudicator's reasons that persuades me that either the nomination or the election of those nominated by Lee Parker was invalid and of no effect.

Accordingly, I will make orders in terms of paragraphs 1 to 3 of the notice of appeal. Because of Ms Young's early notice to Lee Parker that she had no interest in pursuing the matter I will not make any order as to costs.

The orders are:

1. Appeal allowed;

2. The decision of the Office of the Commissioner for Body Corporate and Community Management dated 20 January 2006 is set aside;

3. Margaret Howard, Ron Merrick, Rachel Sparks and Bettina Salada are declared to be members of the committee of the body corporate of Aarons CTS 11476.

Those are my orders.

I will order that the transcript be provided to the parties and I presume also to the Office of the Commissioner.

NEIGHBOURHOOD ASSOCIATION DP 285249 v WATSON

Click to open document in a browser

(2008) LQCS ¶90-145;

Court citation: [2008] NSWSC 876; [2008] NSWLEC 245

New South Wales Supreme Court; Land and Environment Court of New South Wales

Decision delivered on 27 August 2008

Community Schemes — Variation of community development scheme — Development contracts — Variation of development contracts — Community Land Development Act 1989 (NSW) s 70 — Community Land Management Act 1989 (NSW) s 106, Sch 2 — Developers' covenants to develop in accordance with the development contract and the development consent — Where development not in accordance with plans accompanying development application — Whether unregistered development applications and plans are incorporated in development consents referred to in registered development contracts and statutory covenants — Whether continuation or completion of scheme impracticable — Meaning of impracticable – Land and Environment Court Act 1979 (NSW) s 20(2) and (5), s 71 — Breach of development contracts and statutory covenants — Whether developers in breach of obligations — Damages for breach of development contracts — Specific performance of developers' obligations under development contracts and statutory covenants — Whether orders for specific performance appropriate.

Deep Creek was a lagoon joined to the Murray River. The Deep Creek houseboat marina included a public wharf, a boat ramp and mooring berths available for purchase. It was developed by way of a community scheme and subsidiary neighbourhood schemes.

The following features of the scheme documents were relevant to the proceedings:

Key document	Status	Significance to proceedings
Development application (DA)/ development consent (DC) 18/90	Consent granted 1991	A plan (accompanying the DA) of the completed development showed an access track to the mooring berths. Consent was granted subject to the conditions "as per attached letter" (from the council to the applicant). The letter (reproduced at [77]) required the access road to be sealed.
DA/ DC 66/92 (community title subdivision)	Consent granted 1992	The letter (reproduced at [79]ff) from the applicant to the council accompanying the DA stated "The access way to the site will be part of the community association property and will be established as a private access way". Three accompanying Stage 1 subdivision plans showed that the community property included a substantial amount of the foreshore, the whole of the waters of Deep Creek and a boat ramp. An accompanying Stage 2 subdivision plan was substantially the same as the plan accompanying DA 18/90 (referred to above). Consent was granted subject to the conditions "as per attached letter" (from the council to the applicant). The letter (reproduced at [93]) required the access road to be sealed.
Community plan	Registered 1995	Most of the community property (referred to above), including the location of the access track, was now shown as part of the lot owned by the developers (developers' land), rather than as community property.
Community development contract	Registered 1995	The contract differed from the draft contract accompanying DA 66/92. The developer agreed that at the time DA 66/92 was lodged, the intention was to develop the land so as to provide vehicular access in accordance with the plans accompanying DA 66/92. The contract contained various clauses stating that development would be in accordance with the plans shown in DA/DC 18/90. Under CLM Act s 15, the community development contract was taken to include the covenants in CLM Act Sch 2 Pt 1 (the "statutory covenants"). These covenants referred to the "development consent".
Community management statement	Registered 1995	The statement contained a by-law giving the community association control of all aspects of boat traffic and usage (the public wharf was owned by the developers).

Neighbourhood plans, development contracts and management statements	Registered 1995 (Central), 1997 (Western) and 1998 (Eastern)	The development lots containing the mooring berths were subdivided by neighbourhood plan, and were owned by the Central, Eastern and Western Neighbourhood Associations respectively. Neighbourhood and community property contained extremely limited land access to the mooring berths (two metre strip, steep terrain, obstructed by trees). The associations were members of the community association and were parties to the community development contract, giving rise to the binding covenants in Sch 2 to the CLM Act.

[140658]

Access to mooring berths

Although they were not shown on the registered community plan, the developers' land contained access roads and access stairs that were used by mooring berth owners (Owners) to access their mooring berths.

Prior to 2005, the developers repeatedly made oral and written representations (including in marketing material and in at least one contract for sale of mooring berths) that the Owners were entitled to use the access roads for vehicular access to their moorings and that there was no issue about access to the public wharf and boat ramp. The developers also represented that Owners' access rights would be formalised in due course. To prospective purchasers of mooring berths, the marina appeared as if it had a vehicular access road to the western moorings, and two vehicular access roads to the eastern moorings.

These access roads were used by Owners until about 2005, when the developers closed the access roads, fenced off the public wharf, and installed a boom gate that temporarily blocked vehicular access to a boat ramp. The developers also put up signs at the mouth of the marina that stated "Private Property — No Entry". The developers' lawyers then alleged trespass by Owners, and threatened legal action. One of the proprietors of the developers' land indicated that access to the boat ramp would be allowed for a fee.

The closures created serious problems for Owners, guests and the neighbourhood associations, including:

- the inability to use a vehicle to restock houseboats with supplies
- the inability of emergency vehicles to access the mooring berths
- the difficulty of guests (particularly elderly or injured guests) accessing the houseboats (the evidence established that the only way to provide complying disability access to the mooring neighbourhoods was to obtain part of the developers' land behind the limited community property and the neighbourhood property)
- difficulties in conducting necessary repairs to moorings (without trespassing on the developers' land)
- loss of patronage for the owner of the hotel and general store at the marina, and
- an allegation that one owner's boat was too long (ie trespassing into the water that was part of the developers' land).

In 2006, an owner of the developers' land wrote a letter to the Owners explaining his position in relation to some of the disputes, which included:

- the access roads were used primarily as temporary access roads to facilitate construction; there was no planning approval for any access roads to houseboat lots; it was therefore illegal for the developers to continue to allow Owners to use the construction roads to access their houseboats; if an accident occurred the developers would be uninsured
- the boat ramp had no planning approval to be used as a boat ramp; as the developers had been unsuccessful in controlling use of the ramp by the public, they would therefore close it; Owners would be given the opportunity to use a new boat ramp
- casual permits for visitors and guests of Owners would be issued at a nominal cost
- cars parked illegally on the developers' land would be towed away.

The community association

Also in 2005, there were negotiations to transfer, from the developers to the community association, land required for vehicular access to the mooring berths, in return for improvement works to be carried out by the community association. The developers had considered that the community association had not been functioning and that the Deep Creek Marina gave the impression of being neglected. The developers were looking to advance the

[140659]

development of their land, and had applied to the tribunal for the appointment of a managing agent to perform the functions of the community association. The manager was appointed (although subsequently removed after concerns from the neighbourhood associations that they had insufficient input into how the community association's money was being spent), and commissioned professional reports as to what works were required.

Proceedings

The plaintiffs (including the Central, Eastern and Western Neighbourhood Associations) commenced proceedings as follows:

Key submission	Relief sought	Key legislation	Court	Key defendants

The community scheme had become impracticable, both in its continuation (see [419]) and its completion (see [421]), essentially because the development had not proceeded in accordance with DC 18/90 and DC 66/92, which resulted in the access problems from 2005	Variation of the community development scheme and related development contracts, to match the plans that accompanied DA 66/92 (ie to transfer certain areas owned by the developers to community property to allow vehicular access to the mooring berths, and to delete certain facilities that could no longer be constructed due to supervening facilities)	CLD Act s 70	Supreme Court	Current developers and proprietors (including the first defendant, Mr Watson)
The original proprietors of the developers' land covenanted that the land would be developed in accordance with the development contract and "the development consent", and the subsequent proprietors covenanted that they would permit the original proprietors to do so — the covenants were breached in that the community scheme was not developed in accordance with the DAs	Specific performance of the contracts, and damages for breach of those contracts	CLM Act s 15, s 106, Sch 2 Pt 1 and Pt 3; Land and Environment Court Act 1979 s 20(2) and (5), s 71	Land and Environment Court	Original developers and proprietors (including Mr Watson)

[140660]

The court was required to determine:

- What was included in the "development consent" for the purpose of the statutory covenants? Did the "development consent" incorporate the terms of the DA(s) and accompanying plans?
- Can an unregistered plan form part of a community development contract? The developers submitted that even if the plans were incorporated into the development consents, registration was required because the definition of "development contract" in the CLM Act and CLD Act refers to "plans ... that are registered".
- Was continuation or completion of the community scheme impracticable? The developers submitted that the access problem was not something that "has become impracticable" within the meaning of CLD Act s 70 but something that was always a characteristic of the registered scheme. The developers submitted that the purpose of s 70 was to provide a power to vary or terminate a scheme where something had changed since the scheme was registered. In addition, they submitted that the access problem was an inconvenience rather than an impracticability.
- Did the developers breach their obligations under the development contracts?
- Was it appropriate to order specific performance of the development contracts in relation to the varied plan (proposed by the plaintiffs as relief under s 70 of the CLD Act)? The developers submitted that specific performance should not be ordered because the plaintiffs had not established that damages were not an adequate remedy, and the orders sought (eg construction of certain facilities) were not suitable orders for specific performance.

Held: plaintiffs entitled to relief.

Construction of scheme documents

Development consent

1. In construing a development consent, the DA and plans, or other documents, accompanying a DA can only be looked at if they are incorporated in the consent expressly or by necessary implication and only where this is necessary for the purpose of interpreting the consent.

2. Development consents 18/90 and 66/92 incorporated expressly or impliedly the respective DAs and accompanying plans (referred to above) because the conditions of the consents could not be understood without looking at those DAs and accompanying plans.

Development contract

3. A development consent (including a plan or other document incorporated in the development consent) that is expressly or impliedly incorporated in a development contract or in the statutory covenants may be looked at for the purposes of construing those covenants and the development contract, without the development consent having to be registered.

The statutory covenants expressly incorporate a development consent, which can include plans, into every community development contract without any requirement that the development consent be registered.

4. The “development consent” referred to in the statutory covenants must be the development consent or consents that bring land under the community titles legislation. Therefore, the “development consent” referred to in the statutory covenants at least included DC 66/92.

5. Preliminary cl 4 of the community development contract stated that the land would be developed in accordance with DC 18/90, and the statutory covenants required the land to be developed in accordance with the contract.

6.

[140661]

Mr Watson's subjective intention or understanding was not relevant to the interpretation of the community development contract, although it may have been relevant to the exercise of the statutory discretion to vary the community scheme or contract.

Variation of scheme (CLD Act s 70)

7. The claim for variation of the community scheme because continuation and completion of the scheme had become impracticable required close attention to:

- the definition of “community scheme” in the CLD Act
- the terms of s 70 of the CLD Act
- the terms of the statutory covenants
- the provisions of the community development contract.

8. The definition of “community scheme” does not refer to a “registered” scheme, and includes the rights conferred, and obligations imposed, by or under the CLD Act and the CLM Act. Those obligations include the statutory covenants whereby the original proprietors covenant that the land will be developed in accordance with the development consent and the development contract, and subsequent proprietors covenant that they will permit the original proprietors to develop the land in that way.

9. “Impracticable” in the context of s 70 means that in the particular circumstances of the case the scheme cannot continue as a matter of practicality. Continuation of a scheme may become impracticable because a problem, inherent in the terms of the scheme itself, is eventually seen as inevitably producing impracticability during the life of the scheme: *Community Association DP 270212* v *Registrar General for the State of New South Wales* (2005) NSW Titles Cases ¶80-092 considered.

The “development consent” referred to in the statutory covenants included 66/92, which required subdivision in accordance with the plans accompanying that DA. The subsequently registered community plan did not reflect that development consent, which gave rise to the physical impracticability that appeared in 2005 and 2006 when the developers denied access to the access tracks, public wharf and, for a time, the boat ramp. From that time at least, completion of the community scheme had become impracticable within the meaning of s 70.

10. Continuation of the scheme became impracticable because:

- the original developers were (and would nearly always be in the future) in breach of their obligations in the development contract to deliver the scheme in accordance with those proposals
- of the physical access problems— on the evidence, these constituted an impracticability rather than a mere inconvenience.

Completion of the scheme became impracticable because the scheme had not been developed in accordance with what had been proposed, ie:

- the registered community plan represented a major departure from what was approved in DC 66/92
- the facilities that were developed on the land departed significantly from that which was the subject of development (and to develop the land in accordance with the original plans would require developments to be demolished).

11. The by-law in the community management statement giving the community association control of all aspects of boat traffic and usage naturally belonged with ownership of the waters of Deep Creek by the community association, as indicated in the plans accompanying DA 66/92.

Relief

12. The community scheme should be varied as follows (see [462]–[471]):

[140662]

- The land containing the access tracks, and certain other parts of the developers’ land, should be converted to community property as per the Stage 1 subdivision plans accompanying DA 66/92. Those plans were part of DC 66/92. The statutory covenants bound the original developers to develop the land in accordance with that development consent— the conversion of land and waters shown as community property on those plans into community property gave effect to the statutory covenant. The access tracks should not be shown on the varied plan.
- The varied plan should delete the facilities shown on the DA plans (referred to above) that could no longer be constructed due to the supervening facilities.
- The varied plan should delete certain facilities (eg public toilets) that had been superseded by actual development.
- The varied plan should not show the facilities that were not shown on the DA plans, but had actually been (partially) constructed, because to include such facilities on the varied plan would subject them to the statutory regime (including the application of the statutory covenants), with potentially harsh results.

• The development contracts and community management statement should be amended to reflect the amendments to the community plan.

Breach of contract

13. The original developers covenanted under the statutory covenants that the land would be developed in accordance with the "development consent" that at least included DC 66/92. Many of the facilities shown on the Stage 2 subdivision plan could not be developed as shown on that plan because of other superseding development. Therefore, the original developers were in breach of their obligations in the development contract to deliver the scheme in accordance with those proposals.

In particular, the developers were in breach of the obligation in the community development contract:

• to seal the carpark and access way with bitumen (see [476]–[507])
• to provide all electricity services (see [508]–[570]; assessment of damages at [571]–[580]).

Specific performance

14. The legislative intention for community titles schemes is easily set at nought or diluted unless specific performance is generally available in relation to the statutory covenants.

The following orders for specific performance were appropriate:

• that the original developers seal the access way with bitumen to the satisfaction of the Traffic Committee of the Shire of Murray
• that the original developers seal the carpark with bitumen
• that the original developers use all reasonable endeavours to obtain all necessary approvals for the construction of a manager's residence consistent with, and in the location shown on, the varied plan that was to become part of the development contracts.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Mr P. Tomasetti SC (until 22/05/08) and Mr N. Eastman (instructed by Cosgriff Orchard Legal) for the Plaintiffs.

Mr C Leggat SC and Mr J Young (instructed by GDA Lawyers) for the 1st, 2nd and 9th defendants (the current developers and proprietors of Lot 16).

[140663]

CCH Note: see [21] to [24] for a full description of the respective parties to the NSWSC and NSWLEC proceedings.

Before: Biscoe AJ in the NSWSC; Biscoe J in the NSWLEC.

Editorial Comment: Biscoe AJ did not determine the final form of relief in the Supreme Court proceedings. However, note the following comments:

• In relation to the conversion of property to community association property (at [466]):

> "The relief could take the form of an order that that land be vested in the community association and an order for registration of a new community plan to reflect the vesting. The Court is empowered to make such orders under s 70(3) (c), (f) and (g) of the Development Act. "

• In relation to possible conversion of the public wharf to community association property (at [467]–[468]):

> "Unless the developers consent or do not object, I am not minded to make [the proposed order] … because the public wharf was never shown as community property in any development application plan. …
>
> If the public wharf were to be converted to community property the developers would be relieved of any further obligation to repair or maintain it. Presumably, this would also alleviate their insurance burden. Having regard to those considerations … the developers may prefer to consent or not object to an order converting it to community property. The alternative is to order them to repair and open it to the public within, say, 60 days and thereafter to take all reasonable steps to keep it in good repair and open to the public. It may be appropriate for the community development contract or the community management statements, or both, to be amended to impose an obligation on the public wharf owners to take all reasonable steps to keep it in good repair and open to the public."

• In relation to an undertaking from the developers (pursuant to a proposed local environmental plan associated with proposed development of the developers' land, which the developers submitted, would have eventually given the Owners the access relief that they sought) (at [472]–[474]):

> "… the undertaking is couched so unclearly that it raises doubt as to whether it could be enforced through the contempt of court coercive sanction … it is of little weight as a discretionary consideration given the strength of the plaintiffs' case for relief, the uncertainty as to whether the proposed development will eventuate, and the fact that it could only give the plaintiffs a modified version of the relief to which I think they are entitled."

INTRODUCTION

BISCOE AJ: In these two closely related proceedings there are claims for variation of a community development scheme and related development contracts and also for specific performance and damages for breach of those contracts. The scheme and contracts relate to an 85 berth houseboat marina on Deep Creek. Deep Creek is a quiet, picturesque lagoon joined to the Murray River by a narrow channel. It is situated 17 kilometres by road west of the twin towns of Moama (in New South Wales) and Echuca (in Victoria).

2. One of the proceedings is in the Supreme Court. The other is in the Land and Environment Court. They have been heard together by me as an acting judge of the former and as a judge of the latter. In this way duplication of costs and judicial resources has been minimised. An order has been made that evidence in one is evidence in the other. The two proceedings are in different courts because the legislature has given exclusive jurisdiction:

> (a) to the Supreme Court to vary community development schemes and related development contracts: s 70 Community
>
> [140664]
>
> Land Development Act 1989 (NSW) (**Development Act**); and
> (b) to the Land and Environment Court to order specific performance and award damages in relation to development contracts: s 20(2) and (5), s 71 Land and Environment Court Act 1979 (NSW); s 106 Community Land Management Act 1989 (NSW) (Management Act).

OVERVIEW OF THE CASE

3. Deep Creek Marina is the subject of a community scheme and subsidiary neighbourhood schemes established under the New South Wales community titles legislation. That legislation essentially comprises two companion statutes, the *Development Act and the Management Act*. The legislation enables a subdivision of land which incorporates common property and offers facilities in accordance with a pre-determined theme.

The development applications and consents

4. In 1990, development application 18/90 (**DA 18/90**) was lodged with Murray Shire Council for a 100 berth marina as Stage 1 and a tourist complex as Stage 2 on land with an area of 243 hectares and frontages to the Murray River and Deep Creek. The land was formally described as Lot 12 in deposited plan 846348 being part of Lot 1 in deposited plan 521202, Parish of Benarca, County of Cadell. The registered proprietors and original developers of the land were Anthony Watson and Sammy One Pty Ltd (**Sammy One**), a company owned and controlled by Mr Watson and his wife.

5. Accompanying DA 18/90 were four plans showing the completed development including marina berths, an access track behind the eastern berths, and a public wharf. The plaintiffs place particular reliance on one of these plans, Plan 4, entitled *"Detailed Landscape Masterplan"*: a copy is **annexure A** to this judgment. The land described as a *"wildlife refuge"* on Plan 4, on the opposite side of Deep Creek from the development, was sometimes later called *"the island"* (although it is not actually an island). In 1991, the council granted consent to DA 18/90.

6. In 1992, development application 66/92 (**DA 66/92**) was lodged with the council for subdivision of the land under the community titles legislation in two stages. The plaintiffs place reliance on three accompanying Stage 1 subdivision plans: copies are **annexures B, C and D** to this judgment. These plans show that community property included, inter alia, a substantial amount of the foreshores and the whole of the waters of Deep Creek. The plaintiffs also place reliance on the accompanying Stage 2 subdivision plan: a copy is **annexure E** to this judgment. It shows subdivision of the developers' residual parcel into five lots and shows essentially the same facilities as are shown on Plan 4 accompanying DA 18/90. In 1992, the council granted consent to DA 66/92.

Registration of the community plan

7. In January 1995, the developers registered a community plan, community development contract and community management statement. The community plan effected a subdivision of the land in which most

of the community property shown on the plans accompanying DA 66/92 had disappeared, including most of the foreshores and waters of Deep Creek. Instead that area was shown as part of the lot owned by the developers. This gross loss of community property has led to serious access problems for houseboat mooring lot owners at the Deep Creek Marina and, ultimately, to this litigation. One sheet of the community plan as originally registered in January 1995 is **annexure F** to this judgment. It was subsequently amended. The community plan as registered on 16 May 2006 is **annexure G** to this judgment.

8. In 1995, 1997 and 1998 the developers registered three neighbourhood plans for mooring berths together with related neighbourhood development contracts and neighbourhood management statements.

Access at the Deep Creek Marina

9. Notwithstanding the disparity between the plans accompanying DA 66/92 and the registered community plan, access difficulties did not arise until about 2005. That is because access roads to the moorings physically existed over the developers' land (now called **Lot 16** and so described in these proceedings), even though they were not shown on the registered community plan. Mooring berth owners used these access roads for vehicular access. On the western side of the marina, where the foreshore

is steeper, access was facilitated by several access stairs, apparently constructed by the developers, leading from the access road to the mooring berths. Also, until 2005, there was no impediment to access to the public wharf and boat ramp.

10. The developers represented orally in marketing material and in at least one contract for sale of mooring berths that the existing access roads were for use by mooring berth owners. The developers also represented that the berth owners' access rights would be formalised in due course.

11. All this changed following reconstitution of the ownership of Lot 16 (see [28] below). The current proprietors of Lot 16 are Mr Watson, Hillington Valley Pty Ltd (**Hillington**) and Perricoota Boat Club Investments Pty Ltd (**Perricoota Company**). In or about 2005 the developers closed the access roads to the mooring berths, fenced off the public wharf and, for a time, blocked access to the boat ramp. The consequential access difficulties are examined in detail below.

Claims in the Supreme Court proceedings

12. In the Supreme Court proceedings, the plaintiffs claim that the community scheme has become impracticable, both in its continuation and its completion. This is said to be because (a) what was proposed cannot be delivered and (b) what has been delivered is not physically functional and practical. The plaintiffs seek variation of the scheme by amending the related development contracts and the community management statement under s 70 of the *Development Act* in order to alleviate impracticability and to provide what is said to be appropriate.

13. The alleged impracticability arises largely because of access problems in three respects:

> (a) the mooring owners have no legal vehicular access to their moorings and, since the developers closed the access roads in 2005 have not had any actual vehicular access;
> (b) since 2006 the developers have denied access to the public wharf by fencing it off; and
> (c) for a time in 2005, the developers blocked access to the boat ramp by installing a boom gate. The boom gate has since been opened, but remains in place in the open position.

14. The plaintiffs claim that the consents to DA 18/90 and DA 66/92 respectively incorporate those applications, including the plans accompanying each application, subject to the conditions of each consent.

15. The plaintiffs' proposed variations involve accretions to community property to reflect the plans which accompanied DA 66/92 (**annexures B** to **E** to this judgment). These variations would convert foreshores and the waters of Deep Creek owned by the developers into community property, or at least to the extent of providing vehicular access to the moorings. The proposed accretions are shown on the plan which is **annexure H** to this judgment.

16. The plaintiffs' proposed variations under s 70 of the *Development Act* also involve variation of the development contracts, primarily by appending a plan showing facilities, which is itself a variation of Plan

4 accompanying DA 18/90 and the Stage 2 plan accompanying DA 66/92. These proposed variations are shown on the plan which is **annexure J** to this judgment. The plaintiffs propose related amendments to the text of the development contracts and the community management statement.

17. There is an alternative claim for a right of vehicular access to the moorings under s 88K of the *Conveyancing Act 1919* (NSW).

Claims in the Land and Environment Court proceedings

18. In the Land and Environment Court proceedings the plaintiffs allege that the defendants are in breach of the development contracts in respect of: (a) developing the community scheme in accordance with what was proposed; (b) providing electricity and telephone services; and (c) doing road works and sealing.

19. The plaintiffs claim specific performance of the development contracts and damages for electricity and road works already undertaken. Alternatively, they claim damages only.

[140666]

PLANS ANNEXED

20. The following plans annexed to this judgment

[CCH note: these annexures are not reproduced by CCH. See www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf, to which I have already referred, are essential to an understanding of the issues:]

A	Plan 4 accompanying DA 18/90 to which Murray Shire Council consented.
B, C and D	Three Stage 1 subdivision plans accompanying DA 66/92 to which council consented.
E	Stage 2 subdivision plan accompanying DA 66/92 to which council consented.
F	Sheet 2 of the community plan for Community Association DP 270076 registered in January 1995.
G	Additional sheet 12 of the community plan registered on 16 May 2006.
H	Plaintiffs' plan of proposed accretions to community property, pursuant to variation under s 70 of the *Development Act*.
J	Plaintiffs' plan of proposed facilities to be provided by the original developers to be included in community and mooring neighbourhood development contracts, pursuant to variation under s 70 of the Development Act. This shows a modification of the facilities shown on annexures A and E above, and is Schedule 2 to the plaintiffs' Second Further Amended Statement of Claim as further amended.

THE PARTIES

21. In each of the proceedings, the plaintiffs are the owners of Lots 2, 3 and 6 (respectively, **the Central, Eastern and Western Neighbourhood Associations**), which are the mooring neighbourhoods, and the owner of Lots 14 and 15 (Mr Cunnington). (For ease of reference I will refer to the applicants and respondents in the Land and Environment Court proceedings as plaintiffs and defendants).

22. In the Supreme Court proceedings the defendants are the current developers and proprietors of Lot 16 (Mr Watson, Hillington and Perricoota Company), the Registrar-General, the community association, the Lot 16 mortgagee (Statewide Secured Investments Ltd), Murray Shire Council, and the owner of Lot 12 Neighbourhood Association DP 285882 which is called *"Murray River's Edge"*. In the proceedings *"Murray River's Edge"* was generally referred to as the *"Honeyman Lot"*.

23. In the Land and Environment Court proceedings the defendants are the original developers and proprietors, Mr Watson and Sammy One. They caused development consents 18/90 and 66/92 to be obtained. They caused to be registered in 1995 the community plan, community management statement and community development contract for the community association. They caused to be registered the neighbourhood plan, neighbourhood management statement and neighbourhood development contract in

1995, 1997 and 1998 for, respectively, the Central, Western and Eastern Neighbourhoods. They were the parties to the community development contract and neighbourhood development contracts under which they became bound by certain covenants, including those found in Schedule 2 to the *Management Act*, on which the plaintiffs rely (see [57] below).

24. The defendants other than the developers have filed submitting appearances or have not appeared or have taken no active part in the proceedings.

THE COMMUNITY ASSOCIATION AND ITS MEMBERS

25. The community association for Deep Creek Marina is Community Association DP 270076 which, under s 25 of the *Development*

Act, was incorporated in January 1995 upon registration of community plan DP 270076. The land in this community plan has been subdivided and re-subdivided over the years. The current subdivision is indicated in the registered sheet of the community plan copied at **annexure G** to this judgment.

26. Currently, the community association has seven members. Three are neighbourhood associations of mooring berths (Lots 2, 3 and 6 — Lot 6 was originally Lot 4). One is a neighbourhood association whose property is under development for holiday cabins and related facilities (Lot 12, the Honeyman Lot). One is the owner of the hotel/restaurant (Lot 14). One is the owner of the supermarket (Lot 15). Finally, one is a residual development lot (Lot 16) owned by the current developers, which includes the foreshores and waters of Deep Creek, a public wharf and much more. Further details are as follows:

Lot	Member	Unit Entitlement
2	Neighbourhood Association NP DP 285249 (**Central Neighbourhood**). Registered 19 January 1995. 45 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	3,060
6	Neighbourhood Association NP DP 285433 (**Western Neighbourhood**). Registered 30 September 1997. 11 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	1,300
3	Neighbourhood Association NP DP 285486 (**Eastern Neighbourhood**). Registered 25 March 1998. 30 mooring berths. Neighbourhood property: 2 metre wide walkway adjoining the berths.	3,300
12	Neighbourhood Association NP DP 285882known as “Murray River's Edge” (**Honeyman Lot**). Registered 11 November 2004. Neighbourhood property: under development mainly for holiday cabins and related facilities. This neighbourhood scheme was developed by Construct Co Developments Pty Ltd (directors: Thomas Honeyman and Fiona Honeyman).	602
14	Terry Cunnington. Property: hotel/restaurant.	28
15	Terry Cunnington. Property: supermarket.	19
16	Anthony Watson, Hillington and Perricoota Company. This residual lot includes the foreshores and waters of Deep Creek, the public wharf and much more.	1,691
	TOTAL:	10,000

[140668]

The three marina berth neighbourhoods (Lots 2, 6 and 3) have been described above as the "Central", "Western" and "Eastern" in order to indicate their locations relative to each other along the northern side of Deep Creek. This can be seen in the plan on **annexure G** to this judgment. The Central Neighbourhood is divided by the public wharf (part of Lot 16), the hotel/restaurant (Lot 14) and supermarket (Lot 15). At the trial it was said on behalf of the plaintiff owner of Lot 15 that he submitted to the waterfront strip on that land becoming community property.

THE DEVELOPERS

27. It is convenient hereafter to generally refer to the owners from time to time of what is now Lot 16 as *"the developers"*. Lot 16 has had a number of changes in nomenclature over the years. Originally, most of it was called Lot 5.

28. In 1990 Anthony Watson and Sammy One were the registered proprietors of the subject land. Sammy One was a company owned and controlled by Mr Watson and his wife. On registration of the community plan in 1995, those original proprietors owned the largest lot in the community scheme, which was then Lot 5 (but is now mostly Lot 16). In June 2003 they transferred part of their interest in that Lot so that it was owned in equal one third shares by Mr Watson, Hillington owned by Gary and Jayne Bares, and Ozzie Erections Pty Ltd (**Ozzie**) owned by Mr Steven *"Ozzie"* Robertson. By transfer dated 9 October 2006 Ozzie sold its share to Perricoota Company owned by Mr Paul Jarman. Thus, the current developers and proprietors of Lot 16 are Mr Watson, Hillington and Perricoota Company.

29. Mr and Mrs Bares have been associated with Deep Creek Marina since 1997 when Accredited Aged Care Services Pty Ltd, the sole director of which was Mrs Bares, became the first buyer of seven mooring lots in the Western Neighbourhood. That company was the trustee for Mr Bares' superannuation fund. It was he who made the decision to purchase the moorings. The trustee leased out six of the moorings and Mr Bares used the seventh. Commencing in May 2002, it sold its moorings at a substantial gross profit. Throughout the five years of its ownership one could drive a car to the moorings and access them via stairs. It was only after they commenced to be sold that Mr Bares took the position that mooring owners were not entitled to use the access roads and, later, with the other developers, closed the access roads.

30. Mr Jarman has been associated with Deep Creek Marina since 2000–2001 when he worked for Mr and Mrs Watson as the manager of their hotel/restaurant on what is now Lot 14. After a break he then worked for Mr and Mrs O'Brien, the new owners of the restaurant/bar and supermarket on, respectively, Lots 14 and 15, from October 2004 to January 2005. From 2005 he has been employed by the developers as their site manager and to represent them at community association meetings.

31. In 2002 the developers began to use a company which has had several names. At one time it was called DC Marina Pty Ltd. In 2004 its name was changed to Deep Creek Marina Pty Ltd. From December 2002 its directors and secretaries were Messrs Watson, Robertson and Bares and its shareholders were Hillington, Ozzie and Perricoota Investments Pty Ltd. Currently, it appears, its directors are Mr Watson and Mr Bares and its shareholders are Mr Watson and Hillington. The name of this company was sometimes erroneously used in communications as if it were the owner of Lot 16. In fact it was a service company for the developers.

32. By a transfer stamped in April 2002, Mr and Mrs Watson transferred to Hillington a one half share in land known as Lot 23 immediately to the east on Deep Creek. It has been developed as a houseboat marina development called Perricoota Boat Club: see [129]–[130] below. The moorings at Lot 23 have good pedestrian and vehicle access. There is a one metre wide concrete path adjacent to them. Then there is approximately two metres of grass. Then there is a sealed vehicular access road approximately 2.4 metres wide. Houseboats moored at the Lot 23 marina have to cross the waters at the Deep Creek Marina in order to reach the Murray River. Lot 23 enjoys the benefit of easements of access of variable width over those waters as well as over Lot 16

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land just to the north of the upper access track to the eastern moorings.

33. The developers wish to develop Lots 16 and 23 into a very large residential and tourist development and are seeking to have the land rezoned for residential purposes.

THE COMMUNITY TITLES LEGISLATION

34. The Deep Creek Marina may have been the first houseboat marina in New South Wales to come under the community titles legislation, which essentially comprises the *Development Act and the Management Act*. This legislation commenced on 1 August 1990, a little over two months after DA 18/90 for development of Deep Creek Marina was lodged with the local council. Following council consent to that application in 1991, in 1992 DA 66/92 was made to the council for subdivision to bring the land under the community titles legislation. The council approved this application in 1992: see [79]–[93] below.

35. The concept of community title, its historical context and potential use, as well as the general scheme of the community titles legislation, were described in the Second Reading Speech by the Minister for Natural Resources, as follows:

> …Generally known as the community titles legislation, the bills will introduce a new form of land subdivision in New South Wales and will permit greater innovation in subdivision design and greater flexibility in residential, commercial and industrial development. So that honourable members will appreciate the significance of the legislation I should remind them of some of the milestones preceding the bills. In 1961 the Parliament of New South Wales approved legislation permitting titles to be issued evidencing ownership of flats by enabling land to be subdivided into strata lots.
>
> Prior to 1961 the only way of subdividing land was the conventional method, creating blocks used mainly for freestanding cottages for separate occupation. The concept of strata title gained widespread acceptance and encouraged the development of less traditional options for residential accommodation. The 1961 legislation had a number of deficiencies and in 1973 it was replaced by the Strata Titles Act, which continues to function as the operative legislation for all strata-based developments. The original intention of the strata legislation was to permit the strata subdivision of completed buildings of at least two storeys. Despite this intention, since the introduction of the legislation developers have been looking for ways to use it to accommodate types of development it was never designed to permit.
>
> An ever-growing shortage of land available for residential occupation has discouraged developers from employing the traditional method of subdividing land into a grid pattern of rectangular blocks fronting a public road. There has been also a demonstrated demand for developments designed around a theme, such as retirement villages, tourist resorts, industrial parks and sporting complexes. As a consequence there was a clear need to devise an additional means of subdividing land which would combine elements of both conventional and strata subdivision and introduce the context of shared communal property into a land subdivision. The aim of the four bills to be considered today is, therefore, to introduce that much needed alternative system of land subdivision, which will be as innovative today as the strata title legislation was in 1961. **The system proposed will enable a subdivision of land incorporating common property which may be developed in stages in accordance with a pre-determined theme**.
>
> …[T]he model proposed by this legislation offers sufficient flexibility to allow it to be used for low or medium density residential projects; large, mixed-use developments; small urban schemes; rural communes; and theme development specially designed to accommodate the specific needs of special interest groups. The legislation has been divided into two principal bills — the Community Land Development Bill, covering the procedure for establishing a scheme, and the Community Land Management Bill, governing the day-to-day management of schemes and the resolution
>
> [140670]
>
> of disputes. The remaining two bills make associated amendments to the Strata Titles Act and a number of other Acts.
>
> The Community Land Development Bill will permit the creation in subdivisions of shared land known as association property. Individuals purchasing into a scheme will receive a separate title to their lots, which may or may not contain improvements, and will acquire an interest in the association property. Because amenities can be shared, residents will be able to acquire the use of facilities such as sporting and recreational complexes which would have been prohibitively expensive for an individual homeowner. The common elements and communal facilities within a scheme will be shared and

managed by the participants themselves. Management will be controlled by a body corporate, referred to in the legislation as an association, which will be constituted on registration of a plan and will be made up of the individual lot owners. The legislation has been designed to enable a development to be completed as a staged or non-staged scheme. Allowing developments to proceed in stages will make it possible for savings in initial development costs, as one stage can be used to finance the construction of later stages. With a reduction in initial development costs, purchase prices should be correspondingly reduced.

The Community Land Management Bill will complement this development flexibility by providing a range of options for the management structure which may operate within the scheme. When a staged scheme is embarked upon, the community will have two tiers of management. However, where the community is sufficiently large or complex, the developer may elect to interpose a further tier and thereby create three levels of management. Where it is not proposed to develop the land in stages, only one level of management — known as a neighbourhood association — will be created. An important feature of the legislation is the opportunity it will provide for a development or organizational theme to be introduced throughout a scheme. For example, a theme may simply be used to establish a uniform architectural or landscaped design or a development may be designed around a sporting theme, offering facilities such as a golf course or equestrian activities. Safeguards have been built into the legislation to ensure that a theme does not impose restrictions based on race or creed or on ethnic or socioeconomic groupings.

To ensure that purchasers are made aware of any matters that will affect the day-to-day maintenance of a community, a developer will be required to prepare a management statement to accompany each stage of the scheme. This statement will bind the developer and the individual owners buying into a scheme and will be available for public inspection. The statement will set out the rules governing the use of association property including any access ways, and the use of any facilities which may be erected on the communal land. It will provide details of how services such as water and electricity are to be maintained and the insurance cover taken out by the association.

It is envisaged that large developments may be constructed over many years, and with changes in economic and social conditions likely during the period, it would not be appropriate to compel detailed disclosures to be made at the time the community plan initiating the project is registered. However, to balance the need to safeguard the interests of people buying into such a scheme against the danger of shackling developers to a static project indefinitely, **at each stage of a community scheme the developer will be obliged to make binding promises about the facilities to be provided within that stage. This document will be known as a development contract** and will be lodged with each neighbourhood plan to place on public record a description of the development, any theme proposed and details of amenities to be provided. The role of local councils in approving and overseeing development will be preserved by this legislation. Both the management statement and development contract will be submitted to the local council for approval with the relevant plans. Where people are

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living closely in a community, conflicts will inevitably arise.

The Community Land Management Bill will establish procedures designed to simplify the running of an association and to avoid disputes by regulating the calling and holding of meetings and the keeping of records and accounts. A community schemes board is to be constituted to hear disputes and a community schemes commissioner will be established. The role and powers of the commissioner and board will be similar to those of the Strata Titles Commissioner and Strata Titles Board. Some amendment to the Strata Titles Act is required to ensure that strata schemes forming part of a community scheme are subject to the by-laws of the community association and the provisions of the community titles legislation. This is done in the Strata Titles (Community Land) Amendment Bill. In addition, the Miscellaneous Acts (Community Land) Amendment Bill will amend various Acts to ensure that, where appropriate, reference is made to the proposed community titles legislation.

The legislation proposed marks a significant advance in land development. By offering a further means of subdivision, traditional concepts of land development can give way to more imaginative and sympathetic approaches to land use. The legislation will promote higher-density housing without

loss of amenity and will encourage cheaper accommodation by reducing initial development costs. Commercial development will also be advantaged by providing an appropriate legislative base for projects such as tourist complexes and industrial parks.

(emphasis added)

36. One of the passages emphasised above refers to the developer, at each stage of a community scheme, being *"obliged to make binding promises about the facilities to be provided within that stage"* in a neighbourhood development contract. There is also provision in the legislation for the developer, if it wishes to do so, to register at the outset a community development contract to which statutory covenants will attach about developing the land in accordance with the development contract and development consent: *Development Act* s 26 and Schedule 2 to the *Management Act*: see [47] and [57] below. Such a community development contract was registered in the present case. It and the development consents are at the heart of these proceedings.

Community Land Development Act 1989 (NSW)

37. The preamble to the *Development Act* states that it is an Act *"to facilitate the subdivision and development of land with shared property; and for other purposes"*. The object of the Development Act is stated in s 4(1) as follows:

Subject to subsection (2), the object of this Act is to facilitate the subdivision of land into parcels for separate development or disposition:

(a) with an interest in associated land in the nature of common or shared property, and
(b) with or without further subdivision (including a subdivision under the Strata Schemes (Freehold Development) Act 1973) in conjunction with the development of another such parcel or other such parcels.

38. Section 3(2) provides:

This Act is to be interpreted as part of the Real Property Act 1900 but, if there is an inconsistency between them, this Act prevails.

39. *"Community scheme"* is defined in s 3(1) of the Development Act as follows:

(a) the manner of subdivision of land by a community plan, and
(b) if land in the community plan is subdivided by a precinct plan — the manner of subdivision of the land by the precinct plan, and
(c) the manner of subdivision of land in the community plan, or of land in such a precinct plan, by a neighbourhood plan or a strata plan, and
(d) the proposals in any related development contract, and
(e) the rights conferred, and the obligations imposed, by or under this Act, the Community Land Management Act 1989 and the Strata Schemes (Freehold

[140672]

Development) Act 1973 in relation to the community association, its community property, the subsidiary schemes and persons having interests in, or occupying, development lots and lots in the subsidiary schemes.

40. In the present case, there was a registered community plan and three registered subsidiary neighbourhood plans, but no precinct plan.

41. *"Community plan", "neighbourhood plan"* and *"development contract"* are key concepts and are defined in s 3(1) of the *Development Act* as follows:

community plan means a plan for the subdivision of land into 2 or more community development lots and 1 other lot that is community property, whether or not the plan includes land that, on registration of the plan, would be dedicated as a public road, a public reserve or a drainage reserve.

neighbourhood plan means a plan (other than a community plan, a precinct plan or a strata plan) for the subdivision of land into 2 or more lots for separate occupation or disposition and 1 other lot that is

neighbourhood property, whether or not the plan includes land that, on registration of the plan, would be dedicated as a public road, a public reserve or a drainage reserve.

development contract means instruments, plans and drawings that are registered with a community plan, precinct plan or neighbourhood plan and describe the manner in which it is proposed to develop the land in the community plan, precinct plan or neighbourhood plan to which they relate.

42. Other relevant definitions in s 3(1) of the *Development Act* include the following:

community association means the corporation that:

(a) is constituted by section 25 on the registration of a community plan, and
(b) is established as a community association by section 5 of the Community Land Management Act 1989.

community development lot means a lot in a community plan that is not community property, a public reserve or a drainage reserve and is not land that has become subject to a subsidiary scheme or a lot that has been severed from the community scheme.

community management statement means a statement that is registered with a community plan as a statement of the by-laws and other particulars governing participation in the community scheme.

community parcel means land the subject of a community scheme.

community property means the lot shown in a community plan as community property.

developer means:

(a) in relation to a community scheme — the person who, for the time being, is the registered proprietor of a community development lot in the community plan, or
(b) in relation to a precinct scheme — the person who, for the time being, is the registered proprietor of a precinct development lot in the precinct plan, or
(c) in relation to a neighbourhood scheme — the original proprietor of the neighbourhood parcel.

development, in relation to land, means:

(a) the erection of a building on the land, or
(b) the carrying out of a work in, on, under or over the land, or
(c) the use of the land or of a building or work on the land, or
(d) the subdivision of the land, not excluded by regulations under the Environmental Planning and Assessment Act 1979 from the definition of **development** in that Act.

development application means an application under Division 1 of Part 4 of the Environmental Planning and Assessment Act 1979 for consent to carry out development.

development consent means consent under Division 1 of Part 4 of the Environmental Planning and Assessment Act 1979 to carry out development.

development lot means a community development lot or a precinct development

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lot that has not been severed under section 15 from the applicable scheme.

neighbourhood association means the corporation that:

(a) is constituted by section 25 on the registration of a neighbourhood plan, and
(b) is established as a neighbourhood association by section 7 of the Community Land Management Act 1989.

neighbourhood lot means land that is a lot in a neighbourhood plan but is not neighbourhood property, a public reserve or a drainage reserve.

neighbourhood property means the lot shown in a neighbourhood plan as neighbourhood property.

neighbourhood scheme means:

(a) the manner of subdivision of land by a neighbourhood plan, and

(b) the proposals in any related development contract, and
(c) the rights conferred, and the obligations imposed, by or under this Act and the Community Land Management Act 1989 in relation to the neighbourhood association, its neighbourhood property and the proprietors and other persons having interests in, or occupying, the neighbourhood lots.

original proprietor, in relation to land, means the registered proprietor in fee simple of the land at the time of registration of a community plan, precinct plan or neighbourhood plan subdividing the land.

scheme means a community scheme, a precinct scheme, a neighbourhood scheme or a strata scheme.

staged scheme means a community scheme or precinct scheme developed in stages.

subsidiary scheme means

(a) in relation to a community scheme — a precinct scheme, neighbourhood scheme or strata scheme that is part of the community scheme, or
(b) in relation to a precinct scheme — a neighbourhood scheme or strata scheme that is part of the precinct scheme.

43. Section 3(4) of the *Development Act* provides:

A reference in this Act to a development consent, development contract, community management statement, precinct management statement or neighbourhood management statement includes a reference to the consent, contract or statement as from time to time modified or amended in accordance with this Act.

44. Section 5 of the *Development Act* provides for subdivision of land by the registration of a community plan as a deposited plan and permits registration of a development contract for the community scheme, as follows:

5 Community plan

(1) Land that is not part of a community parcel, precinct parcel, neighbourhood parcel or strata parcel may be subdivided by the registration of a community plan as a deposited plan.

…
(5) There may be lodged for registration with a community plan a development contract for the community scheme that complies with Schedule 2 and that, on registration, will become binding in accordance with section 15 of the Community Land Management Act 1989.

45. In the present case, development lots were subdivided by neighbourhood plans. This is provided for in s 13(1)(a) of the *Development Act*:

13 Subdivision of a development lot by a neighbourhood plan or strata plan

(1) A development lot may be subdivided:

(a) by a neighbourhood plan registered as a deposited plan…

46. Section 25 provides for incorporation of a community or neighbourhood association upon registration of a related community or neighbourhood plan:

25 Incorporation of associations

(1) The registration of a community plan operates to constitute a corporation with the corporate name Community Association D.P. No, the number to be inserted being that of the deposited plan registered as the community plan.

…

[140674]

(3) The registration of a neighbourhood plan operates to constitute a corporation with the corporate name Neighbourhood Association D.P. No, the number to be inserted being that of the deposited plan registered as the neighbourhood plan.
(4) The membership and functions of the corporations are as stated in the Community Land Management Act 1989.

47. A community development contract is optional but a neighbourhood development contract is mandatory. In that regard, section 26 provides as follows:

26 Development contract

(1) If an application for development consent to development in accordance with a proposed community scheme or precinct scheme is accompanied by a proposed development contract, the consent authority may not grant the development consent unless the proposed development contract complies with Schedule 2 and is approved by the consent authority in the approved form.
(2) The consent authority may not grant consent to the subdivision to be effected by a neighbourhood plan unless it also gives approval in the approved form to a proposed development contract for the neighbourhood scheme that complies with Schedule 2 and is lodged with the application for consent.

…
(5) If development consent approving a development contract is required and is granted, the consent authority must certify on the development contract:

(a) that consent has been granted to the development proposed by the instruments, plans and drawings that comprise the development contract, and
(b) that the instruments, plans and drawings are not inconsistent with the development consent,

and must provide the applicant for consent with a copy of the development contract bearing the certificate.

48. Schedule 2 to the *Development Act*, prescribes matters to be included in a development contract. It relevantly provides:

Schedule 2 Development contracts

(Sections 5, 9, 13, 18, 26)

1 Matters to be included

Unless clause 3 applies, a development contract that relates to a neighbourhood scheme (whether or not it is part of a community scheme) must consist of instruments, plans and drawings that are prepared in the approved form and include, but need not be limited to:

(a) a description of the land to be developed under the scheme, and
(b) a description of the amenities proposed to be provided, and
(c) a description of the basic architectural design and landscaping under the scheme and any theme on which the scheme is based, and
(d) a simple pictorial representation of the anticipated appearance of the completed development, and
(e) any other matter prescribed by the regulations.

2 Inconvenience and damage

Unless clause 3 applies, a development contract for any scheme (whether or not it is a neighbourhood scheme) must include:

(a) details of access and construction zones, working hours and any related rights over association property, and

(b) an undertaking by the developer not to cause unreasonable inconvenience to proprietors of lots in the scheme and to repair without delay any damage caused to association property or common property by development activities, and
(c) such other matters as may be prescribed.

…

[140675]

4 Warning to be displayed

A development contract (whether or not it relates to a neighbourhood scheme) must prominently display a warning in the prescribed form that draws attention to:

(a) the possibility that the scheme to which it relates may be varied or may not be completed, and
(b) the necessity for prospective purchasers to examine the applicable management statement for details of their rights and obligations under the scheme….

49. It can be seen that cl 1(d) of Schedule 2 requires a *"simple pictorial representation of the anticipated appearance of the completed development"* to be included in a neighbourhood development contract. Plan 4 in DA 18/90 or the Stage 2 plan in DA 66/92 (**annexures A** and **E** to this judgment) would satisfy that requirement. However, in the present case no pictorial representation was included in the neighbourhood development contracts. There is no statutory requirement for a pictorial representation to be included in a community development contract.

50. Clause 39(2) of the *Community Land Development Regulation 1990* (NSW) (now repealed and replaced by cl 30 of the *Community Land Development Regulation 2007* (NSW)) prescribed that, in addition to containing the matters referred to in Schedule 2 to the *Development Act*, all development contracts must prominently display on the first page a warning in a prescribed form as follows:

WARNING

(1) This contract contains details of a *neighbourhood/*precinct/*community scheme which is proposed to be developed on the land described in it. Interested persons are advised that the proposed scheme may be varied, but only in accordance with section 16 of the Community Land Management Act 1989.

*If the scheme forms part of a staged development, interested persons are advised of the possibility that the scheme may not be completed and may be terminated by Order of the Supreme Court.

NOTE:

Delete if not applicable.

(2) This contract should not be considered alone, but in conjunction with the results of the searches and inquiries normally made in respect of a lot in the scheme concerned. Attention is drawn in particular to the management statement registered at the Land Titles Office with this contract, which statement sets out the management rules governing the scheme and provides details of the rights and obligations of lot owners under the scheme.
(3) Further particulars about the details of the scheme are available in:

*..... local environmental plan No. .....
*development control plan ..... of ..... Council
*development consent dated ..... granted by .....

(4) The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them

severally to develop the land the subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

51. Section 31 of the *Development Act* provides for vesting of association property in an association upon registration of a relevant association plan:

31 Vesting of association property

(1) On registration of the plan or dealing by which it is created, association property vests in the relevant association.
(2) Land vests under this section for the estate or interest evidenced by the folio for the land.
(3) On vesting, the land is freed from any mortgage, charge, covenant charge, writ or caveat that affected it immediately before it became association property.
(4) The estate or interest of an association in its association property is held by it:

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(a) if it has only 1 member — as agent for the member, or
(b) if it has more than 1 member — as agent for all the members as tenants in common in the shares prescribed by section 32.

52. Section 35 provides for easements:

35 Creation, release and variation of easements or restrictions

(1) If authorised by a unanimous resolution, a community association may:

(a) execute a dealing creating an easement which burdens its community property or a restriction on the use of land or a positive covenant which burdens its community property or the whole of the community parcel…

53. Section 70 of the *Development Act* empowers the Supreme Court to vary a development contract or terminate a staged scheme where completion of a staged scheme has become impracticable, and to vary (or terminate) a scheme where its continuation has become impracticable:

70 Variation or termination of scheme by Supreme Court

(1) If the Supreme Court is satisfied:

(a) that completion of a staged scheme has become impracticable — the Court may vary any applicable development contract or terminate the scheme, or
(b) that continuation of a scheme (whether or not a staged scheme) has become impracticable — the Court may vary or terminate the scheme, or
(c) that the association of a community scheme, each proprietor of a lot within the community scheme and each registered mortgagee, chargee and covenant chargee of a lot within the community scheme have made an application to the Court to terminate the scheme — the Court may vary or terminate the community scheme and any scheme within the community scheme.

(2) An order of the Supreme Court varying a development contract may provide for:

(a) the conversion of a development lot or former development lot to community property or precinct property, or
(b) the conversion of a neighbourhood lot to neighbourhood property, or
(c) the severance from the scheme of a development lot or a neighbourhood lot, or
(d) any other matter the Court considers to be appropriate, just and equitable in the circumstances.

(3) An order of the Supreme Court varying or terminating a scheme may provide for all or any of the following:

(a) the adjustment, exercise and discharge of rights and liabilities under the scheme of an association and its members,

(b) disposal of the assets of an association or of a strata corporation that is a member of an association,
(c) the vesting of estates or interests in land within the staged scheme,
(d) the winding up of an association or of a strata corporation that is a member of an association,
(e) a variation of unit entitlements in accordance with a new valuation,
(f) the registration of a new plan or reversion to a former plan,
(g) any other matter that the Court considers to be appropriate, just and equitable in the circumstances.

(4) If the Supreme Court orders termination of a scheme, the parcel that was subdivided to constitute the scheme is, for the purposes of section 23F of the Conveyancing Act 1919, reinstated as a lot in a current plan.

(5) Subsection (4) does not apply if the Supreme Court orders the lodgment for registration of a current plan for the parcel.

54. It can be seen the Court's discretionary power under s 70 is enlivened if the Court is satisfied that completion of a staged scheme or continuation of a scheme has become impracticable. Continuation of a scheme may have become impracticable because a problem, inherent in the terms of the scheme itself, is eventually seen as inevitably producing

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impracticability during the life of the scheme. In *Community Association DP 270212* v *Registrar General for the State of New South Wales* (2004) 62 NSWLR 25 at [19]–[22] and [28] Palmer J held:

> In my opinion, s 70(1) does not require the applicant for termination of a scheme to prove that continuation of the scheme is impracticable in the sense of being totally impossible; rather, the applicant must show that in the particular circumstances of the case the scheme cannot continue as a matter of practicality. There is well established authority for construing impracticable in this way.
>
> In *Re El Sombrero Ltd* [1958] 1 Ch 900, the applicant sought an order convening a meeting of a company under a provision of the *Companies Act 1948* (UK) which enabled the court to make such an order if for any reason it is impracticable to call a meeting of the company in any manner in which meetings of that company may be called.
>
> Wynn-Parry J said (at 904):
>
> > …The question then arises, what is the scope of the word impracticable? It is conceded that the word impracticable is not synonymous with the word impossible; and it appears to me that the question necessarily raised by the introduction of that word impracticable is merely this: examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted….
>
> In *Thornley* v *Heffernan* (McLelland J, 12 September 1995, unreported) McLelland J had to consider the meaning of a clause in the constitution of the Liberal Party of Australia which provided for what could be done if … time or circumstance … make it impracticable to hold a meeting. His Honour, referring to *Re El Sombrero Ltd*, said (at 8): The expression impracticable in [the relevant clause] does not mean impossible. It directs attention to considerations of a practical rather than a theoretical nature arising out of the particular circumstances … . See also *Re South British Insurance Co Ltd* (1980) CLC (34,419) 940-664.
>
> …
>
> I do not think that s 70(1) of the Act always requires the court to find that the continuation of a community scheme has become impracticable because a particular unexpected problem has arisen and has proved to be insoluble. No doubt that situation would be the most common one in which the section would be applied. But in some cases, the court may find that continuation of a scheme has become impracticable because a problem, inherent in the terms of the scheme itself and previously unrecognised, is now seen as inevitably producing impracticability at some time in the future during the life of the scheme. In my opinion, that is the case with the present Community Scheme.

Community Land Management Act 1989 (NSW)

55. The preamble to the Management Act states that it is an Act *"to provide for the management of community schemes, precinct schemes and neighbourhood schemes established by the subdivision of land under the Community Land Development Act 1989; and for other purposes"*. The relevant definitions in s 3(1) are to the same effect as those in the *Development Act*, and s 3(2) likewise provides:

> This Act is to be interpreted as part of the Real Property Act 1900, but, if there is an inconsistency between them, this Act prevails.

56. Sections 15 and 16 of the *Management Act* relevantly provide:

> **15 Binding effect of development contract**
>
> (1) If a development contract is registered with a community plan, it has effect as if it included an agreement under seal with covenants to the effect of those set out in Part 1 of Schedule 2.
>
> …
> (3) The development contract registered with a neighbourhood plan has effect as if it included an agreement under seal with covenants to the effect of those set out in Part 3 of Schedule 2.
>
> [140678]
> (4) Any attempt to exclude, modify or restrict the operation of the covenants is void.
>
> …
>
> **16 Amendment of development contract with approval of association**
>
> …
>
> (2) A proposed amendment that involves a change in the basic architectural or landscaping design of the development, or in its essence or theme, may not be made unless it is approved:
>
> (a) by the consent authority, and
> (b) unless the developer is the only member of the association — by unanimous resolution of each association and strata corporation that is a party to the development contract…

57. The plaintiffs rely on Part 1 of Schedule 2 to the *Management Act* which prescribes the following important covenants in a community development contract lodged with a community plan:

> **Part 1 Community schemes**
>
> **1 Covenant by original proprietor — community scheme**
>
> Under the agreement included by section 15 in a development contract lodged with a community plan, the original proprietor of the land the subject of the community scheme
>
> **covenants:**
>
> (a) with the subsidiary bodies jointly and with each of them severally, and
> (b) with the subsequent proprietors jointly and with each of them severally,
>
> **that the land will be developed in accordance with the development contract and the development consent**.
>
> **2 Covenants by subsidiary bodies and subsequent proprietors — community scheme**
>
> The:
>
> (a) subsidiary bodies, and
> (b) subsequent proprietors,

under a community scheme covenant jointly, and each of them covenants severally, with the original proprietor of the land the subject of the community scheme that the original proprietor will be **permitted** to develop the land in accordance with the development contract and the development consent.

(emphasis added)

58. Mr Jarman in cross-examination indicated that his solicitor who acted on the conveyance of the interest in Lot 16 to Perricoota Company *"sort of"* made him aware, during the conveyance, of the covenant in cl 2 of Part 1.

59. Although it is not mandatory to lodge a community development contract, in the present case one was lodged with the community plan. It was executed by the original proprietors, Mr Watson and Sammy One. Under s 15 that contract contains the covenants in Part 1 of Schedule 2 to the *Management Act*. Therefore, the original proprietors, Mr Watson and Sammy One, covenanted that the land would be developed in accordance with the development contract and *"the development consent"*, and the subsequent proprietors — relevantly, Hillington and Perricoota Company — covenanted that they will permit the original proprietors to do so.

60. In the present case, there is a question as to what is the *"development consent"* referred to in cl 1 of Schedule 2 Part 1 to the *Management Act*. Generally, it may be anticipated that there will only be one development consent which brings land under the community titles legislation, providing both for subdivision and proposed facilities for the community scheme. In the present case, the community titles legislation commenced about two months after the original DA 18/90 was lodged. Plan 4 accompanying that DA showed proposed facilities. In 1992, DA 66/92 was lodged to effect a subdivision which would bring the land under the community titles legislation. The Stage 2 subdivision plan showed essentially the same facilities as had been shown on Plan 4 accompanying DA 18/90. Hence, in the present case there are two relevant development consents.

61. The plaintiffs submit that under their statutory covenant the original proprietors covenanted to develop the land in accordance with both consents — or at least consent 66/92 —

[140679]

including the plans in the development applications to which the consents related (**annexures A** to **E** to this judgment).

62. The mandatory neighbourhood development contract was registered with each of the mooring berth neighbourhood plans. Under s 15(3), each of those contracts contain the covenants found in Part 3 of Schedule 2 to the *Management Act*. These statutory covenants in a neighbourhood development contract are as follows:

Part 3 Neighbourhood schemes

4 Covenant by original proprietor — neighbourhood scheme

Under the agreement included by section 15 in the development contract lodged with a neighbourhood plan, the original proprietor of the land the subject of the neighbourhood scheme covenants:

(a) with the neighbourhood association, and
(b) with the subsequent proprietors jointly and with each of them severally,

that the land will be developed in accordance with the development contract and the development consent.

5 Covenants by neighbourhood associations and subsequent proprietors

The:

(a) neighbourhood association, and
(b) subsequent proprietors,

under a neighbourhood scheme covenant jointly, and each of them covenants severally, with the original proprietor of the land the subject of the neighbourhood scheme that the original proprietor will

be permitted to develop the land in accordance with the development contract and the development consent.

DEVELOPMENT CONSENT 18/90

The development application

63. On 23 May 1990, upon the instructions of Mr Watson and Sammy One, Mr B Mitsch of Veitch and Mitsch, consulting town planners, lodged DA 18/90 with Murray Shire Council. The application was for a 100 berth marina as Stage 1 and a tourist complex as Stage 2. It described the development for which development consent was sought as follows:

> Marina — initially for 30 river craft with extension to 100 craft Tourist development complex as stage 2.

64. The application stated that the development involved the erection of buildings and that, when erected, their proposed use would be *"managers residence — boat storage — tourist accommodation"*.

65. An environmental impact statement (**EIS**) accompanied the development application. The EIS included a concept drawing, which showed the proposed development, including houseboat moorings along the northern side of Deep Creek, a speed boat ramp, houseboat ramp, supply jetty, motel, restaurant, units, tennis court, swimming pool, houseboat service centre, manager's residence, office and other facilities. The significance of the manager's residence was emphasised in paragraph 2.5.2 of the EIS, which stated:

> A manager's residence will be incorporated into the project to ensure that day to day activities on the site are carried out in an orderly and environmentally safe manner.

66. In June 1991 a supplementary environmental impact statement (**SEIS**) was lodged with the council. It included a location map and four plans:

> (a) Plan 1 entitled "Existing Conditions Plan";
> (b) Plan 2 entitled "Landscape Masterplan". It included the notation "Refer to Detailed Landscape Masterplan for enlargement of the central area". This was a reference to Plan 4;
> (c) Plan 3 entitled "Stage One Development Plan"; and
> (d) Plan 4 entitled "Detailed Landscape Masterplan".

67. Plan 4 (**annexure A** to this judgment) shows, among other things, mooring berths, a public wharf, a boat ramp, a manager's residence and a central carpark with (it seems) some 60 car parking spaces. It shows an *"access track"* roughly parallel with, and some distance to the north of, the eastern moorings with three paths leading from it to those moorings. The position of this *"access track"* appears to be slightly different from the existing upper vehicular access track to the eastern

[140680]

moorings. There also exists a lower vehicular access track to the eastern moorings, close to and roughly parallel with them, but this lower access track is not shown on Plan 4.

68. The SEIS indicated as follows that Plans 2 and 3 were the *"masterplan"* for the marina development and that Plan 4 showed Stage 1 of the development:

> …[The developers] propose a carefully staged development, to include a 100 houseboat marina with full service facilities, cabin style family accommodation, motel and restaurant facilities.
>
> The existing conditions of the proposed development site are illustrated on Plan 1.
>
> The Masterplan for the marina development is shown on Plans 2 and 3. Plan 2 shows the whole development site including the marina's relationship to the lagoon and Murray River, the proposed road access, fencing of the island and recycled-water woodlot. Plan 3 illustrates the detailed masterplan for the development, showing mooring sites, boat ramp and jetty, kiosk, cabin and motel accommodation, sewage pump out treatment facilities, fuel supply location, restaurant, carparks, tracks and roads.
>
> Stage One of the development will see the construction of the marina facilities. This includes 100 houseboat moorings, kiosk, sewage pump out and fuel supply facilities, manager's residence, carpark,

dry storage area and associated storage and maintenance structures. Stage One of the marina development is shown on Plan 4. Stage One will be implemented over a 12 month period to be completed by December 1992 and can be divided into 4 phases. The first phase will commence in September and will include excavation of the creek, entrance, construction of 30 moorings and associated earthworks, establishing gravel entrance roads and sewage system, power and water supply, fencing, stormwater retention wetland and site planting.

During Phase 2, all of the buildings associated with Stage One, a further 30 moorings and houseboat hardstand area will be constructed and the fuel supply installed.

During Phase 3, the winter months, there will be no construction.

In the final phase of Stage One, the remaining 40 moorings will be constructed, all roads will be surfaced and further site planting will occur.

69. Paragraph 4.2 of the SEIS stated that the Landscape Masterplan (Plan 2) showed the main features of the proposed marina and associated facilities:

4.2 THE MARINA DEVELOPMENT

The Landscape Masterplan which is reproduced in the Introduction to this Supplementary EIS shows the main features of the proposed marina and associated facilities. The Masterplan shows sufficient detail for the purposes of EIS assessment. Further details of site development and construction will be provided once approval for the project had been obtained

70. Also enclosed with the SEIS was a large scale map entitled *"Map 1: Location Map"*. It showed a large area on both sides of the Murray River with a relatively small shaded part marked *"Deep Creek Proposed Marina"*.

71. The SEIS addressed the public components of the proposal, including the public wharf, in paragraph 4.1.6:

4.1.6 The Department of Conservation and Environment raises the issue of the provision of a public component in the development of such facilities as the proposed marina.

While the main objective of the marina proposal (as encapsulated in the Stage 1 Development Plan) is the provision of mooring and associated facilities for houseboats, there is also provision for public components in the proposal. It is envisaged that the general public will have access to the restaurant, motel and cabin components of the development, the kiosk, wharf area, picnic facilities and public conveniences and to the area to the east of the creek which is to be established as a native flora and fauna area with access provided by canoes or rowing boats.

The pump out and re-fuelling facilities would also be available to other river users.

72.

[140681]

Paragraph 4.2.20 addressed the sealing of the main access road and the surfaces of other roads and carparks as follows:

The main access road into the site will be sealed with asphalt and 6.2 metres in width. Access roads to the restaurant and public wharf will also be asphalt sealed. It is proposed that all other roads, and the carparks and houseboat storage area be surfaced with gravel. It is envisaged that these gravel surfaces will fit more comfortably into the rural landscape character of the development while proving satisfactory for access and storage purposes.

73. Paragraph 4.4 noted that the NSW State Pollution Control Commission's main area of concern related to the *"marina's likely impact on water quality of the Murray River and a proper effluent management plan for the treatment and disposal of all … effluent from the complex"*.

74. On 10 September 1991, the council's Health and Building Surveyor submitted a Special Report to the ordinary meeting of Murray Shire Council. It described the application as being for the following development:

Stage 1 is proposed to include excavation of the creek entrance, construction of 30 moorings and associated earthworks, gravel entrance road, sewerage system, power and water supply, fencing, stormwater retention wetland and site planting.

Stage 2 a further 30 mooring sites and houseboat hardstand area and fuel supply installed.

Stage 3 the remaining 40 mooring sites will be constructed, roads will be surfaced and site planting.

To support the Marina development also proposed is a boat ramp and jetty, kiosk, cabin and motel accommodation, sewage pump out facility, fuel supply, restaurant, carpark, managers residence, storage sheds, workshop and houseboat storage area.

Development consent

75. At a meeting on 10 September 2001, Murray Shire Council conditionally approved DA 18/90. The notice of determination was signed by the Shire Clerk on 12 September 1991. The notice stated that the conditions of consent were *"as per attached letter"*. The attached letter was dated 12 September 1991. In the letter the council notified Mr Mitsch that it had granted development consent and set out the conditions of approval.

76. It is necessary to pay close attention to the terms of the notice and the letter because there is an issue of construction about whether the consent incorporated the terms of the development application, particularly the enclosed plans, as the plaintiffs contend. The notice, after identifying Mr Mitsch as the applicant in respect of DA 18/90, stated:

PURSUANT TO SECTION 92 OF THE ACT NOTICE IS HEREBY GIVEN OF THE DETERMINATION BY CONSENT AUTHORITY OF THE DEVELOPMENT APPLICATION

NO: 18/90 RELATING TO THE LAND DESCRIBED AS FOLLOWS:

PART PORTION 19, PARISH OF BENARCA

THE DEVELOPMENT APPLICATION HAS BEEN DETERMINED BY:

*~~(a) GRANTING OF CONSENT UNCONDITIONALLY;~~

*(b) GRANTING OF CONSENT SUBJECT TO THE CONDITIONS SPECIFIED IN THIS NOTICE;

*~~(c) REFUSING OF CONSENT.~~

THE CONDITIONS OF THE CONSENT ARE SET OUT AS FOLLOWS:

AS PER ATTACHED LETTER

THE REASONS FOR THE *IMPOSITION OF THE CONDITIONS/THE REFUSAL ARE SET OUT AS FOLLOWS:

AS PER ATTACHED LETTER.

77. The terms of the attached letter dated 12 September 1991 from the council to Mr Mitsch bear on the issue of whether the development application, particularly the enclosed plans, forms part of the development consent. The letter stated:

Development Consent 18/90

Deep Creek Marina and Tourist Development

Part Portion 19, Parish of Benarca

[140682]

Council resolved at the meeting of 10th September, 1991 to grant development consent for the abovementioned Marina and tourist development subject to the following conditions: —

Stage 1

1. That a concrete regulator be constructed across the entrance of Deep Creek to the River. This regulator shall be constructed so that at low river an acceptable level of water is retained in Deep Creek.

The regulator shall be constructed to a design and finished to a level approved by the Shire Engineer.
2. The sewerage system shall be installed to the requirements of the State Pollution Control Commission.
3. Gravel roads shall be constructed to a design and standard approved by the Shire Engineer.

Stage 2

4. The houseboat storage area shall be surfaced with crushed rock and be screened from the main road by the planting of suitable screens of advanced trees.
5. The fuel supplies shall be installed to the requirements of the Dangerous Goods Branch of the Department of Labour and Industry. Bund walls shall be provided around fuel storage areas.
6. The access road shall be surfaced with bitumen and the intersection with the main road shall be constructed to a standard required by the Traffic Committee.

General

7. Water testing as specified by Council's Health Surveyor shall be carried out in Deep creek on a monthly basis and on the sewage treatment plant on a half yearly basis. The results of these tests shall be forwarded to Council.
8. Water quality within the Marina shall be maintained to a base standard which will be a standard set by water sampling before work on the Marina commences.
9. Approval under Section 21D of the Soil Conservation Act shall be obtained for removal or pruning of any tree within 20 metres of the bank of the river.
10. Approval shall be obtained from the Department of Water Resources for any excavation works proposed to the River bank and the boat ramp.
11. A potable water supply shall be provided for the motel, cabins, restaurant and kiosk.
12. Buildings shall not be constructed nearer than 60 metres from the bank of the River or Deep Creek.
13. Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed.
14. Houseboats shall not be occupied for more than three consecutive days while moored within the Marina.
15. The destruction of any tree not being permitted in the proposed wild life refuge area.
16. All buildings to be finished in a colour that blends into the surrounding landscape.
17. One sign only of an approved size being permitted on the entrance to the development.
18. Moorings within the Marina shall be restricted to the area shown on the map in the supplementary Environmental Impact Statement.
19. Access to the sewage treatment works shall be from within the property and a separate entrance to this facility shall not be permitted from the main road.
20. Stock shall be fenced off from Deep Creek.

The reasons for the imposition of the conditions are sit [sic] out as follows:—

1. To retain an acceptable level of water within Deep Creek at all times.
2. To prevent pollution.
3. To provide safe access.
4. To provide all weather access to vessels and for aesthetic reasons.
5. To comply with legislation and prevent pollution.
6. To provide all weather access and for traffic safety reasons.
7. To check on possible pollution.
8. To provide a base sample for comparison.
9. As required by legislation.

[140683]

10. As required by legislation.
11. For health reasons.
12. To comply with legislation and Councils code.
13. To provide all weather access.
14. To comply with legislation.
15. For conservation reasons.
16. For aesthetic reasons.
17. For aesthetic reasons.
18. To comply with the Environmental Impact Statement.
19. For traffic safety.
20. To reduce pollution.

78. In cross-examination Mr Watson agreed that this development consent included consent to Plan 4. I do not consider that his view is relevant to the construction issue although it may be relevant to discretionary relief if the case reaches that stage.

DEVELOPMENT CONSENT 66/92

Development application

79. On 7 October 1992, Mr Mitsch lodged DA 66/92 which described the development for which consent was sought as: *"Community title subdivision to create 1 community scheme and 2 two neighbourhood schemes"*. The consent of the owners, Mr Watson and Sammy One, appeared on the application.

80. Accompanying DA 66/92 was a letter from Mr Mitsch dated 7 October 1992. The letter explained that consent was sought to a subdivision in two stages, to be effected under the terms of the new community title legislation, involving a community association and neighbourhood associations.

81. The first stage was described in Mr Mitsch's letter as follows:

Lot 1 — Association Property

This association property includes:

1. access way
2. central carpark
3. foreshore area
4. sewerage pump station
5. effluent disposal site
6. that part of the lagoon area not included in the individual berths

Lot 2–11 — Development Lots.

These future development Lots are designed to be further subdivided in a neighbourhood lots and each of the development lots will provide for approximately 10 individual lots of one berth each.

Neighbourhood Development Contracts and Neighbourhood Management Statements will be prepared for each of these subdivisions and will be approved by Council prior to lodgement at the Titles Office.

82. The second stage was described in Mr Mitsch's letter as follows:

Development of Lot 12 —

This is the residue parcel and is designed to be further subdivided into neighbourhood lots to comprise the following:

Neighbourhood Lot 1 will comprised [sic] the open space consisting of the wildlife refuge on the island and the Murray River Foreshore setback Area.
Neighbourhood Lot 2 will incorporate the Motel Unit and the Restaurant area.
Neighbourhood Lot 3 will incorporate:

1. Managers Residence

2. Houseboat Storage Area
3. Houseboat Maintenance Area
4. Wharf and Fuel Supply Area
5. General Store
6. Small Storage Shed

Neighbourhood Lot 4 will incorporate the holiday cabins, tennis court and swimming pools.

Neighbourhood Lot 5 will comprise the residue farming land area and will be utilised for small scale farming activities which will be compatible with the overall development. These will form part of an agriculture based tourist park.

83. Mr Mitsch's letter explained that:

> Each stage of the development involves the incorporation of a association, i.e community association for the overall development and neighbourhood associations for the further subdivisions. These associations are controlled by the
>
> [140684]
>
> appropriate Development Contract and a Management Statement. The Development Contracts and Management Statements form part of the title to the individual Lots and are lodged at the Land Titles Office with the subdivision plan. They are binding on not only the proprietors of the land but also successors in title. Both Development Contract and Management Statement are approved by Council. The Development Contract cannot be varied except with Councils consent.

84. His letter referred to access as follows:

> The access way to the site will be part of the community association property and will be established as a private access way. This remains vested in the community association which is responsible for the maintenance and upkeep of that facility. A private access way allows the community association to control and limit its use to those members of the association and their guests.

85. The letter enclosed drafts of a community management statement, community development contract, neighbourhood management statement and neighbourhood development contract.

86. A *"Subdivision Outline"*, which formed part of DA 66/92, included the following description:

1. COMMUNITY SUBDIVISION

3 LOTS;

LOT 1:	**Association Property** Managed by Community Association in accordance with the Development Contract and the Management statement.
LOTS 2–11	**Development lots;** To be subdivided into individual berths by neighbourhood plans.
LOT 12:	**Development lot;** Further development for Marina Complex in accordance with Development Contract.

2. NEIGHBOURHOOD SUBDIVISIONS

LOT 1:	Association Property Managed by Precinct Association in accordance with Development Contract and Management Statement.
LOT 2–12 inclusive:	
LOT 2	Motel Units and Restaurant
LOT 3	Managers Residence Houseboat Storage Houseboat Maintenance Wharf Fuel Supplies General Store Storage Shed
LOT 4	Holiday Cabins Tennis Court Swimming Pool
LOT 5	Residue Farm Agriculture

Subdivision plans accompanying DA 66/92

87. Among the documents accompanying DA 66/92 were three Stage 1 subdivision plans described as "*Community Plan of Subdivision 3 Sheets*" (copies are **annexures B, C and D** to this judgment). These plans indicated in green that the community property would include a substantial part of the foreshores and the whole of the waters of Deep Creek, a carpark, a boat ramp, and an access road from the Moama-Barham Road (called Perricoota Road). On the third of those plans (**annexure D** to this judgment) under "*carpark*" appear the words "*see EIS for details*". On the second of those plans (**annexure C** to this judgment) in relation to the general store and storage shed shown on

[140685]

Lot 12 also appear the words "*see EIS for details*". A "*public wharf*" is shown as part of Lot 12 on those two plans.

88. The "*Lots 2–11 Development Lots*" in Stage 1 referred to in Mr Mitsch's letter were the proposed neighbourhood development lots for marina berths on the northern bank of the lagoon. Because of the demand for marina berths they were truncated to three neighbourhood mooring lots — Lots 2, 3 and 4 — by the time the community plan came to be registered (one sheet is **annexure F** to this judgment). I have called them the Central, Western and Eastern Neighbourhoods (see [26] above). Later, Lot 4 came to be re-numbered as Lot 6.

89. Also accompanying DA 66/92 was a Stage 2 subdivision plan (**annexure E** to this judgment). As noted above, Mr Mitsch's letter designated Stage 2 as the development of residual Lot 12 by subdivision into five neighbourhood lots. The Stage 2 subdivision plan is described on its face "*Stage 2 Subdivision Lot 12 Proposed Community Title Subdivision*". It shows essentially the same facilities and the same upper eastern "*access track*" as is shown on Plan 4 in DA 18/90 (**annexure A** to this judgment). The Stage 2 plan shows the Stage 1 subdivision area in white and the Stage 2 subdivision of Lot 12 in various colours. Within the Stage 2 subdivision of Lot 12 it shows the Stage 2 neighbourhood subdivision Lots 1 to 5 described in the Subdivision Outline (accompanying DA 66/92) and in Mr Mitsch's letter. (The Stage 2 Lots 1 to 5 should not be confused with the Stage 1 Lots 1 to 11). Lot 3 within Stage 2 is shown as including a general store and a storage shed in areas which are respectively now Lots 14 and 15; the public wharf; and part of what is now Lot 16 on which appear a manager's residence and houseboat storage area. The Stage 2 plan also shows a 100 metre setback from the Murray River adjoining the mooring neighbourhood Lots 2 and 4. Lot 5 within Stage 2 (most of which is now Lot 16) in fact extends all the way up to Perricoota Road. Ultimately,

> (a) Stage 2 Lot 4, most of Lot 2 and part of Lot 1 comprising part of the setback area to the Murray River north of Deep Creek shown on the Stage 2 subdivision plan became the Honeyman Lot (also known as "Murray Rivers Edge"), which has been approved by the council for development as holiday accommodation, part of which has been completed;
> (b) part of Stage 2 Lot 3, where the general store and storage shed are shown, was first developed and used by the original developers as a restaurant/bar and store. It was later sold and eventually became Lots 14 and 15 on which there now are, respectively, a hotel/ restaurant and supermarket;
> (c) the remainder of Stage 2 Lot 3 stayed in the ownership of the developers and is now part of Lot 16, which includes the original Lot 5.

Mr Watson's evidence

90. In cross-examination Mr Watson agreed that:

> (a) the reference to "*central carpark*" in Mr Mitsch's letter was a reference to the central carpark shown on Plan 3 accompanying DA 18/90;
> (b) the reference to "*foreshore area*" in Mr Mitsch's letter could have been a reference to the land on the northern side of Deep Creek between Murray River and the 100 metre setback from the River shown on Plan 4;
> (c) the "*effluent disposal site*" referred to in Mr Mitsch's letter was a parcel of land adjoining the Moama-Barham Road (i.e. Perricoota Road), which Mr Mitsch later deleted from the community plan before it was registered;

(d) at that time "*that part of the lagoon area not included in the individual berths*" was owned by the Lands Department. Mr Watson had told the Lands Department he wanted to acquire it to incorporate it into a community title development. The community title development which he then proposed was to transfer it into community association property; and
(e) when DA 66/92 was made he intended the public wharf to be freely available to the general public.

[140686]

Council report

91. The council's Health and Building Surveyor's Report dated 14 October 1992 commented on DA 66/92 that:

> The proposal appears to be in accordance with Council Consent 18/90 with the exception that individual phases of the development will be subdivided into neighbourhood lots.

Development consent

92. The notice of determination of conditional consent to DA 66/92 signed by the shire clerk was dated 26 October 1992. It is necessary to set out its contents because (as with the notice of determination of DA 18/90) the plaintiffs submit that on its proper construction it incorporated the development application and, in particular, the accompanying plans (**annexures B — E** to this judgment). The notice is in the same standard form as was used for development consent 18/90. It was addressed to Veitch and Mitsch and described them as "*the applicant in respect of development application 66/92"*. The notice then stated:

> PURSUANT TO SECTION 92 OF THE ACT NOTICE IS HEREBY GIVEN OF THE DETERMINATION BY CONSENT AUTHORITY OF THE DEVELOPMENT APPLICATION NO: 66/92 RELATING TO THE LAND DESCRIBED AS FOLLOWS:
>
> Lot 1, DP 16892 Parish of Benarca
>
> THE DEVELOPMENT APPLICATION HAS BEEN DETERMINED BY:
>
> * ~~(a) GRANTING OF CONSENT UNCONDITIONALLY;~~
> * (b) GRANTING OF CONSENT SUBJECT TO THE CONDITIONS SPECIFIED IN THIS NOTICE;
> * ~~(c) REFUSING OF CONSENT.~~
>
> THE CONDITIONS OF THE CONSENT ARE SET OUT AS FOLLOWS:
>
> As per attached letter.
>
> THE REASONS FOR THE * IMPOSITION OF THE CONDITIONS/THE REFUSAL ARE SET OUT AS FOLLOWS:
>
> As per attached letter.

93. The "*attached letter*" referred to in the notice was a letter dated 26 October 1992 from the council to Veitch and Mitsch. The letter was entitled: "*Community Titles Subdivision — Consent 66/92 Lot 1, DP 16892, Parish of Benarca Owner: Anthony Rupert Watson and Sammy One Pty Ltd Your reference : 6616/89*–90". That reference appeared on Mr Mitsch's subdivision plans (**annexures B** to **E** to this judgment) and on Mr Mitsch's letter of 7 October 1992 which accompanied the development application, referred to at [80] above. The council's letter of 26 October 1992 then stated:

> Council resolved at the meeting on 20th October, 1992 to grant consent for the proposed subdivision subject to:—
>
> a) The submission of formal subdivision plans, community development contracts, community management statements, neighbourhood development contracts and neighbourhood management statements.
> b) Conditions 1, 2, 6, 7, 8, 9, 10, 14, 15, 16, 17, 18, 19 and 20 of consent 18/90 being complied with.

c) That no buildings being permit [sic] on Neighbourhood Development Lots 2–11 (moorings or berths).
d) That the neighbourhood management statement require all vessels moored at the Development lots to be able to move under their own power and be a vessel registered with the Maritime Services Board.

The reasons for the imposition of the conditions are as follows.

a) To comply with legislation
b) To comply with conditions of a previous consent.
c) For aesthetic reasons.
d) For aesthetic reasons.

SUBMISSION OF FORMAL SUBDIVISION DOCUMENTATION TO COUNCIL: OCTOBER 1994

94. The council granted subdivision development consent 66/92 subject to submission of formal subdivision plans and other documents. On 12 October 1994 Mr Mitsch, on Mr Watson's instructions, wrote to the council "*Re: Community Title Subdivision —*

[140687]

Consent 66/92…". The letter concluded by requesting the council to certify and return for lodgement at the Land Titles Office the original and two copies of the following documents, which were enclosed:

(1) a community plan in six sheets;
(2) a neighbourhood plan in five sheets;
(3) a community development contract;
(4) a community management statement;
(5) a neighbourhood development contract;
(6) a neighbourhood management statement.

95. The letter also stated:

> We refer to your letter of the 26th October 1992 in which you advised that a community title subdivision of the above described land had been approved by your Council subject to the conditions imposed therein.
>
> We have now been instructed to proceed with the subdivision survey and enclose herewith the formal plans together with Community Development Contract, Community Management Statement, Neighbourhood Development Contract and Neighbourhood Management Statement.
>
> The original proposal as approved was to create the neighbourhood or marina berth lots in ten separate stages i.e. as shown as lots 2 to 11 inclusive on the plans which accompanied the original application. Enquiry for these lots has been such that it is now intended to create these neighbourhood lots in three stages only.
>
> Stage 1 of the development will now comprise the creation of 45 separate marina berth lots together with two future development lots for marina berths with the balance of the land being held in one lot. This balance of the land will be developed for future use as per the approval to the marina proper and associated works. These are shown more specifically on the Environmental Impact Statements and supplementary Environmental Impact Statement which accompanied that application.
>
> It should be noted that the island, which is to form a wildlife sanctuary, is now to be created as community property at Stage 1 of the development. It was originally proposed that this would be part of the community development lot and created as common property at a future stage. Again because of the demand for marina berth lots it is felt expedient to create this as community property at day 1.
>
> **Apart from minor variations in the position of the boundaries due to physical features found on survey the layout generally conforms with that approved in Council's approval referred to above.**
>
> (emphasis added)

96. The last sentence of this letter was, in my opinion, deceptive. The layout "*approved in Council's approval*" was the layout in Mr Mitsch's subdivision plans enclosed with DA 66/92 (**annexures B to E** to this judgment). As discussed above, those plans showed the waters and much of the foreshores of Deep Creek as community property. In the community plan enclosed with the letter, the waters and foreshores were no longer shown as community property but as part of a development lot owned by the developers (now Lot 16). The community plan was later registered in that form, except for an amendment deleting the effluent disposal block on Perricoota Road (**annexure F** to this judgment). Mr Watson in cross-examination agreed that there were no "*physical features*" found on survey which might have justified the land behind the Eastern Neighbourhood berths up to and including the access road shown on Plan 4 becoming the developers' land.

97. This gross disappearance of community property may be viewed as the seminal cause of many of the plaintiffs' grievances as they emerged more than a decade later when the developers closed vehicular access to the mooring berths and closed the public wharf.

98. There was limited reference, in the cross-examination or re-examination of Mr Watson and Mr Bird, to the reason for the disappearance of the lagoon as community property in the registered community plan. In cross-examination Mr Watson said he thought it was a result of discussions between Mr Mitsch and council planning people. In re-examination he said that Mr Mitsch had regular discussions with council officers to check how they wanted

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certain matters treated. He said Mr Mitsch told him that they wanted Mr Watson to be responsible for the water quality because this was the first inland marina in New South Wales, no-one knew what sort of effect it would have on water quality, and they wanted Mr Watson to keep a very close eye on it. Because of that, he understood the council wanted him to retain ownership of the lagoon and the registered plans were altered to reflect that.

99. Mr Bird, a planning consultant to the current developers, said in re-examination that Mr Mitsch had explained to him that the developer was responsible for water quality, sediment and soil erosion control during the development and that that was not practical if the developer did not control the land. He said Mr Mitsch indicated there was significant snagging in the narrower part of the most eastern part of the creek and the sediment control required the land to the north to be the developers' land, as well as the water. This evidence was given unclearly and I am left in doubt as to whether this was said to be a requirement of the council or a requirement of the developers.

100. This evidence from Mr Watson and Mr Bird was an unsatisfactory form of proof of something which goes to a central issue in the case. It is double hearsay. Mr Mitsch appears to have been available to be called as a witness but was not called. No explanation for his non-appearance has been provided. I draw the inference that he could have said nothing which would have assisted the developers' case.

101. Even if I were not to draw that inference, I would regard this evidence of council officers' wishes as unreliable. If the explanation for the transfer of so much community property, shown in the DA 66/92 plans, to the developers lay in a wish of some council officers that the developers should control water quality, one would expect that to have been stated as a condition of development consent or in the council report in evidence or at least in a written communication from the council, and to have been referred to in Mr Mitsch's letter. I am unable to see why the expression of a wish by some council officers that the developers be responsible for water quality should have been interpreted by the developers as a council requirement that the developers had to own the lagoon and foreshores which had been designated as community property in development consent 66/92. It could have been achieved in some other way, such as by a provision in the community management statement. A wish of these unidentified council officers at some unidentified time could not negate council's development consent 66/92 for a subdivision in which the lagoon and foreshores were in the ownership of the community association.

102. In any event, even if this evidence were to be accepted, I see no reason why the lagoon and foreshores should not now become an accretion to the community property as claimed by the plaintiffs and provided for in the subdivision plans accompanying DA 66/92, if the plaintiffs' claim is otherwise made out.

THE COMMUNITY PLAN

103. On 5 December 1994 the six sheets of the community plan submitted by Mr Mitsch to the council on 12 October 1994 were endorsed with the council clerk's signature, indicating council's approval.

104. On 3 January 1995, Mr Mitsch made amendments to the community plan, by deleting part of Lot 5 on Perricoota Road (a detached block) and an easement for effluent disposal connecting the subject land to that lot.

105. On 17 January 1995 the community plan was registered as DP 270076. One of the sheets is **annexure F** to this judgment. Registered with the community plan were a community management statement and community development contract executed by the original developers, Mr Watson and Sammy One.

106. The registered community plan showed Lot 1 as community property, including the access road from Perricoota Road with a "*claw*" at the end of it around most of what is now Lot 14 (the hotel/restaurant) and Lot 15 (the supermarket), which were then part of the developers' Lot 5 (now Lot 16). As noted above at [96], Lot 5 (now Lot 16) was shown as including most of the subject land including the waterway and foreshores. Lots 2, 3 and 4 (Lot 4 is now Lot 6) were the mooring berth areas and later came to be the Central, Western and Eastern Neighbourhood Association lots.

107.

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The registered community plan burdened Lot 5 (now Lot 16) with an easement for access of variable width over the lagoon and benefited Lot 1 (the community association lot) and Lots 2, 3 and 4 (the three mooring neighbourhood association lots). The terms of this easement were as follows:

> Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by him, to go, pass and repass at all times and for all purposes with or without boats to and from the said dominant tenement or any such part thereof.

108. The registered community plan also showed that an easement was granted to the council for effluent disposal adjoining the Murray River (on the northern side of Deep Creek) five metres wide together with an associated right-of-carriageway over land designated as part of Lot 5 but which the DA 66/92 plans had proposed would be community property.

THE COMMUNITY DEVELOPMENT CONTRACT

109. The community development contract registered with the community plan on 17 January 1995 was executed by Mr Watson and Sammy One. Under s 15(1) of the *Management Act*, it had effect as if it included an agreement under seal with covenants to the effect of those set out in Part 1 of Schedule 2 to that Act: see [56]–[57] above. It contained the council's certificate which certified:

> (a) that the consent authority has approved of the development described in the Development Application No. 18/90; and
> (b) that the terms and conditions of this development contract are not inconsistent with the Development as approved.

110. The "*proposals*" in the registered community development contract form part of the "*community scheme*" as defined in s 3 of the Development Act: see [39] above. The plaintiffs rely on proposals in that contract.

111. The preliminary part of the contract is entitled "*Warning*". Paragraphs 1 to 4 of the "*Warning*" are in the form prescribed by the cl 4 of Schedule 2 to the *Development Act* and cl 39 of the *Community Land Development Regulation 1990*, referred to at [48] and [50] above (now cl 30 of the *Community Land Development Regulation 2007*). The provisions of Parts 1 and 2 of the contract were prescribed in Schedule 2 to the *Development Act*.

112. The community development contract includes the following provisions:

> **WARNING**
>
> 1. This contract contains details of a community scheme which is proposed to be developed on the land described in it. Interested persons are advised that the proposed scheme may

be varied, but only in accordance with Section 16 of the Community Land Management Act 1989.

The scheme forms part of a staged development, interested persons are advised of the possibility that the scheme may not be completed and may be terminated by order of the Supreme Court.
2. The development contract should not be considered alone, but in conjunction with the results of the searches and enquiries normally made in respect of a lot in a scheme. Attention is drawn in particular to the management statement registered at the Land Titles Office with this contract, which statement sets out the management rules governing the scheme and provides details of the rights and obligations of lot owners under the scheme.
3. Further particulars about the scheme are available in the:

Development Consent No. 18/90

granted by the Council of the Shire of Murray

dated the 12th September, 1991
4. The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land subject of the scheme in accordance with the development consent as modified or

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amended with the consent authority's approval from time to time.
5. Any reference to Development Consent is a reference to that part of the Development consent that relates to the neighbourhood scheme only.
6. For the purposes of this Contract the particulars in the Development Consent referred to above relate to the Neighbourhood Scheme.

PART 1

DESCRIPTION OF DEVELOPMENT

1.1. DESCRIPTION OF LAND

The land to be developed is Lot 12 in Deposited Plan No. 846348 in the Local Government Area of Murray, Parish of Benarca, County of Cadell and State of New South Wales.

The land is to be developed for the purposes of a marina (known as the Deep Creek Marina) and associated works as detailed in Development Application to the Council of the Shire of Murray dated 23rd May 1990.

1.2. AMENITIES

1.2.1. All electricity services are to be provided by the developer.

1.2.2. The developer is to provide a sealed access way in accordance with the Development Consent.

1.3. FURTHER DEVELOPMENT

1.3.1. All driveways are to be sealed in accordance with the Development Consent No 18/90 issued by the Council of the Shire of Murray on the 12th September 1991.

1.3.2. Community Development Lots 2, 3 and 4 are to be further subdivided into neighbourhood lots for the purpose of houseboat berths.

1.3.3. Community Development Lot 5 is to be developed in a further subdivision to provide facilities incorporated in the Development Consent in accordance with plans approved by the Council of the Shire of Murray. (Refer Development Consent No 18/90 dated 12th September 1991.)

PART 2

ORIGINAL PROPRIETOR'S RIGHTS AND UNDERTAKING

2.1. ACCESS AND CONSTRUCTION AREAS

Working hours 7.00 a.m. to 5.30 p.m. Monday to Friday inclusive.

Access will be via Public Roads adjoining the Parcel.

During the construction period access is limited to community property only and roads within the Community Parcel.

2.2. UNDERTAKING BY THE ORIGINAL PROPRIETOR TO REPAIR

The developer undertakes not to cause unreasonable inconvenience to proprietors of lots in the scheme during the course of construction and should any damage occur, to repair without delay, damage caused to community property by development activities.

113. There were some differences between the provisions of the registered community development contract and the provisions of the draft community development contract which had been enclosed with DA 66/92. Among the differences were that paragraphs 5 and 6 of the former were not in the latter. Mr Watson agreed in cross-examination that at the time of the draft community development contract in October 1992, his intention was: (a) to develop the land as shown in the Stage 2 plan accompanying DA 66/92 (**annexure E** to this judgment); (b) to provide motor vehicle access along the access track shown on that plan so that people could get near their berths when they wanted to use their boats; (c) for the boat ramp shown thereon to be open for people to launch and retrieve boats; (d) for there to be motor vehicle access to and from the public wharf as shown on that plan; and (e) to provide all sewerage, water and electricity services.

114. In relation to cl 3 of the "*Warning*" section of the community development contract, Mr Watson agreed that his understanding was that the proposal in the development contract was to develop the land in accordance with Plan 4 (**annexure A** to this judgment).

115. I do not think that Mr Watson's subjective intention or understanding is relevant to the interpretation of the contract. It may be

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relevant to the exercise of the statutory discretion to vary the community scheme or contract if that point in the case is reached.

THE COMMUNITY MANAGEMENT STATEMENT

116. The community management statement registered with the community plan on 17 January 1995 contained the following reference to Plan 4 enclosed with DA 18/90:

> Landscaping to individual parcels and association property is to be carried out in accordance with Plan No. 4 submitted with the supplementary Environment Impact Statement lodged with the Council (Development Consent No 18/90).

117. The community management statement contained the following by-law 4.21 concerning boat traffic and usage:

> BOAT TRAFFIC AND USAGE
>
> 4.21.1 The Community Association shall have control of all aspects of boat traffic and boat usage within the Community Parcel
>
> 4.21.2 The Community Association may empower any person or persons to control all aspects of boat traffic and usage with the Community Parcel in accordance with its powers under By-law 4.21.1 hereof.
>
> 4.21.3 Any person in charge of a boat within the Community Parcel shall comply with all directions given pursuant to By-laws 4.21.1 and 4.21.2.

118. This by-law, in my view, naturally belongs with ownership of the waters of Deep Creek by the community association, which was what had been indicated in the plans accompanying DA 66/92

(**annexures B — E** to this judgment). It sits most uncomfortably with the developers' ownership of the waters of Deep Creek under the registered community plan, the developers' exercise of control when granting an easement of access over the waters in favour of the adjacent marina to the east on Lot 23, and the developers' closure for a time in 2005 of the boat ramp to all boat traffic and boat usage. Given that ownership of the lagoon and foreshores is vested in the developers, I am unable to agree with the developers' submission that it is unsurprising that the community association should be the boat traffic policeman under the by-law.

THE MOORING NEIGHBOURHOOD PLANS

119. In 1995, 1997 and 1998, the developers registered three neighbourhood plans for mooring berths, which had been approved by the council, together with neighbourhood development contracts and management statements. Under each registered neighbourhood plan, neighbourhood property was limited to a two metre wide strip adjacent to the mooring berths. Another two metre wide strip of community land was adjacent to the Central Neighbourhood Association's two metre wide strip and extended for a metre or two further, so as to just overlap with the beginning of the Western and Eastern Neighbourhoods. These strips provide the only registered legal land access to the marina berths. Much of this access is uneven and in places impeded, including by large trees.

Central Neighbourhood

120. On 19 January 1995 the neighbourhood plan (in five sheets), neighbourhood development contract and neighbourhood management statement for DP 285249 (**Central Neighbourhood**) were registered. This first neighbourhood plan created 45 mooring berths. These mooring berths are rectangular parcels of land lying below Deep Creek and including up to a few inches of dry land abutting the edge of Deep Creek, and so, in most cases, including some or all of the red-gum retaining wall installed by the developers. The plan shows a two metre wide strip of neighbourhood property running along the foreshore next to the houseboat mooring berths. Another two metre wide strip of community land was adjacent to the neighbourhood strip and extended for a metre or two further so as to just overlap with the beginning of the Western and Eastern Neighbourhoods. The plaintiffs claim specific performance and/or damages for breach of clause 1.2.1 of the neighbourhood development contract which provides: "*All telecom and electricity services are to be provided to each lot by the developer*".

Western Neighbourhood

121. On 30 September 1997 the neighbourhood plan (in four sheets), neighbourhood development contract and neighbourhood management statement for DP

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285433 were registered (**Western Neighbourhood**). This second neighbourhood plan created 11 mooring berth lots. The plan shows a two metre wide strip of neighbourhood property adjoining the mooring berths. The plaintiffs claim specific performance and/or damages for breach of cl 1.2.1 of the neighbourhood development contract which provides: "*All telephone and electricity services are to be provided to each lot by the developer*".

Eastern Neighbourhood

122. On 25 March 1998 the neighbourhood plan (in four sheets with two additional sheets), neighbourhood development contract and neighbourhood management statement for DP 285486 were registered (**Eastern Neighbourhood**). This third neighbourhood plan created 30 mooring berth lots. The plan shows a two metre wide strip of neighbourhood property adjoining the mooring berths. The plaintiffs claim specific performance and/or damages for breach of cl 1.2.1 of the neighbourhood development contract which provides: "*All telephone and electricity services are to be provided to each lot by the developer*".

AMENDMENT OF DEVELOPMENT CONSENT 18/90 BY DEVELOPMENT CONSENT 176/00

123. In 2000 the council received DA 176/00 to amend development consent 18/90. Subsequently, the council considered a report by its Director of Environmental Services which noted that the application was to

"*amend the original consent for a 100 berth marina at Deep Creek. The applicant advises that the average size of houseboats within the Marina is somewhat larger than originally anticipated and as a result the number of houseboats able to be moored in the Marina has been reduced to 85. It is now proposed that the Marina be expanded to the eastern end of the lagoon to make provision for a further 21 berths (total 106)*"

124. At the time the council had a moratorium on increasing the number of moorings pending a study on the effects of boating in this area of the river. Consequently, on 20 August 2002 development consent 176/00 was issued granting conditional consent for "*adding additional area to the marina approved under Consent 18/90 without increasing mooring numbers*". This approved eastward extension of the marina was onto the adjoining Lot 23.

THE HONEYMAN LOT

125. On 1 July 2003 the council granted development consent 169/03 for a 53 unit holiday resort on the Honeyman Lot. A council report of 12 December 2002 in relation to this development application stated:

> In the original development application for Deep Creek Marina a proposed holiday resort was included as a later stage of the overall development in this area.
>
> The concept plans before Council are more intensive with approximately double the number of units proposed on this plan.
>
> There are a number of advantages of locating such accommodation in this location…

126. On 11 November 2004 a neighbourhood plan in 10 sheets was registered for DP 285882 (the **Honeyman Lot**). The land is known as "*Murray River's Edge*". The neighbourhood lots within the Honeyman Lot are owned by a company of which Mr and Mrs Honeyman are the directors. The registered neighbourhood plan shows some of the development lots close to the northern side of the western access road, which was used until 2006 by mooring berth owners in the Western Neighbourhood to gain vehicular access to their mooring berths. Development consent has been granted for many holiday cabins and related facilities, some of which have now been constructed.

CONSTRUCTION AND CONSTRUCTION CONSENT FOR RESTAURANT

127. On 8 January 1996 the council granted consent under s 68 of the *Local Government Act 1993* (NSW) to building application 138/95 on behalf of Mr Watson to construct a restaurant and shop in the location shown for a general store in Plan 4 accompanying DA 18/90 and the Stage 2 subdivision plan accompanying DA 66/92 (respectively, **annexures A** and **E** to this judgment). They were then constructed.

128. The developers constructed the junction with Perricoota Road and the access road in

1994, a sewerage pump out station and treatment plant in 1996, a hardstand area by 1996 and the marina berths from 1994 to 1996. They constructed the restaurant/bar in 1996, the carpark in 1996 and landscaping was completed by 1998. They provided electrical services in relation to facilities. The developers landscaped the carpark and planted trees and shrubs in the carpark and along the access road. They maintained the carpark until 2002. Thereafter the trees and shrubs were not watered and died.

LOT 23

129. In June 2002 Mr and Mrs Watson transferred to Hillington a half share in some 77 hectares of land immediately adjoining and to the east of the Deep Creek Marina known as Lot 23 DP 1019398. It extends from Perricoota Road to Deep Creek. In May 2003 the registered proprietors of Lot 23 were Mr Watson and Hillington as tenants in common in equal shares. As at September 2006 the registered proprietors were Mr Watson, Hillington and Ozzie as tenants in common in equal shares. The evidence does not appear to disclose whether or not that position has changed.

130. In May 2003 the council granted development consent 311/02 for construction of an additional 15 houseboat berths on Lot 23 on conditions. In November 2003 the council granted a further development consent to add a further 20 houseboat berths on Lot 23. One of the conditions was that "*Internal Roads are*

to be sealed with bitumen as per Development consent 18/90". By July 2004 the 35 marinas on Lot 23 were under construction. This development is known as the Perricoota Boat Club.

131. Lot 16 is burdened by easements in favour of Lot 23. They include an easement for access of variable width over the waters of Deep Creek and an easement for access of variable width a little to the north of the existing upper eastern access track.

132. In 2003 Mr and Mrs Watson transferred to Hillington an interest in land comprising 143 hectares immediately to the east of Lot 23 known as Lot 222 DP 1022480, which extends from Perricoota Road to Deep Creek. The evidence does not appear to disclose whether or not that ownership position has changed.

133. At trial, Lots 23 and 222 were generally referred to compendiously as Lot 23. I shall also do so in this judgment unless it is necessary to distinguish between them.

134. It is proposed to develop Lot 23 as a 1600 lot residential subdivision and housing estate to be called Perricoota Marina Village.

PROPOSED DEVELOPMENT OF LOT 16

135. The Deep Creek area is zoned 1(a) — General Rural. Residential development is not permitted in that zone. In 2005 the developers made a submission to the council that the land be rezoned to permit the proposed extensive residential development of Lot 16. The proposal was described as including "*water based residential development through the extension of the existing marina waterway. The residential component of the development will aim to provide a range of lot sizes and has the potential to create up to 500–600 allotments in total. The development will also cater for additional water based facilities, recreational areas, community facilities and similar*".

136. One the plans which came to be included in the rezoning submission shows over 20 lots apparently for residences or tourist accommodation on the land between the eastern upper and lower access roads as well as above the eastern upper access road. The plan shows green areas between some of the lots, apparently permitting pedestrian access.

137. There was hazy oral evidence from Mr Watson and Mr Jarman that in 2006 Hillington and either Perricoota Company or Mr Jarman entered into an agreement of some sort with Mr Watson either to purchase (or to acquire an option to purchase) Mr Watson's interest in part of the land referred to in the preceding paragraph and proximate land. Mr Watson indicated that the agreement could not be finalised until the area was subdivided and titles issued. The evidence does not disclose whether or not any such agreement was written. It appears also that Mr Jarman mentioned at the general meeting of the community association on 16 April 2005 that there are "*about 20 apartments being built along here, and at the moment what they're going to be overlooking is just not acceptable*".

138. In August 2006 the council granted development consent 019/07 for a five lot

subdivision of Lot 16. One of the conditions was that a three metre right of vehicular access carriageway be granted in favour of mooring lots. The developers obtained a letter of legal advice that the condition was unlawful.

139. On 19 November 2007 the developers wrote to the council enclosing that letter; asserting that the condition was invalid; enclosing a new development application for the subdivision of Lot 16 into six community title subdivision lots; and stating that if development consent was granted to the new application on terms satisfactory to the owners, they were willing to surrender development consent 019/07 as a condition of approval of the new development consent. This new application stated that it was intended to make further development applications seeking consent to use those lots (insofar in that they had not already been developed) for tourist accommodation, dwellings and associated works. The land proposed to be developed in that way included the extensive foreshore area behind the eastern mooring berths which the subdivision plans accompanying DA 66/92 had proposed should be community property (**annexures B to D** to this judgment).

140. In cross-examination, Mr Watson agreed that:

(a) he has no intention of building the cabins in the configuration shown on Plan 4, although he said that the cabins are going ahead;
(b) he has no intention of building a motel complex comprising three buildings each containing six accommodations as shown on Plan 4, although a motel might be built in a slightly different form on Lot 16 at some unknown time in the future;
(c) he has no present intention of sealing the carpark and internal roads in any fixed time frame; and
(d) his current intention is to pursue the rezoning and development proposal for the adjoining land to the east involving parts of Deep Creek Marina.

141. Thus, it appears that the developers have no intention of the Deep Creek Marina being developed and subdivided in the way specifically contemplated by the plans in DA 18/90 and 66/92 (**annexures A** and **E** to this judgment).

ACCESS ISSUES

Introduction

142. As discussed in more detail below, since 2005 the developers have closed the access roads to the mooring berths, closed the public wharf and, for a time, closed the boat ramp. Indeed, in July 2006 they applied to the council for consent to demolish the boat ramp. The plaintiffs point to serious consequential access difficulties as one of the reasons why continuation or completion of the scheme is impracticable.

143. For the better part of a decade prior to those events, the developers repeatedly made oral and written representations that the mooring owners were entitled to use the access roads for vehicular access to their moorings and that there was no issue about access to the public wharf and boat ramp. When people came to inquire about purchase into the Deep Creek Marina, the marina presented as if it had a vehicular access road to the western moorings, and two roughly parallel vehicular access roads to the eastern moorings.

144. Mr Watson agreed in cross-examination that he permitted vehicular access along tracks to the moorings. He agreed that he told people that there would be car access to the berths. For example, he told people who had their houseboats at another marina at Eildon Dam that, unlike that marina, they would have car access to their berths if they purchased into the Deep Creek Marina.

145. Mr Watson later began objecting to parking other than for drop off and pick up. He attributed this to concerns about damage to landscaping, including sprinklers being run over and vehicles being bogged in landscaped areas requiring removal and causing damage. His reference to landscaping and sprinklers appears to be a reference to landscaping and installation of sprinklers on the eastern side of the marina carried out by the Neighbourhoods on that side with the consent of the developers.

Sales off the plan in 1994

146. In September 1994, prior to registration of the community plan in January 1995, the developers entered into two contracts for sale of

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12 mooring berth lots "*off the plan*" to two companies owned by Mr Graham Smith. The 12 lots were within the first proposed mooring neighbourhood development (the Central Neighbourhood, to be known as DP 285249)

147. The first contract was for the sale of six moorings to Downer Investments Pty Ltd. This contract annexed a plan which showed extensive community property, including the lagoon and the foreshore areas behind the proposed moorings. The community property shown on this plan appears to correspond with that shown in the subdivision plans enclosed with DA 66/92 (**annexures B, C and D** to this judgment). Condition A9.2 of the contract provided that completion was not required until the vendor had "*provided a sealed access road from Perricoota Road and wharf roadway, providing contiguous sealed access from the land to Perricoota Road*". In evidence, Mr Smith said he construed "*contiguous*" as "*continuous*" — rightly, I think, having regard to the context.

148. The second contract was for the sale of a further six moorings to Bilyan Pty Ltd. It annexed a sketch of a "*Sale Plan*" which showed the "*public wharf*" and boat ramp. Special condition A9 provided that the purchaser was not required to complete until the vendor had (inter alia) provided a sealed or formed gravel all-weather access road from Perricoota Road to the wharf area, and a completed boat ramp and houseboat removal service.

Marketing representations

149. Having registered the community plan in January 1995, Mr Watson started a campaign of advertising the attributes of the new development. The advertising material contained a number of representations about access.

150. An information brochure produced in 1995 included a copy of a plan showing the proposed completed development. This plan appears to be a copy of Plan 4 which accompanied DA 18/90 (**annexure A** hereto). The brochure said that Stage 1 of the development had been completed and Stage 2 had commenced. Stage 1 was described as including "*Construction of: opening to river, public wharf, marina wharfing (first 45 berths), slipway and boat ramp, access road (sealed), internal roads, sewage treatment system, main building foundations*". Stage 2 was described as including "*Construction of manager's residence plus balance of internal roads, marina access pathways, landscaping, lawn planting and tree planting. Installation of fuel station, sprinkler reticulation system, houseboat sewage pumping station,…sewerage network, water supply (including state of the art purification system), power and other services to the commercial sites*". The brochure included the following access representation:

> Each berth has vehicle access and mains power available with adjacent car parking and easy access to all facilities.

151. Other facilities described in the brochure included a general store "*scheduled for completion in time for the coming summer*", a restaurant adjoining the general store, a motel and holiday cottages. Mr Watson agreed in cross-examination that the references to these facilities were references to the particulars shown in Plan 4 accompanying DA 18/90.

152. Under the heading "*Stage two — (commenced)*" the brochure contained the statement: "*The detailed landscape master plan shown in the middle pages details the finished project. Some minor variations have been introduced to enhance function of the complex*". As noted above, that plan was a copy of Plan 4 which accompanied DA 18/90 (**annexure A** to this judgment).

153. In cross-examination, Mr Watson agreed that (a) he published the brochure to encourage people to invest in the development for his financial profit, and (b) the landscape plan that he had on display in his office for some or all of the time between 1997 and 2002 (see below at [156]) was consistent with the statement in the brochure that each berth has vehicle access with adjacent carparking.

154. Another marketing brochure for Deep Creek Marina, which directed all enquiries to Mr Watson, was received by (inter alia), Mr Muschinski in 1995 and Mr and Mrs Hannay in 1996. They later purchased moorings. This brochure included the following access representations:

> [C]ar access right to the boat…Berth owners have guaranteed access by road and
>
> [140696]
>
> by water to their moorings…[I]nternal roads topped with crushed rock to provide all weather access.

155. In August 2001, solicitors acting for the developers offered for sale the freehold going concern of the Deep Creek Marina and associated businesses. A marketing brochure described the businesses as including a restaurant/bar, a general store and fuel depot (on what later became Lots 14 and 15), marina berths and two houseboats. It showed the carpark landscaped in two sections, the existing eastern upper and lower access tracks connected at several points along their length, and the western access track. This would reasonably be understood, in my opinion, as a representation that the houseboat berth owners were entitled to use those access tracks.

156. For some or all of the time between 1997 and 2002, Mr Watson had on public display at his office a coloured site plan entitled "*Landscape Concept.*" It showed the Central Neighbourhood with access tracks to

the moorings and on the western side an access track including a layback for kerbside parking. The eastern and western access tracks were shown as connected by a road running behind the public wharf.

157. An article in the Sunday Herald Sun of 2 January 2000 featured an interview with Mr Watson and noted that the marina included (inter alia) "*riverside parking*" and a boat ramp.

Works on Lot 16

158. In 2001, after discussion between members of the Eastern Neighbourhood Association, an irrigation system was installed on land owned by Lot 16 proximate to the eastern mooring berths. It was hoped that the irrigation system would allow for grass cover to be maintained and might provide for other landscaping in the future. As members of the Eastern Neighbourhood, Mr and Mrs Watson contributed to the cost of the irrigation installation. Two working bees were conducted to carry out the necessary work. The Watsons' participation in the installation of the irrigation system would, I think, have been reasonably understood as indicating that mooring owners were entitled to use this part of Lot 16's land in this way.

Developers close the boat ramp, access roads and public wharf and threaten legal action for trespass: 2005–2006

159. In 2005 the developers closed the access roads (and access to adjoining parts of Lot 16) and, for a time, the boat ramp. In 2006 the developers closed the public wharf. In 2005 the developers' lawyers wrote to mooring owners alleging trespass in relation to the boat ramp, parking and mooring and threatening legal action.

Boat ramp closed

160. In April 2005, the developers installed a boom gate across the boat ramp to prevent access to it. The evidence is unclear as to how long the boom gate remained shut, but it appears to have been until about the middle of that year when it was opened after protest and confrontation. The boom gate remains as a reminder of this episode, the boom pointed skyward for the time being. The developers also used large men to police access to the boat ramp and demand money for its use from anyone who did not rent a storage shed from Deep Creek Marina Pty Ltd. At Christmas 2006, a concrete bollard was placed across the boat ramp but lot owners removed it with a crane soon afterwards.

161. Mr Bares acknowledged in evidence that lot owners, their invitees and guests were entitled to use the boat ramp. When the developers closed the boat ramp, they offered the mooring berth owners use of the boat ramp next door on Lot 23 instead.

162. Mr Bares' evidence was that the developers closed the boat ramp because members of the public who were not invited guests were using it, and this had created insurance issues for, and insurance claims on, the developers. The only specific example he gave of the insurance problem concerned a jet boat that sucked up geo-mesh into its motor while fuelling at Mr O'Brien's facility. However, he said that the boat had come off the Murray River. That example therefore hardly seems relevant to the boat ramp since, as the developers acknowledged at the hearing, the wharf was a public wharf and necessarily carried with it the prospect, indeed the invitation, that members of the public from the

Murray River would use it if using the marina facilities.

163. According to Mr Bares, the insurance problem seems to have been resolved because his insurance broker told him that, provided they made an effort to stop the public using the boat ramp, if it was reopened by the community association then the developers would have insured cover because they had done what they could to prevent public use.

Access roads closed

164. In about April 2005, the developers blocked the access roads to the moorings by constructing pine log fencing and gates. Just before Christmas 2006, they arranged, and Mr Watson and Mr Jarman personally undertook, the installation of concrete bollards across the access ways and along the fence lines. Later, the concrete bollard across the western access road was replaced by a locked gate.

165. Mr Bares suggested in evidence that insurance problems contributed to the closure of the access roads, although he did not give specific details except to mention "*illegal*" works being carried out from Lot 16 to adjoining areas which, he said, could cause insurance problems. By "*adjoining*" areas, he appears to have been speaking of foreshore land in the ownership of Lot 16 between the access roads and the mooring berths.

Public wharf closed

166. In about September 2006, the developers fenced off the public wharf so that it could no longer be used by boats or passed over on foot. The fencing remains. The boating public and the mooring owners can no longer use the wharf to access the hotel on Lot 14 (behind the wharf) and the supermarket on the adjoining Lot 15. At the trial, the developers acknowledged that it is a "*public*" wharf — notwithstanding that the word "*public*" does not appear on the registered community plan — and claimed that they intend to re-open it in due course but that their intentions have been stayed pending the outcome of these proceedings.

167. Mr Watson agreed in evidence that he specifically designed the DA 18/90 proposal for a public wharf facility to enable the boating public from the Murray River to pull up there to partake of the proposed services and amenities. He later put a ski-park facility at the public wharf so that speedboats could be moored while their occupants used the facilities.

Developers allege trespass in using the boat ramp, parking and mooring: May 2005

168. In May 2005 the developers instructed Mr Jarman to send letters to mooring owners concerning breaches of by-laws by alleged trespassing by cars, trailers and houseboats on Lot 16 land.

169. On 26 May 2005 Andreones Lawyers on behalf of Ozzie wrote a letter to houseboat owners, including Mr Taylor and Mr Fry, alleging that members of the community association had no legal right to use the lower part of the boat ramp because it was in Lot 16 (in the water) which they had no right to enter. The letter threatened legal action if they did not stop trespassing by using the boat ramp. The letter also said that Ozzie would consider providing its consent for the recipient to use the boat ramp on certain terms (which were not spelt out).

170. At about the time that he received this letter, Mr Taylor tried to use the boat ramp one day but was stopped by Mr Jarman who demanded that he pay him for permission to use the boat ramp. He paid Mr Jarman $20 or $25 cash for a single day's permission.

171. On 26 May 2005 Andreones Lawyers on behalf of Ozzie wrote a letter to houseboat owners, including Mr Taylor, Mr Fry and Mrs Clinch, alleging trespass on what is now Lot 16. The letter alleged that the recipient was trespassing on Ozzie's land by regularly parking a motor vehicle and/or trailer there opposite or near the recipient's houseboat berth. This letter threatened legal action if the recipient did not stop trespassing.

172. Mr Fry received a letter from Andreones in May 2005, acting on behalf of the developers. The letter said that Mr Fry's boat was too long for his mooring and simply by having his boat on the mooring he was trespassing onto Lot 16 (meaning the water in the marina behind his boat).

Developers' access representations to mooring owners and difficulties when developers blocked access

173. For about a decade the developers repeatedly made representations to mooring

owners that they were entitled to use the access roads and that access would be formalised. Serious problems arose when the developers blocked off the access roads, public wharf and, for a time, the boat ramp. The mooring owners' evidence, which I accept, is summarised below.

Mr Collins

174. Mr John Collins was a mooring berth owner in the Eastern Neighbourhood between June 1998 and March 2004. From early 1998, he leased a mooring berth from Mr Watson, whom he knew to be the developer of the Deep Creek Marina. He then became interested in purchasing a mooring berth.

175. In March 1998, before purchasing the mooring, Mr Collins reviewed the plans attached to the contract of sale. He was surprised to see that the access roads appeared to be on private property as he had formed the impression that the access ways were common property because:

> (a) there were well-made gravel roads wide enough for vehicles adjacent to the mooring berths;
> (b) there was no fencing or signage to indicate these roads were for any type of private use;
> (c) he had observed many mooring berth owners using these roads to access mooring berths and parking their cars next to these roads while using their houseboats;
> (d) he had used these roads on many occasions and had parked next to these roads on many occasions;
> (e) he had seen staircases from the western access road to the moorings for the purpose of accessing the western mooring berths from the road;
> (f) he had never heard any objection raised by any person in relation to the use of these roads; and
> (g) he personally knew Mr Watson and had never had any discussion with him prior to this time in which he mentioned there being any problem with the use of these roads.

176. That impression was, in my view, well founded.

177. Mr Collins received advice from his solicitors that the roads were not included in community property and were still part of the development lots. In June 1998, Mr Collins informed Mr Watson of that advice and said "*before I sign a contract I need to know what the deal is*". Mr Watson replied:

> Those roads are not community property but I've always intended that everyone will have road access to the boats. I intend to formalise this down the track.

178. Mr Watson did not go into further detail, and Mr Collins took it on face value that it was a matter that was going to be rectified and that mooring owners would have road access to their boats. His assumption at the time was that the land would be included later in community property.

179. If Mr Watson had said that the roads were going to remain his property, Mr Collins would not have purchased a mooring berth. In entering the contract, Mr Collins relied on what Mr Watson said about intending to formalise vehicle access.

180. Between 1998 and 2004, Mr Collins drove over the access roads unimpeded hundreds of times.

181. Mr Collins raised the question of formalising access with Mr Watson on a number of occasions. On each occasion he was assured that the access situation would be formalised. In February 2002 Mr Watson said to him words to the effect:

> I have always intended that mooring owners would have road access, and it is still my intention to have it formalised.

182. Mr Collins was aware from discussions with mooring owners in the Central Neighbourhood that their neighbourhood had also taken up the issue of access with Mr Watson.

183. Through these conversations, Mr Collins understood that Mr Watson had agreed to formalise access rights but was concerned that some means of controlling the vehicle parking adjacent to boat moorings needed to be introduced. To achieve this, it was agreed that a low level treated pine post and rail fence would be constructed bordering the lower eastern access track at the expense of boat owners.

184. In 2001 Mr and Mrs Watson attended general meetings of the Central, Western and Eastern Neighbourhood Associations and Mr

Bares attended general meetings of the Central and Western Neighbourhoods. In my view, by their conduct at these meetings, as detailed below, the Watsons and Mr Bares represented that mooring owners were entitled to use the access roads.

185. Mr and Mrs Watson and Mr Bares attended the annual general meeting of the Western Neighbourhood Association held on 26 January 2001. At that time the members of the Western Neighbourhood Association were Mr Watson and Sammy One (they were the proprietors of mooring Lots 2 to 6 in that neighbourhood) and Accredited Aged Care Services Pty Ltd (the proprietor of mooring Lots 7 to 12), the sole director of which was Jayne Bares, the wife of Mr Bares. The latter company had acquired its seven mooring lots from the original developers in 1997. It leased out six of them and Mr Bares used the seventh. The resolutions at that annual general meeting included the following:

> (1) it was agreed that a one-off contribution of $1,000 per berth be made to the Neighbourhood Association to pay for landscaping and an automatic watering system and pump;
> (2) it was agreed that the Neighbourhood Association would pay a maintenance contractor eight dollars per berth per week to cover the cost of mowing lawns, checking boat ropes and power leads, and ensuring Neighbourhood Association rules such as parking were being adhered to; and
> (3) it was agreed that no speedboat parking be allowed on Neighbourhood Association access roads and no unauthorised signage be allowed.

186. In my view, the third resolution, at least, indicated that Mr and Mrs Watson considered and represented that the Western Neighbourhood was entitled to use and control their access road for vehicular access.

187. Mr and Mrs Watson and Mr Bares, among others, attended the annual general meeting of the Central Neighbourhood Association on 17 February 2001. The meeting agreed to adopt the resolutions passed by the Western Neighbourhood at their meeting on 26 January 2001 (set out above). Again this indicated, in my view, that Mr and Mrs Watson and Mr Bares considered and represented that the Central Neighbourhood was entitled to use and control their access roads for vehicular access.

188. Mr and Mrs Watson, Mr Collins and Mrs Hannay (among others) attended the annual general meeting of the Eastern Neighbourhood Association held on 17 February 2001. The meeting agreed to adopt (inter alia) the third resolution made by the Western Neighbourhood Association at its annual general meeting on 26 January 2001 viz "*that no speedboat parking be allowed on Neighbourhood Association access roads and no unauthorised signage be allowed*". Again this indicated, in my view, that Mr and Mrs Watson considered and represented that the Eastern Neighbourhood was entitled to use and control their access roads.

189. On 26 February 2002, in anticipation of the Eastern Neighbourhood's annual general meeting to be held on 11 March 2002, Mr Collins wrote to all mooring berth owners in his neighbourhood recounting access discussions and proposals. I accept that the letter is accurate. It stated inter alia:

> I raised the issue with the Developer at the time [of purchase of Mr Collins' berth] and have done so several times since. On each occasion I have been advised that it was always intended that we would have access rights in terms of the existing roads and that the situation would be examined to determine the best way of formalising these rights.
>
> Some berth owners in Neighbourhood 2 who are in a similar situation also recently took up the issue. The Developer again agreed to formalise the access rights in question but was concerned that it should be done in conjunction with suitable landscaping by the berth owners to ensure the appropriate use and maintenance of the area. Particular concern was apparently expressed at the failure of many boat owners to adhere to reasonable vehicle access and parking arrangements to the detriment of the landscaping within the area. It was proposed that the berth owners be given control of the whole area between the northern boundary of our Neighbourhood and the northern side

[140700]

> of the bottom access road and including those sections of the existing roadway extending from the bottom access road to the top access road. In conjunction with this formalisation of access arrangements, we would construct a low level treated pine post and rail fence on either side of the roadways with 1.2m gaps between each 2.4m section of fence to allow easy to pedestrian access but eliminate vehicle access. The fenced roadway would be of such width as to allow adequate vehicle access but not parking…

> The Developer would provide us with access rights over the top road and provide parking areas on the north side of the top road.
>
> I strongly support the proposal for the following reasons…
>
> While the details of how the control of the area can be handed over to us are still being considered, it is important that we consider our views on the proposal before the Annual General Meeting on 11 March 2002, for which I have asked it be placed on the agenda.
>
> Attached is a list of berth owners who have already indicated their support and would be happy to discuss the proposal with any interested party.

190. Mr Collins sent a copy of his letter to Mr Watson because, at the time, Mr and Mrs Watson were owners of a number of individual mooring berths at the far eastern end of the Eastern Neighbourhood. Before sending the letters out, Mr Collins he had shown a copy to Mr Watson and told him that he intended to move a motion at their forthcoming neighbourhood association annual general meeting expressing the support of all members for whatever action was necessary to finalise the formalisation. He told Mr Watson that before sending it out he would like to get Mr Watson's agreement to what he had written insofar as it involved Mr Watson. Mr Watson replied:

> The letter is right. I don't have any problem with it.

191. After sending the letter and before the Eastern Neighbourhood Association annual general meeting on 11 March 2002, Mr Collins attended a meeting on the boat of Mr John Hodson, who was on the executive committee of the Western Neighbourhood. Mr Mitsch and Mr and Mrs Watson were also in attendance. The purpose of the meeting was to discuss specific details as to how access would be formalised so that the access routes would become common property, and the terms upon which this would occur. Mr Mitsch proposed as follows that it be done by a series of easements:

> What you want to avoid having is a designated road that the council will make you seal. I think a series of easements will be the most effective and efficient way to deal with this. You're still going to have to deal with the problems of whether you get it sealed or not and the costs associated with that, but I think that doing it by easements is the best way forward.

192. Everyone agreed and Mr Watson told Mr Mitsch to sort out the details.

193. On 5 March 2002 Mr Collins wrote a letter to mooring owners in his neighbourhood which recorded his discussions with the developers and Mr Mitsch in relation to the eastern access roads, as follows:

> Further discussions have been held with the Developers and with Mr. Brian Mitsch…It is agreed that the most effective and efficient means of formalising the access situation and management of the area immediately adjoining our Neighbourhood is by means of easements. It is proposed therefore that the following easements be created —
>
> > A. An easement in favour of our Neighbourhood between our neighbourhood property and the southern boundary of the bottom access road. Such easement would allow us unrestricted access over the area as well as the right to perform such landscaping including the installation of sprinklers as we consider necessary to protect and beautify the area.
> > A similar easement would be created in favour of Neighbourhood 2 in respect of the corresponding area adjoining the eastern section of their neighbourhood.
> > B. An easement in favour of the Community Association over the top and bottom access roads as well as the joining roads at the eastern end of our Neighbourhood and in
>
> [140701]
>
> between our Neighbourhood and Neighbourhood 2. It is proposed the other two roads joining the top and bottom access roads be eliminated. These are the two joining roads located approximately in the middle of each neighbourhood…
> > C. An easement in favour of the Community Association for vehicle parking purposes over an area roughly between the northern side of the top access road and the existing dry dock area.

It would not be necessary for the Neighbourhoods to formally agree to the easements but as mentioned in my previous letter they will only be granted if we are prepared to fence the road areas below the top access road. In addition the creation of the easements would involve considerable survey and legal costs to which we would be required to contribute…

I will accordingly be moving a motion at the Annual General Meeting on 11 March 2002 that we endorse the proposed creation of easements and agree that we will in exchange contribute to the fencing of the bottom access road and connecting roads at the maximum cost of $190 per berth and to contribute to survey and legal costs at the rate of $50 per berth.

194. I accept the accuracy of the contents of this letter, notwithstanding the testimony of Mr Bares, who participated in those discussions, that the discussions proposed vehicle access for loading and unloading but not parking. It appears that Mr Collins in fact may not have sent this letter to mooring owners because later Mr Mitsch or Mr Watson told him that there might be a legal problem with easements being imposed.

195. On 11 March 2002, the annual general meeting of the Central Neighbourhood Association resolved to endorse action to formalise road access rights to berths, to provide unrestricted access and landscaping rights over the area between their neighbourhood/community land and the bottom access road, and to provide vehicle parking rights over areas north of the top access road. Mr and Mrs Watson were present at the meeting and supported the resolution.

196. On 11 March 2002 about 20 people, including Mr and Mrs Watson and Mr Collins, attended the Eastern Neighbourhood Association's annual general meeting. Mr Collins was elected the representative of that neighbourhood association on the community association. The following resolution proposed by Mr Collins, in virtually the same terms as that carried by the Central Neighbourhood Association, was carried unanimously:

Moved J. Collins that we endorse action to—

1. Formalise road access rights to berths.
2. Provide unrestricted access and landscaping rights over the area between our Neighbourhood property and the bottom access road.
3. Provide vehicle parking rights over areas north of the top access road.

And we authorise the Executive Committee to finalise the necessary arrangements on the understanding that in exchange we agree to—

a. Contribute to the cost of fencing the access road below the top access road at a maximum rate of $190.00 per berth and
b. Contribute to survey and legal costs at the rate of $50.00 per berth.

197. During discussion of the motion Mr Watson was asked by one of those present at the meeting whether he was happy with the proposal. He answered in the affirmative.

198. Mr Collins anticipated that the annual general meeting of the community association to be held on 29 March 2002 would endorse the action resolved at the Eastern Neighbourhood Association's meeting earlier that month. He was mistaken.

199. Present at this meeting of the community association were Mr and Mrs Watson, Mr Gary Bares, Mr Hodson and Mr Collins. Mr Collins initially thought Mr Bares was there as a representative of the Western Neighbourhood. He was unaware that Mr Bares had agreed to purchase from the developers an interest in Lot 23 adjoining the Deep Creek Marina.

200. At the meeting, Mr Watson said that he and his mortgagor were concerned that the council would impose additional requirements

[140702]

on him if the Neighbourhoods' rights were formalised. He said he didn't want to be responsible for sealing the roads or doing any other major works.

201. Mr Bares informed the meeting that he had bought into the development site next door (Lot 23), that the top eastern access road provided access to this site and that he had an easement for access over that road. Mr Bares said words to the following effect:

> You'll need my consent for any of these proposals you're discussing…
>
> I haven't decided whether or not to seal the top road, but if anything like you propose is going to go ahead, then the [community] association will have to contribute to the costs of the improvement and upkeep of the road, and I will decide on the standard and design of it and the same with the parking areas between the top [eastern] access road and the storage sheds. I don't want mud and dirt from the bottom [eastern] road to get all over the top [eastern] road when you bring your cars and trailers up to the top…
>
> But I'm not going to agree to anything until there's a masterplan prepared for the total future development of the marina.

202. Mr Collins replied that he didn't have a problem with preparation of a masterplan but he didn't want this to interfere with getting the access problems sorted out straight away. He said that he and Mr Hodson would get their neighbourhood associations to prepare a written request for formalisation of the access and landscaping rights, providing that the neighbourhoods would meet any additional associated costs if the council imposed any additional requirement to carry out works on these roads.

203. Mr Collins wrote a letter on 4 April 2002 to each of the lot owners in his neighbourhood association reporting on the community association annual general meeting in relation to the formalisation of road access.

204. On 8 April 2002 Mr Collins met with Mr and Mrs Watson. He was informed that Mr Bares "*would come around*" and that the two obstacles to formalisation of the access routes were the requirements from the Watsons' mortgagor to have an indemnity against any future costs associated with the formalisation; and that there was shortage of cash on the Watsons' part to meet any commitments imposed on them by the proposed formalisation.

205. In April 2002 Mr Collins drafted a formal written proposal concerning formalisation of access and management rights over the access roads by a series of easements. It appears that it was delivered to Mr Watson and Sammy One Pty Ltd.

206. Mr Hodson continued to negotiate with Mr Watson and Mr Bares about formalisation of the access routes. Mr Collins saw a letter from Mr Bares to Mr Hodson of 5 September 2002 which set out a proposal for discussion "*Re: Extension of community association land to include access roads to moorings*". Part of the proposal was that the developers extend the land owned by the community association to include the lower roads adjacent to the Central, Western and Eastern Neighbourhoods (at their cost) and that the community association be given a right of carriageway to the upper eastern access road with linked access to the lower eastern access road in two locations (again at the cost of those Neighbourhood Associations).

207. That letter was tabled at a meeting of the executive committee of the Eastern Neighbourhood Association on 7 September 2002 attended by (inter alia) Mr Collins. The executive agreed to the proposals contained in the letter in principle subject to some clarifications and further provisions.

208. On 8 September 2002 Mr Collins attended a general meeting of the community association. Also in attendance were Mr Watson, Mr Hodson and a Mr Borg. The issue of the formalisation of road access was mentioned. It was noted that Mr Hodson was to continue negotiations.

209. Thereafter further works proceeded on and around the lower eastern access road. Treated pine posts were erected bordering the bottom eastern access road in September 2002.

210. Negotiations for formalisation continued sporadically thereafter. By early 2003, Mr Collins was concerned that there appeared to be no further movement on the negotiations with Mr Bares. On 22 February

2003, the annual general meeting of the Eastern Neighbourhood adopted a resolution that the executive urgently pursue formalisation of access.

211. On 5 April 2003, a general meeting of the community association resolved that Mr Mitsch be authorised to draw up a plan to re-align the boundaries, that a suitable landscaper prepare an overall landscaping plan, and that a management plan should be prepared. Mr Collins does not recall ever seeing a plan of the type described in the resolution.

212. Mr Collins compiled notes in September 2003 on the history of the marina. He noted that there was a meeting on 20 August 2003 between Mr Bares, Mr Hodson and Mr Honeywell, among others. The proposal from this meeting was that the access ways were going to be given to the community association, on condition that the community association pay the cost of sealing the roads and the landscaping.

213. On 29 August 2003, a meeting of Mr Bares and Mr Robertson and their consultants was held. They set about undoing the work that the neighbourhoods had done in anticipation of Mr Watson transferring ownership of the vehicle access ways, particularly the removal of pine barriers running alongside the access roads in the neighbourhood areas, which the neighbourhoods had installed.

214. On 4 October 2003 Mr Collins attended a meeting with Mr Bares and some members of the executive committee of the Eastern Neighbourhood. The principal topic of discussion was the proposal for formalisation of access. Mr Bares proposed that the community association would purchase from the developers for the sum of $1 certain land which included the lower eastern access road, the western access road, the lagoon from the river mouth to Lot 23 and an area for additional parking; and that the community association would agree to certain works valued between $500,000 to $1,000,000. Mr Bares agreed to put forward a firm proposal before Christmas that year. Mr Collins recorded Mr Bares' proposal as follows:

> 1. The Developer would hand over to the Community for $1 the following areas —
>
> > a) On the eastern side of the central Marina building, the area commonly known as the bottom access road being the road extending from the boat ramp along the front of our Neighbourhood. The area would include some 3–4 metres on the north side of the existing road and provide for turning circles in approx the middle and at the eastern end of the road. It would also include the area between the road and our Neighbourhood property.
> > b) On the western side of the central Marina building, the formed roadway including the total area between the residential unit development and existing Community/ Neighbourhood property as well as the vacant area at western end of the Marina adjacent to the Marina river entrance.
> > c) The lagoon extending from the river entrance to eastern end of our Neighbourhood and including any currently non-Community land between the lagoon and the island Community property.
> > d) An area for additional car parking of approximately 1.2 hectares (3 acres) across the road on the eastern side from the existing car park area.
>
> 2. In exchange the Community would be required to undertake and meet the cost of the following —
>
> > a) The sealing of all roads and parking areas not currently sealed. This would include that part of the existing Community road not already sealed and the existing car park behind the central Marina building as well as the newly created Community roads entering east and west from the central Marina building. It is uncertain if the new 1.2 hectare carpark is to require sealing but regardless the Community would be responsible for the cost of whatever treatment was required.
> > b) The installation of security boom gates on both sides of the central Marina building.
> > c) Landscaping of the Community property to a standard to be determined.
>
> [140704]
>
> > d) Dredging and widening the Marina river entrance.
>
> …

Gary Bares estimates the cost of works at between $500k and $1m.

215. On 31 March 2005 Mr Briffa, then manager of the Eastern Neighbourhood Association, wrote to its members concerning parking of vehicles and trailers "*on the grassed areas and access roadway*" for prolonged periods. The letter stated that "*these areas are designated for drop off and pick up only, vehicles should only gain access to these areas for approximately 15 minutes at any given point in time. The above rules are designed to provide easy uninterrupted access to boats 24 hours a day*".

Mr Doyle

216. Mr Rodney Doyle leased moorings from Mr Watson for four years from 1996 after arranging to have his boat transported from Lake Eildon for that purpose. Before leasing, Mr Doyle told Mr Watson that one of the problems at Lake Eildon was that you could not get your car to the houseboat. Mr Watson said words to the effect:

> Here you can drive your car to your houseboat. That's the good thing about the mooring. You've got access to it at all times.

217. That response was an important factor in Mr Doyle's decision to move his houseboat from Lake Eildon. During the time of his lease Mr Doyle was always able to drive to his mooring.

218. Recently Mr Doyle sold his houseboat (but kept his mooring) with a view to building a new houseboat. However, he has delayed the production of this houseboat because, without vehicle access to the mooring, he sees little point in having a boat there. He regards that as a shame as his children and grandchildren love the houseboat.

219. On a normal trip on the houseboat, Mr Doyle takes, among other things, food, slabs of beer and soft drink, clothes, 3 × 20 litre containers of water and ski gear. The ski gear includes three slalom skis, two wakeboards, two kneeboards, inflatable tubes, life-vests and wetsuits.

220. Until the access tracks to the moorings were blocked, Mr Doyle transported these things to his houseboat by driving his car down to the moorings. After access to the moorings was blocked, Mr Doyle used the boat ramp to put his ski boat in the water, and then tethered up his ski boat. He then unloaded gear from his car into the ski boat, drove the ski boat to the houseboat, unloaded the gear, drove the ski boat back the boat ramp and repeated the process. He then drove his car to the carpark and parked it, walked back to the ski boat, drove to his houseboat, tethered his ski boat to the back of the houseboat, and sailed the houseboat onto the river. The process was difficult and dangerous, because there were other people using the boat ramp. Mr Doyle considers himself lucky to have the ski boat to cart his gear, which most people do not have. Most people have to carry all their gear from the carpark to the boat.

221. Mr Doyle's wife has ongoing knee problems and has had four operations on her knee. Whenever his wife has to walk the 400 metres from the boat ramp to the houseboat, she has struggled. At night, it is almost impossible for her to do this walk. The Doyles have relatives in the area and often have night-time functions to attend. On occasions, after attending functions at their relatives' houses, they have paid for accommodation in the area, rather than staying on the houseboat, because it was impossible for Mrs Doyle to access the houseboat at night.

Mr and Mrs Hannay

222. Mr and Mrs Hannay first became aware of Deep Creek Marina in 1996 when they were handed a marketing brochure by the vendors of a houseboat they were purchasing, referred to at [154] above. This brochure stated "*Berth owners have guaranteed access by road and by water to their mooring*", and directed all enquiries to Mr Watson. In 1997 the Hannays moved their houseboat to Deep Creek. At first they rented a mooring in the Eastern Neighbourhood, which at that time comprised only 11 moorings. Before this move, Mrs Hannay sought and received confirmation from Mr and Mrs Watson that there would be accessible road access to the Hannays' mooring. Mrs Hannay also asked whether they

[140705]

would be able to park right next to their boat and Mr Watson replied:

> The access is available at any time but I don't like cars parking right next to the boats. I want that area to be a picnic area; so, after you've unloaded, you can park on the gravel road up the top near the sheds.

223. The Hannays enjoyed vehicle access to this mooring for the years that they held the lease. There was never an issue about their right to vehicle access during that time.

224. In 2000, the Hannays purchased a berth in the Eastern Neighbourhood from the developers. Prior to contract the vendors' solicitors wrote to the purchasers' solicitors, stating:

> We advise that in relation to your request for the sealing of the road to the site to be completed prior to settlement, we advise the Development Consent 18/90 from the Shire of Murray General Condition 13 sets out that the internal roads and parking areas are to be sealed with bitumen when the restaurant, motel and cabins are developed. We confirm that our client is prepared to place crushed rock on this road prior to the construction of the bitumen road.

225. Special condition 13 of the executed contract provided that, prior to settlement, the vendors would at their own expense and in a proper and workmanlike manner place crushed rock on the access road to the mooring berth. In my opinion, this conduct by the developers would be reasonably interpreted as a representation that the Hannays were entitled to use that access road. That is how Mrs Hannay understood it.

226. Prior to settlement of the contract, Mr Watson extended the lower eastern access road adjacent to the eastern end and there turned it up to join the upper eastern access road. There was also a road connecting the lower and upper access roads about half way along.

227. On an average trip to their houseboat, Mr and Mrs Hannay take 40 litres of water in 2 × 20 litre containers, two bags of wood for their heater, three bags of groceries, a slab of beer, clothes and other things. Since the developers blocked the access roads with concrete bollards in 2006, they have had to be selective and not take things they otherwise would have taken. On a recent trip they had to make six trips between their car and boat, in the rain, to transfer the things they needed. On that trip they ran out of gas, so Mr Hannay had to walk to the supermarket, pick up a gas bottle weighing about 18 kilograms and bring it back on a trolley over muddy, uneven and sloping grounds. Prior to the barricades going up, the supermarket owner would drive down, pick up gas bottles and replace them. Mrs Hannay considers this to be much safer.

228. To access their mooring, the Hannays still walk on the road they previously drove over, even though vehicle access has been blocked. This is because the community and neighbourhood access strips are partly blocked by several trees, become very boggy in the rain, are unlit, and there are holes in the ground.

229. When the Hannays required a mechanic to repair their houseboat motor, the mechanic had to walk in from the carpark three times, carrying his tools. This time was factored into his invoice.

230. Mrs Hannay's parents are in their early 70s. When they come to the houseboat, there is now a considerable amount of stress involved for them in getting to it. On one occasion, Mrs Hannay's father insisted on helping her bring gear from the car to the boat, causing him to take an angina pill at the outset to help deal with the stress.

Mr Fry

231. Mr David Fry became aware of Deep Creek in about 1995 when he had a houseboat moored at the nearby Merool Caravan Park on the Murray River. He and other houseboat owners at Merool received a letter from Mr Watson inviting them to shift their houseboats to Deep Creek for six months.

232. On his first inspection of the Deep Creek Marina Mr Fry observed, and liked, the vehicle access to the boats. He rented a mooring from Mr Watson for six months and, before the end of that period, purchased a mooring from Mr Watson in the Central Neighbourhood. He subsequently bought two more moorings and leased them out. He has since sold those two moorings but has retained his first mooring which is only four moorings from the boat ramp. His mooring is located just prior to the

concrete barricade. Mr Doyle's mooring, together with moorings 27, 28 and 29 in his neighbourhood, are the only moorings that have vehicle access now that the access road has been barricaded.

233. On a houseboat trip, Mr Fry would normally take two car fridges, a 20 litre container of fresh water and one bag of clothes per person. He has observed the inconvenience caused by the loss of vehicle access for mooring berth owners on his side of the marina. They now drive their cars to the front of his mooring, park there temporarily while they make trips back and forth from their car to their boat, carrying everything they need for their weekend or holiday. He has also watched people loading things into their speedboats and using their speedboats to cart things backwards and forwards — including gas bottles — which he does not think is safe. He has observed people with elderly parents who have difficulty getting down to the moorings.

234. As noted above, in May 2005 Mr Fry received a letter from Andreones Lawyers in Sydney acting on behalf of Mr Bares, Mr Robertson and Mr Watson, stating that his boat was too long for his mooring and was trespassing into Lot 16. This upset him because Mr Watson had originally invited him to bring his boat to Deep Creek, he had rented from Mr Watson for six months before buying three moorings from him, and now Mr Watson was a party to an allegation that he was trespassing. At about the same time he received another letter from Andreones, alleging that he was trespassing by parking his car near the mooring. He had his solicitors respond to these allegations of trespass.

Mr Sidebottom

235. In 1999 Kelvin Sidebottom acquired an option to purchase a mooring from the developers in the Eastern Neighbourhood when the mooring was complete. It was about 12 months before that mooring was complete. In the interim the developers allowed him to keep a houseboat that he had acquired at their mooring in the Western Neighbourhood. Throughout this 12 month waiting period, Mr Sidebottom had road access to the mooring in the Western Neighbourhood.

236. In March 2000, when construction of the mooring in the Eastern Neighbourhood was complete, Mr Sidebottom's wife signed a contract to purchase that mooring from the developers on trust for herself and Mr Sidebottom. Mr Sidebottom had no doubt that vehicle access would always be allowed to the new mooring.

237. Since buying the mooring in the Eastern Neighbourhood Mr Sidebottom has driven his car to it at least 200 times. He considers that it is just too far to carry everything needed for a houseboat holiday without vehicle access. His wife and he would not have bought the mooring without vehicle access.

238. When Mr Sidebottom required a plumber on his boat, he and the plumber had to carry the plumber's equipment to the boat. As the width of the strip on which they were legally allowed to walk was only two metres wide, and had obstacles along it, it was nearly impossible to walk along it, let alone carry tools. For this reason, they were forced to walk on land outside the two metre strip (on Lot 16) in order to get to the boat.

239. Mr Sidebottom has a friend who has multiple sclerosis. The friend rarely gets to go on holiday so Mr Sidebottom had his boat professionally renovated to make it wheelchair friendly. However, since the developers put up concrete bollards preventing road access, Mr Sidebottom has not been able to get his friend to the boat.

240. Mr Sidebottom also used to invite guests from Rotary (of which he is a member) to his houseboat. He is 72 years old and most of his Rotary friends are of a similar age. When access was blocked, it became embarrassing to tell his friends that they had to park behind the restaurant and carry their things all the way to his boat. For this reason he has not had Rotary friends to the boat since access was blocked.

241. On a regular trip to his boat Mr Sidebottom takes 4 × 20 litre drums of fuel, food, bedding and gas, among other things. He used to buy gas from the restaurant, load it into his utility and drive it down to his boat. Since access was blocked, he has not been able to get gas to his boat.

242.

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Mr Sidebottom's mooring has electricity running to it. More than once, in heavy rain, the switch box at the top of his pole has had water in it — blowing the overload switch. When an electrician came to fix the problem,

the electrician first turned the power off at the main switch box, which is located on the high ground owned by Lot 16 behind Mr Sidebottom's mooring. This means that to work on the electricity supply, the electrician first had to trespass on Lot 16 to turn off the power.

Mr Armstrong

243. Peter and Christine Armstrong leased a mooring in the Eastern Neighbourhood for about 12 months until February 2003. During this time, they were always able to drive their car to their mooring: they would drive to the boat, unload and park on the left hand side of the road next to the mooring.

244. The Armstrongs enjoyed their leasing experience. So, in 2003, they decided to purchase a mooring in the Eastern Neighbourhood from Anthony Watson and Sammy One Pty Ltd. Their mooring is one of the furthest from the carpark.

245. On an average short trip to their boat, the Armstrongs take 40 litres of fuel in jerry cans, 2 × 20 litre containers of water, three grocery bags of food, a dog bed and a bag of clothes. On longer trips these amounts increase. Since the access tracks to the moorings have been blocked, Mrs Armstrong normally needs to make one trip from the carpark to the boat carrying provisions, and Mr Armstrong two or three. The Armstrongs usually walk on the track on which they had previously driven, because it is flat and away from the water. As there is no lighting in the area, these trips are particularly difficult at night.

246. From the commencement of their lease in 2002, Mr Armstrong went to his neighbourhood association meetings. In mid 2002 his neighbourhood association agreed with Mr Watson to install an irrigation system on Lot 16 behind the eastern moorings on either side of the access track. The neighbourhood association put poles along the access track to stop cars parking on the new irrigation system and damaging it, although they allowed an area to park on the left hand side of the lower track. This work was done by the mooring owners at working bees and some thousands of dollars from neighbourhood association funds was spent on the fence and irrigation system. In late 2003 the developers removed the poles.

247. In 2004 the developers, who were developing their adjoining land (Lot 23) as an "*extension*" of Deep Creek Marina, built a temporary dam across the end of the Deep Creek Marina. This dam ran across to the "*island*", allowing the developers to drive machinery down from the upper access road behind the eastern moorings, across the dam and onto the island. The developers did not seek and were not granted permission from the neighbourhood association to build the dam. In building the dam, the developers shifted boats from the moorings that they built across, including the Armstrongs' boat without their permission, several times during the construction of the dam and once or twice after construction of the dam was complete. The dam was removed many months later.

248. If the Armstrongs had known that they would not have vehicle access to their mooring, they would not have bought it.

Mr and Mrs Hickman

249. From early 2004 to November 2005 Mr and Mrs Hickman leased a mooring in the Central Neighbourhood on its eastern limb. In 2005 Mrs Hickman purchased the mooring. Their mooring is eight moorings east of the hotel and supermarket, about four moorings along from where the developers blocked the lower eastern access road with a concrete bollard in 2006.

250. Between 1998 and 2003, before leasing their mooring, they visited the marina a couple of times and saw the houseboats moorings there with convenient vehicle access. During the period of their lease they always had vehicle access to their mooring.

251. Even though their houseboat is closer to the concrete bollard than most, the Hickmans have been badly affected by the closing of the access way. Vehicle access is necessary in order to get many large things on the houseboat from time to time: for example, televisions, barbecues, lounge suites, fridges, beds and mechanical gear.

252. The Hickmans also have three young children. When they go on the houseboat, they

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need to take food, drink, clothes, ski gear and fuel. Mrs Hickman has recently had a knee reconstruction and has therefore found it more difficult to walk to the mooring than otherwise.

253. Since the developers fenced off the wharf in 2006, to get to the hotel for dinner the Hickmans now need to climb the many timber stairs at the front of the supermarket. This is particularly hard at night and quite slippery when wet. They used to walk across the wharf and up the few steps at the rear of the wharf to the hotel, which was of a much gentler gradient. The new route has been particularly difficult for Mrs Hickman because of her knee problem.

254. Mr Hickman is very concerned about the difficulty any emergency service would have in getting to the mooring if needed. His greatest concern is his 77 year old father-in-law, who visits their mooring regularly, and who has a plastic knee and recently had heart by-pass surgery. He cannot walk very far without becoming short of breath. Mr Hickman is also concerned that if there was a fire at the marina, it would spread quickly because of the gas and fuel stored on houseboats. It would be critical to get fire services to the marina quickly.

255. Just as Mr Hickman would not buy a house without vehicle access, he would not have bought their houseboat mooring if it did not have vehicle access.

256. In 2007, Mr Hickman was kicking a football with his children next to his mooring when a man well known in the area as a former boxer told him to get off the property as it was private property. It appeared to Mr Hickman that this man was being paid by the developers to patrol its boundaries. The Hickmans would not have purchased their mooring if they thought they would not be able to play with their children on the bank.

Mr Leorke

257. In 2005 Mr Andrew Leorke bought a mooring in the Western Neighbourhood. It is five moorings away from where the marina meets the river. Before buying the mooring, Mr Leorke saw that there was a road to his mooring, and that mooring owners in the area would drive to their moorings and either park at the side of the road or drive back to the carpark. He also saw that there was a timber staircase coming down from the access road to his mooring.

258. In making his decision to purchase a mooring, Mr Leorke assumed that he would have legal access to his mooring along the roadway. He would not have purchased his mooring if he had thought otherwise. After he bought his mooring, and until the road was blocked, he used the road to access his mooring by car.

259. On an average trip to his houseboat his partner and he take food and five or six bags of clothes for themselves and their three children. Recently, he has had to carry all this in relays from the carpark. Mr Leorke walks along the access road, because the neighbourhood property along the waterfront does not have good accessibility. Mr Leorke now finds it particularly difficult to get rubbish off his houseboat. The easiest way to get a gas bottle to the houseboat is to transfer it on a small boat — which he thinks is dangerous.

260. Before the developers fenced off the wharf in front of the hotel, Mr Leorke used to walk through that area to get to the supermarket. It was pleasant to walk around the marina along the waterfront.

261. Mr Leorke's building company has been asked by the manager of the Central and Western Neighbourhood Associations to repair sections of the boardwalk on their neighbourhood property. However, now that the developers will not allow access along the road, there is no way of getting the necessary equipment along the strips of neighbourhood and community property.

Mr Muschinski

262. In mid 1995 Mr Thomas Muschinski received advertising from Mr Watson encouraging him to move his houseboat to Deep Creek. That material, (discussed above at [154]) included the statement:

> Berth owners have guaranteed access by road and by water to their mooring.

263. He then received more advertising material in relation to Deep Creek which included the prominent statement:

> All facilities can be accessed by road or from the river by houseboat or speed boat

with public docking facilities available to visitors.

264. Mr Muschinski relied on that advertising material when, in September 1995, he decided to buy a mooring in the Central Neighbourhood. He would not have bought a mooring if he had thought he would not have access to it by road, and the advertising material reinforced his belief that he would have such access.

265. Mr Muschinski's father is 84 years old and requires a wheelchair or walker to move around. Prior to Christmas 2006, when the access ways were blocked, he was able to take his father to the houseboat by driving him right to the houseboat. He would very much like to be able to take his father on his houseboat again but, with the access roads blocked, he cannot. His father would not be able to walk the 200 or so metres to Mr Muschinski's mooring over the rough ground.

Mr Taylor

266. Mr Michael Taylor's company purchased a mooring in the Central Neighbourhood in October 2000. After receiving the trespass allegation letter from Andreones Lawyers in May 2005 (discussed above at [171]), Mr Taylor felt intimidated into accessing his mooring by driving along the access track to the stairs, unloading people, food, bags and other provisions down the stairs, then driving back to the carpark and walking back to the mooring. He considered this situation inconvenient and aggravating, because he felt robbed of what he felt was his right to park next to his mooring.

267. Since late 2006 when the developers blocked the access track altogether, his family and he have been put to great trouble and inconvenience. Among the guests they regularly have on their houseboat is his father, who turned 87 in September 2007, their five adult children and three grandchildren. This means that a lot of people, food and clothes need to be taken from the carpark to the houseboat mooring for each trip.

Mr Paine

268. In about March 2003 Mr Leon Paine rented a mooring in the Western Neighbourhood from Mr Watson for five months. During that period he was always able to drive his vehicle to the mooring, unload supplies and park at the mooring. In 2003 he purchased the easternmost mooring in the Eastern Neighbourhood. Until the developers denied access in 2006, he would drive his car right down to his mooring. Mr Paine's mooring is over 300 metres from the concrete bollard placed on the lower eastern access road in 2006. The carpark behind the hotel is a further 180 metres away.

Mr Smith

269. As discussed above at [146]–[148], in 1994 the original developers sold 12 mooring berths to companies owned by Mr Smith. Mr Smith has since sold six of these moorings. From the day his companies purchased the moorings until the time when the developers blocked access, there was vehicular access to the moorings.

270. Mr Smith also said that it used to be possible for visitors to the moorings to arrive from the Murray River in speedboats and moor at the public wharf. In his view, having the wharf closed to the public is unworkable. He testified and I accept that: "*the big thing that was talked about from early on in the piece was the idea of putting up a hotel and a shop there and attracting people in from the river*". He always saw the scheme as a tourist development.

271. Mr Smith is of the opinion that the barricading of the vehicle access tracks and the fencing off of the wharf have significantly devalued his companies' moorings. Had the scheme been presented at the outset on the basis that there was no vehicular access to the moorings, he would "*not have touched the moorings with a bargepole*".

Mr Williams

272. In October 2005 Mr Norm Williams bought a mooring in the Eastern Neighbourhood. Before doing so, he made four trips to the Deep Creek Marina. On each trip he had been able to access all areas of the

marina in his car. Prior to purchase Mr Williams had seen the vendor parked next to the mooring and he simply assumed that access to his mooring would not be restricted.

273. Since vehicle access has been cut off, access is a big problem. All his family's clothes, food and water, among other things,

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have to be carried from the carpark to the mooring. Mr Williams says that if he were to try to do that and stay within the two metre community and neighbourhood property strips, which he understands he is legally restricted to in accessing his mooring, he would probably fall in the water. The two metre strip is too narrow and impractical, and there are big trees in the way. This means that he still gets to his mooring by walking on the access roads.

274. In April 2007 Mr Williams was at his houseboat with his two sons aged 7 and 8 when the younger son had an accident, resulting in his clothes catching fire. In order to take his injured son to hospital, he first had to walk to his car carrying his injured son while his other son used a bottle to pour water over his younger son's back. His mooring is one of the furthest from the carpark. He drove his younger son to Echuca Hospital from where he was airlifted to Melbourne with full thickness burns to 10 percent of his body. Mr Williams feels that the extent of his son's injury may have been reduced if he had been able to get him into a vehicle and therefore to medical assistance more quickly. With the access roads blocked, Mr Williams can see no way that emergency vehicles can now access the moorings.

Mr Buchanan

275. In June 2004 Mr Gary Buchanan's company purchased a mooring in the Central Neighbourhood. The mooring is five west of the hotel. In addition to a houseboat that Mr Buchanan and his family keep on the mooring, they have a speedboat that they often take on houseboat trips. They launch this speedboat at the boat ramp.

276. When they originally bought the mooring, the Buchanans would walk directly along the waterfront between their mooring and the boat ramp. That is, they walked along their neighbourhood property, through an area of community property, across what they thought was the public wharf, across the walkway to the front of the supermarket and down onto the boat ramp.

277. Since the developers fenced off the wharf, it is more difficult to get between their mooring and the boat ramp. This is because they now need to go around the wharf by climbing up the retaining wall onto Lots 14 and 15 (the hotel and supermarket), up and across past the fuel bowsers next to the supermarket, down a wooden staircase to the walkway at the front of the supermarket, along the walkway and down onto the boat ramp.

Mr and Mrs Clinch

278. Lindsay and Rita Clinch own a mooring berth in the Eastern Neighbourhood. When they initially purchased into the scheme, Mr Clinch assumed that the gravel access roads and the concrete boat ramp provided free and unfettered access to the water and houseboat moorings. Thereafter Mr and Mrs Clinch used the road on the eastern side of the marina to access their houseboat mooring and to park their car during the time they spent on the houseboat. Mr Clinch observed other houseboat mooring owners doing the same thing.

279. As noted above, Mrs Clinch received a letter on 26 May 2005 from the solicitors for the developers to the effect that parking adjacent to the mooring constituted a trespass. In late April 2005 the developers installed a boom gate to deny access to the boat ramp unless a fee was paid. Mr Clinch corresponded with the community association manager, Mr Haydon, regarding access rights in a letter of 13 June 2005.

Disability access

280. Mr Martin, an architect specialising in disability access, expressed the following conclusions which I accept:

(a) it is not practical to provide disability access that complies with the Building Code of Australia 2007 and the Disability Discrimination Act 1992 (Cth) along the neighbourhood property edge to service the Central and Western Neighbourhoods;
(b) it is not practical to provide complying disability access from the carpark to the eastern side of the Central Neighbourhood or along the neighbourhood property to service the Central and Eastern Neighbourhood;
(c) the only way to provide complying disability access to the three mooring neighbourhoods is to obtain Lot 16 land behind the community property and the neighbourhood property. This should include sufficient space for vehicle access

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and parking, which is best created where vehicle access currently exists. On the western side this would need to be not less than the available land of Lot 16. On the eastern side this would need to be at least about 20 metres expanding to the existing carpark.

Access for repairs and maintenance

281. Mr Neil Giffin, the managing agent of the three mooring neighbourhood associations, gave evidence which I accept. Since early October 2006 he has endeavoured to facilitate necessary repairs to mooring walls and timber decking in the Central Neighbourhood on the western side. It has been extremely difficult to do so. Mr Jarman objected to "*dead man's anchor*" holes (supporting the mooring walls) being dug on Lot 16 and to a development application for the works. Mr Giffin described the physical and logistical difficulties in doing the work without being able to utilise Lot 16 land:

37. It is physically and logistically very difficult to have the work conducted without being able to utilise or pass over the land in Lot 16. I have attached a coloured plan of the community scheme with hand marking to indicate the difficulty to which I refer. The plan is annexed and marked **NG-J**. To access the area requiring repair, the tradesman is required to:

(a) Park his vehicle in the area behind the pub which I have marked A on the plan;
(b) Walk down the grass embankment adjacent to the pub, with his equipment and any plant and machinery, along the line marked B;
(c) Walk along the neighbourhood property 2 metre strip coloured blue and marked C (the additional 2 metre-wide lime coloured community property in this area is impassable); and
(d) Conduct the work within the area where the works are required marked D.

38. This is not only a real problem in this instance, but will be more of a problem for the other two neighbourhood associations I manage when repair works are required there. The other two neighbourhoods I manage are even more difficult to get to. This is because their strips of common property are only 2 metres wide and there are obstacles such as large red gums and steep grassy terrain that are also problematic to having tradesman access.
39. In fact it is not possible to access property in Neighbourhood Association DP 285433 without trespassing onto the neighbourhood property of Neighbourhood Association DP 285249 or Lot 16, with or without tools and equipment. This is because the connecting 2-metre wide strip of community property adjacent to the western half of Neighbourhood Association DP 285249 is too steep and is obstructed by trees.
40. I note further that these other two neighbourhoods will have another serious problem in that the dead man's anchors are longer than 2 metres and without the benefit of the adjacent community property in those neighbourhoods the anchors would need to be buried back into Lot 16.
41. There is in effect no vehicle access for tradespeople to conduct repairs despite the traditional gravel access roads still being in existence (although weeds are starting to grow on them). These access roads have been blocked off by very large concrete bollards making any vehicle passage impossible.

42. The problems with access are not only that the mooring walls and timber decking require repairs, but the lot owners need access to get their families and supplies to their boats and to conduct internal repairs and renovations to their boats as well.
43. I hold a major concern about access to the boats in case of an emergency, such as accident or illness. This has already been a problem when Norm William's son was injured, the details of which are set out in his letter to me dated 14 May 2007 and is annexed and marked **NG-K**.
44. In my opinion it is also only a matter of time before Lot 16's concrete bollards prevent a fire truck from attending a fire on a houseboat laden with gas and fuel and moored only 30 centimetres from houseboats on either side.

[140712]

45. I also have serious concerns about the ability of the community to access the electrical boxes that supply all of the power to the individual houseboat mooring berths as these are wholly contained within the private development lot being Lot 16. I have formed the view that this is a clear indication of the developer's intention that the land directly to the north of the mooring berths, where the roads and meter boxes are, was intended to form part of community property. Indeed this is the only practical way to have vehicle access to moorings and the moorings themselves are only practical and worthwhile if the owners have vehicle access to them. In my view, many, many persons would not have bought into the community scheme if they knew they would not have vehicle access.

282. In cross-examination Mr Giffin agreed that the work could be done from a barge, but added that that would be totally unsatisfactory. I agree. He agreed that since obtaining development consent he had not approached the developers to use Lot 16. In my view, there was little, if any, point in attempting to obtain such an approval. The attitude of the developers was clear.

Access for emergency vehicles

283. There is a serious problem of access by emergency vehicles due to the placement of the concrete bollards by the developers. This is illustrated by the evidence of Mr Williams above. On 3 December 2007 the council served on the developers two notices of intention to serve an order under s 121H of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**). One notice required the following:

Order 6, Section 121B of the Act

To remove as many of the concrete barriers located along the eastern boundary of the Property (as identified in the attached photograph marked annexure *A*), as is necessary to enable access to emergency vehicles and to refrain from blocking access to emergency services to ensure or promote adequate fire safety or fire safety awareness.

Reason for Proposing to Issue the Order (Section 121L)

The reason for the proposed Order is that the concrete barriers may restrict access to emergency services that require access to ensure or promote adequate fire safety including the ability to prevent fire, suppress fire or prevent the spread of fire.

Period for Compliance (Section 121M)

The period allowed for the removal of the concrete barriers will be seven (7) days from the date of service of the Order.

284. The other order required the following:

Order 15, Section 121B of the Act

To comply with Development Approval 48/93 and remove concrete barrier(s) located along the eastern boundary of the Property (as identified in the attached photograph marked annexure *A*), in order to enable Council to have unrestricted access along the nominated right of carriageway required to service the houseboat pump station (Lot 11, DP 839320).

Reason for Proposing to Issue the Order (Section 121L)

The reason for the proposed Order is that the concrete barrier(s) restrict access to Council along the approved right of carriageway to enable required works to be undertaken on the houseboat pump station. Development Approval 48/93 is not being complied with by those persons entitled to act under the Development Approval.

Period for Compliance (Section 121M)

The period allowed for the removal of the concrete barriers will be seven (7) days form the date of service of the Order.

285. The developers have failed to comply with the notices.

Access and other problems for Lots 14 and 15: Mr O'Brien

Lease of mooring at Deep Creek

286. For three months from about June 2003 Mr David O'Brien leased a mooring in the Eastern Neighbourhood from Mr Watson. During that period he accessed his mooring by driving his car along the access track closest to the eastern moorings, unloading his family and gear, parking the car next to the access track on the upper access track, then walking down to his houseboat. During this period he was not

aware of any mooring owner on the eastern side of the marina who did not access their houseboat in this way. He was never told by Mr Watson or anyone else that he did not have the right to access his mooring in this way.

287. During this period Mr O'Brien would sometimes patronise the general store at the marina contained in "*Watson's Bar and Restaurant*" located on the then Lot 9 (now Lot 14). He observed that many patrons of the general store accessed the business by bringing ski boats in from the Murray River and tying the boats up at a custom built ski boat parking pontoon tied to the wharf located directly in front of the business. This ski-park accommodated about ten ski boats. There were steps in the waterline of the wharf so that people could easily step out of their ski boats, onto the pontoon, up the steps onto the wharf and then continue over the wharf to the business. The ski boat parking pontoon was marked "*Watson's Bar and Restaurant*".

Purchase of restaurant

288. During the first half of 2003 Mr O'Brien became aware from a newspaper advertisement that the Watson's Bar and Restaurant land and business were being sold by tender. He contacted the selling agents and they forwarded him an advertisement. The first two photos on the first page of the advertisement showed the view of the lagoon from near the business. The main photo on that page showed open access from the wharf to the business. The plan on the second page did not indicate any obstructions between the business and the water and the wharf. He considered the access to the wharf and lagoon to be a real feature of the business and the land.

289. Mr O'Brien contacted the agents again and obtained the information memorandum and tender documents referred to in the advertisement. This documentation identified the vendors as Mr Watson, D C Marina Pty Ltd, Hillington Valley Pty Ltd and Ozzie Pty Ltd. D C Marina Pty Ltd was not in fact an owner. It was an agent for the developers and owners of Lot 16. D C Marina Pty Ltd later changed its name to Deep Creek Marina Pty Ltd.

290. The information memorandum sent to Mr O'Brien included the statements:

The land has frontage to Deep Creek Lagoon, which provides direct access to the Murray River…

The marina restaurant development forms an integral part of the Deep Creek Marina complex

291. The information memorandum also included a photo which showed unobstructed access from the wharf to the land and business, including steps built into the retaining wall to make that easier. The photo was accompanied by the statement:

The area fronting the restaurant and lagoon is planted to lawn and the large native river red gums provide a most pleasant outlook.

292. Mr O'Brien relied on all that he had seen and experienced in his time at the marina and on what he had read in these documents when his wife and he, together with their partners, the Harrisons (who left the partnership shortly thereafter), decided to tender for the "*Watson's Restaurant and Bar*" land and business using the tender documentation provided. They were successful. Mr Jarman was an unsuccessful tenderer.

293. The contract of sale included a plan which showed the public wharf and adjacent to it a ski park facility comprising berthing spaces with adjacent fingers so there were two ski boats within the confines of each finger. The practice at that time (when Mr Watson owned the restaurant and store) was for people to come in their boats to the ski park, tie up their boats, walk across the public wharf, across the lawns in front of the restaurant and partake of the amenities. Mr Watson would sell them things with the intention of making a profit.

294. Before the necessary land subdivision was complete, Mr O'Brien settled on the purchase and went into occupation under a lease arrangement. The council granted consent No 282/03 to subdivision on 2 September 2003. It was a condition of consent that the adjacent carpark and access roads must be sealed or a bank guarantee in the equivalent cost submitted. The O'Briens and their partners then took a transfer dated 17 February 2004 of the new Lot 10.

[140714]

Extensions to the premises

295. During the early period that he operated the restaurant and bar, Mr O'Brien agreed with Mr Watson, Mr Bares and Mr Robertson that if he could get a general hotel licence for the premises he would lodge a development application to extend the hotel premises and build a separate supermarket. Subsequently, he purchased a general hotel licence and accordingly lodged development application 049/04, which the council approved on 15 June 2004. The proposed development was described as "*extension to existing restaurant/bar and new retail store*". A report considered by the council before granting consent noted that 80 car spaces were to be provided adjacent to the new supermarket, on Lot 16. A condition of consent required the car parking area to be sealed and landscaped.

296. On 21 October 2004 Mr O'Brien entered into a contract with the developers to acquire from them a small further piece of adjacent land on which the supermarket would be built. The price was low, $5,000, because it was Mr O'Brien's responsibility to build the supermarket and extend the hotel and the vendors told him that they believed his work would improve the value of their land for residential development within the scheme. As a result they agreed that this second contract for sale would be effected by a re-subdivision of Lot 10 (which had been transferred to the O'Briens, and Lot 13 (the remainder of Lot 9 belonging to the developers) to create Lot 14 (the land that the hotel is now on), Lot 15 (the land that the supermarket is now on) and Lot 16 (the developers' remaining land in the scheme).

297. On 7 December 2004 the council granted development consent 131/05 for extension to the supermarket to include a manager's residence in accordance with specified plans. One of those plans showed some 80 car parking spaces adjacent to the supermarket, on Lot 16. One of the conditions of development consent 131/05 was that the conditions of development consent 049/04 still applied. Those car parking spaces have never been provided on Lot 16.

298. On the creation of Lot 15 (the supermarket land), Mr O'Brien agreed to an easement benefiting Lot 16 across the waterfront of Lot 15. This easement allows the owners of Lot 16 a permanent right of access across the waterfront of the supermarket. Mr O'Brien directed his solicitors to include that land in the area the plaintiffs seek to be included in community land by these proceedings.

299. Construction of the supermarket was complete by Christmas 2004. Later Mr O'Brien obtained development consent 131/05 for a caretaker residence above the supermarket.

Access problems

300. At Easter 2005 two large men stood on the road outside the supermarket. When Mr O'Brien asked who they worked for and what they were doing, one replied that they worked for Deep Creek Marina Pty Ltd and had been told to collect $20 per day or $50 per week from anybody who wanted to use the boat ramp but who didn't rent a storage shed from Deep Creek Marina Pty Ltd.

301. This situation upset many boat owners. It also upset Mr O'Brien because it was reducing his patronage. Several of his customers accused him of being affiliated with these men and he had to explain that he certainly was not.

302. These two men were there for a week or two. Finally Mr O'Brien observed a confrontation between the two men and one of the mooring owners in the scheme, Mr Peter Armstrong. Following this, the two men came into his supermarket and said to him "*We are bouncers from OPT Nightclub. We have had a much harder time working out here than we've ever had there. We are out of here*". Mr Jarman owned the freehold of OPT Nightclub in Echuca at that time. The men then stopped demanding money from users of the boat ramp. None of the money collected by these men was handed over to the community association by Mr Jarman or his then employer, Deep Creek Marina Pty Ltd.

303. In mid 2005 Mr O'Brien's workmen were installing the concrete access way across the front of the supermarket land. He had a conversation with Mr Jarman:

Mr O'Brien:	"*Can I get my workmen to upgrade the steps in the wharf down to the ski-park?*"
Mr Jarman:	"*No — not unless Neil Giffin retracts the statement that he made*" (Mr O'Brien cannot recall what statement Mr Giffin had made that Mr Jarman was talking about). "*In fact you can't use the wharf to access the ski-park any more because it's our land*".
Mr O'Brien:	"*Ok, I'll move the ski-park away from 'your' wharf and put it in front of the supermarket*".

[140715]

304. In cross-examination Mr Watson agreed that statement of Mr Jarman might have been reported to him and said he agreed with it because there were "*insurance issues to address*". He said he didn't allow Mr O'Brien at his own expense to repair the steps to the public wharf because it wasn't his final decision to make because (in effect) he was now a minority owner of Lot 16. When asked whether he was well aware that fencing off the public wharf and failing to repair the steps would have a definite impact on and hurt Mr O'Brien's business, Mr Watson replied that he didn't think it would be fenced off for as long as it has been and he supposed no-one would rush in to do anything while these proceedings were on foot.

305. At this time, Deep Creek Marina Pty Ltd was operating a houseboat hire business from the wharf alongside the ski boat parking pontoon. It was about this time, mid 2005, that two poles were installed on the wharf to provide a power outlet at the top to service those houseboats — which Mr O'Brien later discovered had been connected to his electricity supply.

306. After his discussion with Mr Jarman, referred to at [303] above, Mr O'Brien shifted the ski-park to the front of the supermarket — abutting the easement which he had granted in favour of Lot 16. His workmen built a concrete walkway to improve the walkway area affected by the easement. At that time one of the houseboats offered for hire by Deep Creek Marina Pty Ltd used the public wharf.

307. In or about September 2006 Mr O'Brien's wife told him that Mr Robertson had towed the ski-park away. He subsequently asked Mr Jarman for its return in the following conversation:

Mr O'Brien:	"*I want my ski-park back*".
Mr Jarman:	"*It's not your ski-park — it belongs to Deep Creek Marina Pty Ltd. And anyway you weren't permitted to put a ski-park in front of the supermarket — the water in the Marina belongs to us*".

308. After Mr O'Brien bought the Watson's Bar and Restaurant business from Mr Bares, Mr Bares called him and told him he needed to insure the ski-park. Mr O'Brien did this. He also maintained the ski-park by painting it. In cross-examination it was suggested to him that when the ski-park was removed it was the property of Deep Creek Marina Pty Ltd or some other entity not associated with Mr O'Brien or his wife. However, Mr O'Brien responded that he always believed it belonged to the Watson's Restaurant and Bar business as it was labelled with that name when he purchased the business. It is unnecessary to resolve that issue.

309. At about the time that Mr Robertson towed the ski-park away in September 2006, the developers fenced off the wharf in front of the hotel.

310. Mr O'Brien recognised immediately that the removal of the ski-park and the closing of the wharf would have a serious impact on his business turnover and goodwill. He had previously estimated that 90 percent of his business during peak times came from visitors to the marina from the river. He therefore engaged a third party to build two new ski boat parks for him at a cost of $30,000 so that each could fit on a privately owned mooring in the scheme.

311. When his new ski-parks were completed in October 2006, Mr O'Brien was unable to use the boat ramp to launch them

[140716]

because manoeuvring them into position was made impossible by the wooden post fencing that by that stage the developers had largely completed around Lot 16. Rather than pay the $2,200 that Mr Jarman demanded to allow him to use the boat ramp in the new marina that had been developed further along Deep Creek on Lot 23 by Messrs Watson, Bares and Robertson, Mr O'Brien paid $300 to have a crane come and launch them.

312. The owners of the moorings immediately on either side of the hotel and supermarket allowed Mr O'Brien to use their moorings to place his new ski boat parking pontoons. They moved their houseboats to other moorings which were not otherwise being used. This situation continues today.

313. Shortly afterwards, Mr O'Brien was contacted by the council and instructed to move his ski boat parking from those moorings because, the council stated, it was an unauthorised use. He was amazed at this because Deep Creek Marina Pty Ltd had operated their houseboat businesses from the wharf for a long time without any development approval that he was aware of. Nevertheless, he made a development application for permission to continue to use the ski-parks on those moorings.

314. Notwithstanding the new ski boat parks, more than one group of customers arrived from the river quite agitated and annoyed with him and asked him aggressively "*Why did you fence off the wharf? What good is it now?*" He had to explain to these people that he did not fence off the wharf and that in order to access his business now they should park at his new ski boat parking and make their way up.

315. Mr O'Brien advised his patrons to take one the following routes:

> (a) the eastern route requires patrons to tie up at his ski-park, make their way over the boat ramp area (which can be quite busy and dangerous with vehicles reversing at peak times), along the walkway in front of the supermarket, up the wooden stairs in the supermarket lot, past the fuel bowsers on the supermarket lot and across to the hotel;
> (b) the western of these routes requires patrons to tie up at his ski-park, make their way over the neighbourhood and community land, up the retaining wall in the edge of the community property without the assistance of adequate steps, and over to the hotel.

316. Mr O'Brien has observed many ski-boats arriving at the fenced-off wharf and turning around and heading out of the marina again — apparently unaware that they are welcome to use these new ski-parks.

317. This problem was made worse by signs that the developers put up at the mouth of the marina which stated:

> Private Property — No Entry
>
> Perricoota Boat Club — Private Property — No Unauthorised Mooring — Trespassers Prosecuted

318. Mr O'Brien has been told many times by patrons that other potential patrons have not come into the marina from the river due to these signs. The signs have since been removed.

319. In late 2006, Mr O'Brien was told by the head of the Echuca — Moama Houseboat Hire Association that Mr Jarman had made a presentation to them and instructed them to tell all their renters not to moor anywhere near or in Deep Creek Marina because it belonged to him.

320. The developers concreted in a sign on the river frontage of the Honeyman Lot which points upstream (past the mouth of the marina) and states "*Perricoota Boat Club — 6.5 km — No unauthorised mooring — Trespassers Prosecuted*". They also erected a further sign, upstream, on the river frontage of Mr Bares' property pointing downstream past the marina mouth which states "*Private Property — 6.5 km — Perricoota*

Boat Club — No unauthorised mooring — No trespassing". The two signs, which point 6.5 km up and downstream respectively, each point across the mouth of the marina and across land belonging to the community association.

321. The developers have not maintained the wharf since they fenced it off. This was upsetting to Mr O'Brien because he bought the goodwill of the business from those same people. He believes that their actions have damaged this goodwill significantly.

322. Just before Christmas 2006 the developers arranged, and Mr Watson and Mr Jarman personally undertook, the installation of

[140717]

concrete barricades around Lot 16 preventing any vehicle access to the moorings. They engaged a former boxer and other men to patrol their new concrete boundary. They also placed a concrete bollard over the boat ramp. Mr Giffin and Mr O'Brien immediately arranged the removal of this particular bollard by crane to Lot 16 on legal advice that it was placed on community land or was obstructing access over the easement over the lagoon. The developers subsequently shifted that bollard back by crane. Mr Giffin and Mr O'Brien again immediately arranged its removal by crane to Lot 16 where it has remained since. Their moving of that bollard was made particularly difficult by the physical intervention of the former boxer.

323. After the installation of the barricades there were far fewer people using the marina and patronising Mr O'Brien's businesses. It was also no longer possible for people to get older or younger members of their family to and from their moorings by car. Mr O'Brien was no longer able to offer the services previously offered to houseboat owners whereby they would let him know when they needed their gas bottles for their houseboats replaced and he would attend to that using his utility.

324. He has observed that at night-time people are now staying in their houseboats rather than walking up to his hotel. There is little or no lighting throughout the marina, making it very difficult to walk around at night. When people were able to get their cars to their moorings they would drive their family up the restaurant, have dinner at night and then drive them back to the mooring afterwards. That is no longer possible. He estimates that it is about 500 metres from the furthest mooring to the door of his hotel.

325. If Lots 14 and 15 were to be fenced off, it would be impossible for people to get from the eastern side of the marina to the western side and vice versa without going around that property and through the carpark at the back of the hotel — except for the owners of Lot 16 because they have the benefit of the easement referred to earlier.

326. Mr O'Brien and his family lived in the manager's quarters built into the supermarket premises. All of the actions of the developers have, in his view, made Deep Creek Marina a very unpleasant place to live and not the environment that he bought into at all.

327. Mr O'Brien testified, and I accept, that the wharf was not in an unsafe condition until the developers fenced it off. Until then he used to keep it clean and safe. The erosion that can now be seen in parts of the wharf occurred subsequently due to rainwater from Lot 16 which flowed over Lots 14 and 15.

328. During the course of the hearing Mr and Mrs O'Brien were made bankrupt.

EVENTS AFFECTING THE COMMUNITY ASSOCIATION IN 2005–2006

Early 2005

329. In 2005, negotiations for the transfer of land from the developers to the community association continued but were confounded to some extent by the developers' application in March 2005 to the Consumer, Trader and Tenancy Tribunal (**CTTT**) for an order under s 85 of the *Management Act* appointing a managing agent to perform all the functions of the community association for 12 months.

330. From February 2005 Mr Jarman was employed full time by the developers as their site manager. In early 2005 Mr Neil Giffin, then the manager of the Central and Western Neighbourhood Associations (and now also the manager of the Eastern Neighbourhood Association) was concerned that the community association did not appear to be functioning. Mr Jarman informed him that the community association records were with Andreones Lawyers (the developers' lawyers) in Sydney. Despite Mr Giffin requesting

these records from those lawyers in order to get the community association operating, the lawyers did not provide him with the records for, it seems, at least six months.

331. According to Mr Jarman, by early 2005 Deep Creek Marina gave the impression of being neglected, run down and in need of repair to the point of replacement in some areas of the community parcel, and of something needing to be done to enable it to function property. He considered that the problems included the community association not holding properly constituted meetings and not taking action to prevent parking on community property, no full time caretaker to look after community

[140718]

property, no maintenance program and the electrical system appeared to need upgrade or serious maintenance due to usage increases and lack of maintenance. Mr Jarman also considered that the problems included that the potable water supply was failing, there were unsafe areas of neighbourhood and community property and capital works were needed to upgrade infrastructure that had run down. Also, he testified, there was a potential public liability exposure which had become of major concern to developers. Consequently, he said, the developers decided to take two courses of action. One was to apply to the CTTT in March 2005 for the appointment of a managing agent under s 85 of the *Management Act*. The other was to give the community association an opportunity resolve the problems referred to above. He was approached by Mr Michael Gannon, the president of the Central Neighbourhood Association, with a view to reactivating the community association.

332. In the first half of 2005 the developers were also looking to advance their development of Lot 16. According to Mr Jarman, to do this they were anxious to resolve their perceived issues with the community association. My impression is that it was their interest in developing Lot 16 that drove their actions in relation to the community association.

CTTT proceedings commenced: March 2005

333. On 7 March 2005 Andreones Lawyers, acting on behalf of the developers, applied to the CTTT for the order to which I have referred appointing a managing agent to perform all the functions of the community association for 12 months. The annexed reasons alleged that the management structure was not functioning or not functioning satisfactorily because of: (a) failures to act in accordance with the *Management Act*, to repair and maintain the community property, to enforce the association's by-laws, and to conduct meetings in accordance with the *Management Act* and the by-laws; (b) financial and accounting malpractice; and (c) failure to properly deal with other issues. The CTTT listed the matter for consideration and hearing on 13 December 2005.

334. At a general meeting of the Eastern Neighbourhood Association on 12 March 2005 it was resolved to obtain quotes for an independent body corporate manager to manage the community association.

335. On 16 April 2005, the community association resolved to appoint Mr Haydon as its manager. Mr Giffin considered that this resolved the issue. However, despite the appointment of Mr Haydon, the developers pushed ahead with their application to the CTTT. A letter from Andreones Lawyers to Mr Haydon of 22 September 2005 indicated that the developers did not accept Mr Haydon's appointment as satisfactory.

336. On 9 May 2005 Mr Gannon wrote the CTTT a letter which included the following:

> The Marina was first developed in 1994 by Mr Anthony Watson and ran smoothly until Mr Watson sold the majority of his interest to Mr Gary Barr [sic] (Hillington Valley P/L). A short time after that Ozzie Erections also became financially involved with Mr Gary Barr.
>
> …As part of Lot 13 [now Lot 16], the land between the boundary of neighbourhood lots excluding community property, contain access roads to the houseboat moorings. What has happened over the last few months, is that these roads have been fenced and blocked off. Also a boat ramp which is on community property has also been blocked off with the erection of a boom gate. This was done at Easter this year. There has also been considerable intimidation to anyone who voices any objections to the behaviour of the developer… We are now of the opinion that the main reason for the appointment of the manager over the Community Association is for the benefit of the parties who have lodged this application…

Annual general meeting of community association — 16 April 2005

337. In consultation with the owners of Lots 14 and 15 (the hotel and supermarket), Mr Jarman and Mr Briffa, the then managing agent of the Eastern Neighbourhood, Mr Giffin sent a notice to all owners within the community association, calling a meeting to reactivate it. This meeting was held on 16 April 2005. At the meeting Mr Giffin said that its main purpose was to try to re-constitute the community

[140719]

association which had been inactive for the past three years or so and then to move to where it was going in the future and to appoint a manager. The meeting resolved to appoint Mr John Haydon of Albury Strata Services Pty Ltd as the community association manager. Mr Jarman had earlier told the meeting that the developers would prefer that company to be the manager.

338. The minutes record:

> Members requested Deep Creek Marina Pty Ltd open the boat ramp boom gate. Mr Paul Jarman tabled the boom gate will remain locked.
>
> Members requested correspondence be forwarded to the developer to unlock the boom gate and permit access to lot owners

In cross-examination Mr Jarman indicated that at that time he held the keys to the boom gate.

339. The minutes record that Mr Jarman tabled issues affecting the community association. Mr Jarman appears to have indicated to the meeting that about 20 apartments were going to be built above the eastern moorings and that what they would be going to overlook was just not acceptable.

340. Subsequently Mr Jarman obtained from the developers' project manager Mr Paul Bird, fee proposals for a proposed upgrade from GMR Engineering Services Pty (**GMR**) and ERM Consultants (**ERM**) referred to below. They totalled about $118,000.

GMR fee proposal for civil and structural engineering assistance — March 2005

341. On 21 March 2005 Mr Glen Ryan of GMR provided Mr Chris Bell of ERM, who were acting for the developers, with a fee proposal for civil and structural engineering assistance. It included the following:

> Re: Deep Creek Marina — Civil & Structural Works
>
> CAPABILITY STATEMENT & FEE PROPOSAL
>
> …We understand that you require general civil and structural engineering assistance with the advancement of the above project. From our site visit on Thursday (17/3/05) and discussions with yourself, Paul Bird and Ozzie we understand the client's requirements to incorporate the following key elements:
>
> Preparation and development of design solutions and documentation necessary for the construction of the following assets;
>
> a) **Main Access Road**:
>
> The existing bitumen surfaced, two lane access road from Perricoota Road to the car park at the rear of the hotel (about 600m long), to be redeveloped as an asphalt surface with a formal drainage solution, which may discharge to ornamental lakes to be developed adjacent to the roundabout. This work will also incorporate a roundabout at the Perricoota end and a divided road connection to Perricoota Road.
>
> b) **Internal Access Road:**
>
> The existing part bitumen and gravel surfaced extension of the two lane access road from the hotel to a the intersection at the rear of the supermarket and adjacent to the boat ramp (about 150m long) to be redeveloped with an asphalt surface with a formal drainage solution, discharging via an interceptor to Deep Creek.
>
> c) **Western Moorings Access Track:**

The existing western house boat moorings gravel surfaced access track (single lane) from the car park through to the turn around at the sewage pump station (about 300m long) to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek. The Council operates a sewage pump out point at the end of this track and requires unhindered access for a light truck/service vehicle.

d) **Eastern Moorings Access Track:**

The existing eastern house boat moorings gravel surfaced access track (single lane) from the boat ramp through to the turn around at the boundary with the new marina (about 350m long). There is also another turn around situated mid way along its length, to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek.

[140720]

e) **Hotel Access Ramp & Bench**:

The access ramp/track to the mooring level bench in front of the hotel site and adjacent to the boat ramp (about 60m long) to be redeveloped as a reinforced concrete surface with a formal drainage solution, discharging via an interceptor to Deep Creek.

f) **Hotel Car Park**:

The existing 2 bay gravel surfaced car park will be paved and surfaced in asphalt, with formal drainage discharging to Deep Creek via the internal access road drainage solution. The existing car park will be divided into two distinct parking areas preventing drive through and discouraging the parking of cars and boat trailers. The car park closest to the Hotel will be the only car park from which access can be gained to the western moorings.

g) **Redevelopment of House Boat Moorings**:

The existing red gum timber retaining and wall and deck structures shall be replaced with a precast concrete and steel pile solution. The moorings shall incorporate a retaining wall structure and be designed to minimise impacts upon the trees.

…

THE MOORINGS;

The moorings will also incorporate free standing driven piles at the end of the vessels (one pile per two vessels). The client advises that they have worked successfully with Murray Valley Piling in the past. Also the client proposes the replacement of the existing service arrangements with all-in-one bollards which include a light, GPO's, metered treated water outlets and provision of data/com's. These bollards have been already sourced, evaluated and used in the recently developed marina.

The reconstructed moorings will include provision for designated tie up points, also consideration of the landscape solution, removal of the existing stairways and facilitate the replacement of the existing stairways and facilitate the replacement of the existing raw water irrigation system. The client prefers the house boat owners provide their own on-board vessel bumper protection.

TRAFFIC MANAGEMENT;

We also note the client's concern that the mooring access tracks will be for set-down, drop-off and pick-up only. Boat owners will be discouraged from parking adjacent to the moorings. Parking on the lawn areas adjacent to the mooring access tracks will actively discouraged by the client and closely supervised. A boom gate will control access to the moorings. The boom gate and controls will sourced and provided by the client.

342. The letter included a fee proposal in the sum of $38,093 for the design of these works. This amount was increased to $44,022 in Mr Ryan's email of 22 March 2005 to Mr Bell, which noted some "*omissions or areas requiring clarification*".

Brolec assessment of electrical requirements — 13 May 2005

343. On 13 May 2005 Mr Jarman obtained from Mr Rick Brockwell of Brolec Electrical Contractors an assessment of electrical requirements for the Deep Creek Marina, which was expressed as follows:

> Please find for your information points that need consideration for the Electrical installation for the Marina extension stage 2 as discussed with yourself and Chris Bell from E.R.M.
>
> 1. Substation is now at peak load and needs urgent upgrade.
> 2. Substation needs to be relocated to a ground mount type kiosk and new main switchboard/metering board constructed to house all individual meters.
> 3. Existing mains power to old Marina is non compliant and needs attention we have already encountered dangerous situations on 3 moorings, cabling is single type insulation and is not recommended. In some cases conduit is barely 150mm underground and crosses other boundaries.
> 4. Safety RCDs must be fitted to all new bollards to comply with Standard to protect moorings and all lighting must be upgraded to comply.
>
> [140721]
>
> 5 New mains cable is recommended to all moorings so they can be individually metered and give mooring owners more capacity to feed their houseboats ie. Air Conditioning, pumps and equipment new houseboats, as you would know require more capacity.
> 6. Communication system via PABX can also be introduced
> 7. Country Energy require meters to be clustered to be read individually in common area, not the current check metering system being read through one main meter.
> 8. We have spoken with Chris Bell E.R.M. in regards to the above and also in reference to water and irrigation system. Any information needed re water speak with Rob Knight [telephone number].
> 9. All existing check meter boards will be made redundant and would probably be an idea to move the pumping station board to a more suitable location.

Extraordinary general meeting of community association — 14 May 2005

344. An extraordinary general meeting of the community association was held on 14 May 2005. Among those in attendance were Mr Jarman, Mr Haydon (the community association manager) and Mr Giffin (neighbourhood associations' manager). Many lot proprietors were in attendance as observers.

345. Mr Jarman tabled preliminary concept plans indicating, he testified, the works which the developers considered needed to be considered for the site. The plans in evidence do not appear to be nearly as comprehensive as that; but do show (among other things) realignment and extension of the western access road with a turning circle at the end and vehicle turnoff areas, a two metre wide concrete boardwalk around the whole marina (apparently over the neighbourhood strip), and the lower eastern access road apparently with vehicle turnoff areas. The total cost of all the planning works and the plans was identified by Mr Jarman at $118,000.

346. The minutes record the following:

> **COMMUNITY ASSOCIATION RECORDS**
>
> RESOLVED that:
>
> 1. Paul Jarman arrange for the transfer of all documents held by Andreones to John Haydon of Albury Strata Services Pty Ltd;
> 2. Paul Jarman also be requested contact the Consumer Trader & Tenancy Tribunal to formally withdraw an application for the appointment of a compulsory manager;
> 3. John Haydon, on receipt of the records presently held by Andreones (Solicitors), be authorised to re-establish, reconstruct the records of the Community Association to comply with statutory requirements…
>
> **OCCUPATIONAL HEALTH & SAFETY (O H & S)**
>
> RESOLVED that a quote be obtained from a professionally qualified person to carry out an OH & S report on the Community Association Property.

FUTURE DEVELOPMENT OF THE DEEP CREEK COMPLEX

Mr Paul Jarman was provided with an opportunity to table a development proposal to those present on future developments within the Deep Creek Marina site.

Mr Jarman advised that the up-grade would need to include a new sub-station for the supply of electricity to the site, as there was concern that the current supply would not [sic] be insufficient to supply future demand especially when the complex was full of owners, guests and visitors, the ball park figure suggested was $200,000.00.

The future plans also included, roads, car parking, retaining walls and the marinas, Paul Jarman tabled a set of drawings of the future project and provided an overview to those present at the meeting.

As part of the project there would be a need for the Community Association (including the neighbourhood schemes) to contribute to the costs.

Deep Creek development would contribute some funds and provide a parcel of land, 1 meter wide × 200 meters in length that would be used as a future car park, however would require sealing at the cost of the Community Association.

[140722]

Paul Jarman then vacated the meeting to allow representatives present to discuss the proposal.

Peter Gray suggested that the Community Association could not meet its share of the total cost of the project, which was expected to cost in excess of two million dollars, ($2.000.000.00), however he would be comfortable to make a non-binding recommendation that each marina berth lot proprietor contribute fifteen thousand

dollars, $15,000.000 towards the project.

The members present then RESOLVED to put forward a proposal for Paul Jarman to take to his company, as follows:

> a detailed proposal be prepared and provided to the manager of the Community Association to be distributed to the representatives of each community association lot to in turn be distributed by the manager of the neighbourhood associations to the appropriate neighbourhood association lots;
> the proposal to contain specific details on each part of the development that funding is expected to be contributed by the Community Association, each section to be accompanied by a site plan identifying where the works will be carried out…

Mr Jarman agreed in cross-examination that the word "*not*" before "*be insufficient*" under the heading "*FUTURE DEVELOPMENT OF THE DEEP CREEK COMPLEX*" was a typographical error.

347. Mr Jarman's note in relation to that meeting on 14 May 2005 included the following:

> Paul Jarman presented
> • A concept layout of the site
> • Guestimations of price for works based on previous works carried out on site (this was clearly explained as not accurately costed)
> • Approximant [sic] works totalled $2,000,000.00 plus
> • Almost all works tabled were for OH & S reasons (that we have had preliminary advice on to say there is significant risk)
> • Deep Creek Marina P/L conceded significant land concessions to the community and neighbourhood association to help resolve this matter once and for all.
> • As a result of the presentation to the executive committee came back and offered $15000.00 per boat ($1,275,000.00 total) but are not in a legal position for 14 days to vote and ratify the decision because of the Comm. Assoc Act I believe.
> • This is a first offer I believe we will get more but have to now present a case with more pressure for them to work a bit harder.

ERM proposal for landscape architectural services — 2 June 2005

348. On 2 June 2005 Mr Bell and Mr Allan Wyatt of ERM wrote to DC Marina Pty Ltd care of Mr Paul Bird, providing a proposal in the sum of about $70,000 for landscape architectural services in relation to the entry road, a roundabout and entry signage; and a landscape concept plan associated with (inter alia) the marina frontage, associated access roads and river entry.

Special general meeting of community association — 18 June 2005

349. A special general meeting of the community association was held on 18 June 2005. The agenda items included:

> 6. That the Community Association determine if a formal occupational health and safety report on the condition of Association Property should be arranged.
>
> …
> 9. That a draft development proposal by Deep Creek Marina Pty Ltd be tabled and approved.
>
> …
> 12. That a draft budget estimate be tabled for approval by the Community Association including raising funds to contribute to the preparation of specifications for the development of Association Property (civil engineering and environmental engineering) totalling $118,000 and that levies be determined pursuant to the Act.

350. All lots in the community association were represented at the meeting. Mr Jarman represented the developers' lot. The manager of the community association (Mr Haydon) and the managers of the Central, Western and Eastern Neighbourhood Associations (Mr Briffa

[140723]

and Mr Giffin) were in attendance. The community association resolved to obtain an occupational health and safety report from Solutions IE to (inter alia) enable any action to be taken in relation to maintaining the community property in a state of good repair and when used as a place of work. The community association discussed: (a) a recent letter from Deep Creek Marina Pty Ltd to boat owners concerning the proposed issuing of notices against owners for "*oversized houseboats*" (b) letters from solicitors of behalf of the developers concerning parking on Lot 16; and (c) a draft development proposal from Deep Creek Marina Pty Ltd, which was tabled. Mr O'Brien spoke in relation to the speedboat mooring facility and why it was needed by the hotel.

351. The meeting also discussed "*The proposal for the Community Association to obtain a transfer of ownership of the access roads, such land currently being part of [blank in minutes] would ensure that houseboat owners have vehicular access to their boats but with provisos eg parking, rubbish etc so that the Community Association Executive Committee would be able to enforce rules*". There was a question about whether this land would become community association property. Mr Jarman spoke in relation to proposed development of the marina. The minutes record in that context (apparently as a statement by him) that:

> In relation to the roads on Lot 13, currently the houseboat owners have access through this area and the developer has noted the title of that land will be given to the Community Association on the proviso that the work that has to be done to the roadway to bring it to the required level (concrete roads and edging), will need to be at the cost of the Community Association on the basis that access controls are put on the road, loading/unloading zones, only 15 minute limits, no vehicular access between 12 midnight and 6 am and that the cost to the developer to be cost neutral (developer pays by the contribution of the land). This would be the same with second section of land and that the only cost to the lot owners will be only the cost of the upgrade. The benefit to the developer is that the site will be clean.

352. The minutes also record that:

> Paul Jarman noted that for the Community Association to move forward, the Community Association would need to approve the $118,000 budget and approve the levies today so that the Community Association is in a position to move forward and that no legal transfers would occur until the resulting

information is available for the Community Association to make a positive decision to move forward with the works.

353. It was resolved that a budget be approved by the community association which included raising funds to contribute to the preparation of specifications for development of association property (civil engineering and environmental engineering) totalling some $118,000 and that this special levy be payable on 1 July 2005.

Planned subdivision of Lot 16 — 16 June 2005

354. On 16 June 2005 the developers' consultant ERM (Mr Bell) provided another consultant GMR (Mr Ryan) with a plan showing over 30 lots, apparently for residential or holiday accommodation, in the area immediately above the eastern moorings; the upper eastern access road apparently connected to Lot 23; and no lower eastern access road. Notes by Mr Bird, the developers' project manager, appear on the document. The plan reflected the developers' intentions which had been communicated to Mr Bird earlier than 16 June 2005 and possibly as early as February or March.

GMR fee proposal to community association — July 2005

355. On 17 July 2005 GMR sent Mr Haydon a fee proposal which was almost identical with its fee proposal of 21 March 2005 (set out above), stating that Mr Bell and Mr Bird had instructed them to do so. Mr Haydon replied two days later that all instructions should come through his office; GMR should not accept any instructions from the developers that placed financial obligation on owners; and he anticipated the executive of the community association would meet to review the matter.

[140724]

Developers' proposed heads of agreement — 12 August 2005

356. On 12 August 2005 Mr Haydon (as managing agent of the community association) received a letter from Mr Jarman entitled "*Re: — Heads of Agreement for Deep Creek Marina P/L (Lot 13) to Transfer Land to Community Association No. 270026 in Exchange for Improvement Works Carried Out by the Community Association*". The heads of agreement referred erroneously to Deep Creek Marina Pty Ltd as if it were the owner of the developers' land (then Lot 13, now renumbered Lot 16). Clauses 1–13 provided:

> 1. No Agreement is reached until contracts are signed.
> 2. Deep Creek Marina P/L has full right of refusal if planning and design is not considered to be acceptable by Deep Creek Marina P/L.
> 3. Deep Creek Marina P/L (lot 13) to pay 50% of Cost towards upgrade works & Planning for the following areas:—
>
> > a) The Entrance to the marina from Perricoota Road
> > b) The Entrance to the marina from the Murray River
>
> 4. The Cost of all other works on community property that Lot 13 must contribute to is to be the exact value of the land to be transferred to the community association based on our Neighbourhoods share of the unit entitlements.
> 5. Community Association and individual Neighbourhood associations to pay for all remaining Planning & Upgrade works on land being transferred to it in this agreement as follows and not limited too [sic]:—
>
> > a) Road seal, Kerbing, Drainage & landscaping on all Community & Neighbourhood association property as is stated and or shown on scope of works provided by ERM & GMR at stated specifications in those documents.
> > b) Power Up grades to be payed [sic] entirely by each neighbourhood associations depending on usage required.
> > c) Water Up grades to be payed [sic] entirely by each neighbourhood associations depending on usage required.
> > d) Retaining wall upgrade to be payed [sic] for by each neighbourhood association depending on what upgrade required.

6. The Community Association will agree to take complete and full responsibility for maintenance of all lands and the up grades transferred to the community association property in this agreement.
7. All access roads have access control systems manage [sic] by (DCM P/L). Management Agreement must be struck between Comm. Assoc and DCM P/L prior to signing.
8. Access control System to be installed at Community Associations Cost.
9. Conditions of usage are to be added to the Lands transferred to the community Association from Deep Creek Marina P/L (lot 13) (legal advice will be required for what form these conditions will take.)

a) All roads are access roads only and have a 15 minute loading and unloading limitation placed on them
b) All access roads and parking area's [sic] are no access for trailers
c) All access roads have hours of usage limitations 6.30am to 12 midnight
d) All penalty and warning notices are to be payable to Community Association
e) Penalties to be determined by Comm. Assoc Exec committee and DCM P/L before agreement signed off on

10. All legal and establishment costs are payable by Community association.
11. The Land will only transfer when the works have been completed to project management and Council specifications and signed off on.
12. **The land to be transferred can not be confirmed exactly as we have only got to a concept stage because the community association has not engaged the contract, so indicative lands can only be given as on the concept drawings at this stage**

a) **But we do agree Deep Creek Marina P/L will transfer lands that are**

[140725]

required for the proposed up graded roads, parking and upgrades that meet Deep Creek Marina Pty Ltd approval as a result of the planning and design of ERM & GMR
b)**This transfer will be in the form of a complete title change over to the community associations ownership**

13. A Interim agreement must be reached to address public liability exposure to lot 13. Due to delays in start of planning and the whole project because of time frame issues the Community Association 270076 has at present:—

a) Community association Must commission and act immediately on an O H & S and Public liability report for the entire Community Parcel.
b) If this cannot be achieved we have no option but to lock all access to our lot 13 properties to reduce our exposure to any liability.

(emphasis added)

357. In cross-examination Mr Jarman said that the reference in paragraph 12 of this document to the*"indicative lands…on the concept drawings*" was a reference to the drawings behind tab 5 of his affidavit, which were draft refurbishment concept plans outlining what works needed to be considered on the site. Those concept plans showed, inter alia, the western access road with vehicle turnouts and extended to include a turning circle; the eastern lower access road with vehicle turnouts; and parking bays on Lot 16 opposite the carpark and Lots 14 and 15.

September to December 2005

358. On 28 September 2005 a meeting of the executive committee of the community association was held and attended by (inter alia) Mr Haydon, Mr Giffin and Mr Jarman. The minutes record inter alia that:

(a) works were required on the Lot 13 (now Lot 16) steps at the edge of the lagoon and Mr Jarman stated "*It is our responsibility however we will not be fixing this until we know that you are going to fund the upgrade, we will fence it off*". The meeting then resolved that those steps be repaired;
(b) Mr Jarman representing the owners of Lot 13 advised that upgrading of community and neighbourhood properties had to be carried out as per the specifications of EMR and GMR;
(c) the executive committee determined that the community association would not enter into negotiations to purchase part of Lot 13 at the present time, and that a large number of lot owners were agreeable to enter into a purchase agreement but a detailed, formal proposal would be needed.

359. At this meeting, the initial safety report of Solutions IE was tabled. Each community and neighbourhood association undertook to carry out the necessary work on their property. As at that date less than 50 percent of the levy of $118,000, struck three months earlier, had been collected. Mr Jarman pressed for the developers' proposed upgrade to be carried out as per the specifications of EMR and GMR.

360. Mr Haydon responded in detail on 27 October 2005 to Mr Jarman's letter of 12 August 2005. He stated inter alia that once a draft agreement became available he would recommend to the community association executive committee that an intention to sign a contract be authorised. Negotiations halted on receipt of a letter dated 16 November 2005 from Andreones, lawyers acting on behalf of the developers, stating that until the CTTT proceedings were decided, no further negotiations would occur.

361. On 5 October 2005 Mr Haydon wrote a letter to Mr O'Brien (as secretary of the community association) in which he stated that during a discussion with Mr Bares, Mr Haydon asked Mr Bares "*what would make the CTTT hearing for a compulsory manager go away*", primarily as it was financially expensive and time consuming for himself and for the community and neighbourhood schemes as well as Mr Bares as the developer. The letter recorded that Mr Bares said that they would have to commit to the development as per Mr Bares' specifications, and that they "*should not muck around with other engineering consultants but use the GMR and EMR groups*". Mr Bares went on to discuss the slow pace that the money was coming in. Mr Haydon told him that it was the fault of the Neighbourhood

Managers, but that most of the money had now been received from the schemes managed by Mr Giffin. The letter stated that it was Mr Haydon's understanding that the developers wished to move very quickly with the project.

362. By the time of the meeting of the community association executive committee on 2 December 2005 some $66,000 had been collected of the levy of $118,000.

CTTT hearing: 13–14 December 2005

363. At the CTTT hearing on 13 December 2005, the developers were represented by their solicitors and a barrister. Mr Haydon spoke on behalf of the community association. Although the three Neighbourhood Associations were not parties to the hearing, some neighbourhood members and managers attended, namely, Mr and Mrs Hannay, Mrs Briffa, Mr Gannon and Mr Giffin.

364. After the introduction by the representative for Lot 16, the tribunal member said:

> It will take a lot to convince me that I should take the draconian step of replacing Mr Haydon, who has been democratically appointment by the community, with a compulsorily appointed manager. I want both sides to go and negotiate.

365. Just before 3 pm, the developers' barrister presented Mr Haydon and the neighbourhood members and managers with a lengthy proposal. They let the barrister know that the timeframes proposed for certain works the subject of proposed orders were "*ridiculous*": for example, the developers proposed some works to be done within 14 days and it was only two weeks before Christmas. Also, the view of the developers as to what work was required was different to that of the neighbourhood members in attendance.

366. The matter was adjourned until the following day. When Mrs Hannay arrived at her motel that evening, she was told that the barrister wanted to speak to her. She went to his room and found the barrister, the solicitors, Mr Bares, Mr Jarman and Mr Honeyman there. Mr Bares said:

Things aren't happening fast enough for me. I need things to be fixed by September.

367. Mrs Hannay understood this to mean that he needed work to be done by September 2006 because of his development ambitions for the adjoining land. Mr Bares also said:

I want to get rid of John Haydon and replace him with Dynamic Property Services. They are a big organisation and know what they're doing.

368. Mrs Hannay had her own concerns about Mr Haydon, in particular, that he was not standing up sufficiently to what she considered to be the "*bully-boy*" tactics of Mr Jarman at community association meetings.

369. At breakfast the following morning, Mr Haydon said to Mr Giffin, Mrs Briffa and Mr and Mrs Hannay:

I would like to make an announcement. I am resigning as community manager. There is too much pressure on me and these disputes are taking up too much of my time. My other work is suffering and will suffer more if I continue to take this on.

They discussed this at the breakfast table and formed the conclusion that the community association had no alternative but to accept the appointment of Dynamic Property Services (**Dynamic**).

370. When the hearing resumed that morning, Mr Haydon informed the CTTT of his decision. After an adjournment so that the parties could discuss the matter, the barrister for Lot 16 presented a proposal that the community association agree to orders appointing Dynamic and other orders that seemed to the members of the neighbourhood associations to basically be orders that the community association obtain reports in relation to what work was required to address occupational health and safety issues and that they then undertake that work. The developers withdrew their earlier demand to include deadlines for carrying out the work.

371. Mrs Hannay said that the feeling among the group was that these proposed orders were "*okay*". The work to be done by the community association was only to be that recommended by professional reports. They trusted that Dynamic would be competent in managing the process.

372. When the CTTT reconvened, the barrister handed up the proposed orders. The

tribunal member asked if the orders were consented to, and nobody objected. The orders were made.

373. In evidence, Mr Jarman had a recollection of the events of 13 and 14 December 2005 which differed somewhat from that set out above based on other evidence. I prefer the latter, taking into account my assessment of the witnesses.

Works commissioned by Dynamic — 2006

374. Dynamic commissioned a risk assessment report from Matrix Risk Pty Limited. Matrix produced the report in January 2006.

375. Dynamic commissioned Brolec Express Services Pty Limited to conduct various electrical works at the community scheme. This work included supply of a new 500kVA pole mount sub-substation, a new mains supply from substation to new main switchboard and new metering facility in the carpark at the rear of the hotel, and supply of all street and public lighting as required around the site. This was at a cost of $774,302. On 7 March 2006, Brolec advised that there were further works to add to its previous quotation, costing $21,341.76.

376. Dynamic also commissioned or embarked on commissioning civil works, indicated by the following documents:

(a) report entitled "*Engineer's Review of Existing Timber Structures*" by GMR dated March 2006;
(b) "*Tender Specifications for Moorings Refurbishment & Modification Works*" by GMR dated May 2006. The document recorded that it was the intention of the developers to close the existing access road to the moorings, reinstate that land with top soil and sow it with grass cover. The proposed works included removal of the access stairs to moorings and to close the boat ramp;

(c) development application 035/07 dated 28 July 2006 submitted by GMR for "*refurbishment of the western (timber) moorings and abutments, replacement of the eastern moorings (concrete), removal of the access stairs, the development of the pedestrian (Community/Neighbourhood) access paths and associated landscape works*" and

(d) advertisement in the Riverina Herald on 4 August 2006 by GMR for a civil works tender, stating "*Dynamic…invites Tenders for the supply of necessary material for Construction of Access Roads, Car Parks and Associated Stormwater Drainage Works at the Deep Creek Marina*".

377. In order to finance the works, Dynamic caused the community association to enter into a loan agreement on a drawdown basis for the sum of $2,000,000.

378. The carpark work that was carried out in 2006 included demolishing the existing carpark (apparently with about 60 car spaces) including the trees and landscaping and constructing a much larger carpark which provided for 125 car spaces. Drainage was installed which connected to a special detention system. Tonnes of crushed gravel was then brought in. By about November 2006 the work appears to have been completed except for sealing. No work has been done since that time.

379. The plaintiffs suggested in cross-examination that the reason that this larger carpark had capacity for 125 cars was to provide for the 80 car spaces for the supermarket which a condition of consent to Mr O'Brien's development applications 131/05 and 049/04 required to be put on the adjacent Lot 16: see [295]–[297] above. It is not clear to me whether or not this is so.

380. During 2006, Dynamic did not consult with any of the Neighbourhood Associations. Mr Giffin was very concerned by this lack of consultation. He was also concerned when he became aware that Dynamic was receiving its legal advice from the developers' solicitors, Andreones.

381. Mr Clinch was concerned that significant work was being commissioned in early 2006 by Dynamic, as compulsory manager, that the community association was going to have to pay for. His concern was twofold:

(a) that members of the community association had no say over decisions being made by Dynamic to spend the community association's money; and

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(b) the works being commissioned mirrored the works he believed Mr Watson and Sammy One were obliged to do pursuant to the terms of the community and neighbourhood development contracts, and had previously sought to have done and paid for with a contribution by the community association.

382. Mr Clinch and Mr Giffin expressed their concerns to Dynamic.

383. In June 2006 GMR produced a sketch marked "*for tender 21/06/06*" apparently, it seems, as a result of discussions between Mr Ryan of GMR and Mr Jarman, showing an enlargement and reconfiguration of the community carpark.

384. On 4 August 2006, solicitors for Mr Giffin as managing agent of the Central and Western Neighbourhoods applied to the CTTT for orders revoking its previous orders appointing Dynamic as managing agent.

385. On 17 November 2006, the proceedings in the CTTT were settled and consent orders made which terminated the appointment of Dynamic from 6 December 2006.

Mr Bares' letter — 19 December 2006

386. On 19 December 2006 Mr Bares wrote a letter addressed to "*Houseboat Lot Owner*" which he sent to the managing agents for the Neighbourhood Associations with a request that they distribute it to each of the houseboat lot owners. The purpose of the letter was said to be so that the recipients could better understand his position in relation to a number of "*areas of dispute*" including the following:

(i) as regards access roads to houseboat lots, Mr Bares wrote that the roads in front of the moorings were construction roads used primarily as temporary access to facilitate construction; over the years the developers had continuously and unsuccessfully tried to come to some form of more permanent access arrangement; that there was no planning

approval for any access roads to houseboat lots; it was therefore illegal for the developers to continue to allow houseboat lot owners to use the construction roads to access their houseboats; and if an accident occurred the developers would be uninsured.
(ii) it was illegal to park in the "*flood plain*" because the developers had no planning permit which would permit it.
(iii) oversized houseboats were encroaching on Lot 16. The developers would not agree to this as it would encroach on other lot owners' right of carriageway.
(iv) the boat ramp had no planning approval to be used as a boat ramp. Mr Bares wrote that as the developers had been unsuccessful in controlling use of the ramp by the public, they would therefore close it. Lot owners would be given the opportunity to use the new boat ramp (on Lot 23). Casual permits for visitors and guests of lot owners would be issued at a nominal cost.
(v) there were security issues in respect of property damage including damage to the developers' boom gates.
(vi) there was a trespass issue. Cars parked illegally on Lot 16 and parking in the flood plain would be towed away.

387. That completes my analysis of the history of the marina development and the statutory framework. I now propose to address the issues which arise for determination.

WHAT WAS INCORPORATED IN THE DEVELOPMENT CONSENTS?

388. The development contracts and the statutory covenants in the *Development Act* refer to development consents. There is an issue as to what is incorporated in the development consents. In particular, does development consent 66/92 incorporate the subdivision plans in DA 66/92 (**annexures B** to **E** to this judgment) and does development consent 18/90 incorporate Plan 4 in DA 18/90 (**annexure A** to this judgment)? It is important to the plaintiffs' case that the question be answered yes. The developers submit that it should be answered no. In my opinion, the question should be answered yes for the following reasons.

389. In construing a development consent, the development application and plans or other documents accompanying a development application can only be looked at if they are incorporated in the consent expressly or by necessary implication and only where this is necessary for the purpose of interpreting the consent. This principle has been repeatedly

[140729]

affirmed in the authorities. A seminal statement appears in *Auburn Municipal Council* v *Szabo* (1971) 67 LGRA 427 (NSWSC) at 433–434 where Hope J held:

> …in determining what a council has approved, one primarily looks at the document constituting the approval, and construes it… The terms of another document may be incorporated in a development approval either expressly or by necessary implication, but I do not think that it is possible otherwise to go to documents outside the formal approval in order to determine what has been approved. In particular, it is not possible to go to the form of application for approval unless in some way that document has in whole or in part, expressly or by necessary implication, been incorporated in the consent. On some occasions no doubt there is such an incorporation. Thus, if an application were made and a council did no more than approve the application, it seems to me that by necessary implication the terms of the application must be incorporated.

390. In *Shell Company of Australia Ltd* v *Parramatta City Council [No 2]* (1972) 27 LGRA 102 (NSWCA) Hope JA (Jacobs and Manning JA agreeing) held at 107:

> … it is not permissible, in order to determine what development has been approved, to construe the document constituting the approval in the same way as if it evidenced some inter partes transaction, for development approvals operate, as it were, in rem and may be availed of by subsequent owners and other occupiers of the land. The nature and extent of the approved development must be determined by construing the document of approval, including any plans or other documents which it incorporates, aided only by that evidence admissible in relation to construction which establishes, or

helps to establish, the true meaning of the document as the unilateral act of the relevant authority, not the result of a bilateral transaction between the applicant and the council.

391. In ***Stebbins* v *Lismore City Council* (1988) 64 LGRA 132** the NSW Court of Appeal found that the notice of determination of a development application should have been read together with a plan accompanying the application, as the application was meaningless without the plan. In a joint judgment, Mahoney, Priestley and Clarke JJA held at 135–136:

> The notice of determination of the development application should, we think, be read together with the plan. The written form of application is meaningless unless the plans accompanying it are considered as part of the application. Similarly when the notice of consent refers to the determination of the development application it must be referring to the application including the plans without which that application would not be an application at all. The consent as granted was to an application incorporating a plan on which, at the time of consent, a marking had been placed showing that the development being approved did *not* include the new entrance. Read together the documents returned to the appellants informed them that the works shown on the plan were the subject of the development consent except insofar as an amendment was required in relation to the new entrance to the Bruxner Highway. The consent could not, in view of the stamp, be regarded as allowing for development in that area in the precise terms shown by the plan.
>
> If the written notice of consent alone is to be regarded as the consent so that it alone would appear on the public register the fact inescapably remains that it could not be understood by a searcher without recourse to the application itself, including the accompanying plans. The searcher wishing to gain a full appreciation of the terms of the consent would then see a plan showing that no approval had been given to the new entrance. The point is that consent was not in fact given to the new entrance nor can the notice of consent accompanied by the stamped plan be regarded as an unqualified approval of the application to develop the new entrance as originally but no longer shown on the plan.

392. These and other authorities were reviewed in *Hubertus Schuetzenverein Liverpool Rifle Club Ltd* v *Commonwealth of Australia* (1994) 85 LGERA 37 (FCA) by Wilcox J, who concluded at 46:

> The authorities clearly establish that it is legitimate, in construing a development consent, to look at the plans that accompanied the application. However, this may be done only where the consent document expressly or inferentially incorporates the terms of the application and only where this is necessary for the purpose of interpreting the consent. For example, where the council simply approves an application without describing the development, it is permissible to look at the application to determine what it was that the applicant sought to have approved (as in Szabo and Shell Co). It is not legitimate to look at the documents that accompanied the application, or even the application itself, to contradict (whether by way of extension or contraction) the scope of a consent stated in clear terms. Stebbins is consistent with the last-stated proposition. On the view of the case taken by the Court of Appeal, in order to learn the terms of the council's consent it was necessary for a person to read the notification of consent in conjunction with the copy plan endorsed by the council. When the documents were read together, it became apparent that the unrestricted consent suggested by the letter of notification was in fact given subject to the elimination of the new entrance.
>
> Applying these principles to the present case, it seems to me that, if a question ever arose as to what Liverpool City Council intended by its reference, in the letter of 10 October 1973 or the subsequent formal consent, to club building, beer garden or children's playground, it would be legitimate to look at the plan dated January 1973 in which each of these facilities was graphically described. To look at the plan for that purpose would be to use it to interpret the consent. But it is not legitimate, in my opinion, to look at the plan for the purpose of extending the consent; for the purpose of adding a facility that was not mentioned in the consent document to those listed as approved. This would be to use the plan to contradict the document, not to interpret it.

[140730]

393. In *Woolworths Ltd* v *Campbells Cash and Carry Pty Ltd* (1996) 92 LGERA 244 (NSWCA) at 249, Sheller JA held:

> Development approvals operate for the benefit of subsequent owners and other occupiers of land and denote the consent authority's unilateral act, not a bilateral agreement between the parties. Generally, if the terms of the approval are clear, it is not permissible to look to the application or to other documents which accompany the application to qualify or contradict its terms. But if the approval incorporates the application, the two must be read together…

Beazley JA agreed with Sheller JA (I note that the LGERA report erroneously omits Beazley JA's reasons for judgment).

394. In *Winn* v *Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 (NSWCA) at [2] and [3] Spigelman CJ accepted, and cited many authorities in support of, the proposition that *"documents accompanying an application for consent are not taken as incorporated in the consent, unless incorporated expressly or by necessary implication"*. Stein JA held at [199]:

> As Hope J observed in *Auburn Municipal Council* v *Szabo* (1971) 67 LGRA 427, in determining what development a consent authorises, one looks primarily at the approval and construes it. The reason for this is that a consent is issued in rem and it would be inconvenient, to say the least, if one had to have regard to a series of documents to know what the consent authority intended to approve. The consent may incorporate another document if it does so expressly (not here relevant) or by necessary implication. In Szabo, Hope J gave the example (at 434) of a council merely approving an application and no more. In such a case, the terms of the application would be incorporated by necessary implication. Szabo was applied by the Court of Appeal in *Sydney Serviced Apartments Pty Ltd* v *North Sydney Municipal Council [No 2]* (1993) 78 LGERA 404 at 407-408.

395.

[140731]

In *Weston Aluminium Pty Ltd* v *Alcoa Australia Rolled Products Pty Limited* [2004] NSWLEC 551 Lloyd J held at [13]:

> In accordance with settled principles in interpreting what is the subject of this consent it is not permissible to look at any other document other than a document either expressly or impliedly referred to in it. In this case it is permissible to look at the plan referred to in condition 20 as forming part of that consent.

396. In *Loreto Normanhurst Association Inc* v *Hornsby Shire Council* (2001) 122 LGERA 347 (NSWLEC) one of the two notices of determination which fell to be construed was in substantially the same form as the notices of determination of DA 18/90 and 66/92. The form was prescribed by the regulations. Bignold J held that each development consent expressly incorporated each development application: at [20]. His Honour went further and held that the comprehensive and detailed statutory regime *"necessarily"* meant that the development application (and its supporting materials) was incorporated in the development consent: at [30]. ***Loreto*** was cited with apparent approval in *Council of the City of Sydney* v *Pink Star Entertainments Pty Ltd* [2008] NSWLEC 176 at [86]; *Tip Fast Pty Limited* v *South Sydney City Council* (2002) 120 LGERA 292 at [22], [24]; and *Kindimindi Investments Pty Ltd* v *Lane Cove Council* [2005] NSWLEC 398 at [52].

397. In *Weston Aluminium Pty Ltd* v *Environment Protection Authority* (2007) 156 LGERA 283 at [17] the High Court found it unnecessary to examine these principles:

> Whether, as Alcoa submitted, reference may not be made when construing a consent to anything but the consent itself and any documents incorporated expressly or by necessary implication need not be examined. In particular, it is not necessary in this case to consider what reference may be made to the development application to which the consent responds.

398. In my opinion, DA 66/92 and its accompanying subdivision plans (**annexures B — E** to this judgment) were incorporated expressly or impliedly in development consent 66/92. The notice of determination is set out at [92] above. It is unnecessary to consider the *"necessary"* incorporation proposition (arising from the statutory regime) advanced in **Loreto**. The notice of determination stated that DA 66/92 *"has been determined by…granting of consent subject to the conditions specified in this notice"*. The notice stated that the conditions were set out *"as per attached letter"*. That letter from the council is set out at [93] above. It is impossible to understand what DA 66/92 was without looking at it. It is impossible to understand what were

the *"Community Titles Subdivision"* and *"the proposed subdivision"*, to which the council's letter referred, without looking at the development application and the enclosed subdivision plans. It is impossible to know what the council intended in condition (a) in its letter by the submission of *"formal"* subdivision plans, community development contracts, community management statements, neighbourhood development contracts and neighbourhood management statements unless one knows what the subdivision plans and other documents enclosed with DA 66/92 were that had to be the subject of formalisation. Condition (c) of development consent 66/92 referred to *"Neighbourhood Development Lots 2 — 11 (moorings or berths)"*. That cannot be understood without looking at the plans which accompanied DA 66/92. Condition (b) of development consent 66/92 required compliance with a host of conditions in development consent 18/90. That condition cannot be understood without referring to development consent 18/90, which in turn cannot be understood without referring to DA 18/90 and its accompanying plans. Condition (d) referred to *"Development lots"*. It is necessary to refer to the Stage 2 plan to understand this reference.

399. In my opinion, DA 18/90, including Plan 4, was incorporated expressly or impliedly in development consent 18/90 (set out at [76] above). That consent cannot be understood unless the application and the plans accompanying it are looked at. The council's letter (set out at [77] above), which was incorporated by express reference in the notice of determination, granted consent to *"the abovementioned Marina and tourist development subject to the following conditions"*. The conditions are pervasive in

their references to matters which can only be understood by reference to the development application and plans. They include references to *"the entrance of Deep Creek to the River"*, *"gravel roads"*, *"the houseboat storage area"*, *"the access road"*, *"the intersection with the main road"*, *"the boat ramp"*, *"the motel, cabins, restaurant and kiosk"*, *"internal roads and parking areas"*, *"moorings within the Marina"*, *"the map in the supplementary Environmental Impact Statement"* and *"the Environmental Impact Statement"*.

400. The developers submit that even if Plan 4 were incorporated in development consent 18/90, it is merely a proposal for landscaping on community property. I do not accept the submission. The narrative in the SEIS stated that Plans 2 and 3 were the *"masterplan"* for the marina development and that Plan 4 showed Stage 1 of the development: see [68] above. Plan 2 included the notation *"Refer to Detailed Landscape Masterplan for enlargement of the central area"*. This was a reference to Plan 4.

401. The developers also submit that the mere incorporation of Plan 4 in development consent 18/90 does not thereby permit the development of anything which happens to be on the plan, for example, potentially three 60 storey motels, 20 holiday cabins and a manager's residence all of the same height. The plaintiffs submit that it does permit this, subject to obtaining a building consent as was required at that time under s 311 of the *Local Government Act 1919* (NSW). In 1996 such a consent was obtained by Mr Watson to construct the restaurant: see [127] above. Under the statutory regime at that time, when a development consent was granted a subsequent building application to approve construction had to be made pursuant to s 311 of the *Local Government Act 1919,* which provided: *"A building shall not be erected unless the approval of the council is obtained…beforehand"*. The later changes to this legislative regime were summarised in *Over Our Dead Body Society Inc* v *Byron Bay Community Association Inc* (2001) 116 LGERA 158 by Bignold J at [29]:

> There is one further preliminary matter that I must refer to, namely the purpose of the statutory requirement for the obtaining of a construction certificate in respect of an approved development (that is, a development which is the subject of the grant of development consent). The concept of certification of development as is now provided in the EP&A Act, Pt 4A was not introduced into the statutory regime until 1 July 1998 when the Environmental Planning and Assessment Amendment Act came into force. As I have earlier mentioned, one of the significant legislative changes introduced by that amending Act was the abandonment of the necessity for obtaining a separate approval under the Local Government Act for the erection of a building and approval for other allied matters, for example, the demolition of a building. Instead of the complementary or supplementary approval processes concurrently operating under the Local Government Act in addition to the requirement of the EP&A Act for the obtaining of development consent for the carrying out of development, the Environmental Planning and Assessment Amendment Act introduced a system of certification of development as contained in Pt 4A together with the subsidiary or ancillary provisions contained in Pts 4B and 4C. The

various types of certificate referred to in s 109C(1) had counterparts under the Local Government Act but they were repealed by the Environmental Planning and Assessment Amendment Act.

402. As discussed at [416] below, in my view Plan 4 was a concept plan for use of the land by putting certain facilities on it at specified locations. The consent was to that use. I construe it as requiring a further consent for the construction of the facilities and carrying out of works consistently with the approved use. Thus, for example, the height of buildings would be controlled by the further consent.

403. Mr Watson acknowledged in evidence that he understood he had development consent for what was depicted in Plan 4 and was then required to get building approval for the restaurant, which he did in 1996. This may be relevant to discretionary relief if the case reaches that stage.

404.

[140733]

Condition 12 of development consent 18/90 provided: *"Buildings shall not be constructed nearer than 60 metres from the bank of the River or Deep Creek"*. The developers contrast that with Plan 4 which shows two motels within 60 metres of Deep Creek. They submit that there is an irreconcilable difference and therefore Plan 4 cannot be incorporated. I disagree. The development application, which included Plan 4, was modified by the conditions of the consent.

UNREGISTERED PLANS

405. The plans which I have held were incorporated in the development consents were not registered by the Registrar General. The developers submit that a plan, even if it is incorporated in a development consent referred to in a community plan or the statutory covenants, cannot form part of a community development contract unless it is registered by the Registrar General with the community plan. In my opinion, a plan incorporated in a development consent which is expressly or impliedly incorporated in the development contracts or in the statutory covenants forms part of the development contracts or statutory covenants even if it is not registered. My reasons are as follows.

406. The developers submit that registration of plans is required by the following definition of *"development contract"* in s 3 of the *Development Act* and s 3 of the *Management Act*:

> **development contract** means instruments, plans and drawings that are registered with a community plan, precinct plan or neighbourhood plan and describe the manner in which it is proposed to develop the land in the community plan, precinct plan or neighbourhood plan to which they relate.

407. The relevant plans, in my view, describe the manner in which it is proposed to develop the land in the community plan. However, since the definition refers (inter alia) to *"plans…that are registered"*, the developers submit that a development contract cannot include a plan that is not registered. They say this is consistent with the general principle of the Torrens system that people seeking to understand how or what *"instruments, plans or drawings"* affect their land need only look at the register: *Westfield Management Ltd* v *Perpetual Trustee Co Ltd* (2007) 239 ALR 75, [2007] HCA 45.

408. In ***Westfield*** at [4]–[5] the High Court succinctly described the scheme of the Torrens system to provide third parties with information concerning the registered title, as follows:

> [4] Section 31B of the RP Act [Real Property Act 1900 (NSW)] requires the Registrar-General to maintain the register. The register comprises, among other instruments and records, both folios and dealings registered therein under the RP Act: s 31B(2). A dealing includes any instrument registrable under the provisions of the RP Act: s 3(1). Section 96B classifies the register as a public record and provides for its inspection.
> [5] Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element in the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd*. It will be necessary later in these reasons to refer further to the significance of this for the present appeal.

(footnotes omitted)

409. The principle expressed in ***Westfield*** is referable to ascertaining the state of an existing title under the *Real Property Act 1900* (NSW). That is because the Torrens system is one of title by registration.

410. Several distinguishing observations may be made about the community titles legislation. First, it introduces an additional concept of future proposed development described in an optional registered community development contract related to a registered community plan or described in a development consent. Secondly, s 3(2) of the *Development Act* and s 3(2) of the *Management Act* each provides that *"This Act is to be interpreted as part of the Real Property Act 1900 but, if there is any inconsistency between them, this Act*

prevails". Thirdly, at common law a contract may incorporate another document by reference.

411. Fourthly, the statutory covenants in Part 1 of Schedule 2 to the *Management Act* expressly incorporate the development consent, which may include plans, into every community development contract without any requirement that the development consent be registered. Thus, at least the development consent, including any plans which may be incorporated in it, may be looked at for the purpose of construing the statutory covenants, regardless of whether the development consent or its incorporated plans are not registered.

412. Fifthly, the regulations under the *Development Act* required certain provisions to be inserted in all development contracts, including a reference to particulars about details of the scheme in an identified development consent and a covenant by the original proprietor to develop the land in accordance with the development consent as modified or amended with the consent authority's approval from time to time: see [50] above. Again, there was no legislative requirement that the development consent, which may incorporate plans, had to be registered. In the present case, the development contracts included the provisions required by the regulations in relation to (at least) development consent 18/90. Consequently, for the purpose of construing these provisions, development consent 18/90 (at least) can be looked at, including any plans incorporated in it, even though that consent and any plans incorporated in it are not registered.

413. The references to *"development consent"* in these statutory covenants can be taken to include development consents in the plural because s 8(b) of the *Interpretation Act 1987* (NSW) provides that: *"A reference to a word or expression in the singular form includes a reference to the word or expression in the plural form"*.

414. The *"development consent"* to which the statutory covenants refer must, in my opinion, be the development consent or consents that bring land under the community titles legislation. That legislation contemplates subdivision of land incorporating common property which may be developed in stages in accordance with a pre-determined theme and development contracts that describe the proposed amenities — which ordinarily require development consent. Therefore, in the present case, in my opinion, the *"development consent"* referred to in the statutory covenants at least includes development consent 66/92 which was for a community title subdivision. The Stage 2 plan accompanying DA 66/92 also described the proposed facilities.

415. It is less clear whether the *"development consent"* to which the statutory covenants refer also includes development consent 18/90 relating to proposed amenities because that development application was lodged two months before the community titles legislation commenced in 1990. I am inclined to think that it does. However, I do not think that it matters whether or not it does. That is because preliminary cl 4 of the community development contract contains an express covenant to develop the land in accordance with development consent 18/90 and the statutory covenants require the land to be developed in accordance with the community development contract. Further, the Stage 2 subdivision plan accompanying DA 66/92 showed essentially the same proposed facilities as are shown in Plan 4 of DA 18/90. If the Stage 2 subdivision plan was incorporated in development consent 66/92, then the statutory covenants apply to it.

416. I construe DA 18/90 as a staged development application that, in its accompanying Plan 4, set out concept proposals for development of facilities on the site, for which detailed proposals were to be the subject of subsequent construction applications. I construe DA 66/92 in the same way so far as concerns the same facilities shown on the Stage 2 subdivision plan. Plan 4 and the Stage 2 plan both showed only

rudimentary marks depicting facilities in various locations. They could not have been any more than concept plans. The concept proposals were of a type now provided for in s 83B of the *EPA Act*, although that section was not in force at the relevant time. Given the conceptual nature of the proposals, the consent to DA 18/90 and the consent to DA 66/92 (insofar as the latter showed the proposed facilities) were consents to the use of the land for such facilities. *"Development"*, as defined in the legislation, may be limited to the use of

[140735]

land and does not necessarily extend to construction of buildings authorised by that use (the definition is set out at [42] above). In the present case, in my view, neither development consent authorises the construction of buildings or the carrying out of work for those facilities shown on the plans. A further council consent would be required before those facilities could be constructed and no doubt the council would require detailed plans and specifications before granting consent. If that were not so, the developers would be permitted, for example, to construct an enormously high motel in any design in the location indicated in those plans accompanying DA 18/90 and 66/92 without any need for a further development consent.

417. In my opinion, for the reasons I have expressed, a development consent (including a plan or other document incorporated therein) contemplated by the statutory covenants in the *Development Act* may be looked at for the purposes of construing those covenants and the development contract, without the development consent having to be registered. It is unnecessary in the present case to consider the wider question whether other documents (including plans), which are unrelated to a development consent, have to be registered in order to form part of a community scheme development contract or management statement.

VARIATION OF THE COMMUNITY SCHEME: IMPRACTICABILITY

418. The plaintiffs claim that continuation and completion of the community scheme have become impracticable and, consequently, that the community scheme should be varied pursuant to s 70 of the *Development Act.* The claim requires close attention to the definition of *"community scheme"* in the *Development Act*, the terms of s 70 of the *Development Act* and the terms of the statutory covenants in Schedule 2 to the *Management Act*. They are set out above at, respectively, [39], [53] and [57]. The claim also requires close attention to the provisions of the community development contract, which are set out at [111]–[112] above.

419. First, the plaintiffs submit that **completion** of the community scheme has become impracticable because:

> (a) fundamental proposals contained within the *"Warning"* cl 4 and cll 1.1, 1.3.2 and 1.3.3 of the community development contract cannot now be delivered by the original proprietors, Mr Watson and Sammy One;
> (b) the original proprietors have breached the developers' statutory covenant by failing to develop the land:
>
> - in accordance with the development contract; and
> - in accordance with development consents 18/90 and 66/92,
>
> to the extent that compliance can no longer practicably be achieved.

420. The plaintiffs submit that as the proposals within the community development contract and the terms of the statutory covenants are elements of the *"community scheme"*, as defined, it has become impracticable for the original proprietors to complete the community scheme, which should therefore be varied.

421. Secondly, the plaintiffs submit that **continuation** of the community scheme has become impracticable for the following reasons:

> (a) Practical physical reasons: The breaches of the original proprietors' obligations pursuant to their statutory covenant contained within cl 1 of Schedule 2 to the Management Act, primarily the failure to develop the land in accordance with development consent 66/92 — especially the failure to subdivide in accordance with the accompanying subdivision plans for Stages 1 and 2 (**annexure B — E** to this judgment) — have manifested in a "manner of subdivision of land by a community plan" that is impracticable for practical physical reasons. As the "manner of subdivision" is also an element of the "community scheme",

the continuation of the community scheme has become impracticable for practical physical reasons and should accordingly be varied.
(b) Continual breach: An effect of the fact that the scheme can no longer be practicably completed is that the original proprietors continue in breach of their obligations, for each day that passes, and then for each time

[140736]

a person purchases a lot within the scheme — whether from the original developer or another transferee.

422. Although it seems to me that matters relevant to the so-called *"completion"* impracticability are also relevant to *"continuation"* impracticability, and vice versa, it is convenient to stay with the plaintiffs' dichotomy.

First limb of completion impracticability

Proposal: clause 1.1 community development contract

423. Clause 1.1 of the community development contract relevantly provides:

1.1. Description of land

…

The land is to be developed for the purposes of a marina (known as the Deep Creek Marina) and associated works as shown in Development Application to the Council of the Shire of Murray dated 23 May 1990.

424. This is a reference to DA 18/90. The developers submit that the relevant part of cl 1.1 is not a proposal but merely part of the description of the land because cl 1.1 is headed *"Description of Land"* and the relevant part was not placed under the heading *"1.3. Further Development"*. I do not accept the submission. Part 3 of the community development contract relevantly provides that *"In this contract unless the contrary intention appears…(g) headings are inserted for convenience and do not affect the interpretation of this Management Statement"*. The reference to *"Management Statement"* is an obvious drafting error. The obvious intention was to refer to *"this"* community development contract. This point of construction should not to be resolved merely by looking at the heading. The first paragraph of cl 1.1 states: *"The land to be developed is Lot 12 in Deposited Plan No. 846348 in the Local Government Area of Murray, Parish of Benarca, County of Cadell and State of New South Wales"*. That is a complete description of the land to be developed. The remainder of cl 1.1, on which the plaintiffs rely, is superfluous if not interpreted as a proposal. Its language is that of a proposal.

425. Clause 1.1 does not expressly refer to any plans. However, DA 18/90 comprised documents including plans and cannot be understood except by a reference to the plans. DA 18/90 included an EIS and SEIS (discussed at [65]–[66] above). The former included a concept drawing. The latter included *"landscape plans"* including Plan 4 (**annexure A** to this judgment) which are different to the concept drawing although, in my view, they are also conceptual. The plans in the SEIS, in my view, superseded the concept drawing in the EIS because the SEIS was later in time. Also, the SEIS stated that the *"Masterplan for the Marina Development"* was shown on Plans 2 and 3 and that:

> Stage One of the marina development is shown on Plan 4. Stage One will be implemented over a 12 month period to be completed by December 1992 and can be divided into 4 phases. The first phase will commence in September and will include excavation of the creek entrance, construction of 30 moorings and associated earthworks, establishing gravel entrance roads and sewage system, power and water supply, fencing, stormwater retention wetland and site planting.
>
> During Phase 2, all the buildings associated with Stage One, a further 30 moorings and houseboat hardstand area will be constructed and the fuel supply installed.
>
> During Phase 3, the winter months, there will be no construction. In the final phase of Stage One, the remaining 40 moorings will be constructed, all roads will be surfaced and further site planting will occur.

Proposal: clauses 1.3.2 and 1.3.3 community development contract

426. Clause 1.3 of the community development contract is entitled *"Further Development"*. Clauses 1.3.2 and 1.3.3 concern subdivision and are in the following terms:

> 1.3.2 Community Development Lots 2, 3 and 4 are to be further subdivided into neighbourhood lots for the purpose of houseboat berths.
>
> 1.3.3 Community Development Lot 5 is to be developed in a further subdivision to provide facilities incorporated in the Development Consent in accordance with plans approved by the Council of the Shire
>
> [140737]
>
> of Murray. (Refer Development Consent No 18/90 dated 12th September 1991).

427. The community plan registered with the community development contract subdivided the land into five lots. Lot 1 was community property. Lots 2 to 5 were development lots. Lot 5 was the Lot 12 earlier referred to in Mr Mitsch's letter of 7 October 1992 (the renumbering occurred because the number of mooring neighbourhood lots became reduced to three — Lots 2, 3 and 4).

428. In my opinion, cll 1.3.2 and 1.3.3 contained proposals for subdivision and for provision of facilities. Therefore the proposals were part of the *"community scheme"* as defined in the legislation.

429. Under cl 1.3.2 the developers proposed to create three houseboat mooring neighbourhoods on Lots 2, 3 and 4.

430. Under cl 1.3.3 the developers proposed that the residual Lot 5 would be developed in a *"further"* subdivision to provide the facilities incorporated in development consent 18/90 in accordance with plans approved by the council. Clause 1.3.3 was concerned not with the present subdivision affected by the registered community plan but with a *"further"* subdivision. Such a *"further"* subdivision had been approved in development consent 66/92 and was shown in the subdivision plans accompanying that development application. The Stage 2 subdivision plan accompanying that development application had shown the same facilities as appear on Plan 4 in DA 18/90. As for the *"facilities incorporated in the Development Consent"* to be provided by the *"further subdivision"*, cl 1.3.3 refers to development consent 18/90 and plans approved by the council. Such facilities are shown on Plan 4 accompanying DA 18/90. Clause 1.3.3 as I construe it, treats Plan 4 as having been approved by the council in development consent 18/90. That accords with my earlier finding that it was.

431. The developers submit that the statement in cl 1.3.3 *"Refer Development Consent No 18/90"* merely means *"Refer to the conditions in Development Consent 18/90 for a description of the sewerage facilities which are to be provided in a further subdivision of Lot 5"*. They submit that the facilities referred to in the statement *"Lot 5 is to be developed in a further subdivision to provide facilities"* means *"the sewerage facilities referred to in conditions 2 and 19 of Development Consent 18/90".* Conditions 2 and 19 respectively provide that the *"sewerage system shall be installed to the requirements of the State Pollution Control Commission"* and *"Access to the sewage treatment works shall be from within the property and a separate entrance to this facility shall not be permitted from the main road'".* The developers submit that the sewage facilities were indicated to be on the community property on the Moama — Barham Road (i.e. Perricoota Road) shown in the first of Mr Mitsch's subdivision plans in DA 66/92 (**annexure B** to this judgment) and shown as part of Lot 5 in the registered community plan (**annexure F** to this judgment). The submission overlooks that, prior to registration of the community plan in January 1995, that area had been excluded from the community scheme and from Lot 5. In any case, I can see no reason for reading down cl 1.3.3 in the way submitted by the developers.

Proposal: preliminary clause 4 community development contract

432. Preliminary cl 4 (under *"Warning"*) of the community development contract provides:

> 4. The terms of this contract are binding on the original proprietor and any purchaser, lessee or occupier of a lot in the scheme. In addition, the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the

land subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

433. In my opinion, this is a proposal to develop the land in accordance with the development consent. Therefore, the proposal is an element of the community scheme. The plaintiff submits that the *"development consent"* here means both 18/90 and 66/92. That is not the way the contract appears to be drafted because preliminary cl 3 refers only to development consent 18/90. It is to that consent which cl 4 appears to refer. However, I do not think that this is of consequence because (as

[140738]

discussed at [414] above) a statutory covenant in cl 1 of Schedule 2 Part 1 to the *Management Act* provided for the land to be developed in accordance with (at least) development consent 66/92. Indeed, I am inclined to think that the regulations under the *Development Act* required preliminary cl 4 to have referred to development consent 66/92: see [50] above.

Second limb of completion impracticability: scheme not developed in accordance with what had been proposed

434. The plaintiffs submit that completion has become impracticable because the scheme has not been developed in accordance with what had been proposed.

435. I accept the submission. The community plan that was registered represented a major departure from what was approved by the council in development consent 66/92. The facilities that have been developed on the land depart significantly from that which was the subject of development consents 18/90 and 66/92. Development consent for the Honeyman Lot and the carrying out of development thereon precludes the provision of facilities the subject of development consents 18/90 and 66/92 in that location. A plan in evidence (Exhibit N) illustrates that to develop the land in accordance with the facilities shown on Plan 4 and the Stage 2 subdivision plan (**annexures A** and **E** to this judgment) is now impossible without demolishing development that has since occurred on the Honeyman Lot and Lots 14, 15 and 16. The Honeyman Lot, where a significant number of the facilities are shown on those plans, has been developed in the form of luxury holiday cabins, a swimming pool, a lake and tennis court. A hotel/restaurant and supermarket have been built on what are now Lots 14 and 15 in the areas marked for other uses on those plans.

Continuation impracticability

436. In this component of the claim for variation of the community scheme, the plaintiffs submit that continuation of the scheme has become impracticable for two reasons. First, continuation has become impracticable because of physical access difficulties on the site arising from *"the manner of subdivision of land by the community plan"*. This is an element of the statutory definition of *"community scheme"*, set out at [39] above. Secondly, construing the proposals in the development contract in the way that I have earlier accepted, then the original developers are and, will nearly always be in the future, in breach of their obligations in the development contract to deliver the scheme in accordance with those proposals.

437. I think that the second reason (breach) is correct. The original developers covenanted under the statutory covenants in the *Management Act* that the land will be developed in accordance with the development consent. That at least included development consent 66/92. Many of the facilities shown on the Stage 2 subdivision plan, which I have held was incorporated in development consent 66/92, cannot be developed as shown on that plan because of other superseding development.

438. I turn to consider the first reason advanced by the plaintiffs, physical impracticability. The plaintiffs submit, and I accept, that a major consequence of denying the plaintiffs the benefit of the community property, originally proposed in DA 66/92, is that the access to most of the private lots within the scheme is dysfunctional. This did not necessarily manifest until about 2005 as, until then, the developers allowed access across their land.

439. In my opinion, physical impracticability arises largely, albeit not entirely, because of three access problems:

(a) there is no registered vehicular access road to the moorings and the developers have denied vehicular access to the moorings;
(b) the developers have closed the public wharf since 2006 (and removed the ski boat parking facility), there is no access to and across the public wharf;
(c) for a time in 2005 the developers denied access to the public boat ramp. The threat is still there because the boom gate remains in place, although open.

440. The evidence suggests that the marina ran reasonably smoothly until these three access problems manifested in 2005 and 2006.

441. The parties' competing submissions as to physical impracticability are set out below.

442.

[140739]

The plaintiffs submit that there is inadequate legal and physical access to private lots for members, guests and emergency services via common property to and from the houseboat moorings for the reasons set out below. These reasons are generally supported by evidence that I have earlier reviewed and accepted; by the evidence as to impracticability (which I generally accept) of Mr Peter O'Dwyer, a planning consultant; and by my own observations on my site inspection with the parties. The reasons, the developers' submissions, and my conclusions are as follows:

(a) there is no vehicular access to any houseboat berths within the scheme, which prevents the loading and unloading of luggage, food provisions, fuel, houseboat furniture and other required equipment for the ordinary use and enjoyment of houseboats.

The developers submit that no vehicular access is required to the houseboat berths. The public wharf, which Mr Bares says has been temporarily closed as a result of required maintenance, is available for loading and unloading, as is the boat ramp and the strip of land in front of the supermarket. There is no evidence that the developers have denied access to this strip of land, and the owner of the supermarket has expressed a desire to make it available to the community association. In addition there is 11.035 metres of community property which adjoins Deep Creek to the west of the public wharf which can be utilised for the purpose of loading and unloading of houseboats.

I accept the plaintiffs' submissions. They are amply supported by the access evidence set out at length above. It would be impractical and, at peak times, chaotic for houseboats to attempt to load and unload at the public wharf (assuming it were open), the boat ramp (assuming the boom gate remains open), or the strip of land in front of the supermarket (assuming the houseboats could dock there at all, which they cannot). They would be competing not only with each other but with the public for the use of those facilities. Houseboats, as such, cannot practicably access the boat ramp. If a houseboat happened to have a ski boat it could access the ramp but it would be highly inconvenient to have to do so for the purpose of substantial loading and unloading people and things. Moreover, as things stand at the moment, there can be little confidence in the availability of the wharf because the developers have closed it for years. As to the 11.035 metres of community property to the west of the wharf, houseboats could not dock square to it because they would be impeded by the first mooring berth next to that location.
(b) there is no emergency service vehicle access directly to the houseboat berths for the evacuation of persons in need and no emergency vehicle access is available to the neighbouring Lot 16 land, it having being sealed off by concrete barriers on or about 22 December 2006.

The developers refer to two notices of intention to issue an order issued by Murray Shire Council. One of these notices indicated that the council intended to serve an order upon the developers requiring them to remove the concrete barriers to enable access to emergency vehicles. The developers submit that these notices address the issue of emergency access, and that there is no

evidence that the council has proceeded with these orders, nor that the emergency services are concerned regarding the access to the community parcel.

I accept the plaintiffs' submissions, which are supported by the evidence concerning emergency vehicle access set out earlier, including the evidence of Mr Williams. The developers have not responded to the council notices by removing the barriers. In any case, the matter should be resolved in these proceedings rather than leaving it to the possibility of resolution by the exercise of a council process.
(c) there is no access, or limited foot access only, to each of the houseboat berths.

The developers submit that the registered community plan delineates the land available to the houseboat owners to access their houseboat berths.

[140740]

Both submissions are correct. However the plaintiffs' submission identifies the physical access difficulty while the developers' submission does not meet that point.
(d) foot access for the eastern marina berths is restricted by uneven sloping land with poor drainage and obstructed by large red gumtrees.

The developers submit that the land to the east of the supermarket did not present on the site inspection as unduly uneven or sloping. This Neighbourhood has undertaken landscaping works. If the Neighbourhood is concerned regarding trees on neighbourhood property, it is within the capacity of the neighbourhood association to make any necessary application to the council regarding the removal or trimming of these trees.

The plaintiffs reply that by-law 4.9.1 in the community management statement prohibits cutting down or lopping of trees except where necessary to erect a residence or for the safety of residents.

I agree that the relevant land is not *"unduly"* sloping; otherwise I accept the plaintiffs' submissions. Subject to somehow overcoming the by-law, no doubt an application could be made to council as suggested by the developers. However, the removal or lopping of trees is unlikely to be possible without trespassing on Lot 16.
(e) in the Central Neighbourhood, foot access is restricted in that it is obstructed and/or interrupted between the east and the west by Lot 15 and part of Lot 16, which has been fenced off by the developers.

The developers submit that at no time has there been unfettered access between the eastern and western sections of the Central Neighbourhood. At registration of the community plan, the Central Neighbourhood was separated with no connection and no direct line of access between the two sections. Further, Mr Bares indicated that the public wharf area has been fenced off for maintenance.

Both parties' submissions are correct. However the developers' submission does not meet the access difficulty problem except by suggesting that the public wharf will at some undefined time be reopened by the developers.
(f) in the Central Neighbourhood, foot access to its eastern side is restricted by uneven sloping land with poor drainage.

The developers submit that the landscaping works undertaken by the neighbourhood associations may have impacted on the drainage and sloping land. Also, the neighbourhoods have the ability to manage and maintain their own property. If the neighbourhood is of the opinion that works should

be undertaken to repair, this may be done. The types of works the neighbourhood associations may undertake include removal of fences, barricades and excavation works.

The plaintiffs' submission is correct. Substantial work on neighbourhood property is likely to be impractical without trespassing on Lot 16. I do not think that the evidence establishes the first sentence of the developers' submission.
(g) foot access to the western side of the Central Neighbourhood is obstructed by large red gums and a timber retaining wall with no steps to abutting community property to the east.

The developers submit that no retaining wall as described was put in place by the developers prior to handover. The neighbourhoods have the ability to manage and maintain the neighbourhood property.

The plaintiffs' submission is correct. However, the plaintiffs' identification of the access difficulty is not met by the developers' submission. It is likely to be impracticable to carry out substantial work on neighbourhood property without trespassing on Lot 16.
(h) the Western Neighbourhood is not physically accessible in that there is no pathway of any type on the community property linking the central part of the marina to it.

The developers submit that the access ways to the neighbourhood associations are defined in the registered community plan and in registered plan for the Western Neighbourhood. The developers submit that

[140741]

the neighbourhood associations have the ability to maintain and repair their neighbourhood property.

Both parties' submissions are correct. However, the developers' submission does not meet the access difficulty. Maintenance and repair are likely to be impracticable without trespassing on Lot 16.
(i) the Western Neighbourhood is not physically accessible without trespass onto the Central Neighbourhood or Lot 16.

The developers submit that this alleged physical inaccessibility is as a result of the physical features on the subject land, such as trees and landscaping. The neighbourhood associations have the ability to take steps to remove or alter these physical features and to maintain and repair their neighbourhood property.

I accept the plaintiffs' submission; I have commented earlier on a similar submission by the developers.
(j) the restricted foot access to the houseboat moorings in the scheme is not suitable for persons with mobility disabilities, particularly having regard to the facts and matters described above.

The developers submit that there is no evidence that a claim has been made against the developers or any other party under the *Disability Discrimination Act 1992* (Cth). Houseboat owners may make use of the public wharf area, and the area directly to the west of the public wharf. The evidence of Mr Martin, an architect specialising in disability access, demonstrates that the plaintiffs' land, and the land of the community association, is sufficient to enable them to develop it so as to provide disabled access if they chose.

I accept the plaintiffs' submission, which is supported by the evidence set out earlier, including that of Mr Martin, and which corresponds with my own observations on the site inspection. It would be highly inconvenient and impractical for houseboats to have to use the public wharf to pick up and put down people with mobility disabilities (assuming it is opened). The community association area just to the west of the wharf cannot be used by houseboats for reasons which I have explained.
(k) development consent 18/90 requires the sealing of internal roads and car parking areas, which is impracticable while the neighbourhood associations do not have access across the informal gravel roads formerly providing access to the houseboat moorings.

The developers note that condition 13 of DA 18/90 requires that *"Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed*." The developers submit that this *"trigger"* has not occurred and therefore there is no requirement to complete this work at this time. The developers also submit that this does not in itself make the scheme impracticable as claimed; and that no evidence has been provided that the unsealed internal roads and car parking areas are impracticable while the neighbourhood associations do not have access across the informal gravel roads formerly providing access to the houseboat moorings.

I deal with this sealing issue below at [487]–[490] below.

443. The plaintiffs submit that there is inadequate access to common property to service the houseboat moorings for repairs and maintenance, and that there is no room for plant and equipment to access neighbourhood and community property improvements for essential maintenance and repair, for the following reasons:

(a) there is no vehicle access for service trades for the conducting of repairs and maintenance to houseboats, houseboat berths, neighbourhood property or community property abutting the houseboat moorings, which require the movement of heavy tools, plant, equipment and materials to and from the relevant repair or maintenance site.

The developers submit that the neighbourhoods and community associations may, if considered necessary, make use of s 7 of the *Access to Neighbouring Land Act 2000* (NSW). There is no evidence before the Court that this

[140742]

avenue has been attempted. There is evidence from Mr Giffin that he did not approach the developers for their consent to use Lot 16 for the purpose of access for works, and that specific work to which he referred may be undertaken without the need to access the land of Lot 16. Also, there is no evidence from tradespeople as to the alleged impracticability of access.

I accept the plaintiffs' submission. The proposition that mooring owners should apply to a court for access for such purposes under the *Access to Neighbouring Land Act 2000* is unreasonable. It is not apparent why they should do so if a remedy lies in these proceedings. Although there was no evidence from tradespeople about impracticability there was evidence from Mr Leorke directly on the point, which I accept. In any case, the impracticability was apparent from the site inspection. The developers closed the access roads and have not agreed to access for repairs and maintenance.
(b) Certain repair works, the subject of the CTTT proceedings, to the timber decking in property of the Central Neighbourhood have been prevented by the inability for plant and equipment to be allowed to be situated on the access roads, which the developers have closed.

The developers submit that in cross-examination Mr Giffin admitted to not seeking the consent of the developers to access Lot 16 for the purpose of undertaking these repairs; and accepted the reasonableness of Mr Jarman's actions in preventing the unlawful work. Further, the developers submit there was no evidence from Mr Giffin that an application under s 7 of the *Access to*

Neighbouring Land Act 2000 was made seeking the required access; and there is no evidence from the tradespeople as to the alleged impracticability of access.

I accept the plaintiffs' submission, which is supported by Mr Giffins' evidence to which I have earlier referred.

(c) the metal staircases that provide foot access from the informal gravel roads formerly providing access to the houseboat moorings cannot be repaired and maintained for the benefit of the houseboat owners in the neighbourhood schemes.

The developers submit that the metal staircases are on Lot 16; there is no evidence to suggest that the neighbourhoods or the community association placed the staircases in their current location; therefore their claim for repair and maintenance needs to be questioned, especially when the foot access is defined by the registered community plan and does not include the area where the staircases are located.

The plaintiffs' submission is correct. It is true that the metal staircases are on Lot 16 and they were placed there apparently by the developers, but they were used by mooring owners for years to access their moorings.

(d) the timber walls constituting the entrance of the marina are wholly within Lot 16 land on both the north and south and cannot be repaired for the benefit of the houseboat owners in the neighbourhood schemes. These are the subject of the CTTT proceedings referred to in [333] above.

The developers submit that Lot 16 has an obligation to repair the walls at its own cost under cll 1.2.2 and/or 1.4.1 and 4.12.1 of the community management statement. If it has not done the repairs, the community association can compel compliance (see s 60(1)(b) of the *Management Act*). No evidence was led regarding the attempts or otherwise of the neighbourhoods or community association to repair the entrance walls, nor any request for access to Lot 16 to undertake this work. Again, if required, the neighbourhoods or community association may make an application under s 7 of the *Access to Neighbouring Land Act 2000*.

I accept the developers' submission.

444. The plaintiffs submit that there is inadequate access between the community and neighbourhood property, the boat ramp and the waterway in Deep Creek. In particular there is inadequate and interrupted access between community and neighbourhood property and the boat ramp.

The developers submit that the boat ramp is located partly on community property and

[140743]

partly on Lot 16. There is thus adequate and uninterrupted access between the community property and the boat ramp. No neighbourhood property is contiguous with the boat ramp. If it is suggested that this inadequacy is as a result of the closure of the public wharf, this has been closed for maintenance and repair and will be reopened when the maintenance and repair is complete.

As I understand it, the plaintiffs' submission is directed to inadequacy arising from closure of the public wharf. I do not accept that the developers' closure of the public wharf for years has genuinely been in order for maintenance and repairs. The conduct of the developers in this respect does not engender confidence that they will promptly repair and maintain it now or in the future.

445. The plaintiffs submit that there is inadequate and interrupted access between the eastern and western side of the marina.

The developers submit that from the registration of the community plan there was a part of what is now Lot 16 between the western and eastern limbs of the marina. At no time has there been uninterrupted access between the western and eastern limbs. In any event, access is available via community

property behind the restaurant. To the extent the issue is about the closure of the public wharf, this is to be reopened after the repairs are completed.

I understand that the issue is about closure of the public wharf. In that context, the plaintiffs' submission is correct.

446. The plaintiffs submit that there is inadequate or no community speed boat parking for hotel and supermarket patrons or member visitors as there is no public wharf or no wharf accessible to the public. In particular:

(a) there is inadequate or no community speed boat parking for hotel and supermarket patrons or member visitors.

The developers submit that the hotel and supermarket should be responsible for speed boat parking if this is desired. Speed boats of member visitors may make use of the public wharf and the community property to the immediate west of the public wharf. Visitors and invited guests to the supermarket, which is located on Lot 15, may use the wharf area directly connected to Lot 15. The developers note that Mr O'Brien gave evidence that the council requested him to remove his ski park as it did not have development consent. He made a development application, but there is no evidence whether development consent has been granted.

I accept the plaintiffs' submission. Adequate speed boat parking depends on the availability of a ski park. The ski park which used to service the hotel and supermarket was removed by the developers. The ski park now servicing the hotel and supermarket has had to be relocated to private moorings, an unsatisfactory situation (see the evidence of Mr O'Brien set out earlier). Assuming the public wharf were to be opened, it is impracticable for speed boats to use the public wharf, particularly in numbers.

(b) there is no public wharf, in that it has been retained wholly by the developer (rather than partially as part of the hotel lot as per 66/92), has been fenced off and access is completely denied to scheme members and members of the public.

The developers submit that the area noted as the public wharf remains part of Lot 16, in accordance with the registered community plan. Mr Bares said that the public wharf was fenced off as a result of concerns about maintenance. Mr Jarman in cross-examination referred to holes in the public wharf.

I accept the plaintiffs' submission. As stated earlier, the developers could and should have repaired and reopened the public wharf years ago.

447. The plaintiffs submit that there is inadequate access for houseboat refuelling facilities.

The developers submit that houseboats can refuel directly from Lot 15 by tying up on the wharf section of Lot 15 adjacent to the fuel facilities.

I accept the developers' submission.

448.

[140744]

The plaintiffs submit that electrical installations for the neighbourhoods and for community property are constructed on private lots. In particular:

(a) there is no or limited access for the repair and maintenance of the electrical meter boxes servicing the neighbourhood associations.

The developers submit that the registered community management statement contains a diagram at sheet 28A of 29 of the statutory easements in relation to power and telephone services. *"Statutory easement"* is defined in s 36 of the *Development Act*:

statutory easement means an easement conferring rights:

> (a) to provide a service line within a scheme and a service by means of the service line, and
> (b) to maintain and repair the service line, and
> (c) to enter:
>
> > (i) land within the scheme that would include, or includes, the service line, or
> > (ii) land within the scheme that is contiguous to the land referred to in subparagraph (i),
> >
> > and do all such things as may be reasonably necessary to exercise the rights referred to in paragraphs (a) and (b).

The developers also submit that the neighbourhoods and community association, as a consequence of the statutory easement, have the right to access Lot 16 for the purpose of repair and maintenance of the electrical service line. This includes access to Lot 16 for the purpose of repair and maintenance of the meter boxes because the neighbourhoods and community association have rights to *"do all such things as may be reasonably necessary to exercise the rights referred to in [the easement]"*as explained above. To the extent the Court finds that the easement does not provide those rights in relation to the meter boxes, the developers undertake to the Court to cause an easement to provide those rights to mirror the terms of the statutory easement.

The developers note that the diagram at sheet 28A of 29 of the community management statement does not include the electrical meter box at the eastern end of the marina. They submit that the obligation is on the community association to submit a diagram showing this meter box to be registered, according to clauses 3.5.5 and 3.5.6 of the community management statement. To the extent the owners of Lot 16 are required to cooperate with the community association in this regard, the owners of Lot 16 hereby undertake to the Court to do so.

I note the developers' undertakings and accept their submissions.
(b) the proprietors of Lot 16 have taken steps or caused steps to be taken for the removal of the electrical meter boxes.

The developers submit that there is no evidence to support this allegation. The proposition that Mr Bares was seeking to have steps taken by others was put squarely to Mr Bares in cross examination, and was denied by him. Mr Jarman denied in cross-examination that it was he who suggested to the CTTT in 2005 that Mr Brockwell be the electrical engineer. A series of questions were put to Mr Jarman regarding the work of Brolec. In cross-examination, a direct proposition was put to Mr Jarman that it was his clients' intention to have the work he commissioned in 2005 done through the appointment of the compulsory manager in 2006. This was denied.

I accept the developers' submission.

449. The plaintiffs submit that dead man anchors to anchor sea walls for the marina are situated in Lot 16 with no concomitant legal right.

The developers submit that there is no evidence that the dead man anchors are located in or partly in Lot 16. Peter O'Dwyer in cross-examination was unsure of their location. In any event, there is no evidence to suggest there is any impediment to the dead man anchors being constructed on neighbourhood land.

I accept the developers' submission.

450.

[140745]

The plaintiffs submit that the design of the neighbouring marina to the east, also controlled by the developers, has a significantly different layout that avoids many of the problems of impracticable design referred to in the preceding paragraphs.

The developers submit that this says nothing as to the alleged physical impracticability of the registered community plan.

I accept the developers' submission.

451. The plaintiffs submit that pursuant to the management statement, the community association has responsibility for maintaining control of the water. It is clear that this is not the case, having regard to the granting by Lot 16 of easements over it, and the restriction of access to it, via the boat ramp, and the enforcement of strict rights in relation to oversized houseboats. As a practical measure, by-law 4.21 of the management statement has become meaningless as the water is not community property.

The developers submit that by-law 4.21 of the community management statement has not become meaningless. There is nothing contradictory in the title of the water being held by the developers and the community association having the control of all aspects of boat traffic and boat usage. The developers say that the by-laws by their very nature control what actions may be taken on both community property and individual lots. For example, by-law 4.7.1 purports to control all aspects of pedestrian and vehicular traffic within the community parcel. "Community parcel" is defined in the s 3 of the Management Act as "land the subject of a community scheme". The developers submit that all land within the registered community plan is subject to the community scheme. The contents of the community management statement are regulated by Schedule 3 to the Development Act. Clause 2 states what matters must be included in the statement. Clause 3 refers to optional matters which may be included in the community management statement, and states at (2): "This clause does not limit the matters that may be included in a management statement". The developers say this supports their position that there is authority for making the by-law and that the by-law is not meaningless.

I considered this issue at [118] above. The position seems to me to be paradoxical. The provision of the management statement naturally belongs with ownership of the waters by the community association, as indeed was contemplated by DA 66/92.

452. The plaintiffs submit, and I accept, that these practical physical difficulties are manifest from two sources:

> (a) directly as a consequence of the manner of subdivision of land by the community plan, that is, by what has been registered; and
> (b) as a consequence of the failure to register plans in accordance with what was approved in DA 66/92 (that is, either at the time of the first registrations on 17 January 1995, or by further subdivision as promised in cl 1.3 of the community development contract), the common property in the scheme is insufficient to service the proper function of the development. Further, the failure by Mr Watson (and subsequent owners of Lot 16) to comply with development consents 18/90 and 66/92, to comply with the development contracts, and to amend the scheme to provide further community property (which was the subject of long negotiation from 2001 to 2005) has caused the continuation of the scheme to become impracticable.

453. The developers submit that the suggested physical impracticability is not something that has become impracticable within the meaning of s 70 of the

Development Act but, rather, something that was always a characteristic of the registered scheme. The developers submit that the words in s 70 *"has become impracticable"* demonstrate the purpose of the section is to provide a power to vary or terminate a scheme where something has changed since the scheme was registered.

454. The developers' submissions refer to a *"registered"* scheme. A community scheme, as defined, is not registered. Rather, it is defined to comprise a number of elements. The elements include the manner of subdivision of land by a (registered) community plan, the proposals in any related (registered) development contract, and the rights conferred, and obligations

[140746]

imposed, by or under the *Development Act* and the *Management Act*. Those obligations include the statutory covenants in Schedule 2 to the *Management Act* whereby the original proprietors covenant that the land will be developed in accordance with the development consent and the development contract and subsequent proprietors covenant that they will permit the original proprietors to develop the land in that way.

455. *"Impracticable"* in the context of s 70 means that in the particular circumstances of the case the scheme cannot continue as a matter of practicality. This may be because a problem, inherent in the terms of the scheme itself and previously unrecognised, comes to be seen as inevitably producing impracticability even at some time in the future during the life of the scheme: *Community Association DP 270212* v *Registrar General for the State of New South Wales* (2004) 62 NSWLR 25 at [19]–[22], [28] (quoted at [54] above).

456. The *"development consent"* referred to in the statutory covenants included 66/92 which required subdivision in accordance with the plans accompanying that development application. The subsequently registered community plan did not reflect that development consent. The disparity between the registered community plan and this *"obligation"* element of the community scheme gave rise to the physical impracticability which appeared in 2005 and 2006 when the developers denied access to the access tracks, public wharf and, for a time, the boat ramp. From that time at least, it can be said, in the words of s 70, that construction or completion of the community scheme *"has become impracticable"*.

457. The developers submit that the alleged physical impracticability is not impracticability but inconvenience. They say that no vehicular access is *"required"* to the houseboat berths because the public wharf has been only temporarily closed for repairs and is available for loading and unloading — as is the boat ramp, the strip of land in front of the supermarket, and the 11.035 metres of community property which adjoins Deep Creek to the west of the public wharf.

458. I reject the developers' submission. I do not accept that the public wharf has been temporarily closed for repairs. Mr O'Brien's evidence, which I have accepted, is that the wharf was not in an unsafe condition until the developers fenced it off: see [327] above. In any event, the repairs could have been done in short order years ago. I have the impression that the public wharf has not been repaired in order to put pressure on the plaintiffs. Be that as it may, I can see no reasonable excuse for closing the public wharf for so long. Assuming that the public wharf were repaired and reopened, I do not accept that it provides a reasonably practicable alternative to vehicular access. Persons would have to walk to their houseboat, then drive their houseboat to the public wharf to load and unload persons and things. This would not merely be an inconvenience, but would create chaos if numerous houseboat owners wished to carry out this manoeuvre at a similar time — as they would at the beginning and end of weekends. The alternative, perhaps, under the developers' proposal would be for a houseboat owner to use a ski boat — if a houseboat owner owned one — to come to the wharf for loading and unloading. It is also impracticable for ski boats to use the wharf, especially in numbers, unless there is a ski boat park tied to the wharf — which the developers have removed. Further, it is impracticable for the infirm, the unwell and the disabled to have to manoeuvre in and out of small boats.

459. Houseboats cannot dock at the 11.035 metre strip of community property to the west of the public wharf because of its oblique angle adjacent to the mooring berth. Even if they could, it would be impracticable to do so for the same reasons as the public wharf.

460. There is a great body of evidence, which I have accepted and set out earlier, concerning the very serious access problems caused by the closure of the access roads, public wharf and (for a time) the boat

ramp. In my opinion, continuation of the community scheme has become impracticable because of the physical access problems.

RELIEF UNDER S 70 DEVELOPMENT ACT

461. In all the circumstances of the case, it is appropriate in my opinion to grant relief

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pursuant to s 70 of the *Development Act*. The plaintiffs propose orders to the following effect pursuant to s 70.

462. First, an order that the community scheme be varied by amending the community development contract, community management statement and the neighbourhood development contracts in accordance with appendices 1 and 2 to the Second Further Amended Statement of Claim. Appendix 2 is a plan and was substituted at trial (a copy is **annexure J** to this judgment). It is a modified version of Plan 4 in DA 18/90 and the Stage 2 plan in DA 66/92, both of which show the proposed facilities. This modified plan deletes the facilities shown on those DA plans that can no longer be constructed due to the supervening facilities (the Honeyman Lot development and the other buildings on what are now Lots 14, 15 and 16), which are all shown. I agree in principle with that deletion. Appendix 2 shows the existing access tracks (possibly extended) in lieu of the access track shown on those DA plans.

463. In my opinion, this modified plan should be modified further as follows:

> (a) the facilities that were not shown on Plan 4 in DA 18/90 and the Stage 2 plan in DA 66/92 should be deleted. They are the Honeyman development, the restaurant/hotel, the supermarket and the existing access tracks. To include those facilities would be to subject them to the statutory regime, with potentially harsh results. For example, under the statutory covenants in the *Development Act* the original developers would thereby become subject (it would seem) to an obligation to develop the Honeyman Lot as shown on the proposed plan. That development is at the moment only partly complete.
> (b) the access tracks should not be shown. The first reason is that, as discussed below, I have decided that the land where those tracks appear should be converted to community property in accordance with the subdivision plans accompanying DA 66/92. Secondly, these access tracks did not appear on the relevant plans accompanying DA 18/90 or DA 66/92. The single access tracks shown on the development application plans appears to have been in a slightly higher location than the existing upper eastern access track.
> (c) the proposed road shown to the south of Lot 14 and bisecting Lots 14 and 15 (with a battleaxe next to the supermarket and adjoining paths) should be deleted. I consider that it has been superseded by the creation and development of Lots 14 and 15 in a way which is both substantially different to that shown in the DA plans and inconsistent with the existence of that road. The construction of a restaurant/hotel and supermarket on Lots 14 and 15 seem more beneficial to the community association and lot owners than the general store and storage shed that were originally proposed. In the circumstances, I do not think it appropriate to exercise my discretion to include the beneficial changes that have occurred in these locations in the community scheme while at the same time providing for this road.
> (d) the facilities shown on Lot 14 — public toilets, underground fuel tanks and sewer pump — should be deleted. Again, I consider that they have been superseded by the restaurant/hotel on Lot 14.
> (e) the green, tree fringed rectangular area immediately north of the carpark should be deleted and shown as part of the carpark. That is because it became part of the carpark in 2006 and, as discussed below, I propose to require the extended carpark to be sealed.

464. There should be related amendments to the text of the development contracts and the community management statement to reflect my decision.

465. Secondly, the plaintiffs propose orders that the community scheme be varied by converting into community property:

(a) that part of Lot 16 described as community property in sheets 1, 2 and 3 of the Stage 1 subdivision plans accompanying DA 66/92 (**annexures B — D** to this judgment); and
(b) the public wharf shown in those plans (shown in **annexure J** to this judgment);
(c) extinguishment of easements for access in favour of Lot 23 over the lagoon and a

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right of way over Lot 16 land above the eastern moorings.

466. In my opinion, it is appropriate to grant relief to the effect of the proposed order (a) to the extent shown in the plan which is **annexure H** to this judgment. The DA 66/92 plans (**annexures B** to **E** to this judgment) were part of development consent 66/92. The statutory covenants in cl 1 of Schedule 2 Part 1 to the *Development Act* bound the original developers to develop the land in accordance with the development consent. To order the conversion of land and waters shown as community property on those plans into community property, to the extent I have indicated, is to give effect to the statutory covenant. The relief could take the form of an order that that land be vested in the community association and an order for registration of a new community plan to reflect the vesting. The Court is empowered to make such orders under s 70(3) (c), (f) and (g) of the *Development Act*.

467. Unless the developers consent or do not object, I am not minded to make proposed order (b) — conversion of the public wharf into community property — if there is another reasonable means of ensuring that it will be promptly and properly repaired and thereafter kept in good repair and open to the public. My reluctance is because the public wharf was never shown as community property in any development application plan. Although it might reasonably have been anticipated that title to the public wharf would run with the title to Lot 14, that did not happen. On the other hand, it is implicit in the concept of a public wharf in this context that the owner would take all reasonable steps to keep it in good repair and open to the public.

468. If the public wharf were to be converted to community property the developers would be relieved of any further obligation to repair or maintain it. Presumably, this would also alleviate their insurance burden. Having regard to those considerations and in the context of the overall relief that I propose to grant in this case, the developers may prefer to consent or not object to an order converting it to community property. The alternative is to order them to repair and open it to the public within, say, 60 days and thereafter to take all reasonable steps to keep it in good repair and open to the public. It may be appropriate for the community development contract or the community management statements, or both, to be amended to impose an obligation on the public wharf owners to take all reasonable steps to keep it in good repair and open to the public.

469. I am not inclined to make proposed order (c) extinguishing the easements for access and right-of-way in favour of Lot 23. I consider that would be disproportionate, harsh and detrimental to third parties such as mooring berth owners on Lot 23.

470. Without descending into detail, I note that two of the three easements specifically identified in the plaintiffs' submissions as the subject of the proposed extinguishment order appear to have been erroneously identified because they were extinguished and replaced by other easements in favour of Lot 23 by an instrument registered in April 2008 (Exhibit 7). In particular, the easement for access (and other purposes) over Lot 16 is now somewhat further away from the Deep Creek lagoon than before. Formerly, that easement appeared to be over the upper eastern access track. I am unsure whether that easement is now wholly or partly within the land which is to be converted into community property. If it is, I am minded to modify the conversion order to the intent that the northern boundary of the land to be vested would be to the south of that easement.

471. I will hear the parties as to the final form of relief under s 70. I note that the owner of Lot 15 has submitted to an order that his waterfront strip be converted to community property. A consent order to that effect may be made.

472. In expressing these views I have taken into account the undertaking to the Court given by the developers at the end of the trial which they submit is relevant to discretionary relief. The developers submit that under this undertaking the plaintiffs would eventually have much of the access relief they seek. The developers say that they intend to give berth owners improved rights of access to their mooring berths

pursuant to a new local environmental plan which they have proposed to the council to permit proposed development

[140749]

on Lot 16. In that context they have given the following undertaking to the Court:

> The owners of Lot 16 undertake to the Court to amend their plans for the development of Lot 16 so as:
>
> > i. To give effect to the intention stated in the last sentence of the defendants' submission in paragraph 129 r and Ex 6(9) LES 7 drawing but in respect of access below the upper access road limited to use by pedestrians, bicycles, electric golf carts, wheel chairs and emergency vehicles, and
> > ii. To create access for the berths to the west of the public wharf in a manner generally consistent with that shown in the plans behind Tab 5 to Mr Jarman's affidavit sworn 13 March 2008, but limited to use by pedestrians, bicycles, golf carts, wheel chairs and emergency vehicles.
>
> And to create easements for such use.

473. In order to glean some understanding of this undertaking it is necessary to look at the documents incorporated by reference therein:

(a) paragraph 129r of the defendants' submissions stated:

> 129. The Applicants' submission that the Defendants should be required, in effect, to specifically perform Plan 4 (B409) can also be met by the answer that the features in Plan 4 have been provided or are in the process of being provided. This is established by an analysis of the matters that have been alleged, in the Second Further Amended Statement of Claim paragraph 89A(iv), not to have been provided. This analysis is set out below.
>
> …
>
> r. Access tracks
>
> *"Access tracks"* are not currently available beyond the roads to the car park and boat ramp. The *"access tracks"* currently on site were used as construction tracks during the construction of the marina. These tracks do not have council approval and are not designated as roads. There was no requirement to provide access tracks in accordance with DA 18/90 or DA 66/92. It is, however, intended to provide vehicular access along an area near the top road on the eastern side of the marina, and foot, golf cart and emergency vehicle access right to the eastern berths on that side, see Ex 6(9), LES 7; T822 ln.6–T626 ln.6).

(b) the Exhibit 6(9) LES 7 drawing shows a sealed upper eastern access road and a gravel lower eastern access road, with residential lots between the roads. The latter road appears to correspond with the location of the existing lower eastern access track. The former road appears to be higher than the existing upper eastern access track and to correspond with the location of an easement for access of variable width, and other easements such as drainage and sewage, created in April 2008 in favour of Lot 23 (Exhibit 7). It replaced an easement for access of variable width which was somewhat lower over (it seems) the existing upper eastern access track;

(c) the plans behind Tab 5 to Mr Jarman's affidavit sworn on 13 March 2008 shows roads in the locations of the western access track and the lower eastern access track, but extended and with laybacks and, in the case of the western road, sealed and with a turning circle at the end. These appear to be the *"concept drawings"* referred to in cl 12 of the draft heads of agreement proposed by the developers in August 2005: see [356] above.

474. In my view, the undertaking is couched so unclearly that it raises doubt as to whether it could be enforced through the contempt of court coercive sanction. Further, I think it is of little weight as a discretionary consideration given the strength of the plaintiffs' case for relief, the uncertainty as to whether the proposed development will eventuate, and the fact that it could only give the plaintiffs a modified version of the relief to which I think they are entitled.

475. In light of my conclusions in relation to the s 70 claim, it is unnecessary to consider the plaintiffs' alternative claim for a right of

[140750]

vehicular access to the moorings under s 88K of the *Conveyancing Act* 1919 (NSW).

CLAIM IN RELATION TO CARPARK, ROAD WORKS AND SEALING

476. The plaintiffs claim that the original developers, Mr Watson and Sammy One, are in breach of cll 1.2.2 and 1.3.1 of the community development contract and cl 4 of the *"Warning"* section of the community and neighbourhood development contracts — incorporating conditions 6 and 13 of development consent 18/90 — in that they have failed to seal the access road, carpark and internal roads.

The contractual obligations

477. Those contractual provisions are in the following terms:

> **1.2.2** The developer is to provide a sealed access way in accordance with the Development Consent.
>
> **1.3.1** All driveways are to be sealed in accordance with the Development Consent No 18/90 issued by the Council of the Shire of Murray on the 12th September 1991.
>
> **4** …the original proprietor covenants with the association concerned and with the subsequent proprietors jointly and with each of them severally to develop the land subject of the scheme in accordance with the development consent as modified or amended with the consent authority's approval from time to time.

478. In my view, 1.3.1 of the community development contract is irrelevant for present purposes. It is limited to *"driveways"*.

479. Condition 6 and 13 of development consent 18/90 are in the following terms:

> **6** The access road shall be surfaced with bitumen and the intersection with the main road shall be constructed to a standard required by the Traffic Committee.
>
> **13** Internal roads and parking areas shall be sealed with bitumen when restaurant, motel and cabins are developed.

480. The reason stated by the council for imposing conditions 6 and 13 were *"to "provide all weather access"* and also, in the case of condition 6, *"for traffic safety reasons"*.

481. Clause 1 of Schedule 2 Part 1 to the *Management Act* provides that the original proprietor (here, the developers) covenants that the scheme will be developed in accordance with the development contract and the development consent. This is the source of the contractual obligation in cl 4.

482. Section 41(1) of the *Development Act* provides:

> All or part of the land comprising the community property in a community scheme may be set apart as a means of open access connecting part of the community parcel and a public place.

483. In my opinion, the *"access way"* referred to in cl 1.2.2 is the *"access road"* referred to in condition 6. It is also the *"access way"* referred to in by-law 3.1.1 of the community management statement which is shown in the access way plan forming part of the community plan registered in January 1995. By-law 3.1.1 provides:

> A private access way is to be constructed by the developer according to plans and specifications supplied to the Council of the Shire of Murray, and more particularly as shown on the access way plan forming part of this statement, and will be open for use by members of the scheme or their guests only.

484. The access plan registered in January 1995 (sheet 29 of the community plan) states that *"it illustrates private access ways which are community property"*. This access plan shows an access way from Perricoota Road with a *"claw"* encircling the carpark area and the area that is now Lots 14 and 15, except for the waterfront strip. This access plan was replaced in 2004 by another registered access way plan which states that it *"illustrates an open access way which is community property"*. The latter plan shows a similar access way to the former plan although the *"claw"* may be larger on the western side.

485. In my opinion, under cll 1.2.2 and 4, read with condition 6, the obligation of the original developers is to surface the access way with bitumen. That does not include the carpark area.

486. Under cl 4, read with condition 13, the obligation of the original developers was to seal

the carpark and internal roads with bitumen when the restaurant, motel and cabins are developed. The reference to *"internal roads"* in condition 13 does not, in my view, include the existing access tracks to the moorings. First, I do not construe *"internal roads"* as including an access track. I think that there is a distinction between a road and an access track in this context. Secondly, if an access track is a road (contrary to my opinion), condition 13 would still not apply to at least two of the existing access tracks because they were not shown on DA 18/90 Plan 4 and the DA 66/92 Stage 2 plan. I do not think it was contemplated that the sealing obligation would apply to something which was not shown on the DA plans and was created later. Only one *"access track"* is shown on those plans, on the eastern side, although it appears to be in a slightly different location to, and is longer than, the existing upper eastern access track.

487. Condition 13 is a contingent condition. That is, performance of its sealing obligation is subject to the condition precedent or trigger *"when restaurant, motel and cabins are developed"*. The developers submit that the obligation has not yet arisen because the motel and cabins (and perhaps the restaurant) have not yet been developed. I do not accept the submission for the following reasons.

488. A restaurant has been developed on Lot 14. Development of a motel and cabins can no longer occur as indicated in the locations shown on Plan 4 and the Stage 2 subdivision plan (**annexures A and E** hereto). That is because they have been superseded by the consent for development of the Honeyman Lot in a different way. However, the Honeyman Lot development, which has been partly constructed, includes cabins. In that regard, the Environmental Service's Department Report to the Planning and Development Committee Meeting of the council on 1 October 2002 noted that an application to subdivide Lot 7 (the Honeyman Lot) had been made and stated:

> This development lot was included in the original development proposal for Deep Creek Marina. In particular this land was designated for holiday cabins or similar resort style development. The current owner does not wish to pursue this proposal any further.

489. In my opinion, if fulfilment of a condition precedent to a contractual obligation is within one party's control and that party prevents its fulfilment, that party cannot rely upon the non-fulfilment (or, as it sometimes put, the condition precedent is taken to be fulfilled or is excused): *Mackay* v *Dick* (1881) 6 App Cas 251 at 263, 270; *Secured Income Real Estate (Australia) Limited* v *St Martins Investments Proprietary Limited* (1979) 144 CLR 596 at 607-608; *Newmont Pty Ltd* v *Laverton Nickel NL* (1982) 44 ALR 598 at 606 (PC); *Amber Holdings (Aust) Pty Ltd* v *Polona Pty Ltd* [1982] 2 NSWLR 470 at 475; *Sanctuary Investments Pty Ltd* v *St Gregory's Armenian School Inc* [1999] ANZ Conv R 454 (Young J); *Quinn Villages Pty Ltd* v *Mulherin* [2006] QCA 433 at [19]–[24].

490. That principle, in my view, applies in the present case. The developers were under a contractual obligation to develop the land in accordance with the development consent, including condition 13. Development of the motel, cabins and restaurant in accordance with the DA plans was within the control of the developers. They allowed the land to be developed in a different way such that those facilities cannot be developed as contemplated by those plans. Therefore, to the extent that the condition precedent is unfulfilled, they cannot rely on its non-fulfilment. Accordingly, in terms of condition 13, they are obliged to seal the carpark with bitumen.

Breach

491. The next question is whether the original developers are in breach of their contractual obligations in relation to sealing of the access way and carpark with bitumen. The following history informs the answer.

492. In 1994, the developer commenced construction of the access way from Perricoota Road. The sealing of this access way stops about 50 metres short of the carparking area shown on Plan 4 and the Stage 2 subdivision plan. No other part of the access way, internal roads or carpark has been sealed. In 1996, Mr Watson commenced landscaping the carpark.

493. In September 2003, the developers were granted conditional development consent

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for the subdivision of what was then Lot 9 in the community scheme (DA 282/03). Condition 3 provided that:

> The adjacent car park and access roads must be sealed to the satisfaction of Council's Director of Engineering Services, or a bank guarantee in the equivalent cost of the work must be submitted prior to the certified plans being released.

The bank guarantee was lodged, and it remains with the council.

494. In November 2003, the developers were granted conditional development consent for a boat storage area on Lot 16 (DA 370/03). Conditions (k) and (l) provided that:

> (k) Within 18 months the owner is to seal the main access road from the property boundary to the entrance of the storage yards. Such sealed road is to be a minimum of 7m wide with 300 mm crushed rock base and double coat seal. The design is to be approved by Council prior to work commencing on site.
> (l) The intersection with Perricoota Road is to be upgraded as deemed necessary by Council's Director of Engineering Services.

495. In March 2005, the developers commissioned Chris Bell of ERM and Glen Ryan of GMR to do works in the community scheme and also on Lot 23. On 21 March 2005, Mr Ryan prepared a proposal for, inter alia, works on the main access roads and community carpark, internal roads and access tracks.

496. The developers accepted the proposal. The developers then endeavoured to have the fee proposal redirected to the community association, which rejected the endeavour. During this period, the developers were negotiating with the community association to have it agree to pay for works, including road sealing, in exchange for the title to the access roads on the creek foreshore. Ultimately, on 12 August 2005, Mr Jarman put forward heads of agreement, as discussed at [356] above.

497. On 6 October 2005, the developers met with the council. During the meeting, the council outlined issues of compliance with certain development consents and their conditions as follows:

> (a) condition 13 of DA 18/90;
> (b) condition 3 of DA 282/03; and
> (c) condition (k) of DA 370/03.

498. After the meeting, the council wrote letters to the developers, stating that it considered certain conditions of consent to be outstanding, as follows:

> (a) to Ozzie on 15 November 2005, in relation to (inter alia) condition 3 of DA 282/03;
> (b) to Mr Watson on 15 November 2005, in relation to (inter alia) condition 13 of DA 18/90 and condition 3 of DA 282/03; and
> (c) to Hillington on 15 November 2005, in relation to (inter alia) condition 3 of DA 282/03.

499. On 20 March 2006, the council issued to the community association a Notice of Intention to Serve an Order. It required compliance with all outstanding conditions of development consents 18/90 and 282/03, including conditions 6 and 13 of development consent 18/90 and condition 3 of development consent 282/03.

500. By letter dated 16 November 2005, the developers' solicitors in the CTTT proceedings wrote to the community manager withdrawing any offer to negotiate pending the outcome of the CTTT hearing. This meant that the heads of agreement put forward by Mr Jarman in August 2005 were no longer the subject of negotiations.

501. The compulsory manager engaged GMR to prepare designs for carparking. Mr Jarman had considerable input into the designs. GMR prepared the final specifications in September 2006. Works were done in anticipation of sealing the carpark and roadways.

502. When the compulsory manager was removed, the works were stopped. At this stage, the landscaping had been removed, and preparatory and drainage work had been done in anticipation of sealing and construction of a carpark, access way and internal roads in accordance with the final specifications prepared by GMR.

503. In my opinion, the above history establishes that the original proprietors are in breach of, first, their obligation to seal the carpark with bitumen and, secondly, their obligation to seal the access way with bitumen

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to a standard required by the council's Traffic Committee in that the access way has only been sealed to a point about 50 metres short of the carpark.

Limitation Act defence

504. The developers submit that any claim for breach of cl 1.2.2 is not maintainable having regard to s 14 of the *Limitation Act 1969* (NSW). Section 14 relevantly provides that a cause of action founded on a contract, not being a cause of action founded on a deed, is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues.

505. The plaintiffs' submit: (a) there was ongoing daily breach: *Sheldon* v *McBeath* (1993) Aust Torts Reports 81- 209 (NSWCA) and other cases; (b) there are new causes of action for the plaintiff Mr Cunnington who only recently purchased into the scheme; and (c) the registered development contracts are deeds.

506. The parties' cryptic submissions on this limitation issue appear to proceed on the assumption that (subject to the deed point) s 14 of the *Limitation Act 1969* applies to a development contract and statutory covenants under the community titles legislation. It is unnecessary to decide whether that assumption is well founded. Assuming that it is, in my opinion s 14 of the *Limitation Act 1969* has no application because the development contracts are deeds. Section 15 of the *Management Act* provides that such a registered development contract *"has effect as if it included an agreement under seal"*. Although an agreement under seal is not necessarily synonymous with a deed, in the present case I consider that it is. Section 36(11) of the *Real Property Act 1900* (NSW) provides that *"Upon registration, a dealing shall have the effect of a deed duly executed by the parties who signed it"*. A *"dealing"* is defined to include any instrument which is registrable under the provisions of the *Real Property Act 1900*. That includes a community development contract. Consequently, in my opinion, s 14 of the *Limitation Act 1969* is inapplicable. It is unnecessary to address the plaintiffs' other points.

Relief

507. The plaintiffs seek an order for specific performance of the contractual obligation to seal the access road, internal roads and carpark. I address and grant that proposed relief, so far as it concerns the access road and carpark, after considering specific performance generally below.

CLAIM IN RELATION TO ELECTRICITY SERVICES

508. The plaintiffs claim that the original developers have breached:

> (a) clause 1.2.1 of the community development contract by *"failing to provide all electricity services"*; and
> (b) clause 1.2.1 of the neighbourhood development contracts by failing *"to provide all telephone and electricity services"*.

509. Clause 1.2.1 of the community development contract provides:

> All electricity services are to be provided by the developer.

Clause 1.2.1 of the neighbourhood development contract for the Central Neighbourhood provides:

All telecom and electricity services are to be provided to each lot by the developer.

Clause 1.2.1 of the neighbourhood development contracts for the Western and Eastern Neighbourhoods provides:

All telephone and electricity services are to be provided to each lot by the developer.

510. The plaintiffs submit that the original developers breached these provisions of the development contracts in three ways:

(a) the development on Lots 14 and 15 of a larger shop and a hotel created a maximum demand for electricity that exceeded supply;
(b) the electrical services provided in 1994 did not conform with the relevant Australian standard and the *Electricity Supply Act 1995* (NSW) in respect of on-selling power and individual metering; and
(c) the cables were not laid at an adequate depth.

511. The developers deny the alleged breaches. They submit that by 1996 they had

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performed their electricity obligations by providing all electrical services in relation to the marina berths and the associated marina facilities.

Background

512. The first stage of the Deep Creek Marina development included the creation of 45 houseboat berths. Mr Watson intended each berth to have an electrical connection. The electrical connection was to be carried out progressively as berths were constructed.

513. In about 1991, Mr Watson contacted Murray River Electricity (**MRE**) (now Country Energy) regarding the process and capacity requirements for electrical connections to the Deep Creek Marina development and the houseboat berths.

514. In about October 1994, MRE connected power to the development site and installed a 25kVA transformer near where the restaurant is now located, on what is now Lot 15 near its boundary with what is now Lot 14.

515. Mr Watson engaged Moama Electrical Services (**MES**) to carry out electrical work not completed by MRE. MES devised a system to make electricity available to each berth. This involved laying of cables from the transformer to the five switchboards, two of which are located to the west of the boat ramp, and the other three to the east of the boat ramp. All are located on Lot 16 so as to be above flood level.

516. Further cables were laid from the switchboards to the power pole connection points for each berth. The connections on the poles at the berths had to be above flood level.

517. Mr Watson assisted MES with digging the required trenches for cables and conduits, laying cables and installing the berth connection poles. Mr Watson testified that the depth of the conduits was at least 600mm.

518. The 18 berths to the east of the boat ramp were the first to have electricity connected. Mr Watson arranged for the payment of costs involved in the design and installation of electricity to the berths.

519. In 1996, Mr Watson decided to upgrade the transformer, as he wanted to develop a further 67 houseboat berths, and power was required for the new restaurant and the sewerage treatment works built in accordance with DA 18/90. Also, the Public Works Department wanted to install a sewerage pump out station, which would draw power from the Deep Creek Marina development.

520. In accordance with this upgrade, a 200 kVA transformer was mounted on a pole on what is now Lot 15 and a meter was located at the base of the pole. MES again carried out the electrical connection works, and Mr Watson again arranged for the installation work, including trench digging, conduit laying, and construction and installation of connection poles at the berths. All costs were paid by Mr Watson with a contribution from the Public Works Department.

521. As a result of the installation of the 200 kVA transformer, electricity was connected to:

(a) a total of 85 houseboat berths;
(b) the Public Works Department's sewerage pump out station;
(c) the restaurant/bar and shop;
(d) the sewerage treatment works; and
(e) the hardstand area.

522. At no time was Mr Watson approached by any houseboat berth owner regarding complaints about the electricity supply to berths, with the exception of individual overload switch issues.

523. Factors of which Mr Watson was aware that he thought had impacted upon the capacity of electrical service, included:

(a) the development of Lots 14 and 15 (previously Lot 10) into a hotel and larger shop which resulted in additional power being required;
(b) in about mid 2001, the Central Neighbourhood engaged a landscape gardener to install wooden retaining walls. During construction, the gardener used a hole digger which cut power lines and broke the stays for berth retaining walls, causing them to fail, and also removed the tie-on point for houseboats prior to the installation of proper bollards;
(c) houseboat owners tied boats to power poles, resulting in an estimated 5 to 10 power poles in the Central Neighbourhood being bent, which damaged the conduits connecting the power cables to the poles.

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(d) numerous poles had unauthorised works, including holes cut in the structure, removal of top caps and apparent addition of wiring;
(e) in around 2001 the Central and Eastern Neighbourhoods installed a watering system which extended onto Lot 16, the pump for which was connected to the power supply system. The watering system leaked at various locations which caused erosion and impacted on the stability of the surface in front of the berths. This, Mr Watson thought, impacted upon the conduits and the retaining walls.

524. In December 2004, the supermarket was completed. By this time, the extensions to the hotel had also been commenced. Mr Brockwell did electrical work in both these buildings. This work was linked to the existing 200kVA transformer.

525. Thereafter the hotel began to experience brownouts. No brownouts had been experienced before the extensions to the hotel and supermarket were built. A brownout is a situation in which the voltage through an electrical system is reduced because demand for the supply of electricity is greater than the supply capacity. It is a condition that causes a consumer's electrical devices to struggle, and in a lot of instances to fail, due to the weakness of the voltage.

526. On 13 May 2005, Mr Brockwell provided Mr Jarman with a report in relation to the supply capacity of electricity, which stated: *"Substation is now at peak load and needs urgent upgrade"*.

527. Mr Jarman spoke about the electricity supply issues at a community association meeting held on 14 May 2005. The minutes record him saying that *"there was a concern that the current supply would not [sic] be insufficient to supply future demand especially when the complex was full of owners, guests and visitors"*. In cross-examination, Mr Jarman said the word *"not"* was a typographical error. It obviously was. Mr Jarman tabled Mr Brockwell's report at another meeting of the community association held on 18 June 2005.

528. In December 2005, the CTTT made orders requiring the compulsorily appointed manager to obtain *"as soon as possible a report from an electrical engineer into the safety and adequacy of the electricity facilities and services to the entire community scheme (excluding the independently installed systems to lots 12 and 13)*. Mr Brockwell performed this task.

529. On 1 February 2006, Mr Brockwell sent his report to Mr Patterson, the compulsorily appointed manager. It was to much the same effect as his May 2005 report. It stated: *"Substation is overloaded and is experiencing brownouts"* and *"Existing substation is at peak load and requires upgrading to 500kVA"*.

530. During the period of compulsory management in 2006, the Brockwell works were commissioned and commenced. In lieu of the 200kVA transformer and single meter on Lot 15, a 500kVA transformer was

installed on community property as was a shed containing a distribution board with individual meters for lots and copper cabling was purchased. The individual meters are not yet connected to the mooring lots. When the connection is made, the existing meters will become redundant. The payments for this work and the materials were from community association funds.

First alleged breach: exceeding maximum demand by development on Lots 14 and 15

531. The plaintiffs submit that:

> (a) the original developers are obliged by cl 1.2.1 of the community development contract to provide electricity to all the facilities shown in Plan 4 which require electricity;
> (b) when new facilities are developed, the developers must ensure that electricity services are provided. If new facilities divert, drain and create demand on power already being supplied, the developers have to provide properly for electricity to all facilities;
> (c) in developing the extensions to the hotel and the supermarket, the developers created a demand for power which exceeded supply. In order to properly facilitate supply they must provide services to meet the full demand. They have failed to do so.

532. As described above, in 1996 Mr Watson upgraded the 25kVA transformer to a 200kVA transformer to power a further 67 houseboat berths, a restaurant and a sewerage

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pump out station. The plaintiffs submit that by upgrading the transformer, rather than continuing to use the 25kVA, Mr Watson *"recognised his obligation to maintain existing supply when providing for the next stage of development"*. They submit that this was the same obligation which arose at the time of the construction of the supermarket and hotel extensions; and thus the developers were obliged to upgrade the transformer to accommodate the new parts of the development.

533. The facilities for which power is supplied by the transformer are: the mooring berths; the pump out station; the hotel; the supermarket; and other associated communal facilities such as pumps. The supermarket, hotel and council pump out facility each have 100 amp circuit breakers. This totals 300 amps. For marina installations, maximum demand can be calculated by the *"calculation"* method in section 2.2.1.2 of the Australian Standard AS 3004-1993 *"Electrical installations — Marinas and pleasure craft at low voltage"*. For an 85 berth marina, the maximum demand is 107 amps. Added together, 300 plus 107 gives a total of 407 amps. There are 1.33 amps to a kVA. Approximately 407 amps gives over 300 kVA, which exceeds the capacity of a 200 kVA transformer.

534. The evidence of Mr Wilson, the plaintiffs' electrical expert, establishes that about 320kVA on a 200kVA transformer would be likely to manifest as brown-outs.

535. It is common ground that after the hotel and supermarket were constructed, more than 200kVA power was being drawn from the electrical supply and the hotel experienced brown-outs.

536. The developers submit that:

> (a) assuming they are obliged to provide electricity to all the facilities shown on Plan 4 which required it (which they dispute), those plans did not oblige or contemplate the provision of a hotel and supermarket, let alone a supermarket that contains commercial fridges and a laundromat, both of which draw heavily on electrical supply. Therefore, they say, any inadequacy arising out of something developed beyond the scope of those plans is not their liability;
> (b) the developers did not develop the hotel and supermarket. Rather, they were developed by the O'Briens, who purchased the business and the land thereon, including some neighbouring land, and a hotel license. It was the O'Briens who applied to develop the land, and did so in 2004. This included the electrical work. The O'Briens converted the existing general store, which Mr Wilson thought would draw about 40kVA, when they were obliged to construct a general store only. This resulted in the capacity of the 200 kVA transformer being exceeded.

537. The developers' submission that the O'Briens were *"obliged to construct a general store only"* requires examination. It is based upon cl 31.5 of the contract of sale of what is now Lot 15 of October 2004 by the developers to Mr and Mr O'Brien which provided that the purchasers must *"erect on the land within 12*

months of the date of the Contract a general store in accordance with the Development Consent issued by the Shire of Murray". The developers' argument is that if the purchasers had merely put in a general store then the transformer would have continued to be adequate. However, they say, the purchasers went further and expanded the hotel/restaurant and put in a supermarket, which was the cause of the inadequacy of the transformer and the brownouts.

538. I am unable to accept the developers' submission. The unchallenged evidence of Mr O'Brien, which I accept, was that:

> (a) he agreed with the developers that if he could get a general hotel licence for the premises he would lodge a development application to extend the hotel and build a separate supermarket;
> (b) he subsequently purchased a general hotel licence and, accordingly, lodged DA 049/04 which was approved by the council in June 2004, apparently for an extension of the hotel and the building of a separate supermarket;
> (c) he then entered into a contract in October 2004 with the developers to acquire Lot 15. The purchase price was low ($5,000) because it was his responsibility to build the supermarket and extend the hotel and the developers told him they believed that work

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> would improve the value of their land for residential development within the scheme.

539. In context, the reference to *"Development Consent"* in cl 31.5 of the October 2004 contract appears to be a reference to the June 2004 development consent 049/04 and, according to Mr O'Brien's evidence, the reference to *"general store"* in cl 31.5 of the sale contract appears to be inaccurate. Be that as it may, by agreeing with Mr O'Brien that he would extend the hotel and construct the supermarket in exchange for their selling the land to him for a low price, the developers created the situation where the extension of the hotel and construction of the supermarket occurred. That led to the transformer becoming inadequate.

540. In my opinion, in the circumstances, the original developers are in breach of contract as alleged. The measure of damages, in my opinion, is the cost of the 500kVA transformer which was installed during the period of compulsory management.

541. The developers plead a defence to this claim under s 14 of the *Limitation Act 1969*. This defence appears to have been abandoned during final oral submissions. In any case I would, first, not accept that defence for the reasons which I gave when considering the same defence in the context of the claim in relation to the sealing of the carpark and access road (see [506] above); and secondly, because the cause of action did not arise until the hotel was extended and the supermarket constructed, which is within the limitation period.

Second alleged breach: metering

542. The second alleged breach concerns the situation whereby electricity was delivered to the Deep Creek Marina by the electrical supplier to a single meter located on Lot 15. The electricity was then on-supplied via submains from that meter to the supermarket and hotel and to four distribution boards on Lot 16. From these distribution boards the power was supplied through check meters located on the distribution boards to the final sub-circuits powering the individual mooring lots.

543. The plaintiffs submit that:

> (a) section 72 of the *Electricity Supply Act 1992* prohibits the on-selling of power. This requires individual metering in accordance with the provisions of the NSW Service and Installation Rules. These meters are to be located in an accessible area on common property;
> (b) in the present case there was no individual metering;
> (c) that was a breach of cl 1.2.1 of the development contracts or, alternatively, a breach of the developers' obligation to provide all electrical services with care, diligence and skill. The onus is on a promisee to provide evidence that the promisor has not exercised the requisite degree of care, diligence or skill in order to make out a prima facie case: *Hobbs* v *Petersham Transport Co Pty Limited* (1971) 124 CLR 220 at 229-230 per Barwick CJ;

(d) the developers ceased to assume responsibility for the receipt of the single bill being received for the one supply authority meter in about August 2005.

544. As I understand it, the plaintiffs' argument essentially is that the electricity was being channelled through the transformer and meter that used to be located on Lot 15 (the supermarket lot). This was billed by the electrical supplier to Mr O'Brien (or whoever owned Lot 15). Somebody had to come around and inspect it to allocate the charges among the individual lot owners. Because the *Electricity Supply Act* says that you must not charge for electricity and the best practice now reflected in the NSW Service and Installation Rules requires individual meters on common property, this arrangement was a breach of cl 1.2.1 or, alternatively, a negligent performance of those contractual obligations.

545. The developers submit that:

(a) the plaintiffs' case is really whether the developers supplied the electricity in a careless way (rather than that they have not supplied the electricity). However, the plaintiffs do not plead that the lack of individual metering is a breach of the developers' obligations to provide all electrical services with the necessary degree of care, diligence and skill. The plaintiffs only plead that the electrical services have not been provided;

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(b) in any case, s 72 of the *Electricity Supply Act* contains no requirement that there be individual metering;

(c) the plaintiffs' electrical expert, Mr Robert Wilson, accepted that the original certificates provided by MRE (being the relevant electrical supply authority) show that, so far as they were concerned, the developers were not in any breach of s 72. There is no evidence of any subsequent dissatisfaction by MRE with this arrangement;

(d) there is no evidence that the NSW Services and Installation Rules were, at the date of installation, or at any time thereafter, mandatory (and it does not appear to be alleged that this was the case);

(e) the original certificates provided by MRE establish that, so far they were concerned, the developers were not in breach of any applicable rules of standards (as Mr Wilson accepted); and there is no evidence of any later complaint by Country Energy or any other person, of non-compliance with the NSW Service and Installation Rules;

(f) thus, there being no legal obligation to replace the current metering arrangement, nor any loss suffered by the current metering arrangement, any cost incurred by the plaintiffs in replacing the current metering arrangement does not arise from a breach of the developers' obligations under the development contracts.

546. Section 72 of the *Electricity Supply Act 1995* (NSW) provides:

(1) A person to whose premises electricity is supplied under a wholesale supply arrangement or customer supply contract must not charge any other person for the use of electricity so supplied.

Maximum penalty: 200 penalty units (in the case of a corporation) and 50 penalty units (in any other case).

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(2) This section does not prohibit a person from imposing a separate charge for the use of a specified service or facility as a result of the fact that the use of that service or facility involves the consumption of electricity.

(3) This section does not prohibit a landlord from imposing a charge for electricity supplied to a tenant if:

(a) the quantity of electricity so supplied is measured by a separate electricity meter that complies with the regulations, and

(b) the charge imposed for the electricity so supplied is no greater than the maximum allowable amount.

(4) A landlord who charges a tenant for electricity supplied to the tenant:

(a) must make such records relating to the electricity so supplied, and
(b) must keep those records for such period,

as may be prescribed by the regulations.
(4A) The regulations may, either unconditionally or subject to conditions, exempt:

(a) any specified person or class of persons, or
(b) any specified matter or class of matters,

from the operation of subsection (1).
(5) The regulations may require the landlord to furnish the tenant with a copy of any records made under this section.
(6) In this section:

landlord means:

(a) the owner or lessor of any premises, whether business, residential or otherwise, or
(b) the proprietor or operator of the premises of any hotel, motel, inn, hostel, boarding or rooming house, holiday flats or cabins, manufactured home estate, caravan park or campsite or any other premises prescribed by the regulations.

maximum allowable amount, in relation to a quantity of electricity supplied during a specific period, means:

(a) the amount prescribed by or calculated in accordance with the regulations for a similar quantity of electricity supplied during the same period, or
(b) if no such regulations are in force, the amount that the relevant standard retail supplier would have charged under a standard form customer supply contract for a similar quantity of electricity supplied during the same period.

tenant includes any person who occupies premises in respect of which some other person is a landlord.

547. The Service and Installation Rules of New South Wales provide:

4.2 Service and metering equipment must be located in an accessible area on common property.

4.2.3 The metering for new multiple occupancy premises will be grouped at the one metering position. Provision should be made to cater for any future metering requirements.

The grouped metering must be in a location accessible to all associated tenants. It must not be located within any one occupancy.

548. In his Community Managers' Report, which was to be tabled at the meeting of the executive committee of the community association on 23 August 2005, Mr John Haydon stated:

Deep Creek Pty Ltd have also terminated an agreement for the supply of electricity to the site, the responsibility for payment now rests with the Community Association, there has been a request for a deposit of $10,000.00 (ten thousand dollars) these funds are not available however we also understand that the hotel/supermarket site consumes 80% of the electricity consumption, this being the case there would be an expectation that that lot owner will contribute 80% of the deposit.

549. The opinion of the plaintiffs' electrical expert Mr Robert Wilson was that, in line with the NSW Service and Installation Rules, the moorings, supermarket and hotel should have always been separately but centrally metered at the main meter board which should have been located on common property. In oral evidence Mr Wilson conceded that the issuing of a certificate such as a Notification of Electrical Work was

proof of the satisfactory installation of electrical work; that the original certificates provided by MRE show that, so far as MRE were concerned, the developers had not breached s 72; and that if he were the installer and found a breach of s 72, he would not provide a certification.

550. The developers say that as there is no reference in the Notifications of Electrical Work to s 72 not having been complied with, it is a strong inference that if there had been a breach of s 72, MRE would have identified it. Furthermore, there is no evidence of MRE being dissatisfied with the arrangement. In my view, MRE's certification and Mr Wilson's concessions do not bear on the objective construction of s 72. However, it is clear that MRE has not expressed any concern about the issue.

551. The Service and Installation Rules in evidence were not in force at the relevant time. They commenced in October 2006. In evidence, Mr Wilson said that he had not made any searches for earlier versions of these rules because he only referred to the current version in his report. However, he indicated that between 1995 and the present day the practice reflected in the two provisions of the Service and Installation Rules quoted above reflected best practice. He said that in 1995 those two provisions were generally best practice known to everybody throughout the industry. However, enforcement was the responsibility of the individual suppliers. Here, the individual supplier was MRE.

552. I am inclined to think that there was no breach of s 72. On the evidence, it seems that the Lot 15 owner did not *"charge"* other persons for the use of electricity supplied to that owner's premises. Rather, there appears to have been a voluntary bill-sharing arrangement whereby other lot owners contributed to MRE's charges to the Lot 15 owner. However, that is not an end to the matter.

553. Clause 1.2.1 of the development contract required the original developers to provide *"all"* electrical services and cl 1.2.1 of the neighbourhood development contract required all electrical services to be provided to *"each"* lot.

554. An individual meter for each lot was, in my opinion, one of those electrical services. The contractual obligation was not discharged by providing only one meter to one privately owned lot (Lot 15) — and leaving it to the Lot 15 owner to work out an arrangement with the

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mooring lot owners as to how the electricity bill might be shared among them. Section 72 turns its face against arrangements where a person in the position of the Lot 15 owner would charge others for electricity on-supplied. The practice reflected in the Service and Installation Rules provides a solution by the installation of individual meters collectively on common property.

555. The community titles legislation and the strata title legislation are analogous in a number of respects. Take as an analogy a conventional residential strata building with 85 strata lots (the same number as the mooring lots in the present case. Suppose that: (a) a strata titles development contract contained a provision equivalent to cl 1.2.1 of the development contracts in the present case; (b) the developer, in purported fulfilment of that contractual obligation, installed one transformer and one meter in one residential strata lot from which electricity was on-supplied to all the other strata lots. The owner of that lot would be in the invidious position of having to enter into an arrangement with other lot owners for them to pay a proportion of his electricity bill and to enter his strata lot to inspect the meter. I think that would be a breach of the developers' contractual obligation. The present situation seems to me to be indistinguishable.

556. In my opinion, failure to supply individual meters was a breach of cl 1.2.1 of the development contracts.

557. The alternative analysis is that it was negligent in the sense of a breach of an implied contractual obligation to provide the electrical services with care, diligence and skill. It is true that the plaintiffs' pleading does not plead its case in that way. However, the report of Mr Wilson with which the developers were served prior to the trial supported such a case; the trial was conducted on both sides as though the matters in Mr Wilson's report were issues in the case; and the pleading point was not taken by the developers until final written submissions. In those circumstances, if it were necessary to decide the claim on the alternative basis, I would be inclined to do so favourably to the plaintiffs. That is, it seems to me to have been negligent to have provided only one meter on Lot 15 and not to have provided individual meters.

Third alleged breach: defects in cable depth

558. The plaintiffs submit that the developers failed to ensure that the cables were laid at an adequate depth of 500 mm prescribed by Australian Standard AS 3000 — 1991.

559. The developers submit:

> (a) there is ample evidence that all cabling was installed to at least 500mm. Mr Watson was present at the installation and he is 99% sure the cable was laid at that depth. This is consistent with Mr Wilson's opinion that the certificates issued by Murray River Energy would not have been issued if they were not equally satisfied;
> (b) Mr Compton's affidavits raise some suggestion that cables at a limited number of locations are not at that depth now, but he recognises that his measurement methods have a significant margin for error and that there are circumstances such as wheel tracks and excavation that would affect the depths over time. Mr Wilson agreed, adding flood as another possible cause, and there has been flooding at the marina.

560. Australian Standard AS 3000 — 1991 *"Electrical installations — Buildings, structures and premises"* (known as the *"SAA Wiring Rules*") states minimum depths for laying of underground wiring. Table 3.7 requires cables to be laid 0.5m below ground (other than where the cables are laid under continuous concrete paved areas of a minimum thickness of 75mm).

561. On 14 April 2008, Mr Dennis Compton, an underground cable locater, measured the depths of electrical cables at Deep Creek Marina. He gave evidence that in many locations around Deep Creek cables are buried shallower than 500mm. Mr Compton measured the depths of cables at 47 locations. At 15 of those locations (being Location Numbers 4, 5, 7, 15, 16, 19, 20, 23, 26, 28–32 and 39), the vertical depths of the cables were less than 500mm.

562. To measure cable depth, a transmitter was attached to the cable where it was above ground. The transmitter sent a signal down the cable which a receiver picked up. The receiver

was placed on the ground at the point where the strongest signal was received. The machine which measured the depth had an inbuilt margin of error of 20mm.

563. In cross-examination, Mr Compton acknowledged that the location at which the receiver was placed would affect the reading. Where the land was not smooth or flat, for example at Location No 30, Mr Compton acknowledged that it would be fair to say that the reading may change by about 100–200mm if the receiver was moved a few centimetres to the left or right.

564. Mr Compton also acknowledged in cross-examination that the depth of the cable at the date of measurement is not necessarily indicative of the depth at the date the cable was laid. First, the cable itself may have been the subject of further works. Secondly, the level of the ground surface may be affected by works, or other factors such as erosion, irrigation, flooding or wheel tracks. There has been quite significant flooding at Deep Creek at times. These factors may mean that Mr Compton's measurements do not reflect the depths at which the cable was laid. As Mr Compton said in cross-examination: *"Any work that's carried out after the pipe or cabling has been put in the ground, anything would affect"* the depth of the cabling.

565. In cross-examination, the following exchange occurred between counsel for the developers and Mr Compton:

> Q. …having regard to the factors that you've identified, your report is in fact consistent or not inconsistent with cables having been laid at that location [Location Number 4] at 500 millimetres. That's fair to say?
>
> A. That's right.
>
> Q. In respect of all the measurements that were carried out, the same position pertains, doesn't it, namely that having regard to the factors you've identified, your report is consistent with cable being laid in those locations of at least 500 millimetres?
>
> A. That's right.

566. Mr Watson was present when MES laid the cables. On the basis of his actual observations, he said that all cable laid by MES was at a depth of *"at least"* 600mm. In cross-examination, Mr Watson said he was there every day of the work, although he may have been away for an hour at a time. He said he did not measure the depths himself, but was *"99 per cent sure"* that all wire went in at least 600mm.

567. Two documents entitled *"Notification of Electrical Work"*, referred to above at [545] and [549], were tendered, dated 2 December 1994 and 4 April 1996. These Notifications were provided to MRE, an independent supply authority, by the Electrical Contractors Association of NSW. The Notification is a prerequisite to an inspection by MRE.

568. The Notification dated 2 December 1994 was in regards to the connection of electricity to the 18 berths in October 1994. The Notification dated 4 April 1996 was in regards to the connection of electricity to the 67 berths in 1996.

569. After inspecting the electrical work, the MRE inspector wrote *"insp ok"* (presumably meaning *"inspection ok*"). Mr Wilson said that the words *"insp ok"* conveyed to him that it was more likely than not that the electrical work installed at the marina was inspected by MRE and found to be *"okay"*. Mr Wilson said that he had signed a number of certificates such as *"Notification of Electrical Works*"; that before signing he would always satisfy himself that the cabling had been buried at at least 500 mm; and that he would not have signed a certificate unless satisfied that the cable had at least 500mm of covering.

570. I accept the evidence of Mr Watson and Mr Wilson. I am not satisfied that the cables were installed at a depth which was less than that prescribed by the Australian Standard. The probable explanation for the later measurement of those cables at lesser depths rests with post-installation events. The plaintiffs' claim in relation to the cable depth is rejected.

Damages

571. I turn to the assessment of damages for breach of the electricity provisions of the development contracts. I have allowed two of the electricity claims: the need to upgrade from a 200 kVA to a 500 kVA transformer and the failure to provide individual meters to lots. The plaintiffs claim damages proportionate to their

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unit liability under the community scheme being 7,707 out of 10,000. The amounts to which they seek to apply this proportion are identified below.

572. First, the plaintiffs claim damages for the upgrade from a 200 kVA transformer to a 500 kVA transformer. The cost incurred by the community association for the latter was $46,110.57. On the proportion that they claim, the plaintiffs are therefore entitled to damages in the sum of $35,537.

573. Secondly, the plaintiffs claim that damages for the non-supply of individual metering should be on the basis of the lump sum quote of $774,302 dated 16 February 2006 by Brolec to the CTTT compulsorily appointed manager, which was discussed in Mr Wilson's report. On the proportion that they claim, the plaintiffs seek damages of $596,754 (7,707/10,000 × $774,302).

574. The Brolec lump sum quote was for the following items:

> 1. Supply of new 500 kva pole mount sub-station mounted at last pole on entrance road before bend. This is a direct cost to client from Country Energy estimate attached.
> 2. New mains supply from substation to new main switchboard and new metering facility in car park rear of Hotel. This facility will meter all Houseboats, Hire boats, Hotel, Supermarket and Public Light and Power.
> 3. New 15a single phase supply cabling to all houseboat moorings (85) plus 2 hire boat moorings.
> 4. All trenching and backfilling required for moorings, street lighting and public power and light.
> 5. Supply of Power head Bollards complete with 2 15a outlets RCD Protected 1 light 2 data/phone outlets key lock cover, 2 intergrated [sic] water meters. Eg. 1 Bollard per 2 moorings.
> 6. All concrete works and shed facility to house main switchboard and metering at one point. Light and power to this facility.

7. Supply of all street lighting and public lighting as required around site and main road entry into deep creek marina.
8. Supply of Power to front gate entry for future signage or lighting.
9. Power under Marina to Island at entry for entry lighting (only possible if we go ahead and dam the river and empty marina).
10. Re-route existing mains supply to Hotel, Supermarket and all auxiliary power to new main board.
11. Disconnect existing redundant services.

Item 1 was excluded from the amount of the quote.

575. The Brolec lump sum quote incorporates a number of items which are irrelevant to the claim for failure to provide individual meters. The relevant items appear to 2, 3, 6, 11 and possibly 10.

576. Only the actual cost of the cabling referred to in item 3 is known. The *"2 hire boat moorings"* referred to in item 3 were owned by the developers and at one time were kept on the public wharf but are no longer there. The new individual meters can only work if they are connected by 85 cables to the houseboat moorings. On 3 May 2006 Mr Brockwell of Brolec sent an email to the compulsorily appointed manager of the community association recommending that an order for this cabling should be locked in because of a forecast of an imminent rise in the price of copper. The cabling was supplied by Brolec to the community association. The price was $280,313 as recorded in Brolec's invoice dated 3 July 2006 addressed to the community association c/-the compulsorily appointed manager. The community association paid the invoice.

577. Apart from item 3 of Brolec's quote of 16 February 2006, there is substantial difficulty in allocating part of the lump sum quote to the other relevant items in the quote. There are invoices in evidence relating to progress claims, however they are so expressed as to be of no real assistance. The developers submit that the shortcomings in the quantum evidence are such that no damages should be awarded.

578. The new individual meters have been installed in a shed in the carpark, behind the hotel on community property. There is no evidence as to the actual cost of the shed and the meters. However, it is clear from the evidence and the site inspection that their cost must have been substantial. Difficulty in assessing damages is not generally a bar to

[140763]

recovery of the damages: *Commonwealth of Australia* v *Amann Aviation Pty Limited* (1991) 174 CLR 64 at 83, 125, 153. The Court should endeavour to do the best it can on the available evidence.

579. On the other hand, apart from item 3 in the Brolec quote, the difficulties in the evidence entitle the Court to take a conservative approach to the quantification of damages in order to ensure that there is no injustice to the developers. In the circumstances, I propose to take a conservative approach and to apportion $50,000 of the Brolec quote to the cost of the individual meters, the shed and any other relevant items. This will be added to the cost of the cabling ($280,313). The total is $330,313. On the proportion claimed by the plaintiffs, damages will be assessed in the sum of $254,572 (7,707/10,000 × $330,313).

580. Aggregating the said sums of $35,537 (for the 500kVA transformer) and $254,572, the plaintiffs should be awarded damages for their electricity claims against Mr Watson and Sammy One in the sum of $290,109.

An elaborate theory of causation

581. For completeness, I should mention that the plaintiffs put forward an elaborate alternative theory of causation of damages to support the proposition that the original developers should pay damages quantified by a reference to a schedule of damages in the sum of $1,111,126.44 plus whatever amount was required to repay the loan raised by the community association's compulsorily appointed manager. However, in final oral submissions the plaintiffs did not press some items in that schedule. The amounts in this schedule appear to relate largely to works commissioned by the compulsorily appointed manager and paid from community association funds (financed by a loan) and (so far as the schedule is pressed) appear to relate to electrical and carpark works.

582. The plaintiffs submit that this damage was caused by the developers' failure to discharge their contractual obligations (discussed earlier) in relation to the electrical works and sealing of the carpark and access road.

583. The steps in the plaintiffs' causation theory are as follows:

> (i) the developers are minority shareholders in the scheme, despite having large interests in neighbouring land;
> (ii) the developers had an overall plan to upgrade the marina and develop neighbouring land, and it was in their interest to upgrade the original marina originally built by the Watson interests;
> (iii) the developers had a number of outstanding obligations in relation to development consent which they were required to do;
> (iv) the developers did not want to pay for the work (both required under the development contract and other development consents);
> (v) the developers were concerned that as a consequence of not complying with conditions of the consent, the council would not approve other developments on adjoining land which they had planned;
> (vi) the developers used access as a tool for negotiation to require community contribution for the payment of these works and engaged in a course of pressure tactics to endeavour to secure their ends;
> (vii) this failing, the developers had a compulsory manager appointed;
> (viii) the compulsory manager was required to comply with a range of orders, specifically drafted by the developers to secure their plans for the marina (but now at 16 percent of the price);
> (ix) the compulsory manager was advised during the process by the developers' lawyers;
> (x) the compulsory manager was advised by the developers' site manager, Mr Jarman;
> (xi) Mr Jarman directed and had significant inputs into works while also having a significant vested interest in the land in Lot 16;
> (xii) the works were conducted against the will of the plaintiffs;
> (xiii) the plaintiffs had the works, being done at their cost, cease on retaining control of the community association;
> (xiv) the developers had brought new CTTT proceedings with a view to restoring the

[140764]

> 2006 situation whereby a compulsory manager was appointed and performed prescribed work.

584. The plaintiffs are entitled to receive such loss as fairly and reasonably either arises naturally, that is, according to the usual course of things, from the breach of contract, or if it does not so arise, may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it: *Hadley* v *Baxendale* (1854) 9 Exch 341 at 355; *St George Bank Ltd* v *Indigenous Business Australia* (2007) 215 FLR 79 (Hammerschlag J). It is unnecessary to pass judgment on the accuracy of the various links in the plaintiffs' alleged chain of causation. In my opinion, even if they were to be proved, the chain is incapable of establishing that the claims for breaches of contract (in relation to electricity and the sealing of the carpark and access road), which I have upheld, caused the claimed damages within either limb of the principle in *Hadley* v *Baxendale*.

CLAIM IN RELATION TO TELEPHONE CONNECTIONS

585. The plaintiffs claim that the original developers are in breach of their obligations under cl 1.2.1 of each of the neighbourhood development contracts by failing to provide any telephone services for mooring lots. Clause 1.2.1 relevantly provides that all telephone/telecom services *"are to be provided to each lot by the developer"*. The plaintiffs claim damages of $59,193.20, which is the amount of a quote dated 23 June 2006 from Brolec to the CTTT compulsorily appointed manager for the supply of Telstra telephone conduits, pits and related services to all moorings.

586. It is clear, in my opinion, that the developers provided some but not all telephone services for mooring lots. On the one hand, there is evidence from Mr Bares, which I accept, that he was able to arrange telephone connections for three of his moorings in the Central and Western Neighbourhoods for $100 each. They appear to be connections to the telephone services provided by the developers. Therefore, telephone

services appear to have been provided for at least the Western Neighbourhood and the western side of the Central Neighbourhood.

587. On the other hand, there is evidence from Mr Dennis Compton, an underground cable locater, which I accept, that he did not find underground telephone services to moorings on the eastern side of the marina with the exception of one telephone pit. This pit is near the boat ramp and has a connection from behind the supermarket. A connection runs from this pit to the first mooring on the eastern side of the marina. I conclude that telephone services have not been completely provided on the eastern side of the marina, although to precisely what extent is less than clear.

588. The developers submit that a telephone tower near the marina provides full telephone services. The submission is cryptic but I deduce that it is to the effect that the tower enables mobile telephones to be used at the moorings. The submission refers only to a very short piece of evidence by Mr Wilson in cross examination. I am not satisfied that that evidence supports the submission. In any case, I do not think that the contractual obligation is limited to providing telephone services that would only enable mobile telephones to be used.

589. The Brolec quote was for telephone services to all moorings. It therefore appears to be an upgrade so far as concerns telephone services that have already been provided. Consequently, the difficulty in apportioning part of it to the telephone services that have not been provided is such that I propose to take a particularly conservative approach to ensure that there is no injustice to the developers. I apportion $5,000 of the Brolec quote to the telephone services that have not been provided. On the proportion of the plaintiffs' unit liability, I assess damages at $3,853 (7707/10,000 × $5,000).

SPECIFIC PERFORMANCE

590. In the Land and Environment Court proceedings the plaintiffs seek specific performance of the development contracts in relation to:

> (a) the construction of the facilities shown in the plan proposed to be annexed to the development contract pursuant to an order under s 70 of the *Development Act*: see [462]–[464] above;
>
> [140765]
>
> (b) the supply of the electricity, telephone, and road and carpark sealing required by the development contracts and considered above: see [476]–[589] above.

591. The developers submit that this is not a proper case for specific performance because:

> (a) it has not been established that damages are not an adequate remedy; and
> (b) the orders sought are not suitable orders for specific performance.

592. The developers also submit that insofar as specific performance is sought for access, access has either already been provided or is in the process of being provided. In that regard they refer to their undertaking to the Court, considered at [472]–[474] above. However, it is unnecessary to consider access relief, given my decision that the foreshore land should become community property pursuant to an order under s 70 of the *Development Act*.

593. The High Court in *Patrick Stevedores Operations No 2 Pty Ltd* v *Maritime Union of Australia* (1998) 195 CLR 1 at [78]–[80] gave general approval to the speech of Lord Hoffmann in *Co-operative Insurance Society Ltd* v *Argyll Stores (Holdings) Ltd* [1998] A.C. 1. Lord Hoffman held at 13:

> This is a convenient point at which to distinguish between orders which require a defendant to carry on an activity, such as running a business over or more or less extended period of time, and orders which require him to achieve a result. The possibility of repeated applications for rulings on compliance with the order which arises in the former case does not exist to anything like the same extent in the latter. Even if the achievement of the result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order. This point was made in the context of relief against forfeiture in *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691. If it is a condition of relief that the tenant should have complied with a repairing covenant, difficulty of supervision need not be an objection. As Lord Wilberforce said, at p. 724:

> what the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, certificates, or by inquiry, to do precisely this.
>
> This distinction between orders to carry on activities and orders to achieve results explains why the courts have in appropriate circumstances ordered specific performance of building contracts and repairing covenants: see *Wolverhampton Corporation* v. *Emmons* [1901] 1 K.B. 515 (building contract) and *Jeune* v. *Queens Cross Properties Ltd* [1974] Ch. 97 (repairing covenant). It by no means follows, however, that even obligations to achieve a result will always be enforced by specific performance. There may be other objections…

One of the objections which his Lordship proceeded to consider was imprecision in the terms of the order. He held at 14:

> Precision is of course a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievement of a result in which the plaintiffs' merits appeared strong; like all the reasons which I have been discussing, it is, taken alone, merely a discretionary matter to be taken into account: see Spry, Equitable Remedies, 4th ed. (1990), p. 112. It is, however, a very important one.

594. The legislative intention for community titles schemes is easily set at nought or diluted unless specific performance is generally available in relation to the statutory covenants in Schedule 2 to the *Management Act*. The original proprietors thereby covenant to develop land in accordance with the registered community development contract and the development consent, and subsequent proprietors covenant to permit them to do so.

Manager's residence

595. I have explained earlier what facilities I consider should be included in the plan that is to become an appendix to the community development contract pursuant to s 70 of the *Development Act*: see [462]–[463]. One of those facilities is the manager's residence shown on Lot 16 adjacent to the carpark.

596.

[140766]

Mr Watson at one point in his evidence stated that the manager's residence shown on Plan 4 (and referred to in the brochure) had now been moved to the top of the supermarket. I reject that evidence. The supermarket is on Lot 15 which is not in the ownership of Mr Watson or the other current owners of Lot 16. Mr Watson's evidence is inconsistent with a statement made by Mr Jarman to a council meeting on 6 October 2005 indicating that the manager's residence on top of the supermarket was not to replace the manager's residence available to the marina at large. When confronted with that statement in cross-examination, Mr Watson conceded that his evidence was incorrect. He agreed that there is no reason why the manager's residence shown on Plan 4 cannot be built. He also agreed that the development contract, as he understood it, provided for an ongoing obligation on the original developers to build it. He said he was unsure when he proposed to build it.

597. In my opinion, an order for specific performance should be made in relation to the manager's residence shown on the plan which is to become an appendix to the community development contract pursuant to s 70 of the *Development Act*. The importance of the manager's residence to the development was emphasised in the developers' EIS accompanying DA 18/90, quoted at [65] above. The manager's residence appears next to the carpark on what is now Lot 16 on plans accompanying DA 18/90 and 66/92 which I have held were incorporated in the consents thereto. If the manager's residence is not built where indicated on Lot 16 in the development consent plans, the community association would have to find a location for the manager's residence on community property. In the circumstances, that is unreasonable. Damages for breach would also be very difficult to assess and I do not think damages would be an adequate remedy.

598. I disagree with the plaintiffs' proposal that the order should require the original developers to construct a manager's residence. As discussed at [416] above, in my opinion development consents 18/90 and 66/92, insofar as they were concerned with facilities, were on their proper construction for the use of the locations

shown on the relevant plans for the facilities shown. They did not authorise construction of the buildings. Construction of buildings would require a further application to the council for approval, for which the council would no doubt require plans and specifications at an appropriate level of detail.

599. An appropriate order, I think, would be to the effect that the developers use all reasonable endeavours to within (say) two years: (a) obtain all necessary approvals for the construction of a manager's residence consistently with the plan which is (to become) appendix 2 to the community development contract; and (b) construct the manager's residence in accordance with the approvals. Anything will suffice that is consistent with the general description of a manager's residence in the general location shown in the plan. This is an order to achieve a result, of which Lord Hoffman spoke in ***Co-operative Insurance***. There should be liberty to apply to allow for the possibility of an appropriate application for a ruling on compliance with the order or for extension of the time for compliance.

Sealing access way and carpark

600. I consider it appropriate to make orders to the effect that the original developers:

> (a) seal the access way with bitumen, to the extent that it has not already been sealed with bitumen, to the satisfaction of the Traffic Committee of the Council of the Shire of Murray;
> (b) seal the carpark with bitumen.

Other matters

601. Apart from the manager's residence and sealing, I accept that damages are an adequate remedy.

602. One of the orders sought by the plaintiffs is an order to *"construct or plant, or effect the development of, shelterbelt planting"*. Shelterbelt planting is a landscaping requirement. By-law 4.5.2 of the community management statement states *"the developer is responsible for the landscaping of community property only"*. The developers did plant shelterbelt on the community property along the access road. The plants died because they were not watered by the community association. If there remains any breach of a planting

obligation, I think that damages are an adequate remedy.

CONCLUSION

603. In summary, in the Supreme Court proceedings I have held that the plaintiffs are entitled to relief to the following effect under s 70 of the Development Act:

> (a) conversion into community property of the land shown in **annexure H** hereto, with the possible exception of the public wharf as to which I will hear the parties: see [465], [467]–[468] above;
> (b) amendments to the development contracts to provide for annexation of a modified version of **annexure J** hereto and related amendments to the text of the development contracts and community management statement: see [462]–[464], [466] above.

604. In summary, in the Land and Environment Court proceedings I have held that the plaintiffs are entitled to:

> (a) orders for specific performance to the effect that the defendants —
>
> > (i) seal the access way with bitumen to the satisfaction of the Traffic Committee of the Shire of Murray: see [600] above;
> > (ii) seal the carpark with bitumen: see [600] above;
> > (iii) use all reasonable endeavours to obtain all necessary approvals for the construction of a manager's residence consistently with, and in the location shown on, the plan which is to become part of the development contracts (a modified version of **annexure J** to this judgment: see [599] above;
>
> (b) damages for breach of the electricity and telephone provisions of the development contracts in the total sum of $293,962: see [572], [579] and [589] above.

605. There should be liberty to apply in both proceedings.

606. I will hear the parties as to the form of relief and, if not agreed, costs. Subject to hearing the parties, it seems to me that the developers should pay the plaintiffs' costs. The parties are to bring in agreed or competing short minutes of orders in both proceedings to give effect to my decisions.

[CCH note: Annexures not reproduced by CCH. See www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf]

THE OWNERS SP 35042 v SEIWA AUSTRALIA PTY LTD

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(2008) LQCS ¶90-146; Court citation: [2007] NSWCA 272

New South Wales Supreme Court of Appeal

4 October 2007

Strata Schemes — Common property — Identification of boundaries of strata lot — Boundaries of strata lot fixed at date of registration of strata plan — Whether notation on floor plan described lower horizontal boundary — Whether upper surface of floor included waterproof membrane and tiles — Strata Schemes (Freehold Development) Act 1973 (NSW): s 5(2) — Strata Schemes Management Act 1996 (NSW): s 62.

This was an appeal from *Seiwa Pty Ltd* v *Owners Strata Plan 35042* [2006] NSWSC 1157.

The respondent Seiwa Australia Pty Ltd was the registered proprietor of a lot comprising the top floor of a residential unit block. At first instance, the respondent successfully argued that the appellant, Owners Corporation, breached s 62 of the *Strata Schemes Management Act 1996* by failing to maintain and keep in a state of good and serviceable repair that part of the common property comprising the tiles and underlying waterproof membrane that sealed the concrete floor of an external uncovered terrace of the respondent's unit. The Owners Corporation denied that the membrane was part of the common property.

[140768]

The key issue on appeal was whether the membrane and the tiles covering the terrace were part of the common property or part of the respondent's lot, which required the identification of the lower horizontal boundary of the respondent's lot. The membrane and tiles were affixed to the upper surface of the concrete floor prior to registration of the relevant strata plan. A notation on the strata plan in respect of the terrace stated:

> "TERRACE LIMITED IN HEIGHT TO 2.5 ABOVE THE UPPER SURFACE OF THE CONCRETE FLOOR THEREOF EXCEPT WHERE COVERED".

The appellant submitted that:

- the notation constituted a description of the boundary within the meaning of s 5(2)(b) of the NSW *Strata Schemes (Freehold Development) Act 1973*
- the lower horizontal boundary (in respect of the terrace) was the upper surface of the concrete floor (not including the tiles and membrane) that supported the terrace and the internal space of the unit.

The primary judge rejected the submission that the notation referred to the lower horizontal boundary of the respondent's lot, and held that:

- the notation sought only to describe the upper horizontal boundary of the cubic space, the base of which was the terrace
- pursuant to s 5(2)(a)(ii), the lower horizontal boundary was the upper surface of the ceramic tiles.

Held: Appeal dismissed.

1. The primary judge was correct in finding that the notation sought only to describe the upper horizontal boundary of the cubic space the base of which was the terrace, and not the lower horizontal boundary. The lower horizontal boundary was defined by s 5(2)(a)(ii), being the upper surface of the floor (including the membrane and tiles).

2. The exception to s 5(2)(a) provided for in s 5(2)(b) requires the relevant boundary to be described in the prescribed manner by reference to a physical datum point being a wall, floor or ceiling (eg the upper surface of a concrete floor). It does not require the boundary to be described by reference to a wall, floor or ceiling that comprises a vertical or horizontal boundary (although it may).

3. Where s 5(2)(a)(ii) defines the lower horizontal boundary of a cubic space as the upper surface of the floor, that boundary is fixed as at the date of registration of the strata plan, ie:

- if a tile or timber floor has been affixed to the concrete slab at the registration date, the upper surface of the floor is the upper surface of the tiles or timber
- if the floor is subsequently removed and replaced, the upper surface of the floor remains the upper surface of the original covering.

Disputes regarding responsibility for repairs and maintenance can be avoided by utilising s 5(2)(b) to fully and clearly describe the relevant boundaries of the cubic space or spaces forming each lot of the strata plan.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Bradford (instructed by Alex Ilkin & Co) for the appellant.

M Young (instructed by Dixon Holmes Du Pont) for the respondent.

Before: Giles, Tobias and Basten JJA.

[140769]

Giles JA: I agree with Tobias JA.

Tobias JA: This appeal raises an important question with respect to the identification of the upper and lower horizontal boundaries of a lot in a strata scheme where there is a dispute as to whether the physical features of that boundary form part of that lot or the common property. In the context of the present case, the issue arises in the following manner.

3. The respondent is the proprietor of Lot 14 (Lot 14) in Strata Plan 35042 (the Strata Plan). Its sole director and shareholder is Mr Shojiro Azuma. The appellant is the Owners Corporation of the Strata Plan. Lot 14 comprises the whole of the top floor (the unit) of a six storey residential flat building fronting the Warringah Expressway at North Sydney. The respondent complained that the appellant had breached its duty under s 62(1) of the (the *1996 Act*) by failing to maintain and keep in a state of good and serviceable repair that part of the common property which comprised, first, certain rectangular steel uprights which provided the framework which enclosed a balcony that formed part of the unit and, second, the waterproofing membrane (the membrane) that sealed the concrete floor of an external terrace (the terrace) of the unit for the purpose of preventing water penetration of its internal, habitable space.

4. Relevantly for present purposes, the appellant disputed that the membrane comprised part of the common property to which s 62(1) would otherwise apply. It contended that the lower horizontal boundary of so much of Lot 14 as comprised the terrace was the upper surface of the concrete slab that supported not only the terrace but also the internal space of the unit. On the other hand, the respondent contended that the lower horizontal boundary was not the upper surface of the concrete slab but the upper surface of the ceramic tiles (the tiles), which had been laid on top of the membrane which in turn had been placed on top of the slab.

5. On 28 July 2005 the respondent instituted proceedings against the appellant alleging a breach of s 62 of the *1996 Act* upon the basis that the common property in respect of which s 62(1) imposed upon the appellant a duty to maintain and keep in repair included the membrane and the tiled surface of the terrace. It was alleged that as a consequence of that breach, the membrane had failed thereby allowing rainwater falling upon the terrace to penetrate the tiles and the membrane and enter the living areas of the unit. The respondent further alleged that s 62(1) imposed a statutory duty upon the appellant, breach of which sounded in damages. In addition to such damages, the respondent sought an order that the appellant replace the membrane and reinstate the tiling on the terrace at its cost.

6. The primary judge upheld the respondent's contentions and on 6 November 2006 ordered that the appellant on or prior to 6 February 2007 properly maintain and keep in a state of good and serviceable repair the common property in the strata plan by repairing the membrane on the terrace of Lot 14 so as to prevent the penetration of water into the unit. His Honour further awarded the respondent damages in the sum of $150,000 in respect of loss of rent of Lot 14 for a period of 30 months at $5,000 per month commencing August 2004. The appellant appeals to this Court against those orders.

The decision of the primary judge

7. As I have indicated, the respondent alleged two breaches of s 62(1) by the appellant, being first, its failure to repair the rectangular steel uprights and, second, its failure to repair the membrane to the terrace. As to the first of these failures, the appellant did not contest that the uprights comprised part of the common property to which s 62 applied. Although it did not admit that the steel work was common property, it made no submission to the contrary and his Honour held (at [12]) that it formed part of the external wall of Lot 14 and substantially coincided with the external boundary of that lot marked on the Strata Plan. Accordingly, the lot boundary was its inner surface with the result that the steelwork was outside the boundary of Lot 14 and, therefore, formed part of the common property.

8. His Honour also found that the appellant was advised of the problems associated with the steel uprights as well as the problem with the water penetration through the membrane to the terrace no later than 3 March 2003. Notwithstanding that it did not admit that the

steel framework formed part of the common property, the appellant remedied that particular problem by replacing the steelwork shortly after the present proceedings were instituted and, in any event, in August 2005.

9. However, there was a live issue before the primary judge as to whether the membrane comprised part of the common property. As I have indicated, his Honour resolved that issue in favour of the respondent. Notwithstanding the institution of an appeal to this Court against that decision, as a consequence of the refusal by the primary judge to stay his order that the appellant repair the membrane on or before 6 February 2007, the appellant carried out the necessary repair work in compliance with his Honour's order.

10. So far as the question of damages is concerned, the following facts as found by his Honour are relevant. Prior to August 2004 Mr Azuma occupied the unit with his family. He paid rent to the respondent at the rate of $5,500 per month, which was in accordance with a valuation obtained by him in May 2004 for refinancing purposes. That valuation was prepared by Mr Ray Laoulach, a registered valuer employed by John Virtue Valuers, who assessed the unfurnished rental value of Lot 14 at $1,300 per week as at 18 May 2004 (the Virtue valuation). Although there was no written lease between Mr Azuma and the respondent and notwithstanding that the rent was paid by journal entry by deduction from Mr Azuma's loan account with the respondent, his Honour found (at [41]) that there was no reason for supposing that the arrangement was other than bona fide, observing that the circumstance that the rent was fixed in accordance with the Virtue valuation (which was admitted into evidence without objection) reinforced its legitimacy.

11. Although the appellant challenges his Honour's adoption of the rental value in the Virtue valuation of $1,300 per week (or $5,500 per month), no challenge was, or could have been, directed to his Honour's finding that the lease transaction between Mr Azuma and the respondent was not other than bona fide.

12. Having failed by August 2004 to secure remediation of the defects of which he complained, Mr Azuma and his family vacated the unit being concerned as to their safety in the premises in the circumstances particularly having regard to the problem with the steel uprights which were found to be dangerous and which were of structural significance. At the time of vacating the unit Mr Azuma ceased to pay rent to the respondent. Accordingly, his Honour found that the respondent had earned no income and received no benefit from the use of Lot 14 as and from August 2004 to the date of judgment.

13. After noting that there was no allegation of a failure on the part of the respondent to mitigate its loss, his Honour held (at [45]) that but for the breaches of s 62 Mr Azuma and his family would have remained in occupation of Lot 14 paying rent at the rate of $5,500 per month. In these circumstances his Honour considered that the respondent's loss should be assessed at $5,000 per month or $60,000 per annum due to its inability to use the unit during the 30 month period from August 2004 to February 2007. The amount of damages so assessed was $150,000.

14. There were essentially three issues debated before the primary judge. Relevantly for present purposes the first was whether the membrane constituted part of the common property. The second was whether a breach of s 62(1) gave rise to a private cause of action sounding in damages. The third related to the proper assessment of the respondent's alleged losses. With respect to the last-mentioned, an issue also arose as to whether the respondent should be awarded damages on the basis of the diminution in value of the unit as a consequence of the breaches of s 62(1) or the cost of rectification of the appellant's breaches or, alternatively, whether a mandatory order should be made that those breaches be rectified. As already noted, his Honour adopted the last alternative.

15. As to the second issue, his Honour held that s 62(1) imposed a statutory duty upon the appellant breach of which gave rise to a private cause of action sounding in damages. Although the appellant's Amended Notice of Appeal alleged in Grounds 3, 3(a) and 4 that his Honour erred in so holding, those grounds were abandoned on 4 September 2007, two days before the date set for the hearing of the appeal.

[140771]

As a consequence the costs associated with the preparation by the respondent of its written submissions with respect to those grounds of appeal were wasted. In my opinion, if the appeal be successful it will be necessary to reflect that fact in the final costs orders to be made on the resolution of the appeal.

16. With respect to the first issue, his Honour found that the tiles and, therefore, the membrane under the tiles, had been affixed to the upper surface of the concrete slab of the terrace prior to the date of registration of the Strata Plan. In those circumstances his Honour held (at [18]) that:

"The upper surface of the floor [of Lot 14] was the top of the tiles. The tiles were not themselves within the cubic space and thus do not form part of the lot. As common property is comprised of those parts of an allotment which are not within an individual lot, the tiles, and more particularly the membrane underneath them, were part of the common property."

17. Before the primary judge the appellant had contended that as a consequence of a notation on Sheet 8 of the Strata Plan which related to Level 6 of the subject building which comprised Lot 14, the lower horizontal boundary of that lot and, relevantly, so much thereof as comprised the terrace was the upper surface of the concrete slab. The terrace, except for a relatively small overhang, was uncovered, that is, it was open to the sky being on the top floor of the building. Marked on the floor plan of the terrace was the legend Ø. There was then endorsed on Sheet 8 a notation (the notation) that that legend:

"DENOTES TERRACE LIMITED IN HEIGHT TO 2.5 ABOVE THE UPPER SURFACE OF THE CONCRETE FLOOR THEREOF EXCEPT WHERE COVERED."

18. His Honour accepted the appellant's submission that the words "EXCEPT WHERE COVERED" in the notation referred to a cover of some part of the cubic space above the terrace such as a roof, awning or overhang. However, he rejected its submission that the reference in the notation to "THE UPPER SURFACE OF THE CONCRETE FLOOR" was a reference to the lower horizontal boundary of that part of Lot 14 of which the terrace was the base. He said (at [17]):

"The effect of the annotation is to describe the *upper* boundary of part of the relevant cubic space, by reference to a floor. It does not describe the *lower* boundary. Accordingly, as the floor joins vertical boundaries of the relevant cubic space, the lower boundary of the lot is, pursuant to s 5(2)(a)(ii), the upper surface of the floor." (Emphasis in original).

The issues on the appeal

(a) Were the membrane and the tiles covering the terrace part of the common property or part of the lot?

19. In order to resolve this question it is necessary to refer to the relevant provisions of the *Strata Schemes (Freehold Development) Act 1973* which were in force at the time of registration of the Strata Plan on 4 July 1989 (the *1973 Act*). The following definitions in s 5(1) of that Act are presently relevant.

"**lot** means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan … to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertain under subsection (2) …

floor plan means a plan consisting of one or more sheets, which:

(a) defines by lines … the base of each vertical boundary of every cubic space forming the whole of a proposed lot, or the whole of any part of a proposed lot, to which the plan relates,
(b)…
(c) …"

20. Section 5(2) provides as follows:

"(2) The boundaries of any cubic space referred to in paragraph (a) of the definition of **floor plan** in subsection (1):

(a) except as provided in paragraph (b):

[140772]

(i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition — the inner surface of that wall, and

(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space — the upper surface of that floor and the under surface of that ceiling, or

(b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building)."

21. Section 8(1) of the *1973 Act* provides that a plan intended to be registered as a strata plan must include, as sheets of the plan, inter alia, a floor plan. Clause 9 of the *Strata Titles Act Regulations 1974* (the Regulations) as in force in 1989 when the Strata Plan was registered provided, relevantly, that a floor plan required for the purposes of s 8 shall be drawn showing —

> "(e) where the boundary of a lot is defined by reference to the surface of a floor or ceiling — such vertical connections and notations as are necessary to define that boundary; and
> (f) in all circumstances, notations sufficient to ensure that each cubic space forming the whole of a lot or a whole separate part of a lot is fully defined; provided that where it is intended that a lot boundary is to be defined in accordance with the formula set out in section 5(2)(a) (but not otherwise) no notation shall be made for the purpose of defining that boundary."

22. It is important to note that the appellant conceded that were it not for the notation on Sheet 8 of the Strata Plan, the effect of s 5(2)(a)(ii) of the *1973 Act* would be that the lower horizontal boundary of the cubic space constituted by the terrace of Lot 14 would be the upper surface of the tiles as the floor of the terrace would comprise not only the underlying concrete slab but also the membrane and tiles which were affixed thereto. However, it submitted that the notation constituted, within the meaning of s 5(2)(b), a description on a sheet of the floor plan relating to the cubic space constituted by the terrace of both the upper and lower horizontal boundaries of that space. As such, it described the lower horizontal boundary as the "*upper surface of the concrete floor*" meaning thereby the upper surface of the concrete slab.

23. It was further submitted that although the purpose of the notation was to define the upper horizontal boundary of the relevant cubic space as being 2.5 metres above the upper surface of the concrete floor, it did so by reference to the lower horizontal boundary describing it as the "*upper surface of the concrete floor*". Accordingly, the horizontal boundary between the common property and Lot 14 was the upper surface of the concrete slab thus excluding the membrane, the repair of which was therefore the responsibility of the respondent.

24. Although at first sight the submissions of the appellant seemed to have merit, further consideration of the relevant statutory provisions has convinced me that they should be rejected and that the primary judge was correct in finding that the notation sought only to describe the upper horizontal boundary of the cubic space the base of which was the terrace, and not the lower horizontal boundary which was defined in accordance with the provisions of s 5(2)(a)(ii) as the upper surface of the floor of the terrace which was conceded to be the upper surface of the tiles.

25. My reasons for so concluding are as follows. First, as I have indicated, the appellant conceded that where the formula referred to in s 5(2)(a)(ii) applied, the relevant horizontal boundary between the common property and the terrace forming part of Lot 14 was the upper surface of the terrace floor which included not only the concrete slab but also the membrane and tiles affixed thereto. Second, s 5(2)(a) sets out a statutory formula for the determination of both the vertical and horizontal boundaries of a cubic space being the whole of the lot except as provided in s 5(2)(b). The latter allows for the statutory formula to be departed from where either the vertical or horizontal boundaries of the relevant cubic space are relevantly "*described*" on a sheet of the floor plan relating to that cubic space.

26.

[140773]

Third, that part of s 5(2)(b) which is in parenthesis requires those boundaries to be described in the prescribed manner by reference to "*a wall, floor or ceiling in a building to which*" the floor plan relates. However, it does not require those boundaries to be described by reference to either a wall, floor or ceiling

which comprises a vertical or horizontal boundary although no doubt it may do so. It merely requires a boundary to be described by reference to a physical datum point being a wall, a floor or a ceiling in the relevant building. In the present case the notation identified that datum point by reference to the upper surface of the concrete floor of the terrace.

27. Although it might be suggested that the foregoing construction of the phrase "*a wall, floor or ceiling*" in s 5(2)(b) gives a different meaning to the individual terms "*floor*", "*wall*" and "*ceiling*" to that which each has under s 5(2)(a), in my view that is of no consequence. Section 5(2)(a) lays down a statutory formula pursuant to which, for instance, the lower horizontal boundary of a cubic space is identified as the "*upper surface*" of a floor where it joins a vertical boundary of that space. However, s 5(2)(b) operates as an alternative to s 5(2)(a). Although it permits a lower horizontal boundary to be described on a sheet of the floor plan relating to that space by reference to a "*floor*" in the building to which that plan relates, it does not require that it do so by reference to the "*upper surface*" of that floor.

28. Although the term "*floor*" is not relevantly defined in s 5(1), contrary to the suggestion referred to in the preceding paragraph, in my view it has the same meaning in both limbs of s 5(2). But that is not to the point. The first limb (s 5(2)(a)(ii)) defines the relevant boundary by reference to the "*upper surface*" of the floor; the second (s 5(2)(b)) by reference only to "*a … floor*" in the relevant building. It may or may not describe that boundary by reference to the upper surface of that floor.

29. Of course, there is still the question of what is the upper surface of a floor even where s 5(2)(a)(ii) applies. Is it the upper surface of the floor slab or, where tiles are affixed to that surface as in the present case, the upper surface of the tiles? As a matter of common sense and common parlance I would have thought the latter. The appellant conceded as much. However, where it is intended to define the lower horizontal boundary pursuant to s 5(2)(b), there is nothing to prevent it being described, for instance, as the upper surface of the concrete floor slab. Provided the description adopted makes it plain that it is in fact purporting to fully define that particular boundary, it will be effective according to its terms.

30. However, the primary judge held (at [17]) that the notation did not purport to define the lower horizontal boundary although it clearly did with respect to the upper horizontal boundary. In my opinion, his construction of the notation which led to that conclusion was correct.

31. Fourth, the requirement of s 5(2)(b) that the boundaries be described "*in the prescribed manner*" is addressed by cl 9(f) of the Regulations. That clause requires that any notation be sufficient to ensure that each cubic space forming the whole of a lot or a whole separate part of a lot, be "*fully defined*". However, there is a proviso that where it is intended that a lot boundary is to be defined in accordance with the formula set out in s 5(2)(a), no notation shall be made for the purpose of defining that boundary. In other words, it is only where it is intended to describe the boundary in accordance with s 5(2)(b) rather than leaving its definition or its description to the statutory formula set out in s 5(2)(a), that a notation is necessary (and permitted) by cl 9(f).

32. For the foregoing reasons, in my opinion the notation should be construed as describing only the upper horizontal boundary of the relevant cubic space (being the terrace) and not its lower horizontal boundary which, in my view, was intended to be defined in accordance with the formula set out in s 5(2)(a)(ii). This would be consistent with the fact that the notation relates only to the terrace and does not extend to the balance of Lot 14, the lower horizontal boundary of which is defined by the statutory formula being, relevantly, the upper surface of the floor of the unit.

33.

[140774]

The reasoning process which I have adopted above finds some support in the judgment of Barrett J in *Symes* v *The Proprietors Strata Plan No. 31731* [2001] NSWSC 527. Although his Honour's ultimate decision was reversed by this Court in *Symes* v *The Proprietors Strata Plan No. 31731* [2003] NSWCA 7, that decision related to issues which do not impinge upon his Honour's observations with respect to the manner in which vertical and horizontal boundaries of a cubic space are determined pursuant to s 5(2) of the *1973 Act*.

34. After referring to the definitions of "*common property*", "*parcel*" and "*lot*" in s 5(1) of the *1973 Act*, his Honour observed (at [25]) that the

"…definition 'lot' goes on to describe the cubic space by reference to three characteristics. First, its base must be designated as one lot or part of one lot on the floor plan forming part of the strata plan. … Second, that base's vertical boundaries must be delineated on a sheet of the floor plan. Third, the horizontal boundaries must be ascertained under s 5(2)."

35. As to s 5(2), his Honour made the following observations:

> "27 Similar provision is made by s.5(2) in relation to horizontal boundaries where any floor or ceiling joins a vertical boundary of the relevant cubic space. In such a case, it is the upper surface of the floor or the under surface of the ceiling which is the boundary of the lot so that again the material of the floor or ceiling is common property.
> 28 Boundaries of lots need not correspond with structural features such as walls, floors and ceilings. This is borne out by s.5(2)(b) which refers to boundaries being described on a sheet of the floor plan 'in the prescribed manner *by reference* to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building' [emphasis added].
> 29 The scheme of the Act is such that lines on plans and physical features of the building combine to identify a lot and its boundaries. Lines on plans alone are insufficient. If a boundary of a lot does not substantially coincide with a wall, floor or ceiling — such as, for example, where there is an open patio or balcony with no structure above — that boundary must nevertheless be delineated 'by reference to' such a physical feature. (I leave to one side for the moment the reference in s.5(2)(b) to 'structural cubic space' noting, however, that it too anchors matters back to physical features such as vertical structural members other than walls and is thus entirely consistent with the conceptual approach which pays attention to walls, floors and ceilings.)"

36. His Honour's remarks in [29] of his judgment are of particular relevance to the present case where he emphasises that in a situation such as the present where there is an open terrace with no structure above, its upper horizontal boundary must be delineated by "*reference to*" a physical feature being a wall, floor or ceiling. There is no requirement that that "*physical feature*" be a vertical or horizontal boundary but only that it be a physical reference point from which an appropriate description of the boundary can be made.

37. Accordingly, in my opinion the primary judge was correct in construing the notation on Sheet 8 of the Strata Plan as describing for the purposes of s 5(2)(b) only the upper horizontal boundary of the cubic space of which the terrace formed the base. As the notation did not purport to define the lower horizontal boundary of that space, that boundary is to be determined in accordance with s 5(2)(a)(ii), namely, as the upper surface of the floor of the terrace being the upper surface of the tiles. It follows, therefore, that the membrane is part of the common property to which the provisions of s 62(1) apply to impose upon the appellant the statutory duty to keep the membrane in a state of good and serviceable repair, which it failed to do.

38. For completeness, I should make it clear that where s 5(2)(a)(ii) applies to define the lower horizontal boundary of a cubic space as the upper surface of the floor of that space, that surface fixes the boundary as at the date of registration of the strata plan. If at that date the floor comprises only the bare concrete floor slab, then its upper surface will constitute the lower horizontal boundary.

39.

[140775]

However, if at the date of registration a tile or timber floor has been laid over and affixed to the concrete slab, then the boundary will be the upper surface of the tiles or timber flooring. If that upper layer of flooring is later removed and replaced by tiles or timber flooring the upper surface of which is higher than the surface as at the date of registration of the strata plan, it is the level of the original surface which remains the lower horizontal boundary, not the level of the new surface. The boundary remains fixed: it is not ambulatory. The same principle applies to the determination of the upper horizontal boundary being the ceiling to the relevant cubic space as well as to a vertical boundary of that space being a wall.

40. I am not unmindful of the practical effect of what I have written above. Careful consideration will need to be given by, for instance, a developer who is constructing a building which is proposed to be the subject of a strata scheme to what is intended to constitute the vertical and horizontal boundaries of the cubic space or

spaces comprising a lot. Are they to be the surfaces of the concrete floor and ceiling slabs or brick walls or the surface of any tiles, timber or other material affixed to those slabs or walls?

41. The present case points up the importance of determining these matters prior to the registration of the strata plan. If they are not given attention, then the relevant boundaries will be determined under s 5(2)(a) by reference to the state of the floor, ceilings and walls at the date of registration, in all probability thus giving rise to unintended consequences in terms of the division of responsibility for repairs and maintenance between the owners corporation and the proprietors of the individual lots. It would seem ridiculous, for instance, if the owners corporation was required to take such responsibility for the state of the internal paintwork of a lot. Disputes over such matters can be simply avoided by utilising s 5(2)(b) to fully and clearly describe the relevant boundaries of the cubic space or spaces forming each lot of the strata plan.

42. I also appreciate that what I have said above will not necessarily assist the avoidance of disputes as exemplified by the present case with respect to many existing strata plans where advantage has not been taken of s 5(2)(b). In many cases it will be the luck of the draw dependent on the condition of the relevant floors, ceilings and walls at the date of registration of the particular strata plan. This is unfortunate and unavoidable as to the past but avoidable for the future.

(b) Did the primary judge err in assessing the respondent's damages in the sum of $150,000?

43. The only challenge by the appellant to his Honour's assessment of the respondent's damages arising out of the appellant's breach of s 62(1) is with respect to his adoption of the figure of $5,000 per month as constituting the respondent's loss of rent for the relevant period. As I have already indicated, his Honour adopted that figure based upon the rental value of the unit determined by the Virtue valuation. The appellant submitted that his Honour erred in adopting that figure given that the respondent tendered a valuation of Ms Petra Freeman, valuer, dated 9 November 2005 in which she estimated the rental income of the unit as at the date of the valuation at $600 per week. That figure assumed that the defects, which gave rise to the appellant's breaches of s 62(1), had been fully rectified.

44. The appellant accepted that it was reasonably foreseeable that if the unit was vacated as a consequence of the breaches of s 62(1) of which the respondent complained, there would be a loss to the respondent of the market rental from time to time which, at least after the respondent obtained Ms Freeman's valuation on or about 9 November 2005, was only $600 per week. It was submitted that it would not have been within reasonable contemplation of the appellant that that loss of rental would be as much as $1,300 per week. Accordingly, the primary judge erred in failing to accept Ms Freeman's valuation of the rental at least as and from 9 November 2005 which at that time was far more reliable than the Virtue valuation as at 18 May 2004.

45. In my opinion what was required, and that which was conceded, was that it was within the reasonable expectation of the appellant that the respondent would suffer a loss of rental from its existing tenant, Mr Azuma and his family, if they were required to vacate the unit

[140776]

as a consequence of the appellant's breaches of its statutory duty to repair the relevant part of the common property.

45. The law does not require that the appellant should have a particular rental value in mind. Nor is it necessarily the case that the only loss of rental recoverable is a loss of the market rent from time to time. Damages for breach of statutory duty in a case such as the present are determined in accordance with the normal principles applicable to the assessment of damages in tort. Those principles require that a wrongdoer must take his victim as he finds him. In the present case the primary judge found that but for the breaches Mr Azuma and his family would have remained in occupation of the unit paying rent of $5,500 per month. That rent was based upon what his Honour found to be a bona fide lease transaction where the amount of rent payable had been determined by an appropriately qualified valuer in circumstances which did not permit of any suggestion of lack of bona fides. Had there been no breach by the appellant of its statutory duties, there would have been no reason for Mr Azuma or the respondent to have obtained Ms Freeman's valuation. Mr Azuma would, as his Honour found, have merely continued to pay rent of $5,500 per month.

47. In my opinion it is trite that this Court is a court of error so that unless and until error on the part of the primary judge is established, this Court has no right to interfere with his Honour's assessment of damages.

The appellant does not challenge his Honour's finding that but for its breaches Mr Azuma and his family would have remained in occupation of the unit paying rent of $5,500 per month. It was clearly open to his Honour to so find. No error has been demonstrated.

Conclusion

48. In my opinion, the challenges by the appellant to his Honour's findings with respect to whether the waterproof membrane formed part of the common property of the Strata Plan on the one hand and his assessment of the respondent's damages on the other should be rejected. I would therefore propose that the appeal be dismissed with costs.

Basten JA: This appeal should be dismissed with costs for the reasons given by Tobias JA.

FRANKLIN & ORS v BODY CORPORATE FOR LA PORTE D'OR

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(2006) LQCS ¶90-129

Court citation: [2004] QDC 154

District Court of Queensland

17 March 2004

Conveyancing — Community titles scheme — Contribution schedule lot entitlements — Adjustment of contribution schedule lot entitlements sought — Consideration of what is just and equitable — Body Corporate and Community Management Act 1997 (Qld), s 46, 47, 48, 49 and 50

The body corporate defendant governed the affairs of a Gold Coast apartment block that contained more than 180 lots, a small number only of which were non-residential. The 33rd floor of the building gave access to the lower level of four penthouses. The first and second applicants each owned one of these four lots.

The owners of the other two penthouse lots did not wish to make common cause with the applicants, who sought adjustment of the contribution schedule lot entitlements pursuant to s 48 of the Body Corporate and Community Management Act 1997 (Qld) (the Act). The body corporate's position was that the contribution schedule lot entitlements should not be changed.

Under the Act, a lot in a community titles scheme has both a contribution schedule lot entitlement and an interest schedule lot entitlement. Under the Act, the contribution schedule lot entitlement should be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal.

The applicants were afflicted with high lot entitlements. This required them to make larger than average contributions to body corporate expenditure, which was devoted not only to maintenance of the common property but to the provision of hot water and air conditioning to other privately-owned lots.

The applicants and body corporate reached a resolution that the Court would endorse; it interfered with the status quo only minimally and represented success for the applicants in that their lot entitlements were significantly reduced.

Held: resolution approved

1. The agreement reached between the parties came within the range of "just and equitable" solutions allowed under the Act.
2. The "equality" approach favoured by the Act applies in a general, global kind of way, rather than being one to be examined separately in respect of all categories of body corporate expenditure.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

GJ Radcliff (instructed by Czaus Lawyers) for the applicants.

RA Perry (instructed by Quinn & Scattini) for the defendant.

Before: Robin DCJ

Full text of judgment below

Robin QC DCJ:

1. These are the Court's reasons for the making of the following order at the conclusion of a hearing which took place on 3 and 4 February 2004:

[140434]

> "Pursuant to s 48 of the Body Corporate and Community Management Act 1997 the Court orders that the contribution schedule lot entitlement of each of Lot 179 and Lot 180 be adjusted from 100 to 40 in each case, the aggregate of such entitlements being reduced from 6881 to 6761 accordingly. Otherwise the contribution schedule lot entitlements in respect of the Body Corporate for La Porte D'Or CTS 12681 remain unchanged."

2. The body corporate governs the affairs of a well-known apartment block at the north of Surfers Paradise, better known by its English name of Golden Gate. It was constructed in the middle 1970s and contains more than 180 lots, a small number only of which are non-residential. The non-residential lots include a large ground-floor restaurant which has been unused for some years (one might hypothesise that the lack of dedicated parking facilities has something to do with the failure of the restaurant to thrive in recent times).

3. The 33rd floor of the building gives access to the lower level of four penthouses, Lots 179-182 inclusive. The applicant, Ms Franklin, is the owner of Lot 179; her fellow-applicants own Lot 180. The Court heard

that the owners of Lots 181 and 182 (indeed, of any other lot) did not wish to make common cause with the applicants, who seek adjustment of the contribution schedule lot entitlements pursuant to s 48 of the *Body Corporate and Community Management Act 1997* (the Act).

4. At one stage Mr Russell Eric Williams, who gave evidence by telephone, elected to become a respondent under s 48(2)(b) of the Act; he has since withdrawn from any role as a separate party, leaving it to the body corporate to respond under subsection (2)(a).

5. Under earlier legislation permitting the establishment of body corporates there was a single lot entitlement schedule which indicated the relative beneficial ownership of the aggregate development, voting rights and liability to contribute to body corporate expenses of the lot owners. The hypothetical lot owner would like to see the lot entitlement lower rather than higher from the point of view of its being the basis for contributions and levies, and higher, rather than lower, from the point of view of the share to be enjoyed if the whole community title arrangement came to an end on destruction of the building(s) or sale of all of the lots. My suspicion is that, except in some special instances, where voting power might really matter, experience has led individual lot owners to the view that there is no particular practical advantage flowing from an enhanced franchise.

6. Many developments occurred on the abovementioned basis. No doubt those involved became accustomed to them and regulated their affairs accordingly. A moment's thought would suggest that changes to the established order of things might be unwelcome, even unsustainable for many. This might be for financial reasons.

7. Under the *Body Corporate and Community Management Act 1997*, a lot in a community titles scheme has both a contribution schedule lot entitlement and an interest schedule lot entitlement. Speaking generally, by s 47 the former indicates the relative extent of the lot owner's obligation to contribute to levies and voting rights in respect of ordinary resolutions. S 46(7) indicates that for new schemes the respective lot entitlements must be equal *"except to the extent to which it is just and equitable in the circumstances for them not to be equal"*. The interest schedule lot entitlements by s 47(3) are the basis for calculating the lot owner's share of common property and the lot owner's interest on termination of the scheme, also the unimproved value of the lot, for purposes of land tax and rates; s 48(6) indicates that the respective lot entitlements should reflect the respective market values of the lots included in the scheme.

8. Setting aside those special situations in which voting control within the body corporate is important, an example of which is *Ciriello v Panitz Centre Building Units Plan 3894* (1999) 20 QLR 138, originating application 67 of 1997 (Southport), 12.11.99, Judge Brabazon QC, it will normally suit a lot owner to have a higher interest schedule lot entitlement and a lower contribution schedule lot entitlement. Now that the Court or a specialist adjudicator may order adjustment of lot entitlement schedules under s 48 of the Act, the typical application encountered appears to be one for reduction of contribution schedule lot entitlements designed to reduce the applicant's proportionate responsibility for body corporate levies. (*Ciriello* was a special case, in which the applicants successfully sought increases against their lots in both schedules).

[140435]

9. As to the contribution schedule, by s 48(4) and (5), the order of the Court must be consistent with, *"…the principle (that)… the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal"*. While there are instances of adjusting orders made that introduce equality (as in *Ciriello*) the typical outcome appears to be that some measure of differentiation among lots is considered 'just and equitable'.

10. The Court was referred to two decisions of specialist adjudicators, *Deltaline Properties Pty Ltd v Body Corporate for Surfers Hawaiian Community Titles Scheme 5682* (0296/2003, 27 November 2003, G F Bugden) and *Peter Rogers v The Body Corporate for Taree Lodge and Beryl Hogan* (20 November 2003, Warren D Fischer). In the latter, contribution schedule lot entitlements were adjusted so that one was 610, one 611, eight were 612, two 613, and one each were 617, 622, 623 and 795. In *Deltaline*, the outcome was that 63 lots were assigned a contribution schedule of entitlement of 10, the other lot being assigned an entitlement of 11; i.e. it was considered 'just and equitable' to depart from equality by a 10% loading in respect of one of 64 lots.

11. If Mr Bugden, who is an experienced writer in the field of body corporate law, is correct, *Deltaline Properties* establishes that it is permissible to apply again and again for adjustments of lot entitlements. The applicant before him was, I understand, a successor in title to the owner of the same penthouse unit which had previously successfully applied to this Court for an approximately 25% reduction in its contribution schedule lot entitlement in *AEFK Properties Pty Ltd v Fiona Lin*, Southport 379 of 1999, 5 April 2000. No opposition emerged to the applicant's proposal, except from Ms Lin, who withdrew. The Court made an order in terms of a table of lot entitlements prepared by an 'expert' in the field, Mr Stewart, which he asserted was 'just and equitable', in line with his considerable experience; the relative liabilities of some units lower in the building were increased by up to 50%. The Court's orders coming into effect was deferred for 28 days, to permit all lot owners to be notified of the order within seven days and within seven days from notification to apply for variation of the order. No such application was made.

12. In *Burnitt Investments Pty Ltd v Body Corporate for St Andrews Community Titles Scheme 20508* [2002] QDC 006, the 'just and equitable' outcome was not equality, rather reduction of the applicant's lot entitlement of 32 to 10, where each of the other 33 separate lots in the scheme had an entitlement of one, rather than equality — essentially, the applicant had been responsible for about half of the contributions required to the body corporate, but received no benefit.

13. A practice appears to have developed of applications such as the present becoming the occasion for a wholesale review of the relevant lot entitlement schedule, notwithstanding that the applicant's real interest and concern relates only to the applicant's own contribution (or interest) schedule lot entitlement, and that, for all that appears, other lot owners are content with the status quo. The application proposes a completely revised contribution schedule affecting all 186 lots.

14. In *Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd* [2003] QDC 438 the respondent lot owners took the stance that some adjustment was appropriate; they presented an expert report of Mr Linkhorn proposing new contribution schedule lot entitlements for the 183 lots which were different from those proposed by the applicant's expert, Mr Sheahan. Neither recommended equality, but Mr Sheahan moved closer to equality than his opposite number, with the consequence that the applicant's contributions, from being much higher than the average, were to become much lower. My view was that the approaches of both (like a wide range of approaches that might be taken) could be regarded as 'just and equitable'. I considered it particularly significant that the respondents were agreed in supporting Mr Linkhorn's proposals – absent which, *"there might be difficult issues here about changing the status quo adversely to the interests of lot owners indicating satisfaction with it"*. In the circumstances, I considered that notwithstanding the Act's strong policy of equality, *"with so many lot owners involved, having disparate interests, an outcome which changes the status quo less, rather than more, seems preferable"*.

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15. In *Application by I J Banks and L J Banks in respect of "Noosa On The Beach"* community title scheme 6417, Maroochydore application 96 of 1999, 14 December 1999, Judge Dodds, in respect of a scheme incorporating 31 lots, said in reference to a report obtained by the applicants (having refused to consider two other reports obtained by the body corporate for reasons which he gave) said:

> "I propose to act on the Stewart report. I am satisfied that it is just and equitable the lot entitlements in the scheme be not equal. For the reasons in Stewart's report the lot entitlements he suggests appear just and equitable. The present lot entitlements plainly are not."

16. In the present application, the applicants relied on the views of Ms Arkcoll (who did not support equality), and she was cross-examined by Mr Perry, representing the body corporate (now identified by the Act as the proper respondent, the way being left open for individual lot owners to elect to participate directly). The body corporate obtained a report from Mr Linkhorn which, like Ms Arkcoll's work, reallocated lot entitlements throughout the building, albeit not as favourably from the point of view of the applicants and proprietors of the other penthouses. Neither of them favoured equality. Mr Linkhorn was not cross-examined, but Mr Radcliff, for the applicants, made it clear that this was not because there was no challenge to his views. It was because the parties, with some encouragement from the Court, had arrived at a resolution of the application which both sides found acceptable.

17. The body corporate's position was not that Mr Linkhorn's views should be endorsed by the Court in an order: its position was that the contribution schedule lot entitlements should not be changed.

18. The resolution reached, which appears in paragraph [1], was one the Court was happy to endorse; it interfered with the status quo only minimally, representing success for the applicants, in that their lot entitlements are significantly reduced, but otherwise preservation of the long-standing status quo, which, for all that appears, suits the requirements of all lot owners, other than the applicants. There is no occasion to change lot entitlements of the other penthouse owners, invited to support the application, but not interested in doing so.

19. Only Mr Williams elected to be joined in the application as a respondent, and supporter of the existing contribution schedule lot entitlements. Although he withdrew as a respondent, he provided the Court with an affidavit whose contents, it seems to me, would be broadly typical of the views of many more lot owners. He works as a radio-technical officer employed in the Commonwealth Public Service; he and his wife purchased a one-bedroom unit in Golden Gate in November 2001, knowing what the lot entitlements were and what the liability for contributions in the form of annual fees would be or was likely to be, there being no suggestion at that time that there would be any increases, except of the kind attributable to inflation. The applicants' proposal boded to increase the Williams' contributions from $3,492 per annum by more than $833 per annum. They are in their fifties, expecting to move to the building some time next year *"in semiretirement"*. Mr Williams says that *"As a future retiree I am greatly concerned by the added financial burden that I will be required to bear whilst on a reduced income"*, describing a situation that may apply for many years to come.

20. I rejected Mr Radcliff's submissions that evidence of this kind was inadmissible. In my opinion, evidence as to the legitimate expectations of lot owners is most germane to an exercise in which the Court must determine what is 'just and equitable'; that s 49(5) precludes reference to the understanding of the applicant tends to reinforce the propriety of having regard to the knowledge and understanding of other lot owners. There was before the Court material from other lot owners similar to that from Mr Williams. I accept that evidence.

21. Ms Arkcoll's approach would result in some lot owners facing additional contribution liability in amounts that are multiples of the sum mentioned by Mr Williams. The

interference with expectations is qualitatively more drastic in the case of those who bought in before the 1997 Act. They would have had no reason to anticipate adjustment of lot entitlement schedules. One lot owner whose contributions bode to fall by more than a dollar per week (Ms Murray) deposes to her belief that *"the proposal is grossly unfair and inequitable"*. I accept that for some lot owners, either the Arkcoll proposal or the Linkhorn proposal would produce real financial hardship. Any financial detriment flowing from adjustment of the contribution schedule lot entitlements in respect of two lots only will have a minimal effect on the other lot owners, which the Court may reasonably disregard, especially as the body corporate, representing the interests of those affected, has agreed to it, as a way of resolving the present application.

22. It might be noted that s 50 of the Act leaves it open to the owners of two or more lots to agree in writing to change lot entitlements, provided the aggregate lot entitlement of the lots involved is not changed. The acceptability of *"tinkering"* in that way is consistent with the outcome of this application, with the notion that changing of lot entitlements may occur otherwise than in a wholesale revision of entitlements of all lots.

23. S 49(3) of the Act, in my view, leaves it open to the Court to receive and act upon evidence of the consequences of proposed adjustments to lot entitlements. Subsection (4)(b), entitling the Court to have regard to *"the nature, features and characteristics of the lots included in the scheme"*, makes relevant (but not, of course, determinative) matters such as the relative sizes of lots and their location in the building.

24. In introducing the Bill which became the Act, the Minister said (Hansard 9 May 1997, 1806), having noted concerns expressed in Parliament regarding various issues – including exclusive use by-laws and management agreements:

> "The legislation will address these problems in the future. However, I have some concerns about redressing the problems of the past. That is where it gets difficult. There is no doubt that this legislation

is for the future. However, we are trying to mop up any problems and we are trying to do that without changing or affecting people's vested rights."

25. A general intention not to change or affect people's vested rights is no less than one would ordinarily expect of the legislature. That apart, established rights and expectations in my opinion are pertinent in the making of judgments about what is 'just and equitable'. Although framed more widely, the application before the Court calls only for adjustment of the applicants' position. I think there is no call for a review of the relativities affecting 180 or so other lots, whose owners are content with the status quo.

26. The existing lot entitlements in Golden Gate roughly reflect areas of the lots, although the multipliers applied vary in a range exceeding three to four. There are special considerations affecting commercial lots. An area-based approach seems reasonable, for purposes of assessing contributions given that, by and large, larger units will account for larger areas of walls, roof and windows to clean. In my view, it is common sense that lots containing more bedrooms will generate more wear and tear upon the common property. There is no occasion here to adjudicate as between Mr Linkhorn's *"accommodation potential"* approach, which regards every bed as potentially occupied for the purpose of making calculations, and Ms Arkcoll's highly simplistic one, which tends to treat lots as essentially equivalent, however many bedrooms they have. There was some inconclusive statistical material (the implications of which really were unclear) regarding occupancy. I am aware of local government planning schemes which define the population density in terms of two persons for the first bedroom and one person for each additional bedroom; such an approach may be thought to produce a more 'accurate' comparison, assuming that it is realistic to hope for accuracy or anything like it.

27. The Court, in approving the resolution reached by the present parties, makes it clear that no precedent is being set, for example, as to what ought to be the lot entitlements of other penthouses. The Court was told that the considerations respecting all of them are not the same. For example, not all are required to maintain a swimming pool as a water reservoir to feed the fire sprinkler system in the building.

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If the adjustment to be made had come down to my decision, it may well not have gone as far as the parties' *"agreement"* in reducing the applicants' lot entitlements. However, I am satisfied that the agreement comes within the range of 'just and equitable' solutions within the Act.

28. (My approach is indicated by paragraph [46] of reasons recently published in *Lupton v Hodge*, Southport 138/2003, 9 March 2004:

> "[46] The purpose of subdivision 2 of division 4 of Part 19 of the Property Law Act 1974, as set out in s 282 is 'to ensure a just and equitable property distribution at the end of a de facto relationship'. S 286 authorises the court to 'make any order it considers just and equitable about the property of either or both of the de facto spouses adjusting the interests'. The expression 'just and equitable' which is found also in the headings to subdivisions 3 and 4 and in s 296 seems tautologous, but is increasingly encountered in legislation. An early instance was in relation to contribution among tortfeasors for purposes of apportioning liability (see *Daniel v Rickett, Cockerell & Co Ltd* [1938] 2KB 32); the 'just and equitable' ground for winding up of companies is long established (see *re Kurilpa Protestant Hall Pty Ltd* [1946] State Reports Queensland 171, 183); more recently, the *Body Corporate & Community Management Act 1997* calls for this court or a specialist adjudicator to determine what is 'just and equitable' by way of relative lot entitlements of owners of lots in community titles schemes: see s 48 and *Sandhurst Trustees Ltd v Condah Bay Investments Pty Ltd* [2003] QDC 438, where the view was expressed at para 14, to which I adhere in the present context, that there is no single 'just and equitable' solution. Both components of the expression 'just and equitable' signify 'fair'. I think that 'just' has a connotation that the outcome is defensible in accordance with legal principles of the kind people would expect to be applied in a court.")

29. As things stand, the applicants are afflicted with high lot entitlements (attributable to the generous proportions and/or, perhaps, the much greater market value of their lots). They must make larger than average contributions to body corporate expenditures, which are devoted not only to maintenance of the common property, but to provision of hot water and air conditioning to the other privately-owned lots. It is apparently the case that the penthouse owners gain no benefit from those services whatever, and are

required to provide and pay for them in the penthouses. It seems there may be a facility whereby the body corporate could meter and charge for the hot water supplied by it, but the facility is not made use of so far. The applicants, as both experts acknowledge, have a case for adjustment downwards of their contribution schedule lot entitlements.

30. I am inclined to think that the 'equality' approach favoured by the Act applies in a general, global kind of way, rather than being one to be examined separately in respect of all categories of body corporate expenditure. I accept that it may be useful for the experts in these matters to do their analyses in this detailed way, treating the dedicated "high-rise" and dedicated "low-rise" lifts separately, for example. This was Mr Linkhorn's approach, whereas Ms Arkcoll, on the basis that there ought to be no distinction made between lift charges made against the 17th floor as opposed to the 16th, considered that there should be no distinction made between the 2nd floor and the 32nd; Mr Linkhorn thought it significant that the "high-rise" lifts cost more to run. It was not clear whether the costs of a lift depend more on distance travelled, or number of stops. This example illustrates the uncertainties in trying to achieve justice and equity by close financial analysis.

31. I would note one argument mounted by Mr Perry which I think merits further consideration, to the effect that the body corporate's expenditure on maintenance of common property helps the owners with higher interest entitlements to protect or enhance their capital. This may provide some justification, analogous with our so-called 'progressive' taxation system (which may be taken to be accepted generally in the community as 'just and equitable') for requiring lot owners deemed to be wealthier in the sense that they hold more valuable real estate, to pay more for the upkeep of the whole. Of course, it cannot be predicted whether expenditure on maintaining in good

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order and appearance a 30-year-old building will be reflected in the value if the whole scheme comes to an end: it may well be if the whole building is purchased by someone proposing to operate it as a going concern, rather than by someone who wishes to demolish it.

32. On the topic of values of lots in the building, I would note my acceptance of the evidence of the valuer, Mr Smith, to the effect that the market values of lots in Golden Gate whose lot entitlements in the contribution schedule are increased will decline, and appreciably so.

MNM DEVELOPMENTS P/L V GERRARD

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(2005) Q ConvR ¶54-624

Court citation [2005] QCA 230

Supreme Court of Queensland, Court of Appeal

Judgment delivered 24 June 2005

Contract for sale — residential property — whether purchaser had a right to terminate contract due to vendor non-compliance with the requirements of the Property Agents and Motor Dealers Act 2000 — whether s 366(1) ``Warning Statement'' correctly attached — meaning of ``attached'' — Property Agents and Motor Dealers Act s 366(1); 367(2).

The respondent was the vendor of a residential property situated in the Gold Coast pursuant to a contract for sale dated 10 June 2003 with the appellant purchaser.

Pursuant to s 366(1) of the Property Agents and Motor Dealers Act, the vendor was required to ``attach'' to the contract for sale, ``as its first or top sheet'', a ``Warning Statement'' advising the purchaser of its rights in regard to the ``cooling-off period'' otherwise the purchaser would have a right to terminate the contract by notice prior to settlement (s 367(2)).

On 26 May 2003, the vendor's agent sent to the purchaser a continuous fax comprising a cover sheet/letter, a Form 27b (``Selling Agent's Disclosure to Buyer''), a Form 30C (``Warning Statement'') and then the contract for sale (in that order). A director of the purchaser signed the Disclosure Statement, the Warning Statement and the contract for sale (in that order) and faxed the executed documents back to the vendor's agent. The purchaser's director also separately sent the original documents back to the vendor's agent. The vendor then executed the original contract in June 2003.

The contract was to be completed on 4 June 2004. On 24 May 2004, the purchaser sent a fax to the vendor's solicitor advising that it was terminating the contract pursuant to its purported right to do so under s 367(2).

The vendor rejected the termination on the basis that the Warning Statement was validly attached to the contract for sale.

At trial, the purchaser sought a declaration that it had validly terminated the contract and sought an order for repayment of the deposit monies. This application was rejected by the trial judge on the basis that the requirements of s 366(1) had been complied with. As this judgment was not final, it was necessary for the purchaser to seek leave to appeal.

The purchaser submitted that the Warning Statement had to be physically annexed to the contract for sale by binding, stapling, pinning etc and that it was not sufficient for the Warning Statement to merely be in close proximity with the contract.

The vendor argued however, that the legislature could not have intended the term ``attached'' to be construed in such a limiting way because this would exclude the electronic exchange of contracts for sale.

In order to ascertain whether the requirements of s 366(1) had been complied with, the trial judge considered the meaning of ``attached'' to the contract, ``as its first or top sheet''.

In his exploration of the meaning of the term ``attached'', the trial judge referred to the observations of Muir J in MP Management (Aust) Pty Ltd v Churven & Anor (2003) Q ConvR ¶54-581; [2002] QSC 320 whereby it was reasoned that attachment in its less

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restrictive sense, does not necessary mean physical joinder. However it was noted that in its everyday sense, ``attached'' does suggest some form of joinder, fastening or affixation and that the intention of the legislature, (ie the protection of residential purchasers by giving prominence to the Warning Statement), would tend to indicate that construction of the term should be construed restrictively. Further, the requirement of s 366(1), that the Warning Statement be attached as the first or top sheet of the contract, is indicative that it is not sufficient to simply place the Warning Statement on the contract or provide it in a folder together with the contract. It must be affixed to the contract or at least be the first page of a bundle, and so numbered as the first page.

The trial judge then explored the meaning of attachment when applied to contacts involving facsimile transmission, finding that what is important in a facsimile transmission is the *order* in which the documents are submitted rather than the means by which they are attached.

Because the Warning Statement was placed immediately in front of the contract in a continuous facsimile transmission, the requirements of s 366(1) were satisfied, the trial judge found.

Held: Leave to appeal granted. Appeal dismissed. Matter needs to proceed to trial for determination.

As per de Jersey CJ (with Williams JA and McMurdo J concurring):

The trial judge erred in his construction of the statutory provisions for the following reasons:

1. The meaning of the term ``attached'' in s 366 should be construed restrictively. Chapter 11 of the Property Agents and Motor Dealers Act (of which s 366 is a part) includes technical requirements ``plainly directed to ensuring a form of consumer protection for purchasers of residential property''. Pursuant to such consumer protections, the purchaser had a right to terminate a contract even for ``quite technical contraventions... whether or not the purchaser has suffered any material disadvantage''.

2. The vendor's argument that the legislature could not have intended the word ``attached'' to be construed in a restrictive sense because this would frustrate commercial dealings by excluding the electronic exchange of contracts was immaterial. The intention of the legislation is first and foremost to protect purchasers of residential property. In any case, a restrictive interpretation would not impede negotiations by fax. It would mean however that the act of contracting must be done by the exchange of original documents.

3. The factual basis assumed by the parties at trial was that the concluded contract was in facsimile form, instead of the original executed contract. Accepting that assumption (which may or may not have been correct), the pages of the Warning Statement appeared in the midst of a series of pages. It is clear however that the intention of the legislation is to ensure that a purchaser would first be confronted by the Warning Statement before reading the rest of the contract. The Warning Statement could not be described as ``attached'' to the contract merely because the contract followed the Warning Statement in the sequence of the fax.

4. Further, if the legislature had intended for a less restrictive approach, it would have done so by using language less prescriptive than ``as its first or top sheet''.

Williams JA made the additional observation that the facts of the case were too convoluted for the court to make a determination. It was unclear which set of documents brought the contract into existence — was it the faxed documents of 26 May 2003 or the original contract of June 2003? Did the original contract of June 2003 include the Selling Agent's Disclosure to Buyer Form, and Warning Statement and if so, what order were the documents sent, and were they bound together?

McMurdo J also explored the issue of when the Warning Statement must be attached to the contract for sale, a matter not specifically addressed in the legislation. If it must be attached at the time the draft contract is prepared, is an offence committed if the Warning

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Statement is not attached to the contract for sale but the sale does not proceed? It is obvious that the Warning Statement must be attached at the time there is a concluded agreement. Additionally, s 366(4) provides that the Warning Statement must be signed by the purchaser before the contract for sale is signed. There is no stipulation in the legislation however, that the Warning Statement must be attached to the contract at the time the Warning Statement and the contract are signed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

H B Fraser QC, with P W Hackett (instructed by Schultz Toomey O'Brien Lawyers) for the applicant.

A J H Morris QC, with L Jurth (instructed by Short Punch & Greatorix) for the respondent.

Before: de Jersey CJ, Williams JA and McMurdo J.

Judgment in full below

de Jersey CJ: By a contract dated 10 June 2003, the respondent agreed to sell to the appellant, for the sum of $1.25 million, residential property at the Gold Coast. *The Property Agents and Motor Dealers Act* 2000 (Qld) applied to the transaction. It obliged the respondent to ``attach'' to the contract, ``as its first or top sheet'', a ``warning statement'' advising the appellant of its rights (s 366(1)). In the event that did not occur, the appellant gained a right to terminate the contract by notice prior to settlement (s 367(2)). The contract was due for completion on 4 June 2004. On 24 May that year, the appellant faxed the respondent's solicitors advising that it terminated the contract under s 367(2). The respondent rejected that termination.

2. The appellant sought a declaration that it validly terminated the contract, and an order for repayment of the deposit monies of $62,500. On the basis there was no relevant dispute about the facts, a learned District Court Judge dismissed the application, because he concluded the warning statement had been attached to the contract as required by s 366(1).

3. Because that judgment was not a ``final judgment'' (*Carr* v *Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246), it was necessary for the appellant, challenging the judgment, to seek leave to appeal (s 118(3) *District Court of Queensland Act* 1967 (Qld)). Because the construction of the statutory provision has not yet been settled at appellate level, and the determination of this case may have a significant impact on contracts for the sale of residential property, the court granted leave to appeal.

4. The critical provision, s 366, is in these terms:

> **``366 Warning statement to be attached to relevant contract**
>
> **(1)** A relevant contract must have attached, as its first or top sheet, a statement in the approved form (`**warning statement'**) containing the information mentioned in subsection (3).
>
> **(2)** The seller of the property or a person acting for the seller who prepared a relevant contract commits an offence if the seller or person prepares a contract that does not comply with subsection (1).
>
> Maximum penalty — 200 penalty units.

(3) The warning statement for a relevant contract must state the following information —

(a) the contract is subject to a cooling-off period;
(b) when the cooling-off period starts and ends;
(c) a recommendation that the buyer seek independent legal advice about the contract before the cooling-off period ends;
(d) what will happen if the buyer terminates the contract before the cooling- off period ends;
(e) the amount or the percentage of the purchase price that will not be refunded from the deposit if the contract is terminated before the cooling-off period ends;
(f) a recommendation that the buyer seek an independent valuation of the property before the cooling-off period ends;
(g) if the seller under the contract is a property developer, that a person who suffers financial loss because of, or

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arising out of, the person's dealings with a property developer or the property developer's employees can not make a claim against the claim fund.

(4) A statement purporting to be a warning statement is of no effect unless —

(a) before the contract is signed by the buyer, the statement is signed and dated by the buyer; and
(b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.
Example for paragraph (b) —
If words on the approved form are presented in 14 point form, the words on the warning statement must also be presented in 14 point form.''

5. The purchaser's right to terminate is established by s 367, as follows:

``367 Buyer's right if warning statement not given

(1) This section applies to a contract to which a warning statement must be attached.

(2) If a warning statement is not attached to the contract or is of no effect under section 366(4), the buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller's agent.

(3) The notice of termination must state that the contract is terminated under this section.

(4) If the contract is terminated, the seller must, within 14 days after the termination, refund any deposit paid under the contract to the buyer.

Maximum penalty — 200 penalty units

(5) If the seller, acting under subsection (4), instructs a licensee acting for the seller to refund the deposit paid under the contract to the buyer, the licensee must immediately refund the deposit to the buyer.

Maximum penalty — 200 penalty units

(6) If the contract is terminated, the seller and the person acting for the seller who prepared the contract are liable to the buyer for the buyer's reasonable legal and other expenses incurred by the buyer in relation to the contract after the buyer signed the contract.

(7) If more than 1 person is liable to reimburse the buyer, the liability of the persons is joint and several.

(8) An amount payable to the buyer under this section is recoverable as a debt.''

6. The respondent contended before the learned primary Judge that the attachment of the warning statement to the front of the contract arose in the following circumstances. On 26 May 2003, the respondent's agent sent to the appellant a continuous — ie single extended sheet, fax, comprising, in this order, a cover sheet/ letter; a form 27b (``Selling Agent's Disclosure to Buyer'' — s 138(1)); a form 30c (``Warning Statement''), the second page of which was headed ``important information you should read before you sign this warning

statement and the attached contract''; then the contract. The appellant's director signed the disclosure statement, the warning statement and the contract, in that order, and faxed the executed documents back to the respondent's agent. The appellant's director separately sent the original documents back to the agent. The respondent then executed the original contract. There was apparent compliance with s 366(4): the issue agitated in the District Court was whether the warning statement was ``attached'' to the contract, ``as its first or top sheet''. While as[sic] s 366(1) and s 367(2) refer to a concluded contract, other references in those provisions to a ``contract'' must be read as referring to a draft contract (eg s 366(2), s 366(4)(a)).

7. The learned Judge set out, in his reasons for judgment, the following observations of Muir J in *MP Management (Aust) Pty Ltd* v *Churven & Anor* (2003) Q ConvR ¶54-581; [2002] QSC 320:

> ``20. The word `attached', in its less restrictive sense, may mean `accompanying' or `associated' (*Bosaid* v *Andrey* [1963] VR 465 at 473) and, in that sense of the word, one thing may be `attached' to another without physical joinder. (*Elliott Common School District No. 48 v Country Board of School Trustees* Tex Civ App, 76 SW 2d 786, 780.)
>
> [140443]
>
> 21. In its more restrictive sense and, I rather think, every day sense, `attached' connotes some form of joinder, fastening or affixation. There is nothing in the context of s 366 or s 367 which would tend to indicate that the word should be construed broadly, quite the contrary. The aim of the sections appears to be to give prominence to the warning statement by ensuring that not only is it inseparable from the contract proper but that it is the first document to be seen by a prospective purchaser when perusing the contract.
>
> 22. Subsection (1), by requiring a contract to `have attached' the warning statement `as its first or top sheet', suggests that more than the mere placing of the warning statement on the contract or providing it in a folder together with the contract is required and that some form of physical joinder or incorporation is necessary.
>
> 23. It may be that the requirements of s 366(1) could be complied with without the warning statement being stapled, pinned to or bound up with a contract. For example, if the warning statement was the first of a number of loose sheets placed together in a folder and numbered or otherwise identified as the first sheet of the bundle, it may be arguable that the warning statement was `attached' to the other documents...''

8. The primary Judge then reasoned as follows:

> ``Where a contract for the sale of land involves facsimile transmission between the parties, the more restrictive sense of the word `attached', as identified by Muir J, will obviously not be applicable. In these circumstances it is the order in which the documents are transmitted that is important rather than the means by which they are affixed...
>
> In the present case, it should be remembered, the Warning Statement was placed immediately in front of the Contract in a continuous facsimile transmission. In my view, the Warning Statement was, therefore, `attached' to the Contract as its first or top sheet, thus satisfying the requirement in s 366(1) of the Act.''

9. At the hearing of the appeal, we drew attention to the parties' and the court's focus below on the facsimile transmission in May, rather than the pleaded concluded contract of 10 June. The relevant statutory requirement relates to the concluded contract (s 366(1)), as does the provision according the right of termination (s 367(2)). While the evidence below did not address the physical configuration of that concluded contract, and that remains so, we were asked by both parties to express our conclusions as to the issue of statutory construction. There is utility in our doing so, even though — on my approach — the matter would have to be sent to trial. That is because while I believe the learned Judge erred in his construction of the statutory provisions, the relevant factual situation was not established clearly by the evidence, or addressed. For that reason, summary judgment could not have been, and could not now be, entered.

10. I turn now to the question of statutory construction.

11. Counsel for the appellant submitted ``that the warning statement [must] be attached to the contract as the first or top sheet (by binding, stapling, pinning, clipping or other form of attachment), and not merely associated with it (such as by mere physical closeness, internal cross references or the like)."

12. Counsel for the respondent submitted that the legislature could not have intended to exclude the exchange of contracts for the sale of residential property by electronic means, including facsimile transmission. Because physical attachment of a warning statement to a contract is impossible in that medium, something falling short of actual attachment must have been contemplated. Accordingly, it was submitted, it sufficed, for there to be attachment within the scope of s 366(1), that the warning statement formed part of a single continuous facsimile transmission, with the statement immediately preceding the contract.

13. Under its primary meaning, you ``attach" one document to another by ``fastening, affixing, joining or connecting" (Macquarie Dictionary) the two together. The related meaning offered in the Shorter Oxford English Dictionary is ``to tack on; to fasten or join (to) by tacking, tying, sticking etc". As Muir J observed, this would require ``some form of physical joinder or incorporation".

14.

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The respondent supports a construction which will maintain the availability of facsimile transmissions to facilitate the making of agreements of this character, and refers to the specific provision for facsimile transmission in s 365:

> ``**365 When parties are bound under a relevant contract**
>
> **(1)** The buyer and the seller under a relevant contract are bound for all purposes by the contract when the buyer or the buyer's agent receives a copy of the contract signed by the buyer and the seller.
>
> **(2)** For subsection (1) and without limiting how the buyer or the buyer's agent may receive a copy of the signed contract, the buyer or the buyer's agent may receive the copy by fax."

15. It is however significant that that section deals only with copies.

16. The context of the requirement set up by s 366 tells against a liberal interpretation of that requirement. Chapter 11 of the Act, in which s 366 occurs, contains a detailed set of technical requirements plainly directed to ensuring a form of consumer protection for purchasers of residential property. One of the objects of the Act, stated in its preamble, is ``to protect consumers against particular undesirable practices". That protection extends, in cases like these, to giving a purchaser a right to terminate even for quite technical contraventions, and whether or not the purchaser has suffered any material disadvantage. See, for example, s 366(4)(a), s 366(4)(b) (including the example) and s 367(2).

17. In *Sidbent P/L & Anor* v *Reinisch* [2003] QSC 203, White J suggested that because a failure to attach attracts criminal sanctions (s 366(2)), a broad interpretation of what amounts to attachment might be favoured. But if the natural construction of this remedial provision is clear, then that should be adopted. While a particular statutory construction may sometimes produce inconvenience, that does not justify departure from that construction if it is clear (cf. *Horinack* v *Suncorp Metway Insurance Ltd* (2001) 2 Qd R 266, 267, 269).

18. My view is that on the factual basis adopted below, this warning statement was not attached to the contract, as its first or top sheet. That ``factual basis" assumed the concluded contract was in the facsimile form discussed by the primary Judge, which may or may not prove to be correct. But accepting that assumption for the present, the pages of the warning statement appeared in the midst of a series of pages comprising a different form, the relevant statement, the contract and the directors' guarantee. The legislature intended that a purchaser, picking up the contract, would necessarily have first to confront the warning statement. That is achieved by adopting here the ordinary concept of ``attach", which I am satisfied was plainly the legislature's intent. One could not reasonably say this statement was attached to the contract, as its first or top page, where the only physical relationship between the documents, within the continuous fax, was that where the warning statement ended, the separate contract began.

19. While on this scenario it may be said that this warning statement was ``attached'' to this contract, being adjacent in that same continuous stream of paper, it was not attached as the first or top sheet of the contract. For that to occur, in order to satisfy the intention of the legislature as I comprehend it, the seller must present the two documents, one on top of the other, with the former physically confronting the reader as he or she sets about perusing the latter, being the contract. The rather fortuitous connection between the warning statement and contract, as presented here, could not fulfil that stipulation, a stipulation obviously directed to consumer protection, not the convenience of vendors of residential property.

20. It would be an exaggeration to suggest that construction would frustrate commercial dealings. In the first place, the convenience of commercial dealings is, implicitly, only subsidiary. Of primary importance is the protection of purchasers of residential property. Also, this approach would in no way impede negotiations by fax. But it would mean the act of contracting must be done by the exchange of original documents, a course probably reflected by s 365, and a course most contracting parties, even in this electronic age, would favour anyway, to ensure the security of their binding dealings.

21. Finally, had the parliament intended to sanction a situation like this, it would have done

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so by using language less prescriptive than, ``as its first or top sheet''. It is those terms which to my mind compellingly exclude the respondent's position. The legislature has considered an exacting obligation justified to secure the goal of consumer protection.

22. But in the end, because the relevant issue was not addressed, and not capable of being addressed because the relevant facts were not clearly established, the matter was not susceptible of summary determination, and that remains the position.

23. I would make the following orders:

1. grant leave to appeal;
2. dismiss the appeal;
3. order the appellant to pay the respondent's costs of and incidental to the appeal to be assessed.

Williams JA: After the close of pleadings the appellant (plaintiff) sought summary judgment of its claim for a declaration that it had validly terminated a contract dated 10 June 2003 for the purchase of a residential property from the respondent. The application was dismissed and the appellant has appealed.

25. Both the application for summary judgment and the statement of claim refer to a written agreement dated 10 June 2003 (``the contract'') between the respondent as seller and the appellant as purchaser for a purchase price of $1.25 million. That allegation was admitted in the defence and it was also not in dispute that the contract was for the sale of ``residential property'' within the meaning of that term as defined in the *Property Agents and Motor Dealers Act* 2000 (Qld) (``the Act''). It was further agreed that the deposit was paid on 11 June 2003, and all calculations of time appear clearly to be based on a contract dated 10 June 2003.

26. The contention of the appellant is that there was a failure to comply with s 366 of the Act (which is fully set out in the reasons for judgment of the Chief Justice) and that in consequence it was entitled to terminate the contract pursuant to s 367 of the Act (again set out in the reasons for judgment of the Chief Justice) and did so on 24 May 2004, being a date prior to settlement.

27. The provisions of the Act in question are badly drafted; the reference in s 366(1) should not be to a ``contract'' but to documents submitted to an intending purchaser. (The possible ways in which the section may be applied discussed by McMurdo J in his reasons highlight other deficiencies in the drafting.)

28. A contract required to be in writing, as is the case here because it is concerned with real property, comes into existence when the document is duly executed by each party thereto. Until such execution there is no contract.

29. What the legislature to my mind clearly intended to say, but did not, was that the documents presented to a potential purchaser for execution, and which would result in a relevant contract coming into existence, must have attached as the first or top sheet a warning statement. That would have the desired consequence of bringing to the potential purchaser's attention prior to execution of the contract the contents of the warning

statement. The sequence would then be, as provided by s 366(4), that the warning statement would be executed prior to execution of the contractual documents; thus prior to the relevant contract coming into existence the potential purchaser would have been duly warned and would have duly signed the warning statement.

30. The obligation is on the party who prepares the contractual documents (and it is not unheard of for that to be the purchaser) to ensure that the documents submitted to the purchaser for execution comprise the necessary contractual documents to which is attached as the first or top sheet the approved warning statement. In the present case it seems clear that the documents were prepared by the respondent and in consequence there was an obligation on the respondent to present the documents to the appellant for execution in that form.

31. The critical question to be determined in deciding whether or not the appellant had its asserted right of termination is whether or not the documents as presented for execution by the appellant complied with that statutory requirement.

32. Unfortunately the facts of the case are far from clear.

33. Paragraph 6 of the statement of claim alleges that on or about 26 May 2003 the appellant was sent for signature and return

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documents (which it is now agreed) were in the form of a continuous fax. The agreed order in that continuous fax was:

(i) Form 27(b) — selling agent's disclosure to the buyer pursuant to s 138(1) of the Act;
(ii) Form 30c being the warning statement referred to in s 366 of the Act;
(iii) REIQ Contract for House and Land.

34. It appears to be agreed that the appellant executed the documents where necessary and returned them, in the same order, to the respondent by fax. Further, it appears to be agreed that some executed documents were returned to the respondent by some other means. It is not clear whether what was involved was returning the original facsimile executed by the appellant, or some other form of the documents.

35. Paragraph 3 of the statement of claim, as already noted, refers to ``a written agreement dated 10 June 2003''. Paragraph 7 of the statement of claim alleges that on or about 10 June 2003 the sellers agent ``sent the original contract referred to in paragraph 3 herein to the Plaintiff for execution''. That is admitted in the defence. An affidavit of the respondent setting out the relevant chronology also alleges that his solicitors on 10 June 2003 sent out ``contract to be signed'' and that ``original was returned with signed contract.'' The next step according to that affidavit was the solicitor sending the contract to its client, the respondent, ``for signing''.

36. Various affidavits filed on the hearing of the application for summary judgment exhibit a great deal of correspondence, but there is nothing which amounts to a covering letter with respect to sending out a further set of documents for execution by the appellant on 10 June 2003. Further, the material is silent as to how on that date the relevant documents were ``sent''. More importantly there is nothing to indicate the form in which those documents were sent, that is the order in which the documents appeared, and nothing to indicate what documents, if any, were bound together in some way.

37. The material from either side is so vague and uncertain that it is not clear whether a set of documents was executed on or about 26 May 2003 and another set on or about 10 June 2003; the material is clearly open to that conclusion. If there were two sets of documents executed by the parties then it is clear from the pleadings that the operative documents were those executed on or about 10 June 2003.

38. All that one can say with respect to documents sent out for execution by the appellant on 10 June is that it is alleged in the statement of claim and admitted in the defence that the documents were ``in the following order'' whatever that means; that order being:

(i) Form 27(b) signed by the appellant on 26 May 2003;
(ii) Form 30c signed by the appellant on 26 May 2003; and
(iii) REIQ contract for house and land.

39. If that be accurate then what was sent out for execution as alleged in paragraph 7 must only have been the REIQ contract — the other documents already being signed on 26 May. That would appear to be the case as paragraph 7 goes on to allege that the appellant then ``executed... the original contract of sale referred to in paragraph 3 herein'' and sent back to the agent the documents in the following order: Form 27(b) signed by the appellant 26 May 2003, Form 30c signed by the appellant on 26 May 2003 and REIQ contract for house and land signed by the appellant on or about 10 June 2003. All of that is admitted in the defence.

40. On the application for summary judgment, notwithstanding what was said in the pleadings, the concentration was on the documents sent out by continuous facsimile on 26 May. Given the state of the material there was a clear factual issue as to whether or not the signing of the documents sent by facsimile on 26 May was the operative act of the appellant in the sense that it was that execution which, after execution by the respondent, brought the contract into existence. If the relevant execution was of documents sent out on or about 10 June then the relevant enquiry for purposes of s 366 and s 367 of the Act would have been with respect to those documents.

41. It is clear in the circumstances that the first question to be determined is what set of documents constituted the relevant contract for purposes of s 366 and s 367. For all this court knows at this stage when the documents were

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sent out on 10 June to have the REIQ form of contract executed by the appellant the Form 30c could have been ``attached'' as the top sheet of that REIQ form.

42. Once the facts relating to the formation of the relevant contract are established it will probably be relatively easy to determine whether or not there has been a breach of the requirements of s 366 of the Act entitling the appellant to terminate the contract.

43. The learned judge at first instance was asked to determine the matter on the basis of documents executed on or about 26 May when ultimately that may not prove to be the relevant question.

44. For the reasons given by the Chief Justice I agree that if the relevant documentation is the continuous fax forwarded to the appellant on 26 May then s 366 of the Act was breached; given the nature of the continuous fax it cannot be said that the warning statement was attached to the contractual document as the first or top sheet thereof. To that extent the reasoning of the learned District Court judge at first instance must be rejected.

45. In my view s 365 of the Act is not an indication that the documents prepared for execution can be forwarded by fax. That section is dealing with the forwarding of a copy of the executed contract to the purchaser, a step required by the Act. It would be unusual to have as the original contract documents forwarded by facsimile and there is no hardship in requiring the documents prepared for execution being submitted to the intending purchaser in a way which complies with the statutory requirements.

46. The consequence of dismissing the application for summary judgment is that the matter will have to proceed to trial. For the reasons given above that is obviously the only appropriate course open. Though the learned judge at first instance erred in his reasoning in arriving at the conclusion that the application for summary judgment should be dismissed, the appropriate order for this court to make is that the appeal be dismissed; as noted, that means the matter will go to trial.

47. Because the relevant facts were so unclear it ought to have been obvious to the appellant that an appeal was doomed to fail. The appellant should pay the respondent's costs of the appeal to be assessed.

48. The orders should therefore be:

(i) Grant leave to appeal;
(ii) Appeal dismissed;
(iii) Order the appellant to pay the respondent's costs of and incidental to the appeal to be assessed.

McMurdo J: I agree that the appeal should be dismissed and with the other orders proposed by Williams JA.

50. As the judgments of the Chief Justice and Williams JA discuss, the factual basis upon which the case was argued before the learned primary judge did not correspond with the facts which are common ground on the pleadings. According to the pleaded facts, it is possible that the requirements of s 366 were satisfied by the attachment of a warning statement to the relevant contract document, if it was not attached by the transmission of facsimile copies as occurred on 26 May 2003. That possibility is indicated by the pleadings, but more facts than those which are pleaded would have to be found before the question of ultimate compliance with s 366(1) could be determined. At the hearing in this court, the parties were asked to agree, if possible, upon such further facts as would enable this court to determine the question. The parties cannot agree, and the facts must be found at a trial.

51. There are several potential questions as to the interpretation of s 366 and s 367 which could arise in this case. Some discussion of them is necessary in order to explain why the facts must be investigated at a trial.

52. Section 366(1) provides that a relevant contract must have attached, as its first or top sheet, a warning statement. A relevant contract means a contract for the sale of residential property in Queensland, other than a contract formed upon a sale by auction.[1] In the context of s 366, the term relevant contract refers to a document which is intended to evidence and define the contractual relationship. That relationship commences, that is the parties are contractually bound, only when the buyer, or the buyer's agent, receives a copy of the

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contract signed by the buyer and the seller: s 365(1). But at what point in the dealings must the warning statement be attached to the contract document?

53. The legislation does not expressly answer that question. Section 366(2) might indicate an answer, by providing that the seller or a person acting for the seller who prepares a relevant contract commits an offence if the seller or person prepares a contract that does not comply with s 366(1). But at what point is that offence committed? Is an offence committed if no contract is formed? It is far from clear that it is intended that a seller, or his estate agent or solicitor, should be caught by the offence provision if the relevant document remains but a draft. Otherwise, for example, an agent might commit an offence simply by faxing the draft contract and warning statement (as occurred here), assuming for the moment that the documents are not thereby attached. The offence is committed by the preparation of a document but only a document meeting the description of ``a relevant contract'', and at least on one view, a document is not of that description unless and until it does record a contractual relationship. If that is correct, s 366(2) does not strongly indicate that the warning statement must be attached before the buyer receives the draft contract.

54. Section 366(4) requires the warning statement to be signed by the buyer before the contract is signed by that party. But it does not provide that the warning statement is to be attached to the contract when either the warning statement, or in turn the contract, is signed by the buyer. Nor does s 367 stipulate the point by which the statement must be attached. Plainly it must be attached by the time there is a concluded agreement for, on any view, the document is by that time ``a relevant contract''.

55. It would be logical to require the warning statement to be attached when the prospective buyer *receives* the (draft) contract. That might enhance the prospects of the buyer's signing the warning statement before signing the contract. But there is no clear implication that the statement must be attached by that point in time. An alternative interpretation is that the statement must be attached by the time the buyer *signs* the contract. That interpretation would make the warning equally effective but it would allow for some greater convenience and expedition. Assuming for the moment that a statement is not attached to the contract by a buyer receiving copies by facsimile transmission, this alternative interpretation would permit the buyer's copies, as printed from the fax machine, to be signed by the buyer.

56. A further alternative interpretation is that the warning statement must be attached to the contract document by the time the parties become bound. That would still provide a warning consistently with the purposes expressed in s 363. It would still require the warning to be signed and dated by the buyer before the buyer signs the contract. And the attachment of the warning to the front of the contract would serve an important purpose, although the attachment was not made until the buyer or the buyer's agent was sent a copy of the contract, signed by the buyer and the seller. That is because the cooling-off period only begins when the parties become bound. The content of a warning statement, as prescribed by s 366(3), seems

largely to be designed to assist the buyer to decide whether to opt out during the cooling-off period. Of course, it is also relevant for the buyer's decision to sign the contract, for otherwise the section would not require the warning statement to be signed prior to the contract being signed. But the subsequent *attachment* of the warning statement serves a substantial purpose in informing purchasers during the cooling-off period. The benefit of the cooling-off period is enhanced by the prominence of the warning as to what the purchaser should or could do within that period. Indeed, that was the purpose of the warning statement which is identified by Professor W D Duncan, in his report which was laid before the Legislative Assembly before the enactment of this Act.[2]

57. It is unnecessary to determine on this appeal which of these interpretations is correct. Nor is it necessary to determine whether the primary judge was correct in holding that the statement was sufficiently attached by the facsimile transmission to the plaintiff of 26 May 2003. Those questions are related, because if there can be no attachment by faxing copies

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of the document, or by e-mailing them, then the argument for the attachment being required at a point subsequent to the buyer's receipt of the documents becomes more persuasive. That argument is also supported by the fact that, as Williams JA has noted, sometimes the contract document is compiled by the buyer's side.

58. According to the pleadings and the present evidence, it is impossible to say whether what ultimately became the contract document had attached a warning statement, and if so, when that attachment was made. Possibly the warning statement signed by the plaintiff on 26 May was attached to the draft form of contract if, as is agreed on the present pleadings, those documents were sent to the plaintiff on or about 10 June 2003. Unless s 366 requires the warning statement to be attached to the contract prior to the statement itself being signed, that would represent compliance with the section. It is at least strongly arguable that those facts would constitute compliance and there is some potential, even from that factual possibility alone, for the defendant to succeed if the learned primary judge's view as to attachment by fax is incorrect.

59. Therefore I agree with Williams JA that not only should the appeal be dismissed but that there must be a trial. I also agree with his Honour's proposal that the appellant pay the respondent's costs of this appeal. Each of the parties approached the hearing of this appeal on the basis that it involved only the attachment by fax point, and overlooking what their own pleadings say was the contract document. But the appeal was, of course, instituted by the appellant and its costs should follow the event.

Footnotes

1 Section 364.

2 W D Duncan ``*Marketeering" regulatory options for inclusion in draft legislation* (July 1999) tabled on 22 July 1999 and referred to in the Minister's Second Reading Speech on 7 September 2000.

FALCONER v BRISBANE CITY COUNCIL & BUCK

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(2006) LQCS ¶90-131

Court citation: [2005] QPEC 058

Planning & Environment Court of Queensland

29 July 2005

Community titles — Body corporate — Application for reconfiguration by subdivision of a lot in a community titles scheme — Adverse submitter appeal against Council's approval of reconfiguration — Whether consent of body corporate required for reconfiguration — Whether proposed development conflicts with legislative provisions Body Corporate and Community Management Act 1997 (Qld), s 54, 55 and 56, Integrated Planning Act 1997 (Qld), s 1.3.2

The co-respondent (B) purchased a block of land (lot 1) in a community titles scheme to subdivide and on which to build two houses. The respondent Council approved B's application for a development permit for reconfiguration of the lot. The proposed reconfiguration was development as defined in the Integrated Planning Act 1997 (Qld) (the IPA).

Lot 1 had street frontage, unlike other lots in the community titles scheme, with street access via the common property. Under the co-respondent's proposed development, access for one of the two new parcels of land would be via the common property.

In an appeal by the applicant (F) it was asserted that the "proposed development" conflicted with the provisions of s 54, 55 and 56 of the Body Corporate and Community Management Act 1997 (Qld). F asserted that consent had not been given to record a new community management statement for the body corporate and that B had not sought an amendment to the current community management statement before seeking permission for subdivision from the Council. F was the owner of lot 2 and previously owned lot 1, at which time he tentatively supported its subdivision.

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B and the respondent Council submitted that the body corporate had consented to the proposed reconfiguration. The respondent Council also submitted that the body corporate's consent to the proposed reconfiguration was not actually required.

Held: for the respondents

1. The respondent Council's task, by reference to the IPA, was to assess the application for reconfiguration. There was no indication in the IPA that reference need be made by the Council as assessment manager to the Body Corporate and Community Management Act 1997 (Qld).
2. The subdivision of lot 1 would trigger obligations in respect of changing the community management statement. However, it did not follow that the Council should delay in deciding an application for reconfiguration until those obligations were attended to in whole or in part.
3. F was entitled to expect that his views and interest would be considered in the submission process, which they were.

Appellant and co-respondent self represented.

KR Johnson (instructed by Brisbane City Council Legal Practice) for the respondent.

Before: Robin QC DCJ

Full text of judgment below

Robin QC DCJ:

1. Mr Falconer (self-represented) appeals "against the decision of the Brisbane City Council (Respondent) to approve the application by Diann Buck (Co-Respondent) for a development permit for making a material change of use and for the reconfiguration of a lot subject to conditions in respect of land situated at 11C Scenic Rd, Kenmore, Queensland and described as lot 1 on SP145009 and common property CTS30012, Parish of Indooroopilly." The Respondent was capably represented by Miss Johnston, for whose expert guidance the other parties and the court are grateful. Ms Buck was self-represented, with some assistance from a "McKenzie friend[1] ", Mr Ian Gordon. Her development application was for reconfiguration only, so that considerations relevant to any material change of use presently have no part to play.

The Land

2. Lot 6 on RP 87134 Parish of Indooroopilly, County of Stanley was an axe-head shaped parcel of land whose street frontage to the northern side of Scenic Rd, Kenmore was represented by the narrow haft end. In 2002 the lot was cancelled, and there was registered a plan of lots 1-8 and common property. Lots 3-7 (whose areas ranged from 734 square metres to 781 square metres, except for lot 7 (1103 square metres))

lie side-by-side along the rear (northern) boundary of the original parcel. They are accessed via a cul-de-sac in the shape of a "T" whose stem extends to Scenic Rd, the cul-de-sac being common property for purposes of the group title arrangements established under the *Body Corporate and Community Management Act 1997*. The balance of the Scenic Rd frontage is occupied by lot 1, that is Ms Buck's property, which contains 1637m^2. Across the common property access described above is lot 8 (1282m^2), which is roughly triangular in shape, any "frontage" it may have to Scenic Rd being limited to a point of the triangle. Lot 1 adjoins lot 2 (1929m^2) for the full length of the latter's northern boundary. Only lot 1 has any practical possibility of direct access to Scenic Rd. The reconfiguration under appeal divides it into its northern half (lot 10) and its southern half (lot 11) of which only the latter will enjoy any possibility of direct access to Scenic Rd. Lot 10's access, like that of lots 2-8, will be via the common property. It may be observed that lot 1 would appear to be no less entitled to use common property for access than lots 2-8.

Issues in the Appeal

3. The notice of appeal asserts that the "proposed development" conflicts with the *Body Corporate and Community Management Act* and sets out the terms of s 54(2), s 55(1) and s 56(1). It is asserted that "no consent has been given to record a new community management statement from the Scenic Pocket Body Corporate" and (correctly, as a matter of fact) that "the co-respondent has not sought an

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amendment to the current community management statement before seeking permission for subdivision from the Respondent." On 8 July 2005 Judge Rackemann ordered that the issues in dispute be identified as those outlined in attachment "A":

> "Council has an obligation to consider the opinion of the other owners before approving the subdivision of a lot in a community title scheme.
>
> Council failed to give due consideration to all the information before it before granting approval. In particular council did not give proper consideration to an objection to the proposed subdivision which indicated that the other owners were unanimously opposed to the subdivision."

The issue seems to resolve into whether the Council could give its approval to the proposed reconfiguration only if the Body Corporate consented and, if so, whether the Body Corporate had consented. Ms Johnston and Ms Buck (contrary to Mr Falconer) submitted that the second aspect was satisfied (whether or not there was any necessity that it be). Ms Johnston submitted that no consent was required.

4. The Body Corporate has taken no part in the appeal. Mr Falconer was not able to assert that he spoke for it (although he appears to be a committee member). For that matter, Mr Falconer established no entitlement to speak for any other lot owner, even lot owners who, like him, had lodged with the Council submissions in opposition to the proposed reconfiguration, but who took no part in the appeal.

5. Ms Johnston's approach may seem inconsistent with that advised to Ms Buck's agent on receipt of the Form 1 Development Application IDAS contained in the Council's letter of 5 July 2004:

> "Thank you for your development application lodged 30 June 2004. I wish to advise that the Council is unable to acknowledge this application as the common property was not included in the description of the land on Form 1A nor was resolution of the Body Corporate consenting to the lodging of the application submitted. As a consequence, the application will be held in abeyance until this information is submitted."

The first requisition was responded to by the provision of a replacement part A of the Form 1 development application adding to the original description of the land as set out in the Notice of Appeal "and common property of 'Scenic Pocket' Body Corporate CTS30012." The requisition may have been made out of awareness of *Australian International Language College Pty Ltd* v *Gold Coast City Council* [1994] QPLR 102, in which the Appellant had argued that since no reference was made to common property over which rights of access would have to be exercised by those resorting to a particular unit, the application was defective. Judge Quirk considered that a *"Pioneer"* point about non-inclusion of all land within a development proposal was unsound. Also, he declined to require that the application be accompanied by the written authority of all the co-owners of the common property, considering that relevant provisions of the *Building Units and Group*

Titles Act 1980 made it clear that common property did not exist as a separate and a distinct legal entity, but was appurtenant to the lots, and held by all proprietors as tenants in common. His Honour considered that provision of the written authority of the registered proprietor of the relevant lot was sufficient for purposes of s 4.1(2)(d) of that Act, the written authority of all the co-owners of the common property being unnecessary, as the proposed use did not involve an exercise of rights beyond those ordinarily appurtenant to the rights of ownership of that lot. It was not shown that his Honour's views would not apply under the current legislation.

6. The Council's second requisition contained in its letter was responded to by provision under cover of a letter of 8 July 2004 of a copy of minutes of the AGM of the Body Corporate held on 19 February 2004 (which the evidence shows were confirmed in due course at a subsequent meeting of the Body Corporate). Those minutes contained the following:

> "MOTION No 10 SUB DIVISION OF A LOT RESOLVED that the body corporate discuss the possibility of allowing the sub division of Lot 1 to create two separate titles within the scheme. Should the meeting consent to this the owner of Lot 1 will need
>
> [140452]
>
> to undertake all legal requirements at that owners cost to be lodged with the Dept of Titles. The prepared paperwork will need to be presented to the owners for final consent.
>
> Whilst this was an item of discussion a vote was taken from the floor and as all lots were represented no person was disadvantaged. The persons holding proxies determined that the proxies would not be used and as such were recorded as an abstaining vote.
>
> The meeting as such voted on allowing consent to Lot 1 to sub divide. The meeting also determined that a By-Law should be drafted and conditions set out in place as to the style, construction and development of the two lots to ensure that the completed fixtures are within keeping with the scheme and do not in any way detract from the overall intent of the scheme. Any proposed construction of development is to be placed before the committee for review as that will be defined within the proposed By-Law and conditions.
>
> By Ordinary Resolution
>
> VOTE FOR ALL PERSONS VOTE WITHOUT LOT 1 DUE TO THE AN INTEREST
>
> 4 YES 3 YES
>
> 2 NO 2 NO
>
> 2 ABSTAIN 2 ABSTAIN
>
> NOTE: The vote would be carried based on both circumstances" At the time of that meeting, Mr Falconer was the proponent of the notion of subdivision of lot 1 and also the owner of lot 1. He is presently the owner of lot 2, which had been retained by the developer, Intech Properties Pty Ltd. There has been an exchange of their lots by Intech Properties Pty Ltd and Mr Falconer.

The Co-Respondent becomes involved

7. About March 2004, Ms Buck was looking to purchase a block of land "to subdivide and build two houses on. One to live in and the other to sell." It is clear that she purchased lot 1 from Intech Properties Pty Ltd. Her solicitor's search made shortly after the 14 day contract dated 17 March 2004 revealed that the property was registered at the time of search in the names of Mr Falconer and another. Ms Buck had been provided with a copy of the minutes of the AGM of 19 February 2004, obviously to provide her with assurance that her plans could be implemented in relation to lot 1. While different interpretations might be placed upon Mr Falconer's apparent change of stance from apparently favouring subdivision of lot 1 to now opposing it, there is no basis shown for implicating him consciously in any scheme to deceive Ms Buck. He told the court that his own tentative proposals for lot 1 had proved (for financial reasons) not to be feasible.

8. Like others concerned, Mr Falconer received notice of Ms Buck's development application. Like a couple of other owners (Mr and Mrs Searls and also Mr Patten and Ms Abbondanza), he lodged an objection to the proposal with the Council, writing on 23 August 2004:

"I am of the understanding, as are all the neighbours I have spoken to and the other members of the affected Community Title Development (Scenic Pocket CTS 30012) that the original subdivision (in 2002) of 11 Scenic Road into 8 lots was granted subject to the condition that the blocks that adjoined Scenic Road were to be retained as large blocks so that the character of the area would be maintained (see copy of attached plan). Permitting the subdivision is contrary to the intention and outcomes of retaining the larger blocks. I believe that allowing this development will have a significant impact on the aesthetic and visual amenity of the original development and of the neighbourhood in general.

Approval of the subdivision will also have a negative impact on the property values of the existing blocks. Are financial impacts taken into consideration when council assesses an application? Most importantly the block in question is, as previously noted, a part of a community title development and the subdivision is not supported by the Body Corporate. I have spoken to Landmark Consulting and they were under the impression that the owners of the block had the support of the Body Corporate. I informed them of their misunderstanding and suggested they or the owner that they are representing contact the Body Corporate Manager (Peter Veal, at R. Jackson Pty. Ltd. 3862 1868) to clarify the matter. They are yet to contact Mr. Veal.

[140453]

The confusion regarding the position of the Body Corporate has arisen from the minutes of a meeting held on 19/2/04. At that time I was the owner of 11C Scenic Road and I wanted to clarify the position of the other members of the Body Corp regarding subdivision of the lot. What was resolved by vote was that the issue of subdivision be discussed, which it was. The minutes are perhaps poorly worded as it gives the impression a vote was taken to allow consent to the subdivision whereas what was decided was that consent would be considered given a significant range of conditions. I felt that it would not be possible for me to satisfy these conditions and therefore sold the block and purchased another in the development.

I have also spoken to a solicitor who said the new owners of 11C would need to seek their own consent from the Body Corporate, and as far as I am aware they have made no attempt to discuss their proposal with the Body Corporate.

I would have thought that a formal letter from the Body Corporate supporting the existing owner's proposal would be required by Council as part of the development application."

9. The planning report prepared by the Council's officer contains the following:

"PLANNING SCHEME AND PLANNING SCHEME POLICIES Emerging Community Area

The intent of Emerging Community Area is to provide for residential development at some time in the future. The sites have scenic or environmental values and/or infrastructure requirements that may limit or influence the extent of development that is possible on the site.

The development comprises infill development within an established residential subdivision all matters concerning infrastructure and environmental value have been previously investigated. This decision does not compromise the achievement of the desired environmental outcomes of the Emerging Community Area and it has been demonstrated that there are sufficient planning grounds to justify this decision.

Subdivision Code

It is considered that the development meets the performance solutions of the Code with respect to road design, provision of pedestrian and public transport, size of the lot and infrastructure provisions.

Secondary Codes

Council engineer undertook assessment of servicing requirements and has assessed the conditioned compliance with relevant secondary codes relating to services, stormwater and access.

With the original subdivision no structure plan was requested and none appears to exist over the subject land. Given low-density residential nature of locality and established pattern of surrounding development a structure plan was not required to assess this subdivision's suitability.

SUBMISSIONS, REPRESENTATIONS AND PUBLIC CONSULTATION

The Notice of Compliance has been submitted and 3 properly made and 1 late submission has been received.

Summary of Submissions

Objections/Concerns Response

1. Request that current building covenant and body corporate rules to be adhered to

This is a matter for the existing Body Corporate to administer.

2. New driveway should be via Scenic Rd

Driveway will only be allowed via existing common road. This strict requirement will be conditioned for vehicle safety.

3. Request that the positioning of new dwellings faces south

Dwelling position is not controlled by subdivisional approach but via Building Approval.

4. Open fencing or no fencing at all.

Not an issue identified in original subdivision, nor relevant to this application. Surrounding residential development has standard timber fencing.

5. Driveway not to be directly opposite existing driveway to avoid collisions.

To be investigated by Council officers during driveway permit application.

[140454]

6. Building envelope for Lot 11 to be 12m from front.

No envelope required. Trees conditioned to be retained. Setbacks administered via Building Approval.

7. Building envelope for Lot 10 to be 6m from front.

Setbacks to road controlled by Building Approval.

8. All costs to be incurred by the developer.

This requirement is standard and will be conditioned.

9. Blocks to issued with half a body corporate vote.

This is a matter for the existing Body Corporate to administer.

10. Modification of letter boxes at cost to developer.

Existing letter box numbers will be retained.

11. Developer to proceed only when all properties have individual water meters.

New meters to new lots, will be conditioned to be installed at cost to developer.

12. Proposal will destroy street appeal.

The area is of post 1970 development with large brick housing. The addition of a single house within a recent subdivision will not destroy the streetscape of Scenic Road. Existing trees have been conditioned to be retained.

13. Cause traffic issues One new dwelling unit will not cause traffic issues onto Scenic Road.

14. Cause environmental issues.

Retention of existing trees on site. No significant environmental issues are apparent.

15. Existing services can't cope with increases in use & consumption.

All services existing to cope with service requirements.

16. Decrease value of land.

Not a valid planning issue.

17. Owner consent has not been obtained. Misunderstanding with Body Corporate Minutes.

Owner consent has been obtained by an ordinary resolution of the body corporate.

10. Whether or not the officer's responses to the objections are wise or open to challenge, it appears that due consideration was given to the interests involved in the adverse submitter points, as required by *Bartlett* v *Brisbane City Council (2003) 133 LGERA 340*; [2003] QCA 494, whose headnote indicates what was decided:

> "(1) The purpose of s 3.2.1 of the IPA was limited. It simply identified the requirements for the first stage of the Integrated development Assessment System (IDAS) process referred to in Chapter 3 of that Act.
>
> (2) The respondents' proposal was very significant to the use of the subject lot (Lot 28) but had no significance whatsoever to the use of the other lots. Each owner of the other lots would continue to have the same interest in the land constituted by the lot, and the same interest in the common property as that owner had prior to the application.
>
> (3) Any concerns on the part of another lot owner about the change in amenity or the integrity or aesthetics of the building were simply matters to be agitated in the decision process. They were not factors of use which determined the identification of the land.
>
> (4) To adopt the construction contended for by the Appellants would, in practice, have the effect of a lot owner in a large development rarely, if ever, being able to make a development application. One could not conclude that the legislature intended such a result.
>
> (5) Moreover, such a construction was only arrived at by a technical and strained application of the terms of the legislation with an undue focus on interests allied to lot ownership rather than the purpose of identifying the land itself.
>
> (6) The other lot holders and the body corporate each had the opportunity to have their respective interests considered through the submission process provided for by s 3.4.9 of the IPA.
>
> (7) The approach of the respondents of simply applying to the terms of s 3.2.1 the ordinary meaning of the words as contemplated by the statutory definitions, gave rise to no real difficulty. By this
>
> [140455]
>
> approach a construction of the section was arrived at which was functional and which did not interfere with the generally accepted rights of the owners of lots in a community title scheme.
>
> (8) This was so whether one was considering the position of the lot owner as an applicant for a development approval or as an owner entitled to notification. (9) There was no warrant for construing the terms of s 3.2.1 of the IPA as requiring the consent of other lot holders."
>
> In the leading judgment, Jones J said:
>
> "[13] The second point is raised in support of that contention, by highlighting one of the characteristics of group or community titles schemes. Section 35 (formerly s 37) of the *Body Corporate and Community Management Act 1997* provides that "(1) Common property for a community titles scheme is owned by the owners of the lots included in the scheme, as tenants in common,..." and that "(3) An owner's interest in a lot is inseparable from the owner's interest in the common property". Counsel for the appellant argues that, as a consequence, all owners have an interest in the maintenance of the appearance and in the integrity of the whole building with the result that all the lots fall within the scope of the land the subject of the application and this is why all the lot owners are, to use his words, "legally connected".
>
> [14] The purpose of this section of BCCM is not to bring about a connection between separate lots of the scheme or between owners of such lots. Its function is to create interests in common property and to tie the ownership of those interests to the ownership of lots so as to make the interests indisseverable. Whilst this has the effect of linking those interests it does not, in my view, create interests for other lot owners in the lot of an individual owner. No part of the common property was involved in or impacted upon by the respondents' proposal."

11. Within the Body Corporate, steps have been taken with a view to ensuring that Motion 10 is not taken as a consent of the Body Corporate to subdivision of lot 1. The Body Corporate's professional manager has generated correspondence, some of which went to the Council, asserting that Motion 10 embodies only discussion, no consent. A new motion was proposed for an EGM on 12 November 2004 as follows:

"**MOTION No 2 NO APPROVAL FOR SUBDIVISION**

Person Proposing: Committee

Lot No: Not Applicable

Resolution Required: Ordinary Resolution

That the body corporate clarify that Motion 10 of Annual General Minutes dated 19/02/04 does not give approval for subdivision of lot 1. This motion was out of order and not able to be approved as all owners were not given the legislative requirement of 21 days to consider their voting options."

Purportedly Motion No. 2 was passed; its validity may be doubted, given that Ms Buck (who took the point immediately) seems able to demonstrate that the requisite 21 days' notice was not given in respect of Motion No. 2. It does not seem necessary or even appropriate at present to canvass the validity of Body Corporate resolutions, which is, one would think, something best resolved under the arrangements established by the *Body Corporate and Community Management Act 1997*.

The Need for Body Corporate Consent

12. The authorities mentioned above, to which the court was taken by Ms Johnston, are suggestive that no consent of the Body Corporate or of the members of it is required. The proposed reconfiguration is development as defined in s 1.3.2 of the *Integrated Planning Act 1997* (IPA), (d) of which is "reconfiguring a lot". There is a definition of "lot" in s 1.3.5 as including "(a) a lot under the *Land Title Act 1994*", schedule 2 of which, as noted in the IPA, provides:

"Lot means a separate, distinct parcel of land created on – (a) the registration of a plan of subdivision; or (b) the recording of particulars of an instrument; and includes a lot under the *Building Units and Group Titles Act 1980*."

[140456]

It appears that the Council's task, by reference to the *IPA*, is to assess the application for reconfiguration. There is no indication in the *IPA* that reference need be made by Council as assessment manager to the *Body Corporate and Community Management Act 1997*, notwithstanding that it contains in part 6 Community Management Statements provisions that may have to be complied with in respect of subdivisions affecting a lot in, or the common property for a scheme. See s 56 in particular, and other references to subdivision, for example in s 57 and s 62. I set out in an appendix ss 55, 56, 57, 62 and 63, the last couple of which draw attention to the important matter of the costs of preparation and recording of a new community management statement, which subdivision of a lot may require. The members of the Body Corporate may wish to revise Motion No. 10 to fix Ms Buck with responsibility for certain costs. The ultimate incidence of such costs and other issues, such as the formulation of a new community management statement, which must deal with significant matters such as lot entitlements, may create real issues in a context like the present one. The court was told that the present lots are a single consumer of water. Unless there is separate metering introduced, there may be issues to do with the share of water charges to be borne by lots 10 and 11, as to whether they must pay one or two shares. The dispute resolution procedures included in the *Body Corporate and Community Management Act 1997* may or may not be available to achieve resolution of issues here. The decision the court makes, however, is that there is no requirement that prior consent to subdivision of a lot be given by the Body Corporate or by the members of it.

It is clear that subdivision of lot 1 will trigger obligations in respect of changing the community management statement. It does not follow that the Council should delay deciding on an application for reconfiguration until those obligations are wholly or partly attended to. There is no proscription against the Council's granting approval in the absence of consent of the kind that is found in s 58 of the *Standard Building Regulation 1993*, for example.

13. Mr Falconer did not present any argument that any statutory requirement existed that consent of the Body Corporate or any of its members be forthcoming. It seemed he may have been relying on some kind of legitimate expectation of the kind described in Halsbury's Laws of Australia in the section devoted to Administrative Law in [10-1880] and [10-1883]:

> "**[10-1880] Legitimate expectation: representations** In special circumstances, a legitimate expectation may be generated by an administrator's having given an undertaking, which good administration requires ought to be honoured, provided that honouring the undertaking is not inconsistent with the administrator's statutory duty."
>
> "**[10-1883] Legitimate expectations: regular practices and government policies** As an extension of the notion that a representation may generate a legitimate expectation, the existence of a regular practice which the person affected could reasonably expect to continue may also give rise to a legitimate expectation that the practice will continue, or in any event that it will not be discontinued without the person affected being given a hearing."

(downloaded from www.lexisnexis.com on 22/07/2005). Authorities cited in Halsbury include *Haoucher* v *Minister for State for Immigration and Ethnic Affairs* (1990) 169 CLR 648. Although the court inquired, nothing was forthcoming to suggest that the Council has any relevant general practice. There is, however, specifically directed to the present development application, the Council's letter of 5 July 2004. It was addressed to Ms Buck (or her agent); it is difficult to see how it could give rise to any legitimate expectation on the part of Mr Falconer. He was entitled to expect (and he got it) that his views and interests would be considered in the submission process. I am quite unable to see how the Council's letter, by making a requisition that appears on examination to be without warrant (although doubtless made in a well intentioned attempt to discover the Body Corporate's attitude), could place some additional hurdle in the way of Ms Buck's development application.

14. I repeat an observation made during the hearing of the appeal, that, while the informality of Motion No 10, which seems to represent no more than a "straw poll", may be

[140457]

noted, it would be undesirable for the Council to be required, where some expression of a Body Corporate's views is called for, in circumstances like the present, to adopt any strict, legalistic approach, where a clear attitude is found apparently expressed. Doing so might compel inconveniences such as the holding of new meetings to achieve a resolution in some technically correct way. As for contests about such matters, they are surely better handled using the provisions and processes of the *Body Corporate and Community Management Act 1997*.

APPENDIX

55 Requirements for motion to change community management statement

(1) Subject to subsection (2), a motion proposing to change an existing community management statement for a community titles scheme may be submitted by only —

(a) the committee for the body corporate; or
(b) the owner of a lot included in the scheme; or (c) the body corporate manager.

(2) The body corporate manager may submit the motion if the body corporate manager may, under the regulation module applying to the scheme, submit the motion.

56 New statements and subsequent plans of subdivision

(1) A request to record a new community management statement for a community titles scheme must be lodged when a new plan of subdivision affecting the scheme (including affecting a lot in, or the common property for, the scheme) is lodged.

(2) A request to record a new community management statement for a community titles scheme may be lodged, and the new statement may be recorded for the scheme, even though a plan of subdivision is not lodged, if all plans of subdivision relating to the scheme, and the new statement, will still be consistent after the new statement is recorded.

57 Other matters about new statements for schemes developed progressively

(1) This section applies —

(a) only to a community titles scheme intended to be developed progressively; and

Examples for paragraph (a) —
1. The subdivision of scheme land to create further lots for the scheme or to establish a subsidiary scheme.
2. The excision of a lot from, or the addition of a lot to, scheme land.

(b) if the circumstances stated in subsection (2) or (3) also apply to the scheme.

(2) For subsection (1)(b), the circumstances are —

(a) a new plan of subdivision proposed to be lodged for the scheme —

(i) is consistent with all statements about proposed future subdivision contained in the existing community management statement for the scheme; or
(ii) is inconsistent with the existing community management statement only to the extent the development of a stage is to be done out of order; and

(b) the difference between the existing statement and a new community management statement required under section 56(1) is limited to ensuring that, after registration of the new plan of subdivision and recording of the new statement, the scheme's community management statement will —

(i) be consistent with all plans of subdivision for the scheme that are registered under the Land Title Act; and
(ii) contain the statements about proposed future subdivision that are contained in the existing statement, changed only to the extent necessary to take account of the registration of the new plan of subdivision.

(3) Alternatively, for subsection (1)(b), the circumstances are that a new plan of subdivision proposed to be lodged for the development is inconsistent with the existing community management statement for the scheme because the plan changes the scheme in a way that affects the nature of the development or 1 or more stages of the development.

Examples of changes affecting the nature of a development for subsection (3) —
1. A development for a scheme intended to be a resort is changed to a development comprising only standard format lots for residential purposes.

[140458]

2. A stage of a development comprising standard format lots for residential purposes and a marina is changed to a stage comprising only standard format lots for residential purposes.

(4) For subsection (2)(a)(ii), the development of a stage is done out of order if it is not consistent with the order of the development of the stages stated in the development approval or existing community management statement for the scheme.

(5) The developer must —

(a) prepare the new community management statement required under section 56(1) for the scheme; and
(b) give the new statement to the body corporate.

(6) The body corporate must, within 30 days after receiving the new statement, endorse its consent on the statement. Maximum penalty — 50 penalty units.

(7) However, if this section applies because of the circumstances stated in subsection (3), the body corporate is not required to endorse its consent on the statement unless —

(a) the developer has —

(i) given the body corporate a notice as required under section 29(2)(a); and
(ii) obtained development approval for the changed scheme; and

(b) the new community management statement is consistent with the development approval for the changed scheme; and
(c) the local government has endorsed a community management statement notation on the new community management statement.

(8) The developer must, within 30 days after receiving the endorsed statement, lodge a request to record the statement. Maximum penalty for subsection (8) — 300 penalty units.

(9) Within 14 days after the new statement is recorded, the developer must give to the body corporate —

(a) a copy of the new statement; and
(b) evidence of its recording. Maximum penalty for subsection (9) — 300 penalty units.

(10) The developer is responsible for the costs of preparing and recording the new community management statement.

62 Body corporate to consent to recording of new statement

(1) This section provides for the form of the consent of the body corporate for a community titles scheme to the recording of a new community management statement for the scheme in the place of the existing statement for the scheme.

(2) The consent must be in the form of a resolution without dissent.

(3) However, the consent may be in the form of a special resolution if the difference between the existing statement and the new statement is limited to the following —

(a) differences in the by-laws (other than a difference in exclusive use by-laws);
(b) the identification of a different regulation module to apply to the scheme.

(4) The consent to the recording of a new community management statement need not be in the form of a resolution without dissent or special resolution if the new statement is different from the existing statement only to the extent necessary for 1 or more of the following —

(a) compliance with a provision of this Act under which the body corporate is required to lodge a request to record a new statement for a purpose stated in the provision;
(b) compliance with the order of an adjudicator or the District Court made under this Act for the lodging of a request for the recording of the new statement;
(c) changing the community titles scheme to give effect to an approved reinstatement process;
(d) changing the community titles scheme to reflect a formal acquisition affecting the scheme;
(e) recording the details of allocations of common property or body corporate assets made under an exclusive use bylaw;
(f) implementation of development proposed under the existing statement or under the provisions of a community management statement to which the existing statement is subject;
(g) showing the location of a service easement for the community titles scheme by including a services location diagram;

[140459]

(h) amalgamating or subdividing lots included in the community titles scheme;
(i) reproducing the existing statement without any change of substance.

(5) However, subsection (4)(h) applies only if the associated plan of subdivision —

(a) does not affect the common property; and
(b) does not change —

(i) the contribution schedule lot entitlements, or interest schedule lot entitlements, for lots included in the scheme (other than the lots being amalgamated or subdivided under the plan); or
(ii) the total of the contribution schedule lot entitlements for the lots included in the scheme; or
(iii) the total of the interest schedule lot entitlements for the lots included in the scheme.

(6) Also, the consent to the recording of a new community management statement need not be in the form of a resolution without dissent or special resolution if the consent is required to be endorsed under section 57.

(7) A consent to which subsection (4) or (6) applies must be given by ordinary resolution if, under the regulation module applying to the scheme, the body corporate has engaged a body corporate manager to carry out the functions of a committee, and the executive members of a committee, for a body corporate.

(8) In this section —

"associated plan of subdivision", for a proposed new community management statement, means the plan of subdivision proposed to be lodged with the request to record the statement.

63 Responsibility for preparing, and for costs of preparing, new statement

(1) This section applies if the body corporate for a community titles scheme consents to a new community management statement, other than a statement to which section 57 applies, being recorded for the scheme.

(2) The new community management statement must be prepared by —

(a) if the body corporate manager may, under the body corporate manager's engagement, prepare the statement — the body corporate manager; or
(b) if paragraph (a) does not apply to the scheme — the committee for the body corporate.

(3) The body corporate is responsible for the costs of preparing and recording the new community management statement, unless this Act provides otherwise.

(4) Despite subsections (2) and (3), if the difference between the new community management statement and the existing statement is limited to changes to reflect a formal acquisition affecting the scheme, the constructing authority for the acquisition —

(a) must prepare the new statement; and
(b) is responsible for the costs of preparing and recording the new statement.

Footnotes

1 See *McKenzie v McKenzie* [1971] p.33

UI INTERNATIONAL PTY LTD v BODY CORPORATE FOR RABY BAY HARBOUR COMMUNITY TITLES SCHEME 30942

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(2006) LQCS ¶90-132

Court citation: [2005] QDC 244

District Court of Queensland

16 August 2005

Community titles scheme — Contribution lot entitlement under registered community management scheme — Application to adjust lot entitlement schedule — Whether it would be just and equitable in the circumstances to adjust the schedule — Body Corporate and Community Management Act 1997, s 46– 49

The applicant was the registered owner of lot 4 in a community titles scheme in a harbour development. Lot 4 contained four unfinished penthouse apartments, and the first community management statement dated 16 December 2002 allocated a contribution lot

[140460]

entitlement to it of seven one hundredths. The other three community titles schemes in the harbour development were allocated the remaining contribution lot entitlements. The contribution lot entitlements were calculated or assessed by reference to the respective lot areas.

The applicant commenced proceedings under s 48 of the Body Corporate and Community Management Act 1997 Qld (the Act) to have the lot entitlement schedule adjusted so that its contribution to the scheme would be decreased. The Act was amended in respect of that part relevant to lot entitlements with effect from early 2003 by the Body Corporate and Community Management and Other Legislation Amendment Act 2003 (Qld) (the amending Act).

Subsection 46(1) of the Act provided that it was not a requirement for a community management statement for a community titles scheme that the contribution schedule be equal for each lot. Subsection 46(2) of the Act provided that an owner could apply for an order for the adjustment of a lot entitlement schedule. Subsection 46(4) of the Act provided that "the respective lot entitlements should be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal".

The amending Act reversed the emphasis in respect of a lot entitlement contribution schedule and spelt out clearly in s 49 the "criteria for deciding just and equitable circumstances" if an adjustment was to be made. The applicant submitted that because its four penthouse apartments were unoccupied, unfinished and were likely to remain in such a condition in the near future if not indefinitely, it should not be obliged to pay a contribution factor of seven one hundredths. In this respect the applicant submitted that lot 4 made no demand on the services and amenities for which the body corporate was responsible.

The applicant submitted that, applying the "just and equitable" principle, the contribution factor should be reduced to somewhere between one and seven to reflect the lack of demand by lot 4 on the services and amenities provided.

The respondent submitted that the applicant had failed to adduce any evidence about what the lot entitlement contribution schedule for the scheme should be, and thus the application should be dismissed.

Held: contribution lot entitlement for lot 4 adjusted to a figure of three one hundredths

1. While the Act is silent with respect to the criteria upon which lot contributions should be assessed, commonsense dictates that some enterprises or uses to be conducted on a lot will place a heavier demand for services and amenities on a body corporate than others and therefore should bear a higher or lower, as the case may be, proportion of contribution for those demands.
2. If those demands on services and amenities are less than what might be described as the functioning optimum then logically and reasonably the body corporate's expenditure for the those services and amenities will be correspondingly less.
3. Where a particular building is not operating to its optimum capacity because it is unfinished, certain expenditure by the body corporate cannot be avoided. Thus, it would be quite reasonable for there to be levied some lot entitlement contribution for lot 4 to cover the demand on some services and amenities.
4. If it was considered "just and equitable" to have a contribution lot entitlement assessed at seven as being the "most appropriate" when the penthouses were to be fully functional, then it is reasonable for the contribution lot entitlement for them to be less than that figure when they are not fully functional.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

C Heysworth-Smith (instructed by Creswicks Lawyers) for the applicant.

S Moody (instructed by McCarthy Durie Ryan Neil) for the respondent.

Before: Tutt DCJ

[140461]

Full text of judgment below

1. This is an application under s 48 of the *Body Corporate and Community Management Act 1997* ("the Act") by the owner of four (4) unfinished penthouse apartments contained in the Raby Bay Harbour Community Titles Scheme 30942 to have the lot entitlement schedule adjusted so that the applicant's contribution to that scheme is less than that currently allocated to the lot in the contribution schedule which is seven (7).[1]

2. The applicant is the registered owner of Lot 4 on SP 147266 in respect of which the first community management statement dated 16 December 2002 allocates a contribution lot entitlement to the Lot of seven (7) with the other three community titles schemes comprising this part of the Raby Bay Harbour development being allotted respective entitlements to make an aggregate contribution lot entitlement of one hundred (100).

3. Lot 4 is part of building number 3 ("Building 3") referred to in Exhibit "KMB4" to the affidavit of Kent Milton Beal filed on behalf of the applicant on 27 February 2005 and which also comprises predominantly commercial offices and a function room. The remainder of Building 3 together with Buildings 1 and 2 which comprise apartments and commercial businesses have been allocated an aggregate contribution lot entitlement of seventy-seven (77) while Building 4 comprising the villa-style apartments has been allocated a contribution lot entitlement of sixteen (16).

4. The Act was amended in respect of that part relevant to lot entitlements with effect from 4 March 2003 by the *Body Corporate and Community Management and Other Legislation Amendment Act 2003* (Qld) in that s 46(1) of the former Act stated that "it is not a requirement for a community management statement for a community titles scheme that the contribution schedule be equal for each lot …" with provision under s 46(2) thereof for an owner to apply "… for an order for the adjustment of a lot entitlement schedule" and further under s 46(4) that "the respective lot entitlements should be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal". Under the Act as amended s 46(7) specifically provides that the contribution schedule for the respective lots "… must be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal". The amending Act therefore reversed the emphasis in respect of a lot entitlement contribution schedule and spells out clearly in s 49 the "criteria for deciding just and equitable circumstances" if adjustment is to be made.

5. The evidence in this matter is that the lot entitlement contribution for this community titles scheme was originally calculated or assessed by reference to the respective lot areas ("volumetric apportionment")[2] by which a figure of 7.15% was reached for Lot 4 which was reduced to the whole number 7 out of 100 being the aggregate for the building as a whole.

6. It is upon this basis that the contribution lot entitlement for Lot 4 has been levied by the body corporate to date.

7. The applicant therefore comes to this court seeking an adjustment in contribution which is lower than that which currently applies, but with the added dimension that the basis for any such adjustment must now be under the "new" rules, as it were, even though the original lot contribution was determined on a different basis.[3]

Legislation

8. Part 5 of the Act defines "lot entitlements" as follows:

> "***46 Lot entitlements***
>
> (1) A ***lot entitlement***, for a lot included in a community titles scheme, means the number allocated to the lot in the contribution schedule or interest schedule in the community management statement."

9. The term "contribution schedule" is also defined as follows:

> "(2) The ***contribution schedule*** is the schedule in a community management statement containing each lot's contribution schedule lot entitlement."

10. Section 46(6) of the Act provides that "a lot entitlement must be a whole number, but must not be 0" and as stated in paragraph [4] above s 46(7) provides that "… the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal".

11.

[140462]

Section 47(2) of the Act provides:

> "(2) The contribution schedule lot entitlement for a lot is the basis for calculating —
>
> (a) the lot owner's share of amounts levied by the body corporate, unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act; and
> (b) the value of the lot owner's vote for voting on an ordinary resolution if a poll is conducted for voting on the resolution."

12. Section 48 of the Act provides the mechanism for a lot owner to apply to the court

> "… for an order for the adjustment of a lot entitlement schedule". It is also repeated in s 48(5) that "… for the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal."

13. Section 49 "… sets out matters to which the court … may, and may not, have regard for deciding —

> (a) for a contribution schedule — if it is just and equitable in the circumstances for the respective lot entitlements not to be equal" — and they include:
>
> "(a) how the community titles scheme is structured; and
> (b) the nature, features and characteristics of the lots included in the scheme; and
> (c) the purposes for which the lots are used".[4]

14. The purpose of having a contribution schedule in a community management statement containing each lot's contribution to the body corporate is that the body corporate must administer, manage and control the common property and body corporate assets reasonably and for the benefit of all lot owners. The body corporate has specific responsibilities and obligations under the Act in respect of the building to which the community titles scheme relates some of which are referred to in the affidavit of Donald Alexander Saunders filed on behalf of the respondent on 4 April 2005.[5]

Applicant's Submissions

15. The applicant's basic submission is that because the four penthouse apartments (Lot 4) are unoccupied, unfinished and are likely to remain in such a condition in the near future if not indefinitely, the applicant should not be obliged to pay a contribution factor of seven one-hundredths (7/100) of the body corporate levies to cover the expenditure for which it is responsible in respect of Building 3 as Lot 4 makes no demand on the services and amenities for which the body corporate is responsible in respect of that building. Therefore by applying the "just and equitable" principle the contribution factor should be reduced to somewhere between 1 and 7 to reflect the lack of demand by Lot 4 on the services and amenities provided.

Respondent's Submissions

16. The respondent's submission is essentially that "the applicant has failed to adduce any evidence about what the contribution schedule lot entitlements for the scheme should be …" and therefore the application should be dismissed.

17. It is submitted the starting point is that under s 48(5) of the Act the contributions by each lot "… should be equal except to the extent to which it is just and equitable in the circumstances for them not to be equal". There is no evidence before the court for it to be able to make a decision that the respective lot contribution schedules under the scheme should be unequal and therefore the applicant has failed to discharge its onus to receive the benefit of the order sought. The respondent sets out the background of the "scheme"; the relevant lot entitlements schedule; the body corporate expenses and responsibilities for the scheme and the respective suggested methods by which a body corporate lot contribution should be assessed.

Contribution Lot Entitlements

18. The evidence is that at the time of registration of the community management statement for the Raby Bay Harbour Community Titles Scheme 30942 on 16 December 2002 the lot entitlement contribution allocation for the respective buildings contained in the statement was as follows[6] :

[140463]

SCHEDULE OF LOT ENTITLEMENTS

Lot on Plan	Contribution	Interest
Raby Bay Harbour Villas Community Titles Scheme	16	16
Raby Bay Harbour Apartments Community Titles Scheme	28	28
Raby Bay Harbour Commercial Centre Community Titles Scheme	49	49
Lot 4 on SP 147266	7	7
TOTALS	100	100

19. Obviously the respective contribution lot entitlements are not "equal" because when they were calculated by Landmark White in the manner set out in that company's letter of 22 May 2002[7] and attachments, it was considered that the above assessments were the "most appropriate" and by implication the "just and equitable" determinations to be made for each of the lot entitlements for the reasons set out in the Landmark White letter commensurate with their respective demands on the services and amenities to be provided by the body corporate to the buildings and enterprises contained therein. While the former Act was silent in respect of the "criteria" upon which lot contributions should be assessed, common sense would dictate that some enterprises or uses to be conducted on a lot would place a heavier demand for services and amenities on a body corporate than others and therefore should bear a higher or lower, as the case may be, proportion of contribution for those demands or services. This would seem to be the view adopted by the Court of Appeal in *Fischer & Ors* v *Body Corporate for Centrepoint Community Titles Scheme 7779* [2004] QCA 214 where Chesterman J, with whom McPherson JA and Atkinson J agreed, stated:

> "…that question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the 'equitable' distribution of the costs".[8]

20. Again it would seem reasonable and logical that the respective contribution lot entitlement would reflect the demand for the body corporate's expenses for those services and amenities when those buildings within the scheme were functional and capable of being used and/or operated to their optimum capacity as this would reflect the optimum demand on those services and amenities for which the body corporate is responsible.

21. It follows therefore that if those demands on services and amenities are less than what might be described as the functioning optimum then logically and reasonably the body corporate's expenditure for the those services and amenities would be correspondingly less.

22. It must be accepted however that even where a particular building is not operating to its optimum capacity because it is unfinished certain expenditure by the body corporate cannot be avoided so that it would be quite reasonable for there to be levied some lot entitlement contribution to cover its demand on some services and amenities, for example, administration services, fire protection equipment, general insurances, maintenance of external walls and/or building facade, roof maintenance and the like.

23. The court has had the benefit of a view in respect of this application and the decrepit nature of the unfinished penthouses is obvious. They are clearly unfinished and access to them in a practical sense is sealed off as there is no purpose in their being accessible.

24. Notwithstanding their dysfunctional state they would place some demand on body corporate expenditure for some services and amenities referred to in paragraph [22] above but considerably less demand than if they were capable of being used and/or operating to optimum capacity.

25. I am not persuaded that it is necessary for the applicant to adduce expert evidence before the court can decide this application for the reason that the empirical evidence speaks for itself. If it was considered "just and equitable" to have a lot entitlement

contribution assessed at 7 as being the "most appropriate" when the penthouses were to be fully functional then it seems reasonable to me that the lot entitlement contribution for them now should be less than that figure.

26. In all the circumstances I find that the lot entitlement contribution for Lot 4 on SP 147266 should be adjusted to a figure of three (3) instead of seven (7) as contained in the registered community management statement for Raby Bay Harbour Community Titles Scheme No 30942 to represent three one-hundredths (3/100) of the aggregate contribution on the basis that for the reasons set out above it is just and equitable to do so.

27. In accordance with s 48(2)(c) of the Act I make no order as to costs.

Order

28. The court's order will therefore be as follows:

> 1. That the lot entitlement contribution for Lot 4 on SP 147266 be adjusted to a figure of three (3) instead of seven (7) as contained in the registered community management statement for the Raby Bay Harbour Community Titles Scheme No 30942; and
> 2. No order as to costs.

Footnotes

1 In practical terms this figure represents 7/100 of the total contribution to the community titles scheme.

2 Exhibit "DAS28" to the affidavit of Donald Alexander Saunders filed 4 April 2005.

3 See reference in transcript page 71 lines 1-20.

4 Section 49(4) of the Act. It should be noted that under the former act there was no statutory prescription as to the criteria which the court may have regard in deciding whether and to what extent any adjustment should be made.

5 See paragraphs [78] and [82] of the affidavit of Donald A Saunders filed 4 April 2005.

6 Exhibit "KMB4" to the affidavit of Kent Milton Beal filed on 27 February 2005.

7 Exhibit "DAS28" as referred to above.

8 At paragraph [26] on page 8 of the judgment.

HABLETHWAITE & ANOR v ANDRIJEVIC & ORS

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(2006) LQCS ¶90-133

Court citation: Hablethwaite & Anor v Andrijevic & Ors [2005] QCA 336

Supreme Court of Queensland — Court of Appeal

9 September 2005

Community titles — Body corporate — Exercise of voting rights — Veto by majority lot holders of motions proposed at annual general meeting of body corporate — Whether exercise of voting rights could be overturned — Matter submitted for decision of adjudicator — Whether adjudicator observed natural justice — Whether adjudicator properly investigated application — Whether trial judge erred in dismissing appeal — Whether leave to appeal should be granted — Body Corporate and Community Management Act 1997 (Qld), s 267, 269 and 271

The applicants held the majority of lots in a community titles scheme. The applicants exercised their controlling vote in respect of a number of motions proposed at the annual general meeting of the body corporate, which they did not attend. The motions concerned proposals put by lot owners other than the applicants.

An adjudicator was appointed under s 267 of the Body Corporate and Community Management Act 1997 (Qld) (the Act). The adjudicator's decision effectively overrode the exercise by the applicants of their controlling vote in respect of these motions. A subsequent appeal by the applicants was dismissed by the trial Judge and the applicants sought leave to appeal this decision.

The respondents, who were co-owners of other lots in the community titles scheme, submitted that the applicants would suffer no actual prejudice if their application for leave to appeal was refused. The applicants did not dispute this submission but claimed that the purpose of the appeal was to obtain a precedent decision to the effect that an adjudicator must investigate an application with fair and proper consideration and, in doing so, must observe natural justice as required by s 269 of the Act. In this respect, the applicants argued that the adjudicator did not request a copy of the submissions forwarded by them to the annual general meeting to explain why they would be voting against the relevant motions. The applicants further argued that the adjudicator should have informed them that he would decide the matter against them if he did not receive their submissions.

The applicants complained generally about the procedure adopted by the adjudicator to gather material on which to base his decision. The applicants claimed that in effect the adjudicator failed to undertake any investigation at all. The applicants also claimed that the adjudicator made a decision that was not just and equitable in the circumstances.

Held: application for leave to appeal dismissed.

Per Keane JA (with whom Cullinane J agreed)

1. The applicants did not identify any practical utility in the Court's resolving the issues which they sought to agitate. That was sufficient to warrant the refusal of the application for leave to appeal.
2. The applicants did not demonstrate a sufficient basis for concluding that the adjudicator failed to observe natural justice as required by s 269 of the Act when investigating the application that was referred to him.
3. The applicants were afforded an opportunity to be heard before a decision was made. The applicants were invited to make submissions and the adjudicator was not required to do more than that.
4. The mere circumstance that voting rights of the owners of lots in a scheme were overridden by a decision, could not, of itself, render the decision something other than "just and equitable".

[2]

[[Headnote by the CCH CONVEYANCING LAW EDITORS]]

The applicants appeared on their own behalf.

C J Ryall (instructed by Miller Bou-Samra Lawyers) for the first and second respondents.

No appearance by the third respondent

Before: Jerrard and Keane JJA and Cullinane J

Full text of judgment below

Jerrard JA:

1. In this application I have had the advantage of reading the reasons for judgment of Keane JA, and the orders proposed by His Honour. I agree with what he has written, and with the orders he proposes.

Provisions of the Act

2. The *Body Corporate and Community Management Act 1997* (Qld) ("the Act") provides in Chapter 6 thereof for the resolution of disputes such as those underlying this application, namely disputes between the owners

or occupiers of lots included in a Community Titles Scheme.[1] The Commissioner for Body Corporate and Community Management[2] has a responsibility for providing a dispute resolution service[3] and persons who are parties to, or directly concerned with, any dispute as defined in the Act may make application in the approved form to the Commissioner for the outcome sought by the applicant.[4] The application must state, in detail, the grounds on which the outcome is sought.

3. The Commissioner may require an applicant to give further information after receiving the application, and is obliged to give written notice of the application to the Body Corporate, which in turn must give a copy of that notice to each person whose name appears on the roll as the owner of a lot included in the scheme. That notice must invite each person given a copy of it to make written submissions to the Commissioner about the application.[5] Where one or more persons are invited to make submissions, the original applicant may apply to the Commissioner to inspect those submissions, and can make a written reply to them. Additionally, any person affected by the application may inspect it, the submissions made about it, and the applicant's reply to those submissions.[6]

4. Those provisions of the Act allow each lot owner to make a written submission about an application to the Commissioner, which application must set out in detail the grounds on which that outcome is sought. After receiving the application and written submissions, the Commissioner may make 1 or more dispute resolution recommendations, as defined in s 248 of the Act; it appears that in this matter the Commissioner recommended a Department adjudication. Part 9 of Chapter 6 makes general provisions about adjudication, including the powers granted to an Adjudicator, obliging her or him to investigate the application to decide whether it would be appropriate to make an order on it; and when investigating, to observe natural justice and act as quickly as possible, and with as little formality and technicality as is consistent with a fair and proper consideration of the application. Section 276 empowers an Adjudicator to whom an application is referred to make an order that is just and equitable in the circumstances about, *inter alia*, the exercise of rights under the Act.

5. Division 4 of Chapter 3, which chapter deals with the management of Community Titles Schemes, makes provision for Body Corporate meetings and counting of votes. The various forms of the 1997 Regulation have provisions giving the right to lot owners to vote at general meetings.[7] Section 276 explicitly provides that an Adjudicator may make an order mentioned in Schedule 5 of the Act; those approved orders include, for example, orders giving effect to a motion considered by a general meeting of the Body Corporate, in which a resolution required to be without dissent was not passed because of opposition that the Adjudicator considered was unreasonable in the circumstances. I agree with the Adjudicator that the act of voting at the Annual General Meeting ("AGM") is an exercise of a right under the Act by a lot owner, and it was intended by the Parliament that an Adjudicator be able to review votes cast by owners on an application to overturn a negative vote on a resolution.

[2]

Background facts

6. The judgment of the District Court dated 13 May 2005, from which Mr and Mrs Hablethwaite seek leave to appeal, was given on their appeal under s 289(2) of the Act from a decision of an Adjudicator given on 2 December 2003. That Adjudicator's decision records that altogether there were three applications made to the Commissioner under s 238, all arising out of the AGM of the Body Corporate of the Maria Creek Estate Community Titles Scheme, Scheme No 25253. One application, reference number 377 of 2003, was by the respondents to this application for leave to appeal, those respondents being respectively the co-owners of lots 1, 4, and 5, in the 9 lot Maria Creek Estate. The present applicants, Peter and Maria Hablethwaite, are the co-owners of Lots 3, 6, 7, 8, and 9; and accordingly have a majority of votes at any meeting in which they cast votes.

7. The Hablethwaites did not attend in person at the AGM held on 29 May 2003, but had forwarded a voting paper to the Administrator for the scheme, which scheme the Adjudicator's decision under appeal to the District Court described as having a dysfunctional history. That voting paper indicated how they wished to vote with respect to each of the motions for determination at that AGM. The judgment of the District Court

records that the Hablethwaites also forwarded to the Administrator a written submission which included their response to each of the motions, and records that those documents set out their objections to each of the motions that they voted against; although there was some dispute before the District Court Judge as to whether the submission was actually received by the Administrator.

8. The Hablethwaites' five votes out of the nine possible votes resulted in the resolutions numbered 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 27, 28, and 29, being defeated. After that the present respondents, the co-owners of Lots 1, 4, and 5, made application number 377 of 2003 to the Commissioner under s 238, asking as an outcome that the "no" vote of the Hablethwaites be declared void and each of those resolutions be deemed to have been carried. The adjudication on that application, which was the adjudication appealed to the District Court and from which decision of that Court there is now this application for leave to appeal, shows that an application (number 379 of 2003) was also made to the Commissioner in the name of the Body Corporate – presumably by the Administrator – seeking an order declaring that the resolutions numbered 5, 6, 7, 9, and 10 held at that AGM be declared void; and the Hablethwaites also made their own application, number 433 of 2003, seeking orders invalidating the AGM entirely, the removal of the Administrator, and the appointment of a registered liquidator or chartered accountant instead of that Administrator.

9. The Adjudicator's decision in reference 377 shows that the Adjudicator accepted the Hablethwaites' submission that their application number 433 of 2003 should be determined first, and the Adjudicator dismissed their applications. His reasons for so doing are not repeated in his decision number 377 of 2003, and the Hablethwaites did not pursue an appeal they lodged in the District Court about those reasons in number 433 and that dismissal of their application. The Adjudicator's reasons in 377 of 2003 do not reveal precisely what happened on the Body Corporate's application to the Commissioner, number 379, but the Hablethwaites originally appealed the result in that adjudication too, and then did not pursue that appeal.

10. In application 377 of 2003 the Adjudicator recorded that of the 18 motions submitted by the owners, 3 were carried (14, 18, and 26), and the rest were defeated, presumably on the votes of the Hablethwaites. The Adjudicator's decision in application 377, which was referred to the Adjudicator by the Commissioner as was application 433 of 2003, records that the applicants in number 377 had submitted a statement explaining the basis of their request for their orders in respect of each of the 15 disallowed motions the subject of that application to the Commissioner. Those statements would have been submitted in accordance with s 239 of the Act. The Adjudicator in number 377 records that the Hablethwaites, the named respondents in number 377, were fully aware of those reasons (that is, the detailed grounds on which the

[2]

applicants in number 377 sought the overturning of the "no" vote to each resolution), as a result of the submission process. The submission process referred to is the process set out in s 239 and s 243 of the Act.

11. That finding by the Adjudicator, that the Hablethwaites were fully aware of the minority lot owners' reasons for challenging the "no" vote for each resolution, was not challenged at all in the proceedings before the learned District Court Judge. Nor was the further finding, that notwithstanding that the minority lot holders had specifically addressed each of the separate motions they sought to have validated in those lot holders' grounds for their application, the Hablethwaites had not responded in like manner, and that their submission in response had been limited to the subject matter of motion number 13. That was a motion about a "gate entrance", and about which the Hablethwaites did make a written submission to the Commissioner.

12. The Adjudicator's decision in number 377 recorded that:

> "The Hablethwaites do not take issues [sic] with the other 14 of [sic] so motions the subject of this application. I conclude from this that the Hablethwaites do not have specific objections to the proposals contained in all other motions, but rather have simply voted "no" to each of the motions as technically they are entitled to do. The scenario is such however that the "no" vote of the Hablethwaites is determinative of the outcome of each of the motions. In this context, the other owners are alleging that the "no" by the Hablethwaites is unreasonable and should be reversed. This is the question to consider in respect of each of the motions in dispute, and I now intend to consider each motion in turn."[8]

13. The Adjudicator then did that, considering in turn each motion, and for all except motions numbered 13 and 28 concluded that because all other owners excepting the Hablethwaites had voted in favour of the proposals, that suggested that the proposal was a reasonable one in the mind of all other owners. He then concluded that the Hablethwaites had raised no specific objection to the proposals to explain or justify their "no" vote; in the circumstances the Adjudicator regarded the "no" votes as unreasonable and considered they should be reversed. The Hablethwaites did not challenge the logic of that approach in the District Court, and do not do so on this application. Nor do they argue that the Adjudicator could not, by order, declare their "no" votes void, and that the resolution(s) be deemed to be carried. What they contend is that the Adjudicator ought to have been alerted, in application number 433 of 2003, the one made by the Hablethwaites and decided first by the Adjudicator, to the fact that they had made written submissions to the Administrator, intended for consideration at the AGM, and explaining the grounds of their opposition to each of the motions they had opposed. The Adjudicator should have been so alerted because the Adjudicator's reasons for dismissing application number 433 (those reasons are only reproduced in part in the appeal record)[9] included the observation that there was a hand written note at the end of their voting paper submitted to the Administrator for the AGM, which stated:

> "We also vote yes to the motions included in our submission to the Administrator."

14. The Hablethwaites contend that as a matter of law the Adjudicator did not investigate the application number 377, as the Adjudicator was obliged to do to decide whether it would be appropriate to make the order that those applicants sought. The failure to investigate in application number 377 was evidenced by the failure to inquire further about the submission to the Administrator referred to in application number 433. They also argue that the Adjudicator had not observed natural justice, as he was also obliged to do, when the Adjudicator simply relied on the written submissions those applicants had made to the Commissioner and the limited written response the Hablethwaites had given the Commissioner in application number 377. The Hablethwaites argue that once the Adjudicator was alerted to the possibility that there were submissions to the Administrator for the purpose of that AGM, the Adjudicator should have investigated further to find out if that was so. They say the

[2]

Adjudicator should have asked for a copy of those submissions from the Administrator, or asked if they had one. After all, the Hablethwaites argue, the issue was whether or not they had provided reasons for their "no" vote at the AGM, not whether they made a submission to the Commissioner or Adjudicator.

15. In further support of that argument on this application for leave, the Hablethwaites argue that they had made a substantial submission in writing in application number 379 of 2003, the one lodged by the Administrator, which had included a dozen or more documents; and also lodged eight pages of submissions under the heading "grounds" in support of their own application number 433 of 2003. (Their written argument to this Court does not say whether those submissions in application numbers 379 or 433 of 2003 did explain their grounds for opposition to any of the motions other than motion 13, although Mr Hablethwaite seemed to suggest in his oral argument that they did. There is no evidence either way.) The Hablethwaites argue in the alternative that the Adjudicator made an order which was not just and equitable, contrary to the obligation imposed by s 276, and the injustice resulted from the Adjudicator's failure to properly investigate application number 377.

16. The learned District Court Judge hearing their appeal held that the Hablethwaites were clearly put on notice that the onus was on them to place any relevant submission before the Adjudicator, and, substituting "Commissioner" for "Adjudicator", I respectfully agree with that. The judge also held that it was unreasonable for the Hablethwaites to assume that their written submissions forwarded to the Administrator would be considered by the Adjudicator in the absence of their having provided the Adjudicator (I substitute "Commissioner") with a copy, and I agree with that conclusion too. The judge also held the Hablethwaites could not assume that the Administrator would provide a copy of their submissions to the Adjudicator (I substitute "Commissioner"), and I agree with that as well. Likewise I agree with the learned judge that the Hablethwaites were well aware that each of the applications was being investigated, and would be determined separately, even if by the same Adjudicator.

17. The learned judge held that an Adjudicator is not obliged to seek clarification or further information from a party once that party has responded, apparently sensibly, to an invitation to make submissions to the Adjudicator (I substitute "Commissioner"); and that it was entirely reasonable for the Adjudicator to limit investigations "to inviting interested parties to make written submissions". I observe, with great respect to the learned judge, that the Adjudicator did not invite anyone to make written submissions, and simply relied on those given to the Commissioner. However, I agree that was a reasonable approach for the Adjudicator to take in the circumstances, since the written submissions that were made by the applicants in number 377, and the response to those by the Hablethwaites, did not suggest that any inspection of the premises, or of other documents, or photographs, was necessary or desirable before deciding the application; or that there was any reason why it would be unsatisfactory to decide those applications on the written material already received.

18. The learned judge held that the Adjudicator was not under any obligation to seek out a copy of, or make investigations regarding, any such written submissions. That was because it had been made plain to the Hablethwaites that they could make written submissions to the Commissioner on the matters raised in application number 377, and because they did forward submissions that related to only one of those contested motions.

19. I sympathise with the Hablethwaites' complaint that their written submissions to the Administrator were apparently not considered at the AGM, because the Administrator did not admit receiving those; and with the Hablethwaites' complaint that they have been treated as if they did not provide written reasons for objection to most of the motions at that meeting, when they say they did, and their complaint that they had not realised that the Adjudicator did not have a copy of those written submissions. However, the Hablethwaites' argument really says that the Adjudicator was obliged to investigate their

[2]

response to the minority lot holders' application number 377, and that is not so. The Adjudicator was obliged to investigate the application, not the response. The Hablethwaites do not suggest that their written submissions, in any of the three applications, referred to the fact that they had made written submissions to the Administrator for the AGM. In those circumstances I agree with the learned trial judge that the Adjudicator was not obliged by s 269 to make investigations regarding those written submissions, and agree with the learned judge that the Adjudicator satisfied the duty to investigate the application by relying on the written submissions made to the Commissioner. The circumstances do not identify any other matters, which as a matter of law, the investigator was required to do. That being so, I agree with the decision of the learned trial judge dismissing the appeal to the District Court, and agree with Keane JA that this application for leave should be refused, and would order that the applicants pay the first and second respondents' costs of the application to this Court, to be assessed on the standard basis.

Keane JA:

20. The applicants seek leave to appeal to this Court from the decision of Bradley DCJ, given on 13 May 2005, whereby her Honour dismissed the appeal by the applicants against the decision of an adjudicator appointed pursuant to s 267 of the *Body Corporate and Community Management Act 1997* (Qld) ("the Act").[10] The adjudicator's decision was given on 2 December 2003. In effect, it overrode the exercise by the applicants of their controlling vote in respect of a number of motions proposed on 29 May 2003 at the annual general meeting of the body corporate of the Maria Creek Estate, a subdivision scheme of nine lots registered under the Act. The motions concerned proposals put by lot owners other than the applicants. The applicants held the majority of lots in the scheme.

21. The applicants require leave to pursue their appeal in this Court by reason of s 118(3) of the District Court of Queensland Act 1967 (Qld). It is well established by decisions of this Court that leave will not be granted pursuant to this section unless an applicant is able to demonstrate a reasonably arguable case of error on the part of the District Court and that some substantial prejudice will be suffered by the applicant if that error is not corrected.[11] These restrictions on the availability of an appeal serve to ensure that this Court's limited time and resources are not taken up by cases which have already had two hearings and in which no evident injustice has been caused to the litigant who seeks to have a third hearing of his or her arguments.[12]

22. The first and second respondents, through their counsel, submitted that the decision of the adjudicator which was upheld by Bradley DCJ related to resolutions of the body corporate in respect of its affairs as they were in May 2003. These resolutions are said to be no longer in issue between the parties. They are said either to have been overtaken by time and events, or to be resolutions which have not been and will not be pursued by the respondents. As a result, the respondents submit that the applicants will suffer no actual prejudice if their application for leave to appeal was refused.

23. The applicants did not dispute that submission. Rather, the applicants submit in reply that "[t]he material purpose of this appeal is to ask the Court for a precedent decision that the adjudicator must investigate an application with fair and proper consideration and in doing so, must observe natural justice as required by [the Act] s 269 and not simply write to interested parties inviting them to make a submission, which Judge Bradley … ruled was entirely adequate".

24. This submission by the applicants is in the nature of a request for an advisory opinion from the Court rather than for an order resolving a dispute with real consequences for the parties. The general propositions that an adjudicator must act fairly and give proper consideration to the dispute referred to him, and observe natural justice in doing so, are plainly correct. The Act says as much; and to repeat the Act's prescriptions is not to elucidate them. Whether the statutorily prescribed standards have been observed in any particular case will depend on the circumstances of that particular case. To warrant the intervention of the Court, there must be an actual controversy requiring resolution. It is no part of the function of the

[2]

Court to speculate how the law might apply to circumstances which may, or may not, eventuate.[13]

25. In this case, the applicants do not identify any practical utility in this Court's resolving the issues which the applicants seek to agitate. That is sufficient, in my opinion, to warrant the refusal of the application for leave to appeal.

26. In any event, the applicants have not demonstrated a sufficient basis for concluding that the adjudicator failed "to observe natural justice" as required by s 269 of the Act when investigating the application which had been referred to him. There is no suggestion by the applicants that they sought to make submissions to the adjudicator but were denied the opportunity to do so. The applicants' complaint is two-fold. First, it is said that the adjudicator did not request a copy of the submissions forwarded by them to the annual general meeting to explain why they would be voting against the relevant motions. Secondly, it is said that the adjudicator should have informed the applicants he would decide the matter against them if he received no submissions from them.

27. In this regard, the adjudicator noted that the other lot owners had submitted a statement explaining the basis for their request to have the dissenting votes of the applicants at the annual general meeting declared void. The applicants were invited to make a written submission that would be considered by the adjudicator. It is not entirely clear whether this invitation was made directly by the adjudicator or by the Body Corporate and Community Management Commissioner on his behalf but, in any event, the applicants conceded they had been afforded the opportunity to make submissions to the adjudicator in the course of the following exchange during the hearing before Bradley DCJ:

> "HER HONOUR: So your argument is that despite the fact that the adjudicator invited you to make submissions to him in writing, as he did invite all the parties, that despite that, he nevertheless should have gone beyond that and made his own inquiries?
>
> APPELLANT P HABLETHWAITE: Absolutely."

It was reasonable for the adjudicator to expect that the applicants would take this opportunity to put forward submissions, whether or not those submissions were the same

[2]

as those advanced at the annual general meeting, as to why their dissenting votes should be upheld.

28. The applicants did not make any specific response to the submissions of the other lot owners, save in relation to one motion where a specific response was provided. The adjudicator then considered each motion in turn and concluded that, with the exception of two motions, the "no" vote of the applicants was

unreasonable. In choosing to make no submission beyond that which they made, the applicants themselves determined the extent to which they sought to be heard by the adjudicator. As the learned District Court judge held, the applicants' argument "misconceives the concepts of a fair hearing, due process and natural justice".[14] It is a rule of natural justice that a person should be afforded the opportunity to be heard before a decision is made against him or her[15] but such an opportunity was obviously afforded to the applicants in the present case when they were invited to make submissions. The adjudicator was not required to do anything more.

29. In addition, and apart from the specific complaint about the failure to accord natural justice, the applicants also complain generally in their submissions about the procedure adopted by the adjudicator to gather material on which to base his decision. The applicants draw attention to s 269(1) of the Act which provides that: "(1) The adjudicator must investigate the application to decide whether it would be appropriate to make an order on the application."

30. The submission made by the applicants is that the adjudicator failed to fulfil this obligation by only seeking submissions from the parties as to what decision should be made and that to only go so far amounted, in effect, to a failure to undertake any investigation at all. This submission cannot stand in light of s 271(1) of the Act which provides that:

> "(1) When investigating the application, the adjudicator may do all or any of the following—
>
> (a) require a party to the application, or someone else the adjudicator considers may be able to help resolve issues raised by the application -
>
> (i) to obtain, and give to the adjudicator, a report or other information; or
> (ii) to be present to be interviewed, after reasonable notice is given of the time and place of interview; or
> (iii) to give information in the form of a statutory declaration;
>
> (b) require a body corporate manager, service contractor or letting agent who is a party to the application to give to the adjudicator a record held by the person and relating to a dispute about a service provided by the person;
>
> (c) invite persons the adjudicator considers may be able to help resolve issues raised by the application to make written submissions to the adjudicator within a stated time;
>
> (d) inspect, or enter and inspect —
>
> (i) a body corporate asset or record or other document of the body corporate; or
> (ii) common property (including common property the subject of an exclusive use by-law); or
> (iii) a lot included in the community title scheme concerned."

31. Two things may be said about this provision. The first is that s 271(1)(c) makes clear that seeking information from the parties to the application was a valid means for the adjudicator to pursue the investigation he was required to carry out under the Act. The second is that, while the adjudicator had other powers at his disposal, the introductory words to the provision stating that an adjudicator "may do all or any of the following" mean that the adjudicator was not required to make use of any more of these powers that he considered were necessary in order to carry out an effective investigation. The applicants' submission that the adjudicator's investigation was flawed because it was limited to considering submissions obtained from the parties must therefore fail.

32. Further, to the extent that the applicants now seek to agitate again the complaint that, contrary to s 276 of the Act, the adjudicator made an order which was not "just and equitable in the circumstances", no error is demonstrated in the decisions below.

33.

[2]

The effect of the adjudicator's conclusion, which was upheld on appeal to the District Court, was that the applicants did not demonstrate that they would be adversely affected in the use and enjoyment of their rights as lot owners (other than their voting rights) by the nullification of their voting rights on the motions in

question. The adjudicator's statutory powers extend to making orders resolving disputes about the exercise of voting rights by lot owners.[16] The statutory conferral of power upon the adjudicator to make an order which is "just and equitable in the circumstances" necessarily contemplates a decision by the adjudicator which may be "just and equitable in the circumstances" even though it overrides the exercise of voting rights by a scheme member.

34. Accordingly, the mere circumstance that voting rights of the owner of a lot in a scheme are overridden by a decision cannot, of itself, render the decision something other than "just and equitable". Insofar as the rights of a lot owner, other than voting rights, are not affected by the adjudicator's decision, it is impossible to see how the lot owner can be prejudiced in a way which could not be "just and equitable" simply by a decision to nullify his or her voting rights. As I have already noted, the applicants did not seek to demonstrate to the adjudicator that the enjoyment of their other rights as lot owners would be adversely affected by the nullification of their voting rights. As a result, there was no basis on which the applicants could seek to demonstrate that the adjudicator had erred in reaching his decision so as to entitle them to succeed on appeal to the District Court on a question of law.[17]

Conclusions and orders

35. For these reasons, I would dismiss the application for leave to appeal and order the applicants to pay the costs of the first and second respondents of the application to be assessed on the standard basis. The third respondent did not take any part in the application; and I would, therefore, not make any order for costs in his favour.

Cullinane J:

36. I agree with the reasons of Keane JA in this matter and the orders he proposes.

Footnotes

1 The meaning of "dispute" is set out in s 227 of the Act

2 Established by s 231 of the Act

3 Created by s 232 of the Act

4 This is provided for in s 238 and 239

5 This is provided for by s 243

6 As provided in s 246

7 Part 4 of each of the *Body Corporate and Community Management (Accommodation Module) Regulation 1997* (Qld); the *Body Corporate and Community Management (Commercial Module) Regulation 1997* (Qld); the *Body Corporate and Community Management (Small Schemes Module) Regulation 1997* (Qld); and the *Body Corporate and Community Management (Standard Module) Regulation 1997* (Qld)

8 At AR 45, in the Adjudicator's reasons in number 377 of 2003

9 At AR 36

10 *Hablethwaite* v *Andrijevic & Ors* [2005] QDC 112; DC No 91 of 2004, 13 May 2005.

11 *Rayner* v *Whiting* [1999] QCA 214 at [5]; [2000] 2 Qd R 552 at 553; *Hockley* v *Sowden* [2000] QCA 9; Appeal No 10317 of 1999, 3 February 2000 at [19] - [20]; *Pickering* v *McArthur* [2005] QCA 294; Appeal No 4013 of 2005, 16 August 2005 at [3].

12 *Pearson* v *Thuringowa City Council* [2005] QCA 310; CA No 94 of 2005, 26 August 2005 at [1].

13 *Bass* v *Permanent Trustee Company Ltd* [1999] HCA 9 at [47] - [49]; (1999) 198 CLR 334 at 355 - 357.

14 *Hablethwaite* v *Andrijevic & Ors* [2005] QDC 112; DC No 91 of 2004, 13 May 2005 at [17].

15 *Cameron* v *Cole* (1944) 68 CLR 571 at 589; *In re Hamilton*; *In re Forrest* [1981] AC 1038 at 1045.

16 See *Body Corporate and Community Management Act 1997* (Qld), s 276(1), s 276 (3) and Sch 5, [10].

17 The right of appeal to the District Court conferred by s 289(2) of the Act is confined to questions of law.

SAIL ISLE PTY LTD v BODY CORPORATE FOR SURFERS AQUARIUS COMMUNITY TITLES SCHEME 11295

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(2006) LQCS ¶90-134

Court citation: [2006] QDC 109

District Court of Queensland

19 May 2006

Strata and community titles — Community titles scheme — Dispute resolution procedure — Whether adjudicator's jurisdiction exclusive — Body corporate's responsibility for repairs to common property — Late application to defend — Body Corporate and Community Management Act 1997, s 229, s 276, s 281 — Uniform Civil Procedure Rules, r 7, r 16, r 144.

The plaintiff owned a ground floor unit. A roof above an external area of the plaintiff's lot formed an extension of the balcony of the unit above. On 15 March 2005, the plaintiff made an application for dispute resolution concerning maintenance and repairs required in relation to the balcony slab and damage to the unit below. On 11 November 2005, an adjudicator gave notice of the following orders:

> "I hereby order that the body corporate shall, at its expense, and in a reasonable time, undertake and complete all necessary structural and other repairs to the balcony slab of unit 2A so as to protect or maintain the structural integrity of the balcony slab and to prevent water ingress to lot 1, and thereafter to reinstate improvements necessary to be removed to undertake the necessary repairs (the work) PROVIDED THAT the owner of lot 1, Sail Isle Pty Ltd as Trustee, shall allow access to the body corporate, its contractors or tradespersons during reasonable times so that the work might be undertaken.
>
> I further order that the application by the owner of lot 1, Sail Isle Pty Ltd as Trustee, for an order that the body corporate pay to it the sum of $9,537.00 for reimbursement for repairs carried out to the unit by the owner and costs of carrying out temporary measures to avoid further damage to the unit, is dismissed.
>
> I further order that within one (1) calendar month of the date of this order, the body corporate shall pay to the owner of lot 1, Sail Isle Pty Ltd as Trustee, the sum of $1,553.20 for reimbursement of the reasonable value of repairs carried out to the property by the owner in consequence of the damage caused by water ingress."

The plaintiff had in fact already done the work some months before the adjudicator's orders were made. In the proceedings brought before the District Court at Southport, in a claim for $47,955.87 plus interest and costs, the plaintiff sought reimbursement on the basis that the plaintiff had discharged the body corporate's obligation on its behalf (though not at its request).

The defendant body corporate was granted relief under r 16 of the Uniform Civil Procedure Rules, even though its application under r 144(3) was filed late. The body corporate's defence was based on the assertion that the dispute was one which could be resolved by the orders of an adjudicator under the statutory dispute resolution process under s 229 of the Body Corporate and Community Management Act 1997 (BCCM Act), which excluded the jurisdiction of the court where the dispute was one which came within the adjudicator's powers.

Mr Barlow, on behalf of the plaintiff, argued that the dispute was not capable of being resolved within s 276 of the BCCM Act, which sets out the orders an adjudicator may make. He pointed to s 281, which deals with damage to an applicant's property, offering in terms the prospect of an order for payment on account of repairs "carried out", and contended that

[140474]

the absence of equivalent provision in respect of common property means that an adjudicator has no jurisdiction or power to make an equivalent order where the repairs are to common property.

Held: Section 276 of the BCCM Act did cover the plaintiff's claim, with the consequence that the District Court lacked jurisdiction to entertain it.

1. Robin QC DCJ quoted at length from James v Body Corporate Aarons Community Title Scheme 11476 (2004) LQCS ¶90-122; [2004] 1 Qd R 386 as authority in the Supreme Court of Queensland that its jurisdiction is excluded by the predecessor of s 229.

2. After ordering that "the defendant should have the relief sought in its application, which includes costs", Robin QC DCJ went on to say:

> "Subject to special considerations such as failure to meet a time limit and to reservations of the kind alluded to in para [6] [of the decision], the defendant will hardly be in a position to dispute the adjudicator's jurisdiction, having asserted it here. One would not expect the adjudicator to decline jurisdiction. It is unfortunate that the Act contains no clear power for an adjudicator to deal with issues that arise from the working out of an order made by him or her."

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Mr Barlow (instructed by Home Wilkinson Lowry) for the plaintiff

Ms Moody (instructed by Herd Law) for the defendant

Before: Robin DCJ

Robin DCJ:

1. This issue is whether an adjudicator under the *Body Corporate and Community Management Act* 1997 has exclusive jurisdiction in respect of the subject matter of the plaintiff's claim which seeks a declaration of the defendant Body Corporate's liability for "structural repairs pursuant to the order dated 11 November 2005" under chapter 9 of the Act, $47,955.87, interest and costs. Mr Barlow informed the Court that the declaration is no longer sought.

2. On 22 March 2006 the Body Corporate filed a conditional notice of intention to defend under rule 144(1) of the *Uniform Civil Procedure Rules*, asserting that there was a "dispute" within s 227 of the Act, which "may be resolved by a dispute resolution process." The words quoted come from s 229 of the Act:

> **"229 Exclusivity of dispute resolution provisions**
>
> (1) Subsection (2) applies to a dispute if it may be resolved under this chapter by a dispute resolution process.
> (2) The only remedy for the dispute is—
>
> (a) the resolution of the dispute by a dispute resolution process; or
> (b) an order of the District Court on appeal from an adjudicator on a question of law.
>
> (3) However, subsection (2) does not apply to a dispute if—
>
> (a) an application is made to the commissioner; and
> (b) the commissioner dismisses the application under part 5.
>
> (4) Also, subsection (2) does not apply to a dispute about the adjustment of a lot entitlement schedule."

3. The defendant was a day late in filing the application required under rule 144(3) if it was to avoid its notice being treated as an unconditional one under sub-rule (4). Indeed, by way of acknowledging sub-rule (5), a defence was filed on 10 May 2006. Ms Moody, for the defendant, sought an extension of time under rule 7. While in an appropriate case, retrospective relief of that kind may well be available, no particular circumstances of sympathy (apart from one's natural reluctance to penalise such a minimal delay) appear. In my opinion, the defendant's ability to apply as it has done under rule 16(a) and (e) is not lost because of the "late" filing of the application. It seems unnecessary to have recourse to rule 7.

4.

[140475]

The underlying differences between the parties relate to the plaintiff's ground floor unit in the relevant building, specifically to where the responsibility lies for the upkeep of a roof above an external area of the plaintiff's lot which forms (although the Court was told it is not used as) an extension of the balcony of the unit above.

5. An adjudicator brought in by the plaintiff's Dispute Resolution Application dated 15 March 2005, under the Act, gave notice dated 11 November 2005 of the following order:

> "I hereby order that the body corporate shall, at its expense, and in a reasonable time, undertake and complete all necessary structural and other repairs to the balcony slab of unit 2A so as to protect or maintain the structural integrity of the balcony slab and to prevent water ingress to lot 1, and thereafter to reinstate improvements necessary to be removed to undertake the necessary repairs (the work) PROVIDED THAT the owner of lot 1, Sail Isle Pty Ltd as Trustee, shall allow access to the body corporate, its contractors or tradespersons during reasonable times so that the work might be undertaken.
>
> I further order that the application by the owner of lot 1, Sail Isle Pty Ltd as Trustee for an order that the body corporate pay to it the sum of $9537.00 for reimbursement for repairs carried out to the unit by the owner and costs of carrying out temporary measures to avoid further damage to the unit, is dismissed.

I further order that within one (1) calendar month of the date of this order, the body corporate shall pay to the owner of lot 1, Sail Isle Pty Ltd as Trustee the sum of $1553.20 for reimbursement of the reasonable value of repairs carried out to the property by the owner in consequence of the damage caused by water ingress."

6. Some months before the order was made, and presumably without any advice to the adjudicator, the work had already been done by the plaintiff, which, accordingly, seeks reimbursement. Mr Barlow, on its behalf, describes the claim as one for restitution, based on unjust enrichment. The idea is that the Body Corporate has had its obligation discharged by the plaintiff. It is not suggested that the Body Corporate in any way requested that this occur. For present purposes, there is no need to examine contentions the Body Corporate may wish to make, as foreshadowed by Ms Moody, about the extent, quality or cost of work done, whether all was to "common property" as opposed to the higher lot, and other possible complications to do with insurance, the processes to be gone through before the Body Corporate could lawfully have the work done, and the like.

7. There is authority in the Supreme Court of Queensland that its jurisdiction is excluded by the predecessor of s 229: *James* v *Body Corporate Aarons Community Title Scheme* 11476 – BC 200207018, affirmed [2004] 1 Qd R 386. Unfortunately, although there may be no relevant changes in the substance (as opposed to the precise wording) of the legislation, there has been wholesale renumbering of sections. Section 229 was formerly s 184. Section 223 has become s 276 and s 227 has become s 281. Enforcement of an adjudicator's order occurs through registration in the Magistrates Court: s 286 (formerly s 232).

8. At first instance in *James*, Holmes J said:

"**[17]** Chapter 6, as already outlined, creates the positions of commissioner, adjudicators and mediators, and provides for case management and for management and adjudication in such a way as to constitute, in my view, a comprehensive code for dispute resolution. The existence of such a code for dealing with the subject matter is at least an indication of exclusivity. As Lunn AJ observed in *Hemruth Advertising v Karafotias*:

> 'The efficient operation of a specialist tribunal with powers to conciliate and to resolve disputes in an expeditious and inexpensive way would be partly defeated if parties to such a dispute could resort to other courts as they saw fit.'

The combined functions of commissioner, mediator and arbitrator under chapter 6 constitute a specialised mechanism peculiarly suited to speedy, cheap and relatively informal resolution of community titles scheme disputes.

[140476]

[18] The conclusion that exclusivity is intended in respect of the disputes to which s184(2) applies is reinforced by the existence of provisions which have the effect of allowing recourse to other remedies (including court orders) in specified situations: subs184(3), which removes the dispute from the purview of s184(2) if the commissioner dismisses the application, and s201(2), which entitles the commissioner to dismiss an application if he or she is satisfied that it should be dealt with in a court of competent jurisdiction.

[19] S184(2) has, I conclude, the effect of confining those remedies which may be given in disputes to which it applies to those available from an adjudicator under the chapter. Other orders or declarations — for example as to the jurisdiction of the commissioner, or of an adjudicator — are unaffected; but any order such as that sought in the present case, designed to resolve a dispute which can equally be resolved by an adjudicator's order under s223, is unavailable. It follows that the jurisdiction of the court to provide any remedy in respect of this dispute is excluded by s184."

9. Upon appeal, Davies JA, Jerrard JA and Mackenzie J concurring, said:

"**[11]** This was plainly a dispute in respect of which an adjudicator may make an order under ch. 6 within the meaning of s. 184. It was, at the very least, both a dispute between the body corporate and the owner of a lot included in the scheme and a dispute between the body corporate and a letting agent for the scheme. In the end, the only questions in issue in this appeal are whether the order

which an adjudicator may make to resolve this dispute is one pursuant to s. 223 or one pursuant to s. 227; or whether the adjudicator may make such an order under either section.

[12] Section 184 does not speak in terms, specifically, of jurisdiction to hear and decide but in terms of providing a remedy. However I think its plain intention is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes, relevantly in s. 223 and s. 227, in disputes of the kind to which s. 182 refers, subject to any statutory exception or limitation. Mr Savage S.C., for the appellants did not argue to the contrary.

[13] It was submitted by Mr Savage S.C. that s. 227, at least indirectly, provided such a limitation which effectively excluded the adjudicator's jurisdiction in this case. The submission was that this case came within s. 227(1) but, because the cost of carrying out repairs to the common property was substantially more than $75,000, the adjudicator had no jurisdiction to make such order. It was submitted that even if this case also came within s. 223, it was subject to the limitation in s. 227(2). Accordingly, it was submitted, the court had jurisdiction in the matter.

[14] The critical question, on the appellants' argument, is whether the relief which the appellants seek, which is, effectively as Mr Savage S.C. concedes, an order that the respondent repair the roof membrane, is an order of a kind which, subject to the exception contained in s. 227(2), an adjudicator could make under s. 227. That question, in turn, depends on whether "damage to property" in s. 227(1) includes, where the applicant is a lot owner, damage to the roof membrane.

[15] Section 227 was not necessary to enable the adjudicator to order a body corporate to have repairs to the roof membrane carried out. Section 87(1) of the Act and s. 108(1) and s. 108(2)(a)(iii) of the Regulation required a body corporate to maintain it in good condition; and an order requiring the body corporate to have repairs carried out, in compliance with that obligation, was an order which the adjudicator was empowered to make, under s. 223(3)(c), in any dispute coming within s. 184. So much was accepted by Mr Savage S.C. However he submitted that an order requiring the body corporate to repair the roof membrane would also be an order made under s. 227 and consequently that it would be subject to the limitation contained in s. 227(2).

[140477]

[16] There can be no doubt that s. 227 confers jurisdiction on an adjudicator to make an order to carry out stated repairs or to pay compensation which would not be an order of a kind which could be made under s. 223(3)(c). An example of such an order is given in the example contained in s. 227(1) which is in the following terms:

> 'A waterproofing membrane in the roof of a building in the scheme leaks and there is damage to wallpaper and carpets in a lot included in the scheme. The membrane is part of the common property and the leak results from a failure on the part of the body corporate to maintain it in good order and condition, the adjudicator could, on the application of the lot's owner, order the body corporate to have the damage repaired or to pay appropriate compensation.'

The damage referred to in the example is plainly the damage to the wallpaper and carpets in the lot. Mr Savage S.C. did not contend that an order of the kind envisaged in the example could be made under s. 223(3)(c).

[17] If Mr Savage S.C.'s submission is correct, s. 227 would apply, not only in the case of damage to the separate property of a lot owner or of the occupier of a lot, but to damage to the common property falling within the power to order repair already conferred by s. 223(3)(c). It would also, on that submission, both expand that power (by the power to order compensation for damage in s. 227(1)(b)) and limit it (by s. 227(2)). And it would do so without any reference to s. 223(3)(c). In my opinion that would be a surprising result.

[18] It would be surprising for two reasons. The first is that when, in an Act, a section confers power to do an act, which at the same time in this case also confers jurisdiction, it would be surprising to find, in a later section, the conferral of the same power, albeit together with the conferral of another power. And the second is that it would be even more surprising to find, in the later section, that the power conferred by the earlier section is not only conferred once again but also expanded in one way and

limited in another. If s. 227 can be given a sensible construction which does not have those effects I think it should be given that construction.

[19] In my opinion s. 227 can be given such sensible construction, having as its purpose the conferral on an adjudicator of a limited power, additional to those already conferred, to provide remedies, including one of compensation, to a lot owner or occupier whose property has been damaged by a contravention of the Act or the community management statement. So, in a case like the present where the breach is alleged to consist in the failure of the body corporate to maintain the roof membrane in good condition, s. 227 confers a power in the adjudicator, additional to the power already conferred to order repair of the membrane, to require the body corporate to make repairs to or to pay compensation in respect of damage to property of the owner or occupier in consequence of that failure. But in my opinion, reading s. 223(3)(c) and s. 227 together requires the conclusion that, just as damage to the property of a lot owner or occupier could not be the subject of an order made under s. 223(3)(c), damage to the common property could not be the subject of an order for repair or compensation under s. 227.

[20] It was submitted by Mr Savage S.C. that such a construction would have the curious result of conferring on an adjudicator under s. 223(3)(c) a power to make an order, unlike other orders of the kind which can be made under s. 223(3), which may involve expenditure of substantial money, as it seems in this case; whereas orders which can be made under s. 227 are limited in amount to $75,000 for repairs and $10,000 for compensation. I do not find that curious. Orders of the kind which the adjudicator is given power to make by s. 223(3) are all orders with respect to matters which might be expected to arise in the administration of the affairs of the body corporate including the obligation of the body corporate to maintain the common property in good condition. Orders which the adjudicator is given power to make under s. 227 are orders of a quite different

[140478]

kind. They are orders to remedy a civil wrong causing damage to property where that wrong arises out of a contravention of the Act or the community management statement. In this respect they trespass into the field ordinarily occupied by the common law. It is therefore unsurprising, it seems to me, that the power which is conferred on an adjudicator to make orders of that kind should be limited in amount."

10. Mr Barlow is correct that *James* concerned repairs, not a claim like the present, whether characterised as compensation, reimbursement, restitution, etc. His argument is that the "dispute" which, for purposes of the Act, he conceded exists, is not capable of being resolved within s 276:

> "(1) An adjudicator to whom the application is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—
>
> (a) a claimed or anticipated contravention of this Act or the community management statement; or
> (b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
> (c) a claimed or anticipated contractual matter about—
>
> (i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
> (ii) the authorisation of a person as a letting agent for a community titles scheme.
>
> (2) An order may require a person to act, or prohibit a person from acting, in a way stated in the order.
> (3) Without limiting subsections (1) and (2), the adjudicator may make an order mentioned in schedule 5.
> (4) An order appointing an administrator—
>
> (a) may be the only order the adjudicator makes for an application; or

(b) may be made to assist the enforcement of another order made for the application.

(5) If the adjudicator makes an order in a form agreed to by the parties to the application following mediation or conciliation, the order—

(a) may include only matters that may be dealt with under this Act; and
(b) must not include matters that are inconsistent with this Act or another Act."

11. It was conceded that subsection (2) extends to an order to pay money. It would appear correct that (subject to whatever subsection (3) may add), there must be something under (1)(a),(b) or (c) – here (a) or (b). Mr Barlow submits there is not. He points to s 281:

"(1) If the adjudicator is satisfied that the applicant has suffered damage to property because of a contravention of this Act or the community management statement, the adjudicator may order the person who the adjudicator believes, on reasonable grounds, to be responsible for the contravention—

(a) to carry out stated repairs, or have stated repairs carried out, to the damaged property; or
(b)to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out to the property by the applicant.

Example—

A waterproofing membrane in the roof of a building in the scheme leaks and there is damage to wallpaper and carpets in a lot included in the scheme. The membrane is part of the common property and the leak results from a failure on the part of the body corporate to maintain it in good order and condition, the adjudicator could, on application of the lot's owner, order the body corporate to have the damage repaired or to pay an appropriate amount as reimbursement for amounts incurred by the owner in repairing the property.

(2) The order can not be made if—

(a)for an order under subsection (1)(a)—the cost of carrying out the repairs is more than $75000; or

[140479]

(b)for an order made under subsection (1)(b)—the amount fixed by the adjudicator would be more than $10000."

which deals with damage to an applicant's property, offering in terms the prospect of an order for payment on account of repairs "carried out," and contends that the absence of equivalent provision in respect of common property means an adjudicator has no jurisdiction or power to make an equivalent order where the repairs are to common property. The underlying notion is the correct one that an adjudicator may do no more than the Act allows.

12. In my opinion, s 276 does cover the plaintiff's claim, with the consequence that this Court lacks jurisdiction to entertain it. The extension of s 276 might be noted, including from Schedule 5:

"4. An order requiring the body corporate … to have repairs carried out."

s 152(1):

"(1) The body corporate for a community titles scheme must –

(a) administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners; and
(b) comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme."

and s 108 of the Body Corporate and Community Management (Accommodation Module) Regulation 1997:

"(1) The body corporate must maintain common property in good condition, including to the extent that common property is structural in nature, in a structurally sound condition.
(2) To the extent that lots included in the scheme are created under a building format plan of subdivision, the body corporate must –

(a) maintain in good condition –

(i) railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; and
(ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and
(iii) roofing membranes that are not common property but that provide protection for lots or common property; and

(b) maintain the following elements of a scheme land that are not common property in a structurally sound condition –

(i) foundation structures;
(ii) roofing structures providing protection;
(iii) essential supporting framework, including load-bearing walls.

…"

13. Acknowledging the strange chronology of events here, whereby the plaintiff had taken upon itself to do "repairs" before the adjudicator made his order, I think we are dealing with a "claimed contravention" by the Body Corporate, namely failure to look after the relevant roof or "membrane" (however it is to be described). Section 288, imposing penalties for contravention of an order of an adjudicator, has the effect of creating a duty and requirement that such an order be complied with. Cf *Kelly* v *Alford* [1988] 1 Qd R 404, 408. It would be an odd (and inconvenient) situation that an adjudicator might make orders that repairs be carried out, which identify how the cost should be borne, but (even where the adjudicator has previously ordered the particular repairs) may not make an order about how the costs should ultimately be borne. It occurs to me that there may be emergency situations (it was not suggested the present is one) in which, for practical reasons, it is imperative that an owner (like the plaintiff) have urgent repair work done, leaving for later determination (on the "just and equitable" basis) the question of who should bear the cost. I do not think it should matter whether the contractor carrying out the work has been paid or not.

14. The Court of Appeal's approach in *James* acknowledges that an adjudicator may be brought in under more than one section to resolve a particular dispute, with some financial

[140480]

limits applicable in one scenario but not in another. (Here, Mr Barlow made it clear that the limits in s 281 create no problem.) In the circumstances, s 281 does not appeal to me as a reason for reading down s 276.

15. The defendant should have the relief sought in its application, which includes costs.

16. If my decision is wrong, nevertheless, as a determination binding on the parties, it must, one would think, be accepted by the adjudicator, if one is asked to resolve the dispute. Subject to special considerations such as failure to meet a time limit, and to reservations of the kind alluded to in para [6] above, the defendant will hardly be in a position to dispute the adjudicator's jurisdiction, having asserted it here. One would not expect the adjudicator to decline jurisdiction. It is unfortunate that the Act contains no clear power for an adjudicator to deal with issues that arise from the working out of an order made by him or her.

THE OWNERS — STRATA PLAN No 43551 v WALTER CONSTRUCTION GROUP LTD

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(2005) LQCS ¶90-128

Court citation: [2004] NSWCA 429

New South Wales Court of Appeal

23 November 2004

Strata titles — Practice and procedure — Standing of owners corporation to sue in negligence with respect to defects in common property — Application and scope of s 227 of the Strata Schemes Management Act 1996 — Whether an owners corporation entitled to sue in representative capacity for loss suffered by lot owners — Whether owners corporation entitled to sue on own behalf as legal owner of common property — Strata Schemes Management Act 1996 (NSW), s 226(1); 227 — Strata Schemes (Freehold Development) Act 1973 (NSW), s 20; 24.

The appellant was constituted as an owners corporation under s 11 of the Strata Schemes Management Act 1996 (NSW) (``the Management Act'') and, accordingly, was a body corporate for the purposes of the Strata Schemes (Freehold Development) Act 1973 (NSW) (``the Freehold Development Act''). The building in question was a 10-storey residential building in Sydney, New South Wales, which the respondent had built. Upon registration of the strata plan in 1993, the common property in the strata plan vested in the appellant. The appellant claimed that the respondent had been negligent in and about the construction of the building.

There were 52 lots in the strata plan. Twenty-nine of the 52 lots were sold after 2 November 1994, when at least some of the alleged defects in the building had become manifest. The respondent had argued successfully before Master Macready that the appellant had no standing to institute proceedings (2004) NSW Titles Cases ¶80-082; (2004) LQCS ¶ 90-124. The respondent's case was that the lot owners who acquired their lots after 2 November 1994 had no relevant cause of action against the builder and that, therefore, the appellant had no cause of action.

The appellant relied on the express statutory right to sue found in s 227 of the Management Act which provides:

> ``(1) This section applies to proceedings in relation to common property.
> (2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the owners corporation.
> (3) Any judgment or order given or made in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment or order given or made in favour of or against the owners.
> (4) A contribution required to be made by an owner of a lot to another owner in relation to such a judgment debt is to bear the same proportion to the judgment debt as the unit entitlement of the contributing owner bears to the aggregate unit entitlement.''

Master Macready had rejected the appellant's case on the basis that the words ``jointly entitled'' in subs 227(2) require all lot owners to have the right to take the relevant proceedings.

[140424]

On appeal, the appellant submitted that s 227 of the Management Act encompassed a joint entitlement, which did not require all lot owners to have the same cause of action. The appellant invoked the principle of statutory interpretation that the plural includes the singular and referred to s 8 of the Interpretation Act 1987 (NSW).

Alternatively, the appellant submitted that it was entitled to sue without relying on s 227 of the Management Act. This proposition was based on two alternative approaches. First, the appellant asserted it was entitled to sue in a representative capacity for loss suffered by the

[140424]

owners of the lots. Secondly, it asserted that it was entitled to sue on its own behalf for loss suffered by the owners corporation as the legal owner of the common property. In relation to the first approach, the respondent had successfully argued before Master Macready that, as an ``agent'', the owners corporation was not entitled to sue on behalf of a disclosed principal.

Section 20 of the Freehold Development Act provides:

> ``The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:
>
> > (a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned — for that proprietor or those proprietors, or
> > (b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned — for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.''

Section 24 of the Freehold Development Act provides:

> > ``(1) In any dealing or caveat relating to a lot, a reference to that lot includes a reference to any estate or interest in common property which is vested in the body corporate as agent for the proprietor of that lot

without express reference to the common property and without that dealing or caveat being recorded in the folio of the Register comprising the common property.
(2) The beneficial interest of a proprietor of a lot in the estate or interest in the common property, if any, held by the body corporate as agent for that proprietor shall not be capable of being severed from, or dealt with except in conjunction with, the lot.''

Subsection 226(1) of the Management Act provides:

> ``Nothing in this Act derogates from any rights or remedies that... an owners corporation... may have in relation to... the common property apart from this Act.''

Held: leave to appeal granted and appeal allowed.

Per Spigelman CJ (with whom Ipp and McColl JJA agreed)

Section 227 of the Management Act

1. Section 227 of the Management Act does not confer standing on the owners corporation to sue in its own right in the circumstances of the case.

2. Section 227 of the Management Act only applies where all of the owners of all lots have a common interest.

3. With respect to the enforcement of any judgment in favour of the owners corporation, subs 227(3) gives it the effect of a judgment in favour of ``the owners''. This is clearly a reference back to the phrase ``the owners of the lots'' in subs 227(2).

4. Subsection 227(4) operates on the assumption that all lot owners are the subject of the relevant judgment debt.

Claimed entitlement to sue in representative capacity

1. The word ``agent'' in s 20 and 24 of the Freehold Development Act is not used in the technical sense of the law of agency. The characterisation of the relationship for purposes of determining standing to sue turns on an assessment of the whole statutory scheme, including

[140425]

the powers and duties with respect to common property. There is a tension between the use of the word ``agent'' and of the words ``beneficial interest'' in subs 24(2). The fact that the statute vests title in the owners corporation is particularly significant.

2. It is not appropriate to characterise the statutory role of an owners corporation solely in terms of an agency at common law.

[140425]

3. Inability to sue in contract does not determine whether the legal owner of property can sue with respect to damage to property. In this regard, the statutory scheme does not suggest that the appellant suffered from any incapacity. The appellant should be treated as a trustee would be treated in this respect. Subsection 226(1) preserves any such right, including the right of a trustee to sue in tort for damage to trust property.

Claimed entitlement to sue by the owners corporation on its own behalf

As the legal owner, the owners corporation may sue in its own right.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

F Corsaro SC with Mr Young (instructed by Andreones Pty Ltd Lawyers) for the appellant.

M Pembroke SC with R Dubler (instructed by Corrs Chambers Westgarth) for the respondent

Before: Spigelman CJ, Ipp and McColl JJA.

Spigelman CJ: The Appellant seeks leave to appeal from a judgment of Master Macready on a separate question in proceedings instituted in the Technology and Construction List of the Supreme Court. As will presently appear, significant questions of law arise and leave to appeal should be granted.

2. The Appellant is constituted as an owners corporation under s 11 of the *Strata Schemes Management Act* 1996 (``the *Management Act*'') and, accordingly, is a body corporate for purposes of the *Strata Schemes (Freehold Development) Act* 1973 (``the Freehold Development Act''). Upon registration of Strata Plan No 43551 on 30 March 1993, the ``common property'' in the strata plan vested in the Appellant pursuant to the sections I will hereinafter set out.

3. The Appellant is the owners corporation of a ten storey residential building in Bondi Junction, Sydney. The Respondent was the builder and, according to the statement of claim issued by the Appellant, was guilty of negligence in and about the construction of the building.

4. There are 52 lots in the strata plan. Twenty-nine of the 52 lots were sold after 2 November 1994, when at least some of the alleged defects had become manifest. The Respondent's case is that the lot owners who acquired their lots after this date have no relevant cause of action against the builder and that, therefore, the Appellant has no cause of action.

5. The Respondent argued, successfully, before the Master that the Appellant had no standing to institute the proceedings.

6. On the pleadings, the Respondent put in issue the Appellant's standing. Under Pt 31 r 2 of the *Supreme Court Rules*, the Court ordered, in accordance with the Respondent's Notice of Motion, that certain paragraphs of the Defence be separately determined. The Master identified the issue to be:

> ``Does the plaintiff, as an owners corporation, have standing to sue in its own name in respect of the alleged defects to the common property?''

7. Although this summary was not criticised on the appeal, it is pertinent to set out the particular paragraphs of the defence that were separated by Court order, adding par [14] by way of introduction:

> ``[14] Further and in answer to the whole of the Plaintiff's claim the Defendant says:
>
> [15] By s 18(1) of the Strata Schemes (Freehold Development) Act 1973 (NSW) (the Strata Schemes Act) the common property in strata plan no: 43551 (the Strata Plan) was vested in the Plaintiff upon registration of the Strata Plan pursuant to the terms of the Strata Schemes Act.
>
> [16] By s 21 of the Strata Schemes Act the Plaintiff is only capable of dealing with the common property the subject of the Strata Plan in accordance with the provisions of the Strata Schemes Act.
>
> [140426]
>
> [17] By s 20 of the Strata Schemes Act the estate or interest of the Plaintiff in the common property the subject of the Strata Plan vested in it pursuant to s 18(1) is to be held by the Plaintiff as agent for the proprietors of each of the lots the subject of the Strata Plan as tenants in common in shares proportional to the unit entitlements of their respective lots (the Statutory Agency).
>
> [18] By virtue of s 227 of the Strata Schemes Management Act 1996 (NSW) (the Strata Schemes Management Act) the
>
> [140426]
>
> Plaintiff only has standing pursuant to the Statutory Agency to bring proceedings in respect of the common property the subject of the Strata Plan on behalf of the proprietors of the lots in the Strata Plan (the Proprietors) where all of the proprietors of the lots are jointly entitled to take proceedings against the person whom the Plaintiff proposes to take proceedings.
>
> [19] Some or all of the alleged defects the subject of the Plaintiff's notice of contentions were in existence prior to the Proprietors' purchase of the lots in the Strata Plan.
>
> [20] The Proprietors are not the original proprietors of the lots in the Strata Plan.
>
> [21] The Proprietors have purchased their lots at different times.
>
> [22] Accordingly, the Proprietors do not share a common interest in the alleged cause of action pleaded against the Defendant in respect of the common property the subject of the Strata Plan in that each Proprietor's entitlement to take proceedings against the Defendant in negligence is severally dependent upon:
>
> (a) a duty of care arising between the Defendant and each Proprietor;
> (b) each Proprietor demonstrating he, she or it relied on the Defendant at the time of a duty of care arising between the Defendant and the Proprietor;
> (c) each Proprietor purchasing the lot or lots without knowledge of the defects the subject of the Statement of Claim or such defects not being reasonably discoverable at the time of purchase.
>
> [23] In the premises, the Defendant says that the Proprietors are not jointly entitled to take proceedings on the cause of action pleaded against the Defendant.

[24] Accordingly, by virtue of the provisions of the Strata Schemes Act and the Strata Schemes Management Act pleaded above, the Plaintiff does not have standing to bring the current proceedings on behalf of the Proprietors against the Defendant.

[25] The Defendant says that some or all of the Proprietors have purchased their lots with knowledge of the defects the subject of the Statement of Claim or at a time when such defects were reasonably discoverable and/or without relying upon the Defendant's care or still as building, and hence would not have a cause of action in tort against the Defendant in respect of such defects.

[26] In the premises, the Plaintiff is not entitled pursuant to the Statutory Agency to bring proceedings on behalf of such Proprietors to recover damages in tort as pleaded in the Statement of Claim herein in respect of their interest in the common property in the Strata Plan."

8. Two issues arise on this pleading:

(i) joint entitlement.
(ii) statutory agency.

In each case, the pleading concludes with an assertion that the Appellant cannot bring proceedings on behalf of the owners.

9. However, the statement of claim does not assert a right to bring proceedings on behalf of the owners. It asserts an ability on the part of the Appellant to proceed in its own right:

``6. In carrying out the works the defendant had in contemplation that:

a. on registration of the strata plan the common property of the Building would be vested in the plaintiff; and
b. in the event that the construction works were not carried out in a proper and workmanlike manner the plaintiff would be a member of a class of person who would suffer loss and damage as a consequence.

7. As a consequence of the matters pleaded in paragraph 5. above, and all the circumstances of the case, including, without limitation:

[140427]

(a) the fact that the defendant, in its capacity as a builder of a strata development, would, or ought to, have been aware of the implications of the Strata Schemes (Freehold Development) Act 1973 (NSW) in that, upon registration, the plaintiff, as owners' corporation, would become the owner of the common property and would thereby suffer loss and damage as a result of defective works;
(b) reliance by the plaintiff on the defendant;

[140427]

(c) the fact that the plaintiff was in no position to protect itself against the defendant's default; and
(d) the fact that, as between the parties, the building works were entirely within the defendant's control,

the defendant owed the plaintiff a duty to exercise reasonable care in carrying out the construction works."

10. The statement of claim goes on to allege breach of duty and consequential loss. The Respondent denies duty, breach and that loss was caused by breach of duty. However, these paragraphs of the Defence were not the subject of the order for separate determination. This is of significance with respect to some of the submissions made by the Respondent in this Court.

The statutory right to sue

11. The Appellant relies on the express statutory right to sue found in s 227 of the *Management Act* which provides:

``227(1) This section applies to proceedings in relation to common property.

(2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the owners corporation.

(3) Any judgment or order given or made in favour of or against the owners corporation in any such proceedings has effect as if it were a judgment or order given or made in favour of or against the owners.

(4) A contribution required to be made by an owner of a lot to another owner in relation to such a judgment debt is to bear the same proportion to the judgment debt as the unit entitlement of the contributing owner bears to the aggregate unit entitlement."

12. The Master rejected the Appellant's case on s 227 on the basis that the words ``jointly entitled'' in s 227(2) require all lot owners to have the right to take the relevant proceedings. He referred to the judgment of the Singapore Court of Appeal in *Management Corporation Strata Title Plan No 1938* v *Goodview Property Pty Limited* (2000) 4 SLR 576; see (2001) 75 ALJ 217, but noted that the relevant section of the Singapore statute differed from that of New South Wales, by providing that:

``Where *all or some* of the subsidiary proprietors of the lots... are jointly entitled."

13. The Appellant submitted that the New South Wales section should be understood in the same way, so that it encompassed a joint entitlement which did not require all lot owners to have the same cause of action. The Appellant also invoked the principle of statutory interpretation that the plural includes the singular and referred to s 8 of the *Interpretation Act* 1987. However, there are indicators in s 227, and in the statutory scheme of which it forms part, that the Appellant's contentions are incorrect including, so far as it is necessary to do so, a contrary indication for purposes of the application of s 8 of the *Interpretation Act* 1987.

14. First, there is the repetition of the definite article in s 227(2) which commences with the words ``if *the* owners of *the* lots...''. If the terminology had been ``if owners of lots'' or even ``if the owners of lots'', then there may have been a suggestion that an indeterminate number of owners in any combination could be represented by the owners corporation. The repetition of the definite article in the two places identified indicates that the section applies only in the circumstances where *all* the owners of *all* lots have a common interest.

15. Furthermore, with respect to the enforcement of any judgment in favour of the owners corporation, s 227(3) gives it the effect of a judgment in favour of ``*the* owners''. This is clearly a reference back to the phrase ``the owners of the lots'' in s 227(2). This third deployment of the definite article reinforces my conclusion.

16.

[140428]

The second reason for reaching this conclusion is the express provision contained in s 227(4) as set out above. That subsection is concerned with the situation in which a judgment is made against the owners corporation and, by force of subs (3), has effect as if it were made against ``the owners''. The successful plaintiff in such proceeding would have an order enforceable, it appears, against all or any of the owners of the lots. If enforcement action is taken against some only of the owners that would give rise to a right of contribution by those owners against other owners.

17. Subsection (4) indicates that any such contribution is to be made on the basis of the proportion that the ``unit entitlement of the

[140428]

contributing owner'' bears to the ``aggregate unit entitlement''. The phrase ``aggregate unit entitlement'' is defined in Pt 1 of the dictionary as:

``aggregate unit entitlement of lots subject of a strata scheme means the sum of the unit entitlements of those lots.''

18. This definition refers to the ``lots'' in the ``strata scheme'' as a whole. Section 227(4) does not refer to the sum of the ``unit entitlements'' of the lot owners seeking contribution and of the lot owners from whom

contribution is sought. Subsection (4), accordingly, operates on the assumption that *all* lot owners are the subject of the relevant judgment debt.

19. The final reason for concluding that s 227 applies only to action on behalf of all of the owners is the fact that, by subs(1), the section applies only to proceedings in relation to common property. This is usually a matter in which all owners of lots have an identical interest. Subsection (2) applies not only where owners assert a ``joint entitlement'' to take proceedings but also where a third party can take proceedings against owners ``jointly''. Although the present case is of the former character, it is difficult to envisage circumstances in which a third person can take proceedings in relation to common property that does not affect all owners of lots in the strata scheme.

20. For these reasons, in my opinion, s 227 does not confer standing on the owners corporation to sue in its own right in the circumstances of this case.

Statutory ``Agency''

21. Alternatively the Appellant submits that it is entitled to sue without relying on s 227 of the *Management Act*. This proposition was based on two alternative approaches. First, the Appellant asserts it is entitled to sue in a representative capacity for loss suffered by the owners of the lots. Secondly, it asserts that it is entitled to sue on its own behalf for loss suffered by the owners corporation as the legal owner of the common property.

22. I have set out above, pars [25] and [26] of the Defence that relate to this matter. They appear to me to give rise to only the first of the ways in which the Appellant asserts a right to sue. Paragraph [26] of the Defence refers only to the ``statutory agency''.

23. In this regard it is relevant to note that s 226(1) of the *Management Act* provides:

> ``226(1) Nothing in this Act derogates from any rights or remedies that... an owners corporation... may have in relation to... the common property apart from this Act.''

24. The nature of the relationship between the owners corporation and the owners of the lots is set out in the following provisions of the two Acts.

25. Section 11(1) of the *Management Act* provides:

> ``11(1) The owners of the lots from time to time in a strata scheme constitute a body corporate under the name `The Owners- Strata Plan No X' (X being the registered number of the strata plan to which that strata scheme relates).''

26. The relevant sections of the *Freehold Development Act* are s 18(1), s 20 and s 24:

> ``18(1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.''
>
> [140429]
>
> ``20 The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:
>
> (a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned — for that proprietor or those proprietors, or
> (b) where different persons are proprietors of each of two or more of the lots the subject of the strata scheme concerned — for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots.''
>
> ``24(1) In any dealing or caveat relating to a lot, a reference to that lot includes a reference to any estate or interest in common property which is vested in the body corporate as agent for the proprietor of that lot without express reference to the common property and without that dealing
>
> [140429]

or caveat being recorded in the folio of the Register comprising the common property.

(2) The beneficial interest of a proprietor of a lot in the estate or interest in the common property, if any, held by the body corporate as agent for that proprietor shall not be capable of being severed from, or dealt with except in conjunction with, the lot."

27. The special nature of an owners corporation, and the need to identify its role within the parameters of the *Freehold Development Act* and the *Management Act*, is emphasised by s 110(3) of the *Management Act* which provides that s 50(1)(d) of the *Interpretation Act* 1987 does not apply to an owners corporation. The significance of this exclusion, and of the applicable paragraphs of s 50(1), is manifest in the terms of s 50 which are:

``50(1) A statutory corporation:

(a) has perpetual succession,
(b) shall have a seal,
(c) may take proceedings and be proceeded against in its corporate name,
(d) may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property, and
(e) may do and suffer all other things that bodies corporate may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its functions."

28. An owners corporation has functions and powers conferred by the two Acts. Of particular significance are the functions relating to common property.

29. First, s 21 of the *Freehold Development Act* provides:

``21 Common property shall not be capable of being dealt with except in accordance with the provisions of this Act."

30. It is also relevant to note certain provisions of Ch 3, which is headed *Key Management Areas*.

31. Section 61(1) provides:

``61(1) An owners corporation has for the benefit of the owners:

(a) the management and control of the use of the common property of the strata scheme concerned, and
(b) the administration of the strata scheme concerned.

(2) The owners corporation has responsibility for the following:

(a) maintaining and repairing the common property of the strata scheme as provided by Part 2,
..."

32. In Pt 2 appears s 62 which provides:

``62(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.

(2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.

(3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and
(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme."

33.

[140430]

Part 3 of Ch 3 is concerned with the finances of a strata scheme. Sections 66 and 69 impose obligations upon an owners corporation to establish, respectively, an administrative fund and a sinking fund.

34. Section 75 makes provision for levies on owners. By ss 67(1)(a) and 70(a) contributions levied on and paid by owners for payment into the respective funds must be paid into the funds. Section 68 and s 71 state that moneys must not be paid out of either of the funds save for the purposes specified, respectively, in the two sections.

35. The pleading in the Defence which gives rise to what the Respondent calls a ``statutory agency'' is based on the reference in s 20 and s 24 of the *Freehold Development Act*, quoted above, to the fact that the owners corporation holds the common property ``as agent'' for proprietors.

36. The Respondent's contention, which succeeded before the Master, was that, as an ``agent'', the owners corporation was not

[140430]

entitled to sue on behalf of a disclosed principal. The Appellant's case was that the owners corporation under the statutory regime was analogous to the situation of a trustee who can act on behalf of beneficiaries.

37. The Master accepted the Respondent's contentions in the following passage:

> ``[15] In support of the proposition that in the case of a disclosed principal an agent cannot sue on behalf of his principal reference was made to the principles referred to in **Bowstead and Reynolds on Agency** in art. 99. This dealt with the situation in contract. Reference was also made to `**Parties to an Action**' by AV Dicey where under rule 83 it was pointed out that a servant cannot sue for a mere injury to a master. The general rule on enforcement of a contract by an agent is that the agency can only bring an action to enforce the contract in the name of the principal with the consent of the principal. The agent himself has no cause of action and no interest in the subject matter of the suit. See *Campbell* v *Pye* (1954) 54 SR (NSW) 308 at 309. The person whose right has been violated is the most appropriate person to bring the suit. See *Gray* v *Pearson* (1870) LR5CP568 at 574-576. An exception will arise where the agent is expressly authorised in the agency agreement to bring an action in his or her name in which case the agent can bring the action and be named as plaintiff. See *Netage Pty Ltd* v *Cantley* (1985) 6 IPR 200 at 212.
>
> [16] The cause of action in the present case is for economic loss being any diminution in the value of the lot holders undivided interest as tenants in common in the common property. Prima facie it is hard to see how, unless there is any special exception, an agent can sue for the benefit of loss claimed by a disclosed principle whether in tort or contract.
>
> [17] The very inclusion in the Act of section 227, confirms the basic underlying principle to which I refer. Section 227, in the case where on the face of the Act there is a clear agency relationship, creates an exception in respect of the common property. Section 228, which deals with a situation (damage to property comprised in a unit where there is danger to the support of other units) in which the other provisions of the Act do not provide for agency, creates the agency and provides the exception allowing the Owners Corporation to take proceedings.''

38. The Master gave weight to the inclusion of s 227 in the *Management Act*. Notwithstanding the preservation of other rights by s 226(1), the Master characterised the section as ``an exception in respect of the common property'' in the context of a ``clear agency relationship''.

39. Although an owners corporation suing as a trustee may not require the additional power conferred by s 227(2), nor indeed may a person choosing to sue the legal owner of title require statutory authority, it cannot be said that the matter covered by s 227(3) is unnecessary. That subsection has the effect of making a judgment or order enforceable against the owners, together with the provision in subs(4) for contribution between owners. This is a modification of the position at law.

40. Section 227 creates a specific statutory regime establishing a system of interconnected mutual rights and obligations, some of which would not exist at law. The inclusion of s 227 in

[140431]

the statutory scheme is not a basis for an inference that none of the matters to which it refers could exist at law.

41. The use of the word ``agent'' in s 20 is not of itself determinative of the nature of the relationship. As Lord Herschell observed in *Kennedy* v *de Trafford* [1897] AC 180 at 188: ``No word is more commonly and constantly abused than the word `agent'.'' This aphorism is frequently referred to with approval. (See the authorities collected in *Pinkstone* v *R* [2004] HCA 23 at footnote 34.)

42. In my opinion, the word ``agent'' in s 20 and s 24 is not used in the technical sense of the law of agency. The characterisation of the relationship for purposes of determining standing to sue turns on an assessment of the whole statutory scheme, including the powers and duties with respect to common property set out above. There is a tension between the use of the word ``agent'' and of the words ``beneficial interest'' in s 24(2). The fact that the statute vests title in the owners corporation is particularly significant.

43.

[140431]

In *Carre* v *Owners Corporation — Strata Plan 53020* [2003] NSWSC 397; (2003) 58 Barrett J referred to the words ``beneficial interest'' in s 24(2) and said:

> ``[28]...The statute seems clearly enough to proceed on the footing that each proprietor of a lot is to be regarded as the equitable owner of an undivided interest as one of several tenants in common in the estate or interest of which the owners corporation is the legal owner....
>
> [29] It is clear from the statutory scheme that an owners corporation is in no sense the beneficial owner of common property. Its ownership is always in a representative capacity identified by the Act as that of `agent', with the lot proprietors, as the owners in equity of undivided interest of tenants in common, each identified as having a `beneficial interest'. The restrictions upon alienation and other dealings and the provisions with respect to repair, renewal and replacement proceed on the assumption that common property exists for the benefit of the lot proprietors as a general body.... As was observed in *Houghton* v *Immer (No 55) Pty Ltd* (1997) 44 NSWLR 46, by Handley JA (with whom Mason P and Beazley JA concurred), a provision that vests this common property in an owners corporation as `agent' for lot proprietors makes the proprietors equitable tenants in common.''

44. Gzell J said in *Lin* v *The Owners — Strata Plan No 50276* [2004] NSWSC 88:

> ``[7] The notion of an agency in this context is odd. If common property is vested in the owners corporation for the benefit of the lot owners, one would expect the relationship to be that of trustee and beneficiary rather than that of agent and principal. That something more than the relationship of principal and agent was intended by the legislation was clear from the terms of the *Strata Schemes (Freehold Development) Act* 1973, s 24(2) which spoke of the beneficial interest of a proprietor of a lot in the estate or interest in the common property held by the body corporate as agent for that proprietor.
>
> [8] It is not surprising, then, that the nature of the interest of a lot owner in the common property has been described as an equitable interest as a tenant in common with other lot owners (*Houghton* v *Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 at 56) and as a proprietary right (*Young* v *Owners — Strata Plan No 3529* (2001) 54 NSWLR 60 at 46).''

45. I agree with these observations of Barrett J and Gzell J. It is not appropriate to characterise the statutory role of an owners' corporation solely in terms of an agency at common law.

46. The institutions of trust and agency are not mutually exclusive. It is a distinguishing characteristic of the former that a trustee, unlike an agent, must have trust property vested in it. Where an agent has actual title to property, then the agent will be a trustee, albeit one who is bound to follow the directions of the principal with respect to the property. (See *Scott on Trusts* (4th ed) Vol 1 p 95; Jacobs *Law of Trusts in Australia* (6th ed) 1997 par 210; Ford and Lee *Principles of the Law of Trusts* par 1200.)

47. The doctrine upon which the Respondent successfully relied before the Master is a rule applicable to contracts and is to the effect that, in the case of a disclosed principal, an agent

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cannot sue a third party on the contract. The Master applied this rule to the case of a tort on the basis that the cause of action was one for ``the diminution in the value of the lotholders undivided interest as tenant in common in the common property''. This does not accurately reflect the Appellant's pleading which particularises its loss as ``The diminution in value of the building and/or the cost of rectifying defects''.

48. In any event, inability to sue in contract does not determine whether the legal owner of property can sue with respect to damage to the property. In this regard, the statutory scheme does not suggest that the Appellant suffers from any incapacity. In my opinion, it should be treated as a trustee would be treated in this respect. Section 226(1) preserves any such right (see also *Margiz Pty Ltd* v *Proprietors Strata Plan No 30234* (1993) 30 NSWLR 364 at 372), including the right of a trustee to sue in tort for damage to trust property. (See the authorities referred to in *Young* v *Murphy* [1996] 1 VR 279 at 290-291.)

49. As the legal owner, the owners corporation may sue in its own right. This was determined by Needham J in *Proprietors of Strata Plan No 6522* v *Furney* (1976) 1 NSWLR 413 a decision under the *Strata Titles Act* 1973. Although s 147 (the equivalent of s 227) did not apply, the owners corporation

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nevertheless had standing to seek a declaration as legal owners of the common property on the basis of s 146 (now s 226). His Honour said at 414, after concluding that s 147 was not applicable:

> ``However, s 146(1) says: `Nothing in this Act derogates from any rights or remedies that a proprietor or mortgagee of a lot or body corporate may have in relation to any lot or the common property apart from this Act'. Under the Act the common property is vested in the body corporate by s 18 `for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan immediately before its registration'. Section 18(2) requires the Registrar-General to issue in the name of the body corporate a certificate of title of any common property in that strata plan.
>
> It seems to me that, as registered proprietor of the common property, the body corporate would have rights equivalent to the rights of any other registered proprietor to protect its interests or to have the Court declare the extent of its interest, the extent of its powers and liabilities. I think that s 146 protects the ordinary incidents which attach to the ownership of land registered under the *Real Property Act* 1900. One of those rights, it seems to me, is a right to approach the Court to make declarations under s 75 of the *Supreme Court Act*, 1970. Accordingly, I am of the opinion that these proceedings are competent, and that the Court is entitled to make orders which would declare the rights and responsibilities and liabilities of the plaintiff under its strata plan and under the Act.''

50. The Master distinguished this case on the basis that it was an application for a declaration. This does not appear to me to be a material point of distinction. Indeed, Needham J, as quoted, expressly referred to the right to a declaration as ``one of those rights'' which are an ordinary incident of ownership. The Appellant's pleading of duty, breach and damage, manifests another such incident.

51. The Respondent does not seek to uphold this aspect of the Master's reasons. The Respondent relied on the authorities on recovery for economic loss, particularly *Bryan* v *Maloney* [1995] HCA 17; (1995) 182 CLR 604 and *Woolcock Street Investments Pty Ltd* v *CDG Pty Ltd* [2004] HCA 16; (2004) 75 ALJR 628, for the propositions that the proprietors who purchased after the defects became manifest had no right of action and that the Appellant has suffered no loss. However, such issues as arise in this regard do so under the Respondent's denial of duty, breach and damage. They do not arise under the paragraphs ordered to be separately determined.

52. I propose the following orders:

1. Leave to appeal granted.
2. Appeal allowed.
3. The Respondent to pay the Appellant's costs of the separate question and the appeal.

Ipp JA: I agree with Spigelman CJ.

McColl JA: I agree with Spigelman CJ.

JAMES and ANOR v THE BODY CORPORATE AARONS COMMUNITY

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(2004) LQCS ¶90-1221

Supreme Court of Queensland Court of Appeal

Judgment delivered 1 August 2003

Strata and Community titles — Community titles scheme Damage to common property — Statutory powers impacting upon repair work orders Jurisdiction of adjudicator Whether relief sought by lot owners was of a kind that an adjudicator could make Body Corporate Management Act 1997 (Qld), sec 87, 184, 223 and 227.

The appellants were the owners of a lot in a community titles scheme for a holiday unit complex at Surfers Paradise, Queensland. Under the scheme, the appellants held site management and letting rights for the complex. The respondent was the body corporate constituted under the Body Corporate and Community Management Act 1997 (the Act).

Before the trial Judge the appellants had sought:

> 1. A declaration that the respondent must, in compliance with its obligations under see 87(1) of the Act and the Body Corporate and Community Management (Accommodation Module) Regulation 1997:
>
> > (a) maintain the roofing membrane and other external surfaces of the buildings of the body corporate so as to prevent the ingress of water into the premises of the body corporate;
> > (b) maintain the parapets along the boundary of the body corporate in good condition.
>
> 2. An injunction requiring the body corporate to forthwith carry out such work as was necessary to comply with its obligations under the declaration that was sought.

There was independent evidence that the building was in disrepair. In particular, there was evidence of water leaking in through the top of the building penetrating into some units and parts of the common property affecting, among other things, electrical fittings. The appellants, together with the owners of other lots in the scheme, were tenants in common in the common property including that part of it that was damaged. The appellants claimed that unfavourable publicity about the damage and the continuing problems caused by leaks and dampness had caused their business as on-site letting agents to suffer. They also asserted that, because the value of the building had declined, so had the value of their lot. An estimate, by an independent expert, of the total cost of putting the building in repair, including but not limited to remedying the water penetration, was $659,280.

The trial Judge dismissed the originating application for a declaration and an injunction against the respondent. The trial Judge concluded that she did not have jurisdiction to make either of the orders sought because, she held, an adjudicator appointed under Chapter 6 of the Act had exclusive jurisdiction to decide and grant a remedy in a dispute of the kind for which the application sought remedies.

Section 184 of the Act provided that:

> "(1) Subsection (2) applies to a dispute if an adjudicator may, under this chapter, make an order to resolve it.
> (2) The only remedy for the dispute is an order of
>
> > (a) an adjudicator; or
> > (b) a District Court on appeal from an adjudicator on a question of law.
>
> ..."

A dispute for the purpose of sec 184 was relevantly defined in subsec 182(1) as a dispute between the body corporate and the owner or occupier of a lot, a dispute between the body

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corporate and a service contractor for the scheme who is also a letting agent for the scheme or a dispute between the body corporate and a letting agent for the scheme. On at least two of those bases, this dispute was a dispute within the meaning of sec 184.

Section 223 of the Act provided that:

> ``(1) An adjudicator to whom the application for an order of an adjudicator is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about —
>
> > (a) a claimed or anticipated contravention of this Act or the community management statement;
> > ...
>
> (2) An order may require a person to act... in a way stated in the order.
>
> (3) Without limiting subsection (1) and (2), the adjudicator may, for example —
>
> > ...
> > (c) order the body corporate... to have repairs carried out;
> > ..."

Section 227 of the Act provided that:

``(1) If the adjudicator is satisfied that the applicant for the order has suffered damage to property because of a contravention of this Act or the community management statement, the adjudicator may order the person who the adjudicator believes, on reasonable grounds, to be responsible for the contravention —

(a) to carry out stated repairs, or have stated repairs carried out, to the damaged property; or
(b) to pay compensation of an amount fixed by the adjudicator.

(2) The order cannot be made if —

(a) for an order under subsection (1)(a) — the cost of carrying out the repairs is more than $75,000;
(b) for an order made under subsection (1)(b) — the amount of the compensation is more than $10,000."

The question before the Court on appeal was the principal question before the trial Judge; that is, whether the application sought remedies for a dispute of a kind the granting of remedies for which were within the exclusive jurisdiction of an adjudicator under the Act.

The appellants submitted that this case came within subsec 227(1) but, because the cost of carrying out repairs to the common property was substantially more than $75,000, the adjudicator had no jurisdiction to make such an order. The appellants also submitted that even if this case fell within the ambit of sec 223 of the Act, it was subject to the monetary limitation in subsec 227(2).

Held: appeal dismissed.

1. When in an Act a section confers power to do an act, which at the same time in this case also confers jurisdiction, it would be surprising to find in a later section the conferral of the same power, albeit together with the conferral of another power. It would be even more surprising to find, in the later section, that the power conferred by the earlier section is not only conferred once again but also expanded in one way and limited in another.

2. Where a breach is alleged to consist in the failure of the body corporate to maintain the roof membrane in good condition, sec 227 of the Act confers a power in the adjudicator, additional to the power already conferred to order repair of the membrane, to require the body corporate to make repairs to or to pay compensation in respect of damage to property of the owner or occupier in consequence of that failure. However, reading subsec 223(3)(c) and sec 227 together requires the conclusion that, just as damage to the property of a lot

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owner or occupier could not be the subject of an order made under subsec 223(3)(c), damage to the common property could not be the subject of an order for repair or compensation under sec 227.

3. Orders of the kind which the adjudicator is given power to make by subsec 223(3) are all orders with respect to matters which might be expected to arise in the administration of the affairs of the body corporate, including the obligation of the body corporate to maintain the common property in good condition. Orders which the adjudicator is given power to make under sec 227 are orders of a quite different kind. They are orders to remedy a civil wrong causing damage to property where that wrong arises out of a contravention of the Act or the community management statement. It is therefore unsurprising that the power conferred on an adjudicator to make orders of that kind should be limited.

Before: Davies, Jerrard and Mackenzie JJA.

Full text of judgment below

Davies JA:

The application and appeal

1. This is an appeal against an order of a judge of the trial division on 25 November 2002 dismissing an originating application for a declaration and an injunction against the respondent. The respondent is the body corporate, constituted under the *Body Corporate and Community Management Act* 1997 (``the Act'') of a community titles scheme for a holiday unit complex at Surfers Paradise. The appellants are the owners of a lot in that community titles scheme and also, pursuant to the scheme, hold site management and letting rights for the complex. It is common ground that the Act in question in this appeal is the Act in the form in which it was prior to its amendment on 4 March 2003. The references herein to sections are references to the sections of the Act in that form.

2. The application to the learned primary judge sought:

> 1. a declaration that the respondent body corporate must in compliance with its obligations under s 87(1) of the Act and s 108 of the *Body Corporate and Community Management (Accommodation Module) Regulation* 1997 (``the Regulation''):

(a) maintain the roofing membrane and other external surfaces of the buildings of the body corporate so as to prevent the ingress of water into the premises of the body corporate;

(b) maintain the parapets along the boundary of the body corporate in good condition.

2. An injunction requiring the body corporate to forthwith carry out such work as is necessary to comply with its obligations under the declaration at 1 above.

3. The learned primary judge concluded that she did not have jurisdiction to make either of the orders sought because, she held, an adjudicator appointed under Chapter 6 of the Act had exclusive jurisdiction to decide and grant a remedy in a dispute of the kind for which the application sought remedies. Alternatively her Honour declined to proceed with the application because she held that the injunctive relief sought was of indefinite duration and imprecise as to its requirements such that a court would be loathe to supervise. Accordingly she dismissed the application.

4. The question before this Court, which was the principal question before her Honour, is whether the application sought remedies for a dispute of a kind the granting of remedies for which were within the exclusive jurisdiction of an adjudicator under the Act. In this Court the respondent did not seek to support her Honour's obiter conclusion, in the alternative, that there were, in any event, discretionary factors which would effectively preclude the court from granting the relief sought. Before turning to the above question, it is necessary to say something about the context in which it arose.

The relevant context

5. There is some independent evidence that the building is in some disrepair. In particular there is evidence of water leaking in through the top of the building penetrating into some units and parts of the common property affecting, amongst other things, electrical fittings. Whilst

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I do not understand the appellants to assert that their unit was damaged they assert, correctly, that they are, together with the owners of other lots in the scheme, tenants in common in the common property including that part of it which was damaged.[1] They also assert that unfavourable publicity about the damage and the continuing problems caused by leaks and dampness has caused their business as on-site letting agents to suffer. And they assert that, because the value of the building has declined, so has the value of their lot. An estimate of the total cost of putting the building in repair, including but not limited to remedying the water penetration, by an independent expert is $659,280.

Relevant statutory provisions

6. Section 87(1)(c) of the Act requires the body corporate for a community titles scheme to carry out functions given to it under the Act and the community management statement. Subsection (2) requires it to act reasonably in anything it does under subsection (1). Section 108 of the Regulation provides:

``(1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.

(2) To the extent that lots included in the scheme are created under a building format plan of subdivision, the body corporate must —

(a) maintain in good condition —

(i) railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; and

(ii) doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and

(iii) roofing membranes that are not common property but that provide protection for lots or common property; and

(b) maintain the following elements of scheme land that are not common property in a structurally sound condition —

(i) foundation structures;
(ii) roofing or other covering structures providing protection;
(iii) essential supporting framework, including load-bearing walls.

(3) Despite anything in subsections (1) and (2) —

(a) the body corporate is not responsible for maintaining fixtures or fittings installed by the occupier of a lot if they were installed for the occupier's own benefit; and
(b) the owner of the lot is responsible for maintaining utility infrastructure in good order and condition, to the extent that the utility infrastructure —

(i) relates only to supplying utility services to a particular lot; and
(ii) is 1 of the following types —

- hot-water systems
- washing machines
- clothes dryers
- another device providing a utility service of a domestic nature to a lot.

(4) To avoid doubt, it is declared that, despite an obligation the body corporate may have under subsection (2) to maintain a part of a lot in good condition or in a structurally sound condition, the body corporate is not prevented from recovering an amount of damages from a person (whether or not the owner of the lot) whose actions cause or contribute to damage or deterioration of the part of the lot."

7. Section 184 of the Act headed ``Exclusivity of dispute resolution provisions",[2] relevantly provides:

``(1) Subsection (2) applies to a dispute if an adjudicator may, under this chapter, make an order to resolve it.

(2) The only remedy for the dispute is an order of —

(a) an adjudicator; or
(b) a District Court on appeal from an adjudicator on a question of law.

..."

8. A dispute for the purposes of s 184 is relevantly defined in s 182(1) as a dispute between the body corporate and the owner or

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occupier of a lot, a dispute between the body corporate and a service contractor for the scheme who is also a letting agent for the scheme or a dispute between the body corporate and a letting agent for the scheme. It is plain that, at least on two of those bases, this dispute is a dispute within the meaning of s 184.

9. Among the orders which an adjudicator may make to resolve a dispute pursuant to Chapter 6 of the Act, the Chapter referred to in s 184, are those in s 223 and s 227. Section 223 relevantly provides:

``(1) An adjudicator to whom the application for an order of an adjudicator is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about —

(a) a claimed or anticipated contravention of this Act or the community management statement;
...

(2) An order may require a person to act... in a way stated in the order.

(3) Without limiting subsections (1) and (2), the adjudicator may, for example —

...
(c) order the body corporate... to have repairs carried out;
..."

10. Section 227 provides:

``(1) If the adjudicator is satisfied that the applicant for the order has suffered damage to property because of a contravention of this Act or the community management statement, the adjudicator may order the person who the adjudicator believes, on reasonable grounds, to be responsible for the contravention —

(a) to carry out stated repairs, or have stated repairs carried out, to the damaged property; or
(b) to pay compensation of an amount fixed by the adjudicator.

(2) The order cannot be made if —

(a) for an order under subsection (1)(a) — the cost of carrying out the repairs is more than $75 000; or
(b) for an order made under subsection (1)(b) — the amount of the compensation is more than $10 000.''

Whether the Act, on its face, gives the adjudicator exclusive jurisdiction to resolve this dispute

11. This was plainly a dispute in respect of which an adjudicator may make an order under Chapter 6 within the meaning of s 184. It was, at the very least, both a dispute between the body corporate and the owner of a lot included in the scheme and a dispute between the body corporate and a letting agent for the scheme. In the end, the only questions in issue in this appeal are whether the order which an adjudicator may make to resolve this dispute is one pursuant to s 223 or one pursuant to s 227; or whether the adjudicator may make such an order under either section.

12. Section 184 does not speak in terms, specifically, of jurisdiction to hear and decide but in terms of providing a remedy. However I think its plain intention[3] is that the adjudicator is to have exclusive jurisdiction to make orders of the kind which the Act prescribes, relevantly in s 223 and s 227, in disputes of the kind to which s 182 refers, subject to any statutory exception or limitation.[4] Mr Savage SC, for the appellants did not argue to the contrary.

13. It was submitted by Mr Savage SC that s 227, at least indirectly, provided such a limitation which effectively excluded the adjudicator's jurisdiction in this case. The submission was that this case came within s 227(1) but, because the cost of carrying out repairs to the common property was substantially more than $75,000, the adjudicator had no jurisdiction to make such order. It was submitted that even if this case also came within s 223, it was subject to the limitation in s 227(2). Accordingly, it was submitted, the court had jurisdiction in the matter.

14. The critical question, on the appellants' argument, is whether the relief which the appellants seek, which is, effectively as Mr Savage SC concedes, an order that the respondent repair the roof membrane, is an order of a kind which, subject to the exception contained in s 227(2), an adjudicator could make under s 227. That question, in turn, depends on whether ``damage to property'' in s 227(1) includes, where the applicant is a lot owner, damage to the roof membrane.

15. Section 227 was not necessary to enable the adjudicator to order a body corporate to have repairs to the roof membrane carried out. Section 87(1) of the Act and s 108(1) and s

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108(2)(a)(iii) of the Regulation required a body corporate to maintain it in good condition; and an order requiring the body corporate to have repairs carried out, in compliance with that obligation, was an order which the adjudicator was empowered to make, under s 223(3)(c), in any dispute coming within s 184. So much was accepted by Mr Savage SC. However he submitted that an order requiring the body corporate to repair the roof membrane would also be an order made under s 227 and consequently that it would be subject to the limitation contained in s 227(2).

16. There can be no doubt that s 227 confers jurisdiction on an adjudicator to make an order to carry out stated repairs or to pay compensation which would not be an order of a kind which could be made under

s 223(3)(c). An example of such an order is given in the example contained in s 227(1)[5] which is in the following terms:

> ``A waterproofing membrane in the roof of a building in the scheme leaks and there is damage to wallpaper and carpets in a lot included in the scheme. The membrane is part of the common property and the leak results from a failure on the part of the body corporate to maintain it in good order and condition, the adjudicator could, on the application of the lot's owner, order the body corporate to have the damage repaired or to pay appropriate compensation."

The damage referred to in the example is plainly the damage to the wallpaper and carpets in the lot. Mr Savage SC did not contend that an order of the kind envisaged in the example could be made under s 223(3)(c).

17. If Mr Savage SC's submission is correct, s 227 would apply, not only in the case of damage to the separate property of a lot owner or of the occupier of a lot, but to damage to the common property falling within the power to order repair already conferred by s 223(3)(c). It would also, on that submission, both expand that power (by the power to order compensation for damage in s 227(1)(b)) and limit it (by s 227(2)). And it would do so without any reference to s 223(3)(c). In my opinion that would be a surprising result.

18. It would be surprising for two reasons. The first is that when, in an Act, a section confers power to do an act, which at the same time in this case also confers jurisdiction, it would be surprising to find, in a later section, the conferral of the same power, albeit together with the conferral of another power. And the second is that it would be even more surprising to find, in the later section, that the power conferred by the earlier section is not only conferred once again but also expanded in one way and limited in another. If s 227 can be given a sensible construction which does not have those effects I think it should be given that construction.

19. In my opinion s 227 can be given such sensible construction, having as its purpose the conferral on an adjudicator of a limited power, additional to those already conferred, to provide remedies, including one of compensation, to a lot owner or occupier whose property has been damaged by a contravention of the Act or the community management statement. So, in a case like the present where the breach is alleged to consist in the failure of the body corporate to maintain the roof membrane in good condition, s 227 confers a power in the adjudicator, additional to the power already conferred to order repair of the membrane, to require the body corporate to make repairs to or to pay compensation in respect of damage to property of the owner or occupier in consequence of that failure. But in my opinion, reading s 223(3)(c) and s 227 together requires the conclusion that, just as damage to the property of a lot owner or occupier could not be the subject of an order made under s 223(3)(c), damage to the common property could not be the subject of an order for repair or compensation under s 227.

20. It was submitted by Mr Savage SC that such a construction would have the curious result of conferring on an adjudicator under s 223(3)(c) a power to make an order, unlike other orders of the kind which can be made under s 223(3), which may involve expenditure of substantial money, as it seems in this case; whereas orders which can be made under s 227 are limited in amount to $75,000 for repairs and $10,000 for compensation. I do not find that curious. Orders of the kind which the adjudicator is given power to make by s 223(3) are all orders with respect to matters which might be expected to arise in the administration of the affairs of the body corporate including the obligation of the body corporate to maintain the common property in good condition. Orders which the adjudicator is given power to make under s 227 are orders of a quite different kind. They are orders to remedy a civil wrong

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causing damage to property where that wrong arises out of a contravention of the Act or the community management statement. In this respect they trespass into the field ordinarily occupied by the common law. It is therefore unsurprising, it seems to me, that the power which is conferred on an adjudicator to make orders of that kind should be limited in amount.

21. As I understand his submissions, Mr Savage SC did not contend that, if s 227(1) did not also permit the making of an order to repair the roof membrane, of the kind which could be made under s 223(3)(c), s 227(2)

would apply to limit any such order. Nor do I think that any such contention would be open. Section 227(2), in terms, refers to an order made under s 227(1).

2. For those reasons, in my opinion, the learned primary judge was correct in making the order which she did and this appeal must be dismissed.

Orders

1. Appeal dismissed.

2. That the appellants pay the respondent its costs of the appeal to be assessed.

Jerrard JA: I have read the reasons for judgment of Davies JA and the orders he proposes and I respectfully agree with those.

Mackenzie J: I agree with the orders proposed by Davies JA for the reasons given by him.

Footnotes

1 Section 37 of the Act.

2 This heading is part of the Act: *Acts Interpretation Act* 1954 s 14(2).

3 See, especially, the heading to the section.

4 And subject, possibly, to the power of the Commissioner to terminate that jurisdiction under s 201(2). See also, s 192(1)(a).

5 Which is part of the Act: *Acts Interpretation Act* 1954 s 14(3).

OWNERS CORPORATION STRATA PLAN 7596 v RISIDORE and ORS

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(2004) LQCS ¶90-123

Court citation: [2003] NSWSC 966

Supreme Court of New South Wales

Judgment delivered 28 October 2003

Strata titles — Appeal from adjudicator's decision — Appeal from interim Tribunal decision — Admissibility of further evidence — Relevance of admissibility issue to question before Tribunal — Strata Schemes Management Act 1996 (NSW), sec 140, 181 and 186.

The defendants were the owners of a lot in a strata plan comprising 64 lots and they wished to make alterations to their lot. The question of the making of the proposed alterations was considered at an Extraordinary General Meeting of the plaintiff owners corporation and the motion was overwhelmingly defeated. The end result was that it was not specially resolved to make the proposed additional by-law. This was treated as a refusal of consent to the proposed alterations.

Subsequently, an adjudication took place under the *Strata Schemes Management Act 1996* (NSW) (the Act). The defendants put before the adjudicator certain expert material (four documents) that came into being after the meeting. Three of those documents did not come to the attention of the plaintiff until after the adjudicator had made his decision. Accordingly, the plaintiff was not afforded an opportunity to put its case in relation to that material. It was not in dispute between the parties that the adjudicator took this material into account in reaching his decision.

The adjudicator found that the refusal of the plaintiff to the defendant's proposal was unreasonable. He then made orders pursuant to sec 140 of the Act. Under sec 140(1) of the Act, an adjudicator can order an owners corporation to consent to work proposed to be

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carried out by an owner if the adjudicator considers that the owners corporation has unreasonably refused its consent.

The plaintiff appealed and the Consumer, Trader and Tenancy Tribunal was asked to set aside the decision that was made by the adjudicator. This relief was sought on grounds that asserted that the plaintiff did not unreasonably refuse consent.

The plaintiff sought directions for the filing of two expert reports that were not available at the time the plaintiff refused the defendants' alteration application. The defendants opposed the admissibility of such expert evidence and the Tribunal made an interim finding to the effect that there could not be reliance upon this additional expert evidence.

The plaintiff commenced proceedings in the Supreme Court of New South Wales seeking to appeal against the Tribunal's interim finding. However, the plaintiff could not bring an appeal unless leave to do so was first granted.

In relation to the expert evidence, the plaintiff relied upon sec 181 of the Act that enables a Tribunal to admit new evidence. The plaintiff also relied upon sec 186(2) of the Act that provides:

> ``In any such investigation or in any proceedings before it for an order, the Tribunal:
>
> (a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, and
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."

The plaintiff contended that the jurisdiction of the Tribunal was to conduct a review on the merits of the question of whether the defendants should be allowed to carry out the proposed alterations. The defendants argued that the appeal was limited to the question that was before the adjudicator.

Held: application for leave to appeal refused.

1. What is before the Tribunal is an appeal from the adjudication. The relief sought by the plaintiff in the appeal was the setting aside of the decision of the adjudicator. The relief was sought on the basis that the plaintiff did not unreasonably refuse its consent.

2. The plaintiff may well have a good case for the setting aside of the adjudicator's decision on the basis that he took into account extraneous material and that he did not afford procedural fairness. These matters remain for determination by the Tribunal.

3. The additional expert evidence sought to be relied on by the plaintiff was not relevant to the question before the Tribunal. Accordingly, the plaintiff failed to satisfy the Court that there was error made in respect to the interim finding. This decision means that the appeal must fail. Therefore, it would be futile to grant leave to appeal.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

MR Gracie (instructed by Makinson & D'Apice) appeared for the plaintiff.

I Hemmings (instructed by SA Teen) appeared for the first and second defendants.

IV Knight Crown Solicitor submitting appearance for the third defendant.

Before: Master Malpass.

Full text of judgment below

Malpass M: These proceedings were commenced by Summons filed on 9 May 2003. The plaintiff seeks to bring an appeal against an interim finding made by the Consumer, Trader and Tenancy Tribunal (the Tribunal). The finding was as follows:

> **``1. The applicant is not entitled to rely on additional expert evidence which was not available to the owners corporation at the time of it refusing the respondent's application to carry out certain alterations to the common property."**

The finding was made at a directions hearing held in an appeal brought to the Tribunal against an order made by an adjudicator. The plaintiff had sought directions for the filing of two expert reports which were then being

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obtained. The defendants opposed the admissibility of such expert evidence.

2. It is common ground that an appeal lies by way of leave where there is error of law. By consent, the application for leave and the appeal itself were heard together.

3. The defendants are the owners of Lot 14 in the relevant Strata Plan. There are 64 lots. The building is known as Gainsborough. It is at Kirribilli.

4. The defendants wish to make alterations to their lot. The question of the making of the proposed alterations was considered at an Extraordinary General Meeting of the plaintiff held on 7 August 2002. The motion was overwhelmingly defeated. The end result was that it was not specially resolved to make the proposed additional by-law. This has been treated as a refusal of consent to the proposed alterations.

5. A request was made for an order by an adjudicator pursuant to Pt 4 Div 1 of the *Strata Schemes Management Act* 1996 (the Act), (which is headed ``**General power of Adjudicator to make orders**") and subsequently an adjudication took place.

6. The defendants put before the adjudicator certain expert material (four documents) which came into being after the meeting. Three of those documents did not come to the attention of the plaintiff until after the adjudicator had made his decision. Accordingly, it was not afforded an opportunity to put its case in relation to that material. It is not in dispute between the parties that the adjudicator took this material into account in reaching his decision.

7. The adjudicator found that the refusal of the plaintiff to the defendant's proposal was unreasonable. He then made orders pursuant to s 140 of the Act.

8. The plaintiff then brought an appeal pursuant to Pt 4 Div 12 of the Act (which is headed ``**Appeals against orders of Adjudicator**"). The Tribunal was asked to set aside the decision that was made by the adjudicator. This relief was sought on grounds which asserted that the plaintiff did not unreasonably refuse consent.

9. Subsequent to the making of the interim finding in that appeal, the plaintiff brought the proceedings in this Court. The plaintiff cannot bring an appeal unless leave to do so is first granted.

10. Before determining whether or not leave should be granted, it is convenient to first look at the question of the merits of the proposed appeal. This is a question that has been argued at some length and has seen the court being taken to various provisions of the Act and certain decided cases (including *Paris* v *The Owners Strata Plan 16973* [1998] NSWSSB 12; *Chomyn* v *Owners Corporation SP 14801* [2001] NSWRT 194 and *McCann* v *The Owners SP 11318* [1998] NSWSSB 44).

11. The orders that may be made by an adjudicator in relation to property are set forth in s 140. For present purposes subs (1) thereof is the relevant provision. It enables an adjudicator to order an Owners Corporation to consent to work proposed to be carried out by an owner if the adjudicator considers that the Owners Corporation has unreasonably refused its consent.

12. In my view, this provision makes it clear that the question for determination by the adjudicator in the present case was whether or not he considered that the Owners Corporation had unreasonably refused its consent.

13. It seems to me that that is a question which falls to be determined having regard to the state of affairs in existence at the time of the refusal of consent. In considering that question, regard should not be had to material that came subsequently into existence. The taking into account of the subsequent material would involve the adjudicator in embarking on a fresh consideration in the light of material that was not before the decision maker. The adjudicator would not then be addressing the relevant question.

14. It is common ground that appeals against orders made by the Tribunal are governed by Part 5 Division 3 of the Act and not the appellate provisions contained in the *Consumer, Trader and Tenancy Tribunal Act* 2001.

15. For present purposes, the plaintiff places stress on provisions contained in ss 181 and 186 of the Act. Section 181 enables the Tribunal to admit new evidence. Section 186 contains inter alia the following provisions:

> ``**186. Investigations and proceedings before the Tribunal**
> **(1)** Before making an order (except an order for a stay of proceedings), the Tribunal must
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>
> investigate the application for the order or, in the case of an appeal, the grounds for the appeal.
> **(2)** In any such investigation or in any proceedings before it for an order, the Tribunal:
>
> (a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, and
> (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
>
> **(3)** The Tribunal need not hold a hearing in order to decide an application or appeal unless there is an appearance by a person entitled or required to appear before it.
> **(4)** A hearing need not be formal."

16. Considerable argument has been devoted to questions touching on the nature of the appeal before the Tribunal. For the purposes of this case, it does not seem to me to be necessary to embark on a determination of all these matters.

17. It is common ground that it is an appeal de novo. What that means may be the subject of debate. The plaintiff sees this appeal as being wider in scope than the adjudication. It contends that the jurisdiction of the Tribunal is to conduct a review on the merits of the question of whether or not the defendants should be allowed to carry out the proposed alterations. The defendants say that this appeal is limited to the question that was before the adjudicator.

18. In my view, the latter approach is the correct one. What is before the Tribunal is an appeal from the adjudication. The relief sought by the plaintiff in the appeal was the setting aside of the decision of the adjudicator. This relief was sought on the basis that the plaintiff did not unreasonably refuse its consent.

19. It seems to me that the question which is the subject of the appeal in this case is determinative of the ambit of the evidence that may be placed before the Tribunal.

20. The Tribunal has a discretionary power to admit new evidence. This is a power exercised having regard to the issues that are before it and the other particular circumstances of the case.

21. Appellate and reviewing bodies usually have a power to admit further evidence (either expressly or by implication). There is a body of case law dealing with the question of what may be received.

22. The plaintiff relies on observations to be found in *McCann*. They relate inter alia to the provisions of s 186. They were said to reflect a change in approach to that taken in the earlier decisions of *Paris* and *Chomyn* (which had been followed by the Tribunal).

23. It does not seem to me that such is the case. Be that as it may, the provisions of s 186 make it clear that investigation must take place before the making of an order and that a hearing must be had where there is the requisite appearance.

24. Subsection (2) of s 186 enunciates how the Tribunal may or must apply itself in the course of dealing with the appeal before it.

25. The defendants concede that the fresh material should not have been placed before the adjudicator and that to such extent his decision is thereby flawed. The plaintiff may well have a good case for the setting aside of the adjudicator's decision on the basis that he took into account extraneous material and that he did not afford procedural fairness. I say no more on these matters as they remain for determination by the Tribunal.

26. As earlier said, I am of the view that the additional expert evidence sought to be relied on by the plaintiff was not relevant to the question before the Tribunal. Accordingly, the plaintiff has failed to satisfy the court that there was error made in respect to the interim finding.

27. This decision means that the appeal must fail. Therefore, it would be futile to grant leave.

28. The prospects of the granting of leave are also beset by other problems. The finding made by the Tribunal came at an early stage in the appellate process and was restricted to a question of the admissibility of evidence. Instead of bringing the present proceedings, it was open to the plaintiff to bring an appeal on all grounds after the Tribunal had made its final decision.

29. A large body of appellate work comes to this Court both from the Tribunal and other bodies. It is experiencing great difficulty in handling the present volume of work. The volume has been increasing and is expected to continue to do so unless legislative changes are made. In this context, the court is loath to exacerbate these problems by granting leave to

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appeal on interim questions or questions concerning rulings on the admissibility of evidence during the conduct of an appeal.

30. The application for leave is refused. The Summons is dismissed. The plaintiff is to pay the costs of the proceedings. The Exhibit may be returned.

THE OWNER — STRATA PLAN NO 43551 v WALTER CONSTRUCTION GROUP LTD

Click to open document in a browser

(2004) LQCS ¶90-124

Court citation: [2003] NSWSC 1177

Supreme Court of New South Wales

Judgment delivered 12 December 2003

Strata titles — Practice and procedure— Owners corporations — Limitations on owners corporations' standing to sue for defects in common property — Application and scope of sec 62 and 227 of the Strata Schemes Management Act 1996.

The plaintiff was the owners corporation in respect of a building in Sydney, New South Wales, that was constituted in 1993 upon registration of a strata plan. The common property in that plan vested in the plaintiff as agent for the lot owners as tenants in common. There were 52 lots in the strata plan.

The plaintiff claimed that the defendant builder carried out the construction works of the building under a contract with the developer. The plaintiff further claimed that the defendant builder owed it, as holder of the common property, a duty to exercise reasonable care in the carrying out of the construction works. The plaintiff claimed that the defendant builder breached the said duty of care by failing to carry out the construction works in a proper and workman-like manner. The plaintiff claimed that as a consequence of such breach it had suffered and continued to suffer loss and damage, being the diminution in value of the building and/or the cost of rectifying the defects.

By 2 November 1994 at the latest, at least some of the defects had become manifest and made the subject of demands by the plaintiff's solicitor (acting at that stage for all the lot owners as well) on the defendant builder and the then Building Services Corporation. Of the 52 lots in the strata, 29 were sold after 2 November 1994. By its judgment of 5 November 2001, the Fair Trading Tribunal ruled that the remaining pleaded defects (with the exception of recently pleaded defects in respect of fire services) related to those notified on or before 2 November 1994.

Section 62(1) of the *Strata Schemes Management Act 1996* (NSW) (the Management Act) provides that:

> ``An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.''

Section 226(1) of the Management Act provides that:

> ``Nothing in this Act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot or an owners corporation or covenant chargee may have in relation to any lot or the common property apart from this Act.''

Section 227(2) of the Management Act provides:

> ``If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the owners corporation.''

The defendant builder submitted that the owners corporation holds the common property as agent for individual lot holders and, unless there is some special provision providing to the contrary, the lot holders as disclosed principals are the only persons entitled to sue for damage to the interest of the lot holder in the common property.

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An owners corporation of a strata scheme, according to the defendant builder's submissions, can only bring proceedings in respect of the common property where all lot owners of the strata scheme are jointly entitled to take the proceedings. The defendant builder's submissions pointed to the fact that 29 lot owners would not have a cause of action (assuming a duty) against it because they purchased their lots after the defects had become manifest. The defendant builder further submitted that a special exception did not apply and that the owners corporation was not the proper plaintiff.

The plaintiff submitted that the owners corporation has both standing and power to bring proceedings in respect of damage to the common property in its own name outside sec 227 of the Management Act. Alternatively, the plaintiff submitted that sec 227 of the Management Act did not require all lot owners to be jointly entitled in order for the owners corporation to have standing to bring proceedings in respect of a lesser number of the owners.

The plaintiff submitted that, according to the rules of statutory interpretation, the reference to ``owners of the lots'' could be taken as a reference to the singular ``lot owner'' and submitted that it is sufficient for one lot owner to be entitled, or two or more to be entitled jointly, to bring an action.

The plaintiff submitted that the obligations to maintain and repair the common property of the strata scheme included, if necessary, the commencement of proceedings against the builder of the strata plan in respect of building defects in the common property of the strata scheme. Thus, the plaintiff submitted that the owners corporation's duty under sec 62 of the Management Act to maintain the common property of the strata scheme meant that the owners corporation suffered economic loss by way of the cost of rectification of defective common property as a result of the defendant builder's breach of duty of care.

Held: the lot holders are necessary parties for the purposes of the proceedings.

1. The relevant lot holders are necessary parties and will need to be joined as plaintiffs to the extent that they wish to make a claim.

2. The cause of action was for economic loss being any diminution in the value of the lot holders' undivided interest as tenants in common in the common property. Prima facie it is hard to see how, unless there is any special exception, an agent can sue for the benefit of loss claimed by a disclosed principal whether in tort or contract. The very inclusion in the Management Act of sec 227 confirms this basic underlying principle.

3. Section 227 of the Management Act seems to be specifically aimed at allowing owners corporations to take proceedings when in accordance with the general law they would not normally be so entitled.

4. The plantiff's submission that the the reference to ``owners of the lots'' in section 227 of the Management Act can be taken as a reference to the singular ``lot owner'' was not supported.

5. An owners corporation has a variety of powers to raise funds or use existing funds for the purpose of complying with its duty under sec 62 of the Management Act to maintain the common property in good repair. Given its ability to fund repairs in different ways, it is hard to see how it suffers economic loss as a result of its duty to repair.

6. The lot holders are the disclosed principals and are necessary parties to sue in respect of damage to their individual beneficial interest in the common property.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

F Corsaro SC with J Young (instructed by Andreones Pty Limited) appeared for the plaintiff.

MA Pembroke SC with R Dubler (instructed by Cooors Westagarth) appeared for the defendant.

Before: Master Macready.

Full text of judgment below

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Macready M: This is the hearing of a separate question in these proceedings. A judge of the court has referred to me the hearing of the separate question which is the issue pleaded in paragraphs 15 to 26 of the amended defence the statement of claim. Shortly described the issue is:

> ``Does the plaintiff, as an owners Corporation, have standing to sue in its own name in respect of the alleged defects to the common property?''

The nature of the proceedings

2. The defendant's submissions that I will adopt with some alterations conveniently summarise the proceedings.

3. The plaintiff is the Owners Corporation in respect of the building 17-25 Spring Street Bondi, New South Wales (the Building). It was constituted on 30 March 1993 upon registration of the Strata Plan No. 43551 (the ``Strata Plan''). By ss 18(1) and 20 of the *Strata Schemes (Freehold Development ) Act* (the ``*Development Act*''), upon registration of the Strata Plan, the common property in that plan vests in the plaintiff as agent for the lot owners as tenants in common.

4. The plaintiff pleads that the defendant carried out the construction works of the Building pursuant to a contract with San Kuei Pty Limited (the Developer). It is further pleaded that the defendant owed the plaintiff, as ``*holder*'' of the common property under the strata legislation, a duty to exercise reasonable care in the carrying out of the construction works. It is alleged that the defendant breached the said duty of care by failing to carry out the construction works, inter alia, in a proper and workmanlike manner.

5. It is then pleaded that as a consequence of such breach the plaintiff has suffered and continues to suffer loss and damage, being the diminution in value of the Building and/or the cost of rectifying the defects.

6. Accordingly, the case is one of an alleged duty to take care said to be owed by a builder to an owners corporation as ``*holder*'' of the common property to prevent economic loss in respect of alleged defective building work where no contract exists between the parties.

7. The evidence discloses the following:

(a) There are 52 lots in the Strata Plan;
(b) By 2 November 1994, at the latest, (the defendant contending for an earlier date in respect of its statute of limitations defence) at least some of the defects pleaded had become manifest and made

the subject of demands by the plaintiff's solicitor (acting at that stage for all the lot owners as well) on the defendant and the then Building Services Corporation;
(c) By its judgment of 5 November 2001, the Fair Trading Tribunal ruled that the remaining pleaded defects (with the exception of recently pleaded defects in respect of fire services) related to those notified on or before 2 November 1994.
(d) 29 of the 52 lots have been sold since 2 November 1994.

The principal submissions

8. The defendant's submissions were that the Owners Corporation holds the common property as agent for the individual Lot holders. Unless there is some special provision providing to the contrary, the lot holders as disclosed principals are the only persons entitled to sue for damage to the interest of the lot holder in the common property.

9. The only provision to the contrary is section 227 of the *Strata Scheme Management Act* 1996 (``the Management Act''). The section is in the following terms:

``227 Owners Corporation may represent owners in certain proceedings

(1) This section applies to proceedings in relation to common property.
(2) If the owners of the lots in a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly, the proceedings may be taken by or against the Owners Corporation.
(3) Any judgment or order given or made in favour of or against the owners corporation in any such proceeding has effect as if it were a judgment or order given or made in favour of or against the owners.''

10. An Owners Corporation of the strata scheme, according to the defendant's submissions, can thus only bring proceedings in respect of the common property where all lot

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owners of the strata scheme are jointly entitled to take the proceedings.

11. The defendant's submissions point to the fact that the 29 lot owners will not have a cause of action (assuming a duty) against the builder because they have purchased their lots after the defects have become manifest — ie reasonably discoverable on inspection. See *Bryan* v *Maloney* (1995) 182 CLR 609 at 630 and 665; *Woollahra Municipal Council* v *Sved* (1996) 40 NSWLR 101 at 139; *Goulding* v *Kirby* [2002] NSWCA 393 at para [19] and [21] and *Proprietors Unit Plan No 95198* v *Jiniess Pty Ltd* [2000] NTSC 89 at 116-123.

12. It follows in the defendant's submissions that therefore the special exception does not apply and that the Owners Corporation is not the proper plaintiff.

13. The plaintiff's submissions were that the Owners Corporation has both standing and power to bring proceedings in respect of damage to the common property in its own name outside section 227 of the *Management Act*. Alternatively it says that section 227 of the *Management Act* does not require all lot owners to be jointly entitled in order for the Owners Corporation to have standing to bring proceedings in respect of a lesser number of the owners.

The owners Corporation as agent for the Lot holders

14. This requires a consideration of the *Development Act* and the *Management Act*. In *Carre* v *Owners Corporation — SP 53020* (2003) NSW Titles Cases ¶80-079; (2003) NSW SC 397 Barrett J had to consider whether the Owners Corporation was a necessary party to proceedings. He conveniently and felicitously spelt out the various provisions of the act that indicated the agency between the Owners Corporation and the Lot holders. In paragraphs 28 and 29 he described the relationship in these terms:

``28 At this point, I pause to examine more closely the scheme of the strata titles legislation. I have already mentioned s. 11(1) of the *Strata Schemes Management Act* which causes the owners of the lots from time to time in a strata scheme to constitute a body corporate and s.18(1) of the *Strata*

Schemes (Freehold Development) Act which causes common property in a strata plan to vest in the body corporate upon the registration of the plan. I have not, however, referred to the way in which an owners corporation holds common property. In a case such as the present, where different persons are the proprietors of lots, the estate or interest in common property vested in the owners corporation is held by it `as agent... for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots': s.20(b). Each such proprietor accordingly has what s.24(2) calls a `beneficial interest' in the estate or interest of the Owners Corporation in the common property. The statute seems clearly enough to proceed on the footing that each proprietor of a lot is to be regarded as the equitable owner of an undivided interest as one of several tenants in common in the estate or interest of which the Owners Corporation is the legal owner. Section 21 renders common property incapable of being dealt with except in accordance with the Act. Section 24(2) makes a lot proprietor's beneficial interest in the estate or interest in common property held by the Owners Corporation incapable of being `severed from, or dealt with except in conjunction with, the lot'. The Owners Corporation has a limited power to deal with common property in certain ways pursuant to a `special resolution' passed at a general meeting of the Owners Corporation, but only in the circumstances expressly provided: see ss.25, 26 and 27. Under s.62 of the *Strata Schemes Management Act*, an Owners Corporation is obliged to maintain common property, to keep it in repair and to renew or replace `any fixtures or fittings comprised in the common property'.

29 It is clear from this statutory scheme that an Owners Corporation is in no sense the beneficial owner of common property. Its ownership is always in a representative capacity identified by the Act as that of `agent', with the lot proprietors, as the owners in equity of undivided interests as tenants in common, each identified as having a `beneficial interest'. The restrictions upon alienation and other dealings and the provisions with respect to repair, renewal and replacement proceed on the assumption that common property exists for the benefit of the lot proprietors as a general body. While the legislation makes

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provision for a particular lot proprietor to be granted special rights in relation to common property, there is no suggestion in the present case that Ms Carre has been granted any such rights in respect to so much of the common property as is said to form part of the air conditioning system serving her lot. As was observed in *Houghton* v *Immer (No 55) Pty Ltd* (1998) NSW Titles Cases ¶ 80-048; (1997) 44 NSWLR 46 by Handley JA (with whom Mason P and Beazley JA concurred), a provision that vests common property in an Owners Corporation as `agent' for lot proprietors makes the proprietors equitable tenants in common."

15. In support of the proposition that in the case of a disclosed principal an agent cannot sue on behalf of his principal reference was made to the principles referred to in *Bowsted and Reynolds on Agency* in art. 99. This dealt with the situation in contract. Reference was also made to ``*Parties to an Action"* by A V Dicey where under rule 83 it was pointed out that a servant cannot sue for a mere injury to master. The general rule on enforcement of a contract by an agent is that the agent can only bring an action to enforce the contract in the name of the principal with the consent of the principal. The agent himself has no cause of action and no interest in the subject matter of the suit. See *Campbell* v *Pye* (1954) 54 SR (NSW) 308 at 309. The person whose right has been violated is the most appropriate person to bring the suit. See *Gray* v *Pearson* (1870) LR5CP568 at 574 & 576. An exception will arise where the agent is expressly authorised in the agency agreement to bring an action in his or her name in which case the agent can bring the action and be named as plaintiff. See *Netage Pty Ltd* v *Cantley* (1985) 6 IPR 200 at 212.

16. The cause of action in the present case is for economic loss being any diminution in the value of the lot holders undivided interest as tenant in common in the common property. Prima facie it is hard to see how, unless there is any special exception, an agent can sue for the benefit of loss claimed by a disclosed principal whether in tort or contract.

17. The very inclusion in the Act of section 227, confirms the basic underlying principle to which I refer. Section 227, in the case where on the face of the Act there is a clear agency relationship, creates an exception in respect of the common property. Section 228, which deals with a situation (damage to property

comprised in a unit where there is danger to the support of other units) in which the other provisions of the Act do not provide for agency, creates the agency and provides the exception allowing the Owners Corporation to take proceedings.

The exception in section 227 of the Management Act

18. It is immediately noticeable upon a consideration of section 227 that it is expressed to apply to proceedings in relation to common property. As has been pointed out above the beneficial ownership of the common property resides in the Lot holders. The section seems to be specifically aimed at allowing the Owners Corporation to take proceedings when in accordance with the general law they would not normally be so entitled.

19. Unfortunately in New South Wales the provisions and its predecessor, section 147 in the *Strata Titles Act* 1973, contain a specific limitation on power. That limitation on its face is very clear and it is only where all the owners of the lots are jointly entitled to take proceedings that the Owners Corporation may take proceedings for them.

20. The plaintiff submits that, according to the rules of statutory interpretation, the reference to ``lot owners'' can be taken as a reference to the singular ``lot owner'' and submits that the correct reading of the section is that it is sufficient for one lot owner to be entitled, or two or more to be entitled jointly, to bring an action. Such rules are subject to any express contrary intention. The plaintiff relies on the decision in Singapore in *Management Corporation Strata Title Plan No 1938* v *Goodview Properties P/L* [2000] 4 SLR 576.

21. The decision in that case was, relevantly, that it was not necessary for all of the proprietors to act jointly for there to be a valid action brought against the developers for defective work to common property. 24 of the 615 proprietors were entitled to sue and wished to proceed; the Singaporean Court of Appeal found that number to be sufficient. The statutory provisions relevant to that decision, while similar to section 227 and with, I think, the same intention, differ in an important way from the NSW legislation. While section 227 provides that the Owners Corporation may bring an action ``if the owners of the lots are jointly entitled to bring proceedings'', the Singaporean provision (s 116 of the *Land Titles*

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(Strata) Act (Cap 158, 1999 Ed) is that the ``management corporation'' may bring an action ``where *all or some* of the subsidiary proprietors of the lots... are jointly entitled'' (my emphasis). (See also Disa Sim, *Expanding tort claims in construction cases: Time to contract?*, (2003) 11 Tort L Rev 38 at 38-39). The words ``all or some'' are not in the NSW legislation and the Singaporean decision does not support the construction for which the plaintiff contends.

22. Of interest is the court's description of the procedural nature of the section. It said at p 8:

> ``The conclusion we have reached here does not detract from or qualify in any way what this court decided in *Ocean Front*. As this court held (at p 121 C-E), the purpose of s 116(1) is to enable a management corporation to bring an action on behalf of all or some of the subsidiary proprietors, as the case may be, against a third party, and also to enable a third party to bring an action against a management corporation representing all or some of the subsidiary proprietors. The action may be in contract or in tort, depending on the circumstances. That section provides a procedural mechanism for the management corporation to sue or to be sued as representing all or some of the subsidiary proprietors. The management corporation represents the subsidiary proprietors, whether they be the plaintiffs or the defendants, and it is the subsidiary proprietors who are the substantive party, although the proceedings are instituted by or against the management corporation. The section simplifies the procedural aspect of the proceedings [*32] so as to avoid naming all or some of the subsidiary proprietors who are involved in the proceedings as the plaintiffs or as the defendants, as the case may be. Apart from we have said, the only requirement imposed by the section is that the proceedings must relate to the common property.''

23. Also of interest in the case is that the court held that the corporation should only recover proportionately abated damages in respect of the 24 proprietors.

24. The reference to the statutory rules of construction does not assist the plaintiff because the use of the word ``jointly'' is a clear contrary intention.

25. The obvious difficulties caused by the limitation will vary from case to case. At some stage it will have to be determined at what time the section speaks. Is it to be the commencement of proceedings, judgment or the commencement of the cause of action? These difficulties led to substantial emphasis in oral submissions upon the plaintiff's argument that there was power for the Owners Corporation to sue outside the terms of section 227 of the *Management Act*.

The plaintiff's ability to sue outside section 227 of the Management Act

26. The plaintiff's submissions founded upon the fact that the Owners Corporation has legal title to the common property, its other duties under provisions of the Act and noted section 226 (1) of the *Management Act* which provided as follows:

> ``(1) Nothing in this act derogates from any rights or remedies that an owner, mortgagee or chargee of a lot or an Owners Corporation or covenant chargee may have in relation to any lot or the common property apart from this act.''

27. With regard to the powers of the Owners Corporation it should be noted that section 110 (3) of the *Management Act* provides that section 50 (1) (d) of the *Interpretation Act* does not apply to an Owners Corporation. Section 50 of the *Interpretation Act* facilitates the powers of a statutory corporation and section 50 (1) is in the following terms:

> ``50. Statutory corporations
>
> (1) A statutory corporation:
>
> (a) has perpetual succession,
> (b) shall have a seal,
> (c) may take proceedings and be proceeded against in its corporate name,
> (d) may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property, and
> (e) may do and suffer all other things that bodies corporate may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its functions.''

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28. Importantly an Owners Corporation has power to do such things as are necessary for, or incidental to, the exercise of its functions.

29. The key management areas for a strata scheme are dealt with in section 61 of the *Management Act*. That section is in the following terms:

> ``61. What are the key management areas for a strata scheme?
>
> (1) An Owners Corporation has, for the benefit of the owners:
>
> (a) the management and control of the use of the common property of the strata scheme concerned, and
> (b) the administration of the strata scheme concerned.
>
> (2) The Owners Corporation has responsibility for the following:
>
> (a) maintaining and repairing the common property of the strata scheme as provided by Part 2,
> (b) managing the finances of the strata scheme as provided by Part 3,
> (c) taking out insurance for the strata scheme as provided by Part 4,
> (d) keeping accounts and records for the strata scheme as provided by Part 5.
>
> (3) Other functions of an Owners Corporation are included in Part 6.''

30. The key management area of maintenance and repairs is dealt with in Part 2 of chapter 3. Importantly there is a duty on the Owners Corporation to maintain and repair the common property. That obligation arises from section 62 which is in the following terms:

``62. What are the duties of an Owners Corporation to maintain and repair property?

(1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the Owners Corporation.
(2) An Owners Corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
(3) This clause does not apply to a particular item of property if the Owners Corporation determines by special resolution that:

(a) it is inappropriate to maintain, renew, replace or repair the property, and
(b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme."

31. Under the succeeding sections the Owners Corporation has a variety of remedies in respect of recovering the cost of such work. However, apart from special circumstances, which do not apply in this case, it can only raise levies to pay for the work. Such levies under sections 76 and 78 must be made on the owners of the lots at the time of the levy and in proportion to their unit entitlement.

32. The plaintiff relied on three decisions at first instance in this court. The first one was *Proprietors of Strata Plan No 6522* v *Furney* (1976) 1 NSWLR 412. In that case Mr Justice Needham was dealing with a claim for a declaration that the body corporate had power to carry out repairs arising as a result of defects in construction of the units and levy the proprietors to cover the cost of the repairs. At page 414-15 his Honour said:

``However, the *Strata Titles Act*, 1973 does make provision with respect to legal proceedings. Section 147 (1) provides, so far as relevant, as follows: `Where the proprietors of the lots the subject of a strata scheme are jointly entitled to take proceedings against any person or are liable to have proceedings taken against them jointly (any such proceedings being proceedings for or with respect to common property), the proceedings may be taken by or against the body corporate.' Again, there seems some doubt to me as to whether s. 147 would justify the body corporate taking proceedings for declarations as to its rights or obligations, because I do not think such proceedings can be described as proceedings against any person. If these proceedings were said to be proceedings against Mr. and Mrs. Furney, then they would not be proceedings under which the proprietors of the lots were jointly entitled to take such proceedings, because Mr. and Mrs. Furney could hardly take proceedings against themselves. However, s. 146 (1) says:

[140402]

[140402]

`Nothing in this Act derogates from any rights or remedies that a proprietor or mortgagee of a lot or body corporate may have in relation to any lot or the common property apart from this Act.' Under the Act the common property is vested in the body corporate by s. 18 `for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan immediately before its registration'. Section 18 (2) requires the Registrar-General to issue in the name of the body corporate a certificate of title for any common property in that strata plan.

It seems to me that, as registered proprietor of the common property, the body corporate would have rights equivalent to the rights of any other registered proprietor to protect its interest or to have the Court declare the extent of its interest, the extent of its powers and liabilities. I think that s. 146 protects the ordinary incidents which attach to the ownership of land registered under the *Real Property Act*, 1900. One of those rights, it seems to me, is a right to approach the Court to make declarations under s. 75 of the *Supreme Court Act*, 1970. Accordingly, I am of the opinion that these

proceedings are competent, and that the Court is entitled to make orders C which would declare the rights and responsibilities and liabilities of the plaintiff under its strata plan and under the Act."

33. It can be seen that his Honour relied upon section 146, which was the then equivalent of section 226 in the *Management Act*. However it must be noted that his Honour was only concerned with a somewhat limited right namely a right to apply to the court for declarations. His Honour did not have to explore the basis of section 147.

34. The plaintiff also relied upon *Margiz Pty Ltd v Proprietors of Strata Plan No 30234* BC9303923. There Powell J said the following:

``I am quite unable to accept that... the Body Corporate, when dealing with the common property vested in it, has only such powers as are expressly vested in it by the provisions of the Act... if one were to proceed upon such a basis, one would be obliged to treat as nugatory, and totally devoid of content, many provisions of the Act, the existence of which are clearly at the heart of, and critical to the effective operation of, the concept of strata title legislation. A simple sample will suffice - unless it is to be implied from such provisions as s 54(3), s 68(1)(a), s 68(1)(b), s 68(1)(c), the Act does not confer upon a Body Corporate a power to repair, yet, without such a power, the imposition on the Body Corporate of a duty to repair would be an exercise in futility...

I regard such provisions as those contained in s 68 as carrying with them an implied grant to the relevant Body Corporate of power to do all things reasonably necessary to enable the relevant Body Corporate to perform the several duties cast upon it..."

35. He does not seem to be doing more than deciding what would already be provided for in section 50 of the *Interpretation Act*.

36. The plaintiff relied upon *Carre v Owners Corporation SP 53020* to which I have earlier referred. In that case the plaintiff was suing for damages caused by the faulty installation of an air-conditioning system which of its nature passed through and affected the common property. To that extent she was seeking damages in respect of the air-conditioning system part of which was part of the common property because of the installation. The defendant companies had pleaded that as a result the unit holder had no standing to sue to the extent that it was part of the common property.

37. His Honour considered the right to bring proceedings on behalf of the company under the rule in *Foss v Harbottle*. In paragraph 25 his Honour concluded that the rule applied to an Owners Corporation. His Honour does not seem to have been directed to the question of whether or not principles of agency would make any difference as to who suffered the loss. At paragraph 46 he seems to assume that the Owners Corporation would suffer a nominal or modest loss in its representative capacity. In paragraph 49 he concluded that he would order the joinder so that the Owners Corporation could assert such ``claims as it may have in relation to that air conditioning system''. He did not decide on a final basis that it was a necessary party. Ultimately in his decision, relying upon the fifth exception to the rule in *Foss v Harbottle*, he added the Owners Corporation as a plaintiff subject to various indemnities being given by the original plaintiff. Given that the plaintiff had been

[140403]

locked out of the Owners Corporation it was not unnatural for the argument before his Honour to take the course that it did. Agency was not of immediate concern as the lot holder was already a party to the action. His Honour did not have to decide whether the lot holder was a necessary party, only whether it was appropriate to join the Owners Corporation to avoid a possible procedural difficulty.

38. It was the plaintiff's submission that the obligations to maintain and repair the common property of the strata scheme includes, if necessary, the commencement of proceedings against the builder of the strata plan in respect of building defects in the common property of strata scheme. Put another way the plaintiff submitted that the Owners Corporation's duty pursuant to section 62 of the *Management Act* to maintain the common property of the strata scheme means that the Owners Corporation suffers economic loss by way of the cost of rectification of defective common property as a result of the defendant's breach of duty of care.

39. In connection with this argument it should be noted that the Owners Corporation has a variety of powers to raise funds or use existing funds for the purpose of complying with its duty to maintain the common property in good repair. It can raise levies upon the then existing lot holders at the time the levy is raised. It need not necessarily sue the original builder to recover the damages being the cost of rectification of the faulty workmanship.

40. Given its ability to fund the repairs in different way it is hard to see how it suffers economic loss as a result of its duty to repair.

41. There are many practical problems that will occur in the management of the strata scheme if the lot owners are necessary plaintiffs. Some may not wish to be a party to the litigation. If they are then once they receive the proceeds of their claim they may not proceed with the repairs. This does not mean that they will not be entitled to recover damages. See *SAS v Scott Carver* [2003] NSWSC 1097. The practicalities of the work may mean that they are not able to do the work themselves.

42. If the Owners Corporation does the repair work is it entitled to recoup from the lot proprietors the amount they received by way of damages? I would have thought that they would not as it has no power to do so. The Owners Corporation can levy to cover the cost of the work and the lot holder's cause of action gives him or her some relief from the liability which he or she will have for levies imposed by the Owners Corporation.

43. The whole problem with this aspect of the matter is that the submission runs headlong into s 227 of the Act. It is apparent that the limited rights given are available only in very restricted circumstances where the practical problems which arise in this case are not present.

44. We are here dealing with a particular cause of action which is a tortious claim for economic loss as a result of the diminution in value of the common property. Whether or not reliance will play a part in the resolution of that claim is not relevant at the moment as I am concerned with the procedural aspects of who are proper and necessary parties. Plainly the lot holders are the disclosed principals and are in my view necessary parties to sue in respect of damage to their individual beneficial interest in the common property. Leaving aside agency, the ownership of the common property is divided under the legislation between the Owners Corporation and the lot holder. The Owners Corporation has the legal estate and the lot holders the whole equitable estate in the common property. In an action by a home owner for a similar cause of action where the title was old system, I would think that the mortgagee would not be a necessary party. There may, however, be other reasons, such as the fact that the common property exists for the benefit of the lot proprietor as a general body, which would indicate the appropriateness of the Owners Corporation remaining as a plaintiff.

45. The difficulties I have identified should be the subject of consideration by the appropriate authorities with a view to further amendment of the *Management Act* and I will bring these matters to their notice.

46. In my view the answer to the separate question is that the relevant lot holders are necessary parties. They will need to be joined as plaintiffs to the extent that they wish to make a claim.

47. The parties should bring in short minutes and deal with costs. I will make any necessary procedural directions to keep the matter on track for its next hearing.

DEVINE LTD v TIMBS

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(2004) LQCS ¶90-125

Court citation: [2004] QSC 024

Supreme Court of Queensland

Judgment delivered on 26 February 2004

Real property — Put & call options — Whether correct warning statement was attached to contract for sale — Validity of purported termination of contract for sale — Property Agents and Motor Dealers Act, sec 366(1) — Body Corporate and Community Management Act 1997, sec 213(6)

[140404]

[140404]

A buyer purported to terminate four contracts for failure by the seller to attach the most up-to-date warning statements and information sheets required under the Property Agents and Motor Dealers Act 2000 (``PAMDA'') and Body Corporate and Community Management Act 1997 (``BCCMA'') respectively.

The contracts resulted from the terms of put and call option agreements that had been signed by the buyer and seller nine months earlier. Attached to the option agreements were the sale contracts together with the then correct warning statements under PAMDA and the BCCMA.

Under the option agreements:

- the buyer granted to the seller a put option to require the buyer to complete the contracts;
- the buyer signed the contracts and returned the signed copies to the seller; and
- the seller held the contracts in escrow and could not sign the contracts until the seller exercised its put option.

Legislation amended before option exercised

Before the seller exercised its put option, the relevant warning statement under PAMDA was amended. In addition, the BCCMA was also amended to require an information statement to be attached to relevant contracts.

Under both pieces of legislation, if the required statements were not attached to relevant contracts, the buyer could rescind the contract.

The seller exercised its put options by signing the contracts that had been executed by the buyer nine months earlier.

The buyer purported to rescind the contracts on the basis that the most recent warning statements and information sheets approved under PAMDA and the BCCMA were not attached to the contracts. The buyer argued that contracts did not come into existence until the seller exercised the option and signed the contracts. That was the relevant time for applying the provisions of PAMDA and the BCCM. Therefore, the most up-to-date statements should have been attached to the contracts.

The seller sought a declaration that the buyer had improperly rescinded the contract.

Held: Helman J held that the seller was entitled to declaratory relief.

His Honour found that the date that the buyer signed the contracts was the relevant date for giving the statements under PAMDA and the BCCMA. The buyer became bound by the proposed sale contracts on signing subject to the exercise of the seller's put option. His Honour concluded that this ``contention appears to me to be consistent with the contemplated sequence of events. The Act contemplates that the seller or the seller's agent will prepare the contract (s. 366(2)) and then, before signing the contract the buyer will sign the warning statement (s. 366(4)(a)).''

[Headnote by CCH CONVEYANCING LAW EDITORS]

P.H. Morrison QC for the applicant (instructed by Nicol Robinson Halletts).

D.J. Campbell for the respondent (instructed by Broadley Rees Lawyers).

Before: Helman J.

Judgment in full below

[140405]

[140405]

Helman J: This application concerns four put and call option agreements entered into between the applicant company and the respondent. Three of the agreements were executed on 24 August 2001. Those three agreements concerned lots 3006, 3106, and 3206 in a proposed residential apartment building called ``River City Apartments''. Another put and call option agreement, executed on 23 January 2002, had as its subject lot 2906 in the same building. The survey plan upon which all four lots appeared was no. 139730. In

each case the first two digits of the lot number showed the level in the building in which the apartment was situated. The option agreements were all executed at a time before the applicant as vendor had completed the building. Each option agreement had attached to it a sale contract of the relevant lot showing the applicant as vendor and the respondent as purchaser. The option agreements were in identical terms.

2. Each contract document was signed by the respondent and had attached to it the notices then required by the *Body Corporate and Community Management Act* 1997 and the *Property Agents and Motor Dealers Act* 2000. On 23 January 2002, by deed, the parties varied the option agreements concerning lots 3006, 3106, and 3206. New contract documents were signed by the respondent and in each case the notices then required by the two statutes I have mentioned were attached to the new contract documents.

3. In each case cl 2.1 of the option agreement provided that the agreement was not binding on the applicant until and unless the respondent returned to the applicant *inter alia* two copies of a warning statement under the *Property Agents and Motor Dealers Act* signed by the respondent and two copies of the contract document signed by the respondent. Under cl 2.2 of the option agreement the applicant was required to hold the contract document received under cl 2.1 in escrow and was forbidden to sign it until and unless either option was exercised.

4. In each case cl 3.1 of the option agreement provided that the respondent granted to the applicant the right to require the respondent to enter into the sale contract for the acquisition of the lot in question on the terms and conditions specified in the contract document. Clause 5.2 of the option agreement provided that the applicant was required immediately to notify the respondent when certain conditions precedent referred to in cl 3.1 of the proposed sale contract were satisfied. Clause 5.3 provided that if the applicant had not given notice to the respondent that those conditions precedent were satisfied by 31 July 2004, or by an extended date fixed in accordance with the relevant clause of the proposed sale contract, either party might terminate the option agreement. Clause 6.3 provided that the sale contract would come into existence on the date determined under s. 365 of the *Property Agents and Motor Dealers Act* and the applicant was authorized to insert that date into the contract document as the contract date. Section 365, as it was on 23 January 2002, defined when the buyer was bound under a relevant contract (defined in s 364, the definitions section for Chapter 11 (Residential Property Sales) as ``a contract for the sale of residential property in Queensland, other than a contract formed on a sale by auction'') providing that a buyer was bound under a relevant contract when the buyer gave the seller under the contract or the seller's agent:

> (a) a copy of the contract signed by both the buyer and the seller; and
> (b) a notice in the approved form signed and dated by the seller declaring the date on which the seller signed the contract.

5. The applicant, having notified the respondent on 15 August 2003 that the conditions precedent the subject of cl 3.1 of the proposed sale contract had been satisfied, exercised its put option on 25 September 2003. The contracts were signed on its behalf, and it required that settlement take place on 9 October 2003. On 8 October 2003 transfer documents for all lots were sent from the applicant to the respondent. On 9 October 2003 the respondent purported to elect to terminate the contracts, relying on the applicant's failure to comply with the provisions of the *Property Agents and Motor Dealers Act* and the *Body Corporate and Community Management Act* as to warning statements and information sheets in the approved forms then current.

6. The letter dated 9 October 2003 from the respondent's solicitors to the applicant's solicitors purporting to terminate the contracts was, formal parts omitted, as follows:

> ``**Timbs proposed purchase from Devine Limited**
>
> [140406]
>
> [140406]
>
> **Lots 2906, 3006, 3106 and 3206 `River City Apartments' (the `Lots')**
>
> We act for Patrick Timbs who is the purchaser of Lots 2906, 3006, 3106 and 3206 `River City Apartments' from Devine Limited pursuant to contracts dated 29 September 2003 (`the Sales Contracts') in respect of which settlement is scheduled to take place on 9 October 2003.
>
> The Sales Contracts for the Lots comprise:
>
> 1. PAMD Form 30a Warning dated 17 January 2002;

2. BCCM Act 1997 Contract Warning;
3. PAMD Form 31a Declaration by Seller unsigned and undated;
4. PAMD Form 32a Lawyers Certifications dated 21 January 2002;
5. Sale Contract (including Annexure `A' dated 25 September 2003.

The Sales Contracts came into existence on 25 September 2003 following your client's exercise of the Put Option contained in the Put and Call Option Agreement dated 24 August 2001 as amended by the Deed of Variation dated 23 January 2002.

We are instructed to inform you that the Sales Contracts do not contain a warning statement in the form approved pursuant to the *Property Agents and Motor Dealers Act* 2000 (`the Act').

Section 366(1) of the Act provides that a relevant contract must have attached a statement in the approved form (`Warning Statement') containing the information mentioned in subsection (3). The current approved form is substantially different from that used in the Sales Contracts.

Section 367(2) of the Act provides that if a Warning Statement is of no effect under section 366(4) the buyer may terminate the contract at any time before the contract settles.

We are instructed to terminate the Sales Contracts for the Lots in accordance with Section 367 of the Act on the basis that the Sales Contracts do not contain Warning Statements in the approved form.

We are also instructed to terminate the Sales Contracts for the lots pursuant to Section 213(6) of the *Body Corporate and Community Management Act 1997* on the basis that the Sales Contracts do not include Information Sheets in the approved form.

Accordingly, could you please make arrangements for my client's Deposit Bonds submitted in respect of the Lots to be returned to my office within fourteen (14) days."

7. The applicant's solicitors' response in a letter dated 14 October 2003 to the respondent's solicitors was, formal parts omitted, as follows:

``Devine Limited sale to Timbs — Lots 2906, 3006, 3106 and 3206, River City Apartments

We refer to your letters of 9 October regarding these four matters.

After considering the arguments raised by you on behalf of your client, Mr Timbs, our client, Devine Limited, has formed the opinion that the arguments are unmeritorious and that Mr Timbs' purported termination of the four Contracts in reliance upon his entitlements under the *Property Agents and Motor Dealers Act* and the *Body Corporate and Community Management Act* were unjustified.

As a result, Devine Limited does not accept that the purported termination of the four Contracts on behalf of Mr Timbs was effective, nor does Devine Limited accept that Mr Timbs is entitled to a refund of the deposits, nor to the return of the four deposit bonds in relation to these Contracts.

Nevertheless, Mr Timbs' purported termination of the four Contracts amounts to a wrongful repudiation of contracts. Devine Limited accepts the repudiation of the Contracts which are now at an end. As the repudiation was wrongful, Mr Timbs is in breach under each Contract. Devine Limited declares each deposit forfeited and reserves its rights under each Contract to pursue Mr Timbs for damages arising from the breach.

In the alternative, Devine Limited was, on the due date for settlement of each Contract, ready and willing and able to complete and Mr Timbs failed to tender settlement of any of the four Contracts. As a result, Mr Timbs is in breach of his obligations under each Contract and Devine Limited, in the alternative, terminates each Contract on the basis of that breach. Once again, Devine Limited declares each deposit forfeited, and reserves its rights regarding any damages

[140407]

[140407]

that may flow from the breach of any of the Contracts.

Your separate correspondence of 9 October raising dispute in relation to each deposit is noted. We are instructed to call up each deposit bond but, when the proceeds of each bond are received, funds will be held in our trust account in accordance with the relevant legislation and your notice of dispute."

8. It is not in issue that the sale contracts have been terminated. The issue between the parties concerns the deposits. The applicant seeks declarations that the respondent's purported termination of the sale contracts by his solicitors' letter dated 9 October 2003 was invalid, that its termination by its solicitors' letter dated 14 October was valid, and that it is entitled to demand payment under the deposit bond lodged as the deposit under each contract. It is not in issue that the forms attached to the contract documents were those required on 23 January 2002 nor is it in issue that by 25 September 2003 new forms had been approved.

9. At the heart of the dispute between the parties is the question what date is relevant for the application of the provisions of the two statutes: is it, as contended on behalf of the applicant, the date of execution of the option agreement in each case (23 January 2002, after the execution of the deed of variation in relation to lots 3006, 3106, and 3206), or is it, as contended on behalf of the respondent, 25 September 2003 when the put options were exercised and the applicant signed the contract documents it had held in escrow? If the former, the applicant must succeed on this application because it will follow that the respondent had no valid ground for terminating the contracts; if the latter the applicant must fail unless an argument based on a contention of substantial compliance with the provisions of the statutes succeeds.

10. Among the objects of the *Property Agents and Motor Dealers Act* is consumer protection. Section 10(2) provides that a significant object of the Act ``is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property''. The purposes of Chapter 11 are three, as s. 363 provides:

> ``**363 Purposes of ch 11**
>
> The purposes of this chapter are —
>
> > (a) to give persons who enter into relevant contracts a cooling-off period; and
> > (b) to require all relevant contracts for the sale of residential property in Queensland to include consumer protection information, including a statement that the contract is subject to a cooling-off period; and
> > (c) to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.''

Section 366(1) provides that a ``relevant contract'' must have attached, as its first or top sheet, a warning statement in the approved form containing the information mentioned in s. 366(3). Section 366(2) provides that the seller of the property or a person acting for the seller who prepares a relevant contract commits an offence if the seller or person prepares a contract that does not comply with s. 366(1). Section 366(4), as it was on 23 January 2002, provided as follows:

> ``(4) A statement purporting to be a warning statement is of no effect unless —
>
> > (a) before the contract is signed by the buyer, the statement is signed and dated before a witness by the buyer; and
> > (b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.''

(On 1 July 2002 s. 366(4)(a) was amended by omitting the words ``before a witness'': s. 99 of the *Tourism, Racing and Fair Trading (Miscellaneous Provisions) Act* 2002, but there was no issue before me on that subject.)

Section 367(2) provides that if a warning statement is not attached to a contract to which a warning statement must be attached or is of no effect under s. 366(4), the buyer under the contract may terminate the contract at any time before the contract settles by giving signed, dated notice of termination to the seller or the seller's agent.

11. The argument for the respondent rested on the proposition that since the contracts did not come into existence until 25 September 2003 it was only then that there was in each case a relevant contract to which the provisions of the *Property Agents and Motor Dealers Act*

[140408]

could apply. While that proposition may be accepted, it does not necessarily resolve the issue before me in favour of the respondent, because what is contemplated in the Act is a sequence of events culminating in the coming into existence of a relevant contract.

12. On behalf of the applicant it was argued that the date of signature by the respondent was the relevant one because it was then that, pursuant to the option agreement, the respondent became bound by the terms of the proposed sale contract subject only to the exercise by the applicant of its put option. That contention appears to me to be consistent with the contemplated sequence of events. The Act contemplates that the seller or the seller's agent will prepare the contract (s. 366(2)) and then, *before signing the contract* the buyer will sign the warning statement (s. 366(4)(a)). (The word ``contract'' is there used to mean the document which the buyer signs whereby the buyer becomes contractually bound: cf *Nguyen* v *Taylor* [1993] ANZ ConvR 260; (1992) 27 NSWLR 48 at p. 53 per Kirby P.) That sequence suggests that the relevant warning statement will be one in the form approved at the time when the buyer signs the contract document.

13. I am therefore persuaded that the argument advanced on behalf of the applicant is correct. If it is not, a buyer in the position of the respondent would be bound by the terms of a contract document of the kind in question in this case for a lengthy period without having the benefit of a warning statement. That does not appear to be what was intended in a régime that contemplates the buyer's receiving the notice and signing it before signing the document. Furthermore, to construe the provisions of the Act as contended on behalf of the applicant would best achieve the consumer-protection purpose of the Act: see s. 14A(1) of the *Acts Interpretation Act* 1954.

14. Section 2 of the *Body Corporate and Community Management Act* provides that the primary object of that Act is to provide for flexible and contemporary communally-based arrangements for the use of freehold land, having regard to the secondary objects of the Act. Among the secondary objects is the provision of ``an appropriate level of consumer protection for owners and intended buyers of lots included in community titles schemes'': s. 4(f). Section 213(1) of Part 2 (Proposed lots) of Chapter 5 (Sale of lots) of the *Body Corporate and Community Management Act* so far as it is relevant, provides that ``[b]efore a contract is entered into'' by a seller with a buyer for the sale to the buyer of a proposed lot intended to come into existence as a lot included in a community titles scheme when the scheme is established the seller must give the buyer a ``first statement'' complying with s. 213(2) to (4). Section 213(5) provides that the seller must attach an information sheet in the approved form to the contract:

> ``(5) The seller must attach an information sheet (the **`information sheet'**) in the approved form to the contract —
>
> (a) as the first or top sheet; or
> (b) if the proposed lot is residential property under the *Property Agents and Motor Dealers Act 2000* — immediately beneath the warning statement that must be attached as the first or top sheet of the contract under section 366 of that Act.''

15. Those provisions are those appearing in the Act as it is now and as it was on 25 September 2003. On 23 January 2002 the provisions, so far as they are relevant, were the same, except that s. 213 bore the number 170 then and subsection (5) was as follows:

> ``**(5)** The seller must attach to the contract, as a first or top sheet, an information sheet (the **`information sheet'**) in the approved form.''

On this application nothing turns on the discrepancy between the two versions of subsection (5).

16. The considerations relevant to the warning statements required under the *Property Agents and Motor Dealers Act* (the sequence of events contemplated, and — above all — the consumer-protection purpose of the Act) apply to the provisions of the *Body Corporate and Community Management Act* and lead me to conclude that the date of the signature by the respondent was the relevant one.

17. It is not necessary for me to consider the argument concerning substantial compliance.

18. It follows that the applicant is entitled to the relief it seeks. I shall invite further submissions on the form of the orders to be made and costs.

WARREN and ORS v BODY CORPORATE FOR BUON VISTA COMMUNITY TITLES SCHEME 14325

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(2004) LQCS ¶90-126

Court citation: [2004] QCA 104

Supreme Court of Queensland — Court of Appeal

Judgment delivered 7 April 2004

Strata and community titles — Unpaid body corporate fees — Costs incurred in recovering unpaid body corporate fees — Court order — Costs of body corporate incurred in recovering unpaid body corporate fees to be assessed by registrar — Whether such an order could be made — Whether important question of law involved — Queensland Law Society Act 1952, Pt 4A — Uniform Civil Procedure Rules, rule 684.

[140409]

[140409]

The applicants in these leave to appeal proceedings were the owners of a lot in a Community Titles Scheme. The respondent body corporate had previously brought a claim in the Magistrates Court against the applicants for unpaid body corporate fees, penalty interest and costs.

By-law 12 of the respondent body corporate's Community Management Scheme provided that:

> ``An owner shall pay on demand the whole of the body corporate's costs and expenses (including solicitor and own client costs) incurred in recovering moneys and levies duly levied upon the owner of the body corporate pursuant to the Act, such amount deemed to be a liquidated debt..."

The applicants subsequently paid the outstanding body corporate fees and a small additional amount. The Magistrate gave summary judgment in favour of the body corporate in the following terms:

> ``The whole of the body corporate costs and expenses (including solicitor and own client costs), incurred in recovering levies and moneys duly levied upon the owner of the body corporate pursuant to the Body Corporate and Community Management Act 1997 to be assessed by the Registrar pursuant to Rule 684 of the Uniform Civil Procedure Rules, plus interest in accordance with the Supreme Court Act 1995. Costs of the assessment to the [body corporate] in any event."

The Registrar assessed the respondent body corporate's costs in an amount of $944.45.

The applicant applied for leave to appeal to a District Court judge against the Magistrate's decision, leave being necessary because the judgment sum was less than $2,000. The District Court dismissed that application with costs to be assessed.

The District Court judge observed that the form of the judgment was unusual in the Magistrates Court in that it did not identify a specific monetary sum but left all matters of quantification to the Registrar. The District Court judge expressed concern that there not be duplication between the costs levied under by-law 12 and the costs order made in respect of the action but considered there was no reason to expect duplication from the terms of the order made.

The applicants sought leave to appeal from the decision of the District Court judge. The applicants submitted that the Magistrate's ordering of costs under by-law 12 of the respondent body corporate's Community Title Scheme was in excess of jurisdiction. The applicants submitted that the Magistrate was not authorised to order, nor the Registrar authorised to assess, such costs as costs of the proceeding in the Magistrates Court. The applicants submitted that such costs were the respondent body corporate's claimed damages not the costs of the proceeding contemplated by the Uniform Civil Procedures Rules 1999 (``UCPR"). The applicants also submitted that by-law 12 was inconsistent with Pt 4A of the Queensland Law Society Act 1952 (Qld), which dealt with client agreements as to costs.

Held: application for leave to appeal refused; costs to be assessed

McMurdo P (with whom Williams JA and Holmes J agreed)

1. The application did not raise an important question of law or of public importance.

2. The decision at first instance, which involved only a relatively modest amount, did not appear to be manifestly unjust.

3. The applicants failed to establish any ground warranting the granting of leave to appeal.

4. There was nothing to suggest that there had been any duplication of costs in the assessment of the $944.45 or that any sum beyond the respondent body corporate's entitlement under by-law 12 was included in that assessment.

5. Part 4A of the Queensland Law Society Act 1952 was not necessarily relevant to or inconsistent with by-law 12.

[Headnote by the CCH CONVEYANCING PROPERTY LAW EDITORS]

JA Griffin QC with RJ Clutterbuck for the applicants (instructed by Lexie Warren).

GJ Robinson for the respondent (instructed by Herdlaw Solicitors).

Before McMurdo P, Williams JA and Holmes J.

Judgment in full below

McMurdo P: The three applicants are owners of a lot in Buon Vista Community Titles Scheme 14325. The respondent brought a claim in the Brisbane Magistrates Court against the applicants for unpaid body corporate fees, penalty interest and costs. The applicants subsequently paid the outstanding body corporate fees and a small additional amount.

On 14 December 2001 a Magistrate gave summary judgment in favour of the respondent/ plaintiff in the following terms:

> ``The whole of the body corporate costs and expenses (including solicitor and own client costs), incurred in recovering levies and moneys duly levied upon the owner of the body corporate pursuant to the *Body Corporate and Community Management Act* 1997 to be assessed by the Registrar pursuant to Rule 684 of the *Uniform Civil Procedure Rules*, plus interest in accordance with the *Supreme Court Act* 1995. Costs of the assessment to the plaintiff in any event."

It seems that the applicants, one of whom is a solicitor practising on her own account, are aggrieved that, now having paid the levies of the body corporate in full, they should also be required to pay the respondent's legal costs, especially on an indemnity basis.

The applicant applied for leave to appeal to a District Court Judge against the Magistrate's decision, leave being necessary because, on any view, the judgment sum was less than $2,000. On 20 February 2002 a District Court Judge dismissed that application with costs to be assessed on the standard basis and on the basis that the matter had been concluded before lunch that day, because the respondent was responsible for wasting a half day's costs. The applicants now seek leave to appeal from that decision, their application for leave to appeal being filed on 18 March 2002. The significant delay in progressing this application has been no fault of the Court.

The applicants have an onerous task in demonstrating why they should be granted leave to appeal to the Court of Appeal of the Supreme Court of Queensland over an amount of effectively only $944.45 when they have already had a hearing in the Magistrates Court and had been refused leave to appeal in the District Court, in circumstances where the learned primary Judge gave consideration to the matters which the applicant again seeks to raise on an appeal before this Court.

They contend that their proposed appeal relates to an important point of law: the Magistrate's order was in excess of jurisdiction in ordering costs under by-law 12 of the respondent's Community Management Scheme. The Magistrate was not authorised to order, nor the Registrar authorised to assess, such costs as costs of the proceeding in the Magistrates Court; such costs are the respondent's claimed damages not the costs of the proceeding contemplated by the UCPR; UCPR rr 690(3) and (4) have the effect that Magistrates can only order those costs under those sub-rules.

By-law 12 is in the following terms:

> ``An owner shall pay on demand the whole of the body corporate's costs and expenses (including solicitor and own client costs) incurred in recovering moneys and levies duly levied upon the owner of the body corporate pursuant to the Act, such amount
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>
> deemed to be a liquidated debt in that this by-law be recorded on the CMS statement and lodged with the Department of Natural Resources."

The learned primary Judge observed that the form of the judgment was unusual in the Magistrates Court in that it did not identify a specific monetary sum but left all matters of quantification to the Registrar; there did not, however, seem to be any reason why such an order could not be made. His Honour expressed concern that there not be duplication between the costs levied under by-law 12 and the costs order made in respect of the action but considered there was no reason to expect duplication from the terms of the order made. The learned primary Judge also noted that the Magistrate ordered only the lower rate of interest under s 47 of the *Supreme Court Act* 1995 (Qld) rather than any higher penalty rate of interest claimed by the respondent.

The order made is clearly intended to convey that the Registrar assess the costs which the respondent incurred in recovering moneys owed by the applicants under the *Body Corporate and Community Management Act* 1997 (Qld).

The respondent's solicitor has filed affidavit material which demonstrates a registrar of the Brisbane Magistrates Court has assessed the respondent's costs in the amount of $944.45. There is nothing before this Court to suggest there has been any duplication of costs in that assessment or that any sum beyond the respondent's entitlement under by-law 12 was included in that assessment; indeed the assessment if anything appears to have been modest. The applicants' application for a review of that assessment was dismissed with costs on 15 March 2004. The order made does not appear to be plainly unjust.

The applicants also contend that an important matter of law is that by-law 12 is inconsistent with part 4A *Queensland Law Society Act* 1952 (Qld) which deals with client agreements as to costs. Section 180 *Body Corporate and Community Management Act* specifically provides that where there is an inconsistency between a by-law and the principal Act or another Act the by-law is invalid to the extent of the inconsistency.

I cannot see that part 4A of the *Queensland Law Society Act* is necessarily relevant to or inconsistent with by-laws such as by-law 12 made under the *Body Corporate and Community Management Act*. The respondent was only entitled to recover the Body Corporate's costs and expenses properly incurred, that is, subject to section 48I *Queensland Law Society Act*. In any event, the position has since been clarified by regulation 99(1)(c) of the *Body Corporate and Community Management (Standard Module) Regulation* 1997.

The application does not raise an important question of law or of public importance; nor does the decision at first instance, which involves only a very modest amount, appear to be manifestly unjust; nor does the significant delay in progressing this appeal assist the applicants. The applicants have failed to establish any ground warranting the granting of leave to appeal to the Court of Appeal of the Supreme Court of Queensland. I would refuse the application for leave to appeal with costs to be assessed.

Williams JA: I agree.

Holmes J: I agree.

The President: That is the order of the Court.

FISCHER and ORS v BODY CORPORATE FOR CENTREPOINT COMMUNITY TITLE SCHEME 7779

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(2004) LQCS ¶90-127

Court citation: [2004] QCA 214

Supreme Court of Queensland — Court of Appeal

Judgment delivered 25 June 2004

Strata and community titles — Contribution schedule lot entitlement — Whether schedule just and equitable — Whether schedule should be varied — Matters which should be taken into account in determining whether a variation should be made — Body Corporate and Community Management Act 1997, sec 47; 48 and 49.

The applicants for leave to appeal were owners of lots in an apartment building known as Centrepoint. It consisted of two towers, all the lots in which were residential. One tower contains 20 apartments and the other 31. As well there was underground car parking. Most

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of the apartments had two bedrooms, but some had three bedrooms and others had one bedroom. The smallest apartment was 81 square metres and the largest apartment was 241 square metres in size. The common area contained a number of amenities for owners and their guests.

The respondent, the body corporate for Centrepoint, was originally incorporated under the Building Units and Group Titles Act 1980 (Qld) and titles to the lots in the buildings were granted pursuant to that Act. The owner of the realty comprising a residential lot had an entitlement to ``lots'', which determined the proportionate share of the owner to the common property and to the contributions to be paid for the costs of maintaining and providing services to the building.

The Building Units and Group Titles Act 1980 was repealed in 1997 and replaced by the Body Corporate and Community Management Act 1997 (Qld) (``the Act''), which provided that there should be two sets of ``lot entitlements'' for each apartment in a community title scheme, formerly a building units plan. The two sets were ``contribution schedule lots'' and ``interest schedule lots''. The former was the means by which the respective contributions of the apartment owners to the maintenance cost of the building could be determined. The interest schedule was the means by which the respective owners' interests in the common property was determined. In each case there was a schedule of lot entitlements which consisted of a whole number allocated to each apartment.

To determine the amount of an apartment owner's contribution to expenses the total of body corporate expenses was divided by the total number of contribution lots. The quotient was then multiplied by the number of contribution lots in respect of each apartment to arrive at the respective amounts to be paid. The respondent, having been incorporated under the Building Units and Group Titles Act 1980, had only one schedule of lot entitlements. That schedule was taken to be both the contribution schedule lot entitlement and the interest schedule lot entitlement for the purposes of the Act.

Subsection 47(2) of the Act provided:

> ``The contribution schedule lot entitlement... is the basis for calculating—
>
> (a) the lot owner's share of amounts levied by the body corporate, unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act;...''

Section 48 of the Act provided:

> ``(1) The owner of a lot... may apply—
>
> (a) to the District Court for an order for the adjustment of a lot entitlement schedule;
>
> ...
>
> (4) The order of the court... must be consistent with—
>
> (a) if the order is about the contribution schedule — the principle stated in subsection (5);
>
> ...
>
> (5) For the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal.
>
> ...''

Section 49 provided:

> ``(1) This section applies if an application is made for an order... for the adjustment of a lot entitlement schedule.
>
> (2) This section sets out matters to which the court... may, and may not, have regard for deciding—

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(a) for a contribution schedule — if it is just and equitable in the circumstances for the respective lot entitlements not to be equal

...

(3) However, the matters the court... may have regard to... are not limited to the matters stated in this section.

(4) The court... may have regard to—

(a) how the community titles scheme is structured; and
(b) the nature, features and characteristics of the lots included in the scheme; and
(c) the purposes for which the lots are used.

(5) The court... may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—

(a) the lot entitlement for the subject lot or other lots included in the... scheme; or
(b) the purposes for which a lot entitlement is used.

..."

The applicants commenced proceedings seeking an order varying the contribution entitlement schedule of the respondent. The applicants and the respondent respectively called witnesses who were knowledgeable about the types of costs incurred by building owners and bodies corporate in maintaining and providing services to those who inhabit the buildings and the means by which those costs might be allocated between apartment owners. There was little difference in the evidence given by the respective experts. To a large extent they performed a mechanical exercise: identifying the relevant costs, categorising them and then allocating them among the lot owners at Centrepoint.

The experts, in reaching their conclusion that the existing contribution lot entitlement schedule was not ``just and equitable'' and that it would not be ``just and equitable'' to make the lot entitlements in respect of all apartments equal, had regard only to the expenses incurred by the respondent in operating and maintaining its buildings and the extent to which the apartments ``consume'' those expenses differentially. The exercise undertaken, and the basis for the opinions as to the proper allocation of lot entitlements, did not go beyond identifying and classifying the extent to which different apartments plead greater financial burden on the body corporate than other apartments.

The trial judge concluded that this approach was too narrow. The trial judge considered that a determination of lot entitlements among apartment owners could take other factors into account. Having considered other factors the trial judge concluded that it was just and equitable to depart from the principle that all apartment owners should contribute equally to the expenses.

The trial judge found that even though there was no evidence how the original lot entitlements were established, the existing lot entitlements reflected a differentiation between the lots based on the size of the lot, number of bedrooms and location of the lot in the building. The trial judge was of the view that an adjustment to the lot schedule would probably have an effect on the value of the apartments. The trial judge concluded that under subsec 49(4) it was appropriate to consider the application by reference to the effect of a change on the value of the apartments and the amenity of the apartments. The application was dismissed.

The applicants appealed and submitted that the Act was concerned with the just and equitable distribution of body corporate expenses among apartment owners and that in making an adjustment of a lot entitlement schedule, the Court must pay regard only to the origin and allocation of body corporate expenditure.

Held: leave to appeal granted and appeal allowed.

Per Chesterman J (with whom McPherson JA and Atkinson J agreed)

1. The evidence showed that there was a degree of arbitrariness in the original allocation of lot entitlements. There was no distinct pattern though it could be said that, generally

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speaking, the higher an apartment was in the buildings the greater its entitlement. This probably reflected a connection between the value of the units and their lot entitlements.

2. The point in issue was a narrow one. It was whether in determining an application for the adjustment of a contribution lot entitlement schedule and, in particular, in determining the extent to which it is just and equitable that respective lot entitlements not be equal, the enquiry is at large (save for the matter described in subsec 49(5)) or whether it is limited to matters which show how apartments differently affect the cost of running and maintaining a community title scheme.

3. Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded.

4. The Act is intended to produce a contribution lot entitlement schedule that divides body corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses or disproportionately consume services. That determination can only be made by reference to factors that have a financial impact or consequence on the body corporate. It cannot be affected by factors that go to an apartment's value or amenity.

5. The nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate. If this principle is not the applicable one then there is no basis on which applications for adjustment of a contribution lot entitlement schedules could consistently be made.

6. Section 49 of the Act, and in particular subsec (4), should be construed as meaning that those identified matters to which a court may have regard are to be regarded only to the extent, if any, that they affect the cost of operating a community title scheme.

7. The evidence adduced by both parties established that:

- The present lot entitlement schedule was not equal.
- The present lot entitlement schedule was not just and equitable.
- An equal contribution lot entitlement schedule would not be just and equitable.
- A contribution lot entitlement schedule in the terms compiled by the applicant's and respondent's experts would be just and equitable.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

RG Bain QC with DLK Atkinson for the applicants (instructed by Kinneally Miley).

RA Perry for the respondent (instructed by Quinn & Scattini).

Before: McPherson JA, Chesterman and Atkinson JJ.

Judgment in full below

McPherson JA: I agree with the reasons of Chesterman J, which I have had the advantage of reading.

2. The appeal should be allowed with costs; the order of the District Court should be set aside; instead, the lot entitlement contribution schedule should be ordered to be adjusted as set out in the reasons of Chesterman J.

Chesterman J: The applicants for leave to appeal are owners of lots in an apartment building known as Centrepoint which is located at 69 Leichhardt Street, Spring Hill. Centrepoint

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consists of two towers, all the lots in which are residential. One tower contains 20 apartments and the other 31. As well there are three levels of underground car parks. Of the 51 apartments, six have one bedroom, 28 have two and 17 are three bedroomed. They vary in size. The smallest is 81 square metres in extent, and the largest, 241 square metres. The common area contains a number of amenities for lot owners and their guests. These include a sauna, a swimming pool and a games room. The respondent, the body corporate for Centrepoint, was originally incorporated pursuant to the *Building Units and Group Titles Act* 1980 (Qld) and titles to the lots in the buildings were granted pursuant to that Act. It provided that the owners of the realty comprising the residential lot had an entitlement to ``lots'' which determined the proportionate share of the lot owner to the common property and to the contributions to be paid for the costs of maintaining and providing services to the building.

4. To avoid confusion in use of the word ``lot'' — which means both the real property represented by the residential unit and the designated number representing the obligation to contribute to body corporate expenses — I will use the word ``apartment'' to refer to the former use and the word ``lot'' to refer to numbers in the contribution schedule, which will be described shortly.

5. The *Building Units and Group Titles Act* was repealed in 1997 and replaced by the *Body Corporate and Community Management Act* 1997 (Qld) (``the Act''), which provides that there should be two sets of ``lot entitlements'' for each apartment in a community title scheme, formerly a building units plan. The two sets were ``contribution schedule lots'' and ``interest schedule lots''. The former is the means by which the respective contributions of the apartment owners to the maintenance cost of the building are determined.

The interest schedule is the means by which the respective owners' interests in the common property are determined. In each case there is a schedule of lot entitlements which consists of a whole number allocated to each apartment.

6. To determine the amount of an apartment owner's contribution to expenses the total of body corporate expenses is divided by the total number of contribution lots. The quotient is then multiplied by the number of contribution lots in respect of each apartment to arrive at the respective amounts to be paid.

7. The respondent, having been incorporated under the *Building Units and Group Titles Act*, has only one schedule of lot entitlements. That schedule is taken to be both the contribution schedule lot entitlement and the interest schedule lot entitlement for the purposes of the Act.

8. Section 48 of the Act provides that the owner of a lot may apply to the District Court for an order for the adjustment of a lot entitlement schedule.

9. By an application dated 10 February 2003 the applicants applied for an order varying the contribution entitlement schedule of the respondent. The application was heard on 28 and 29 January 2004 and dismissed on 13 February 2004. The applicants seek leave to appeal against the dismissal of their application.

10. The Act was amended by the *Body Corporate and Community Management and Other Legislation Amendment Act* 2003 (Qld) (``the 2003 Act''), which came into effect on 4 March 2003. It was thus the Act as amended which contained the relevant law when the District Court came to decide the application. This is not controversial but some of the amendments made are referred to as assisting in the proper construction of the Act.

11. Section 47 of the Act provides:

> ``(1) This section states the general principles for the application of lot entitlements to a community titles scheme, but has effect subject to provisions of this Act providing more specifically for the application of lot entitlements.
>
> (2) The contribution schedule lot entitlement... is the basis for calculating —
>
> > (a) the lot owner's share of amounts levied by the body corporate, unless the extent of the lot owner's obligation to contribute to a levy for a particular purpose is specifically otherwise provided for in this Act; and
> > (b) the value of the lot owner's vote for voting on an ordinary resolution if a poll is conducted for voting on the resolution.
>
> (3) The interest schedule lot entitlement... is the basis for calculating —
>
> > (a) the lot owner's share of common property; and
>
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>
> > (b) the lot owner's interest on termination of the scheme, including... body corporate assets...; and
> > (c) the unimproved value... for the purpose of a... rate or [land] tax...
>
> (4) Neither the contribution schedule lot entitlement nor the interest schedule lot entitlement... is used for the calculation of the liability of the owner... of the lot for the supply of a utility service... if the amount of the... service supplied... is capable of separate measurement, and the owner... is billed directly.''

12. Section 48 provides:

> ``(1) The owner of a lot... may apply —
>
> > (a) to the District Court for an order for the adjustment of a lot entitlement schedule; or
> > (b)...
>
> (4) The order of the court... must be consistent with —

(a) if the order is about the contribution schedule — the principle stated in subsection (5); or
(b)...

(5) For the contribution schedule, the respective lot entitlements should be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal."

13. Section 49 provides relevantly:

``(1) This section applies if an application is made for an order... for the adjustment of a lot entitlement schedule.

(2) This section sets out matters to which the court... may, and may not, have regard for deciding —

(a) for a contribution schedule — if it is just and equitable in the circumstances for the respective lot entitlements not to be equal; and
(b)...

(3) However, the matters the court... may have regard to... are not limited to the matters stated in this section.

(4) The court... may have regard to —

(a) how the community titles scheme is structured; and
(b) the nature, features and characteristics of the lots included in the scheme; and
(c) the purposes for which the lots are used.

(5) The court... may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about —

(a) the lot entitlement for the subject lot or other lots included in the... scheme; or
(b) the purposes for which a lot entitlement is used."

The ``relevant time'' is that at which an applicant contracted to buy his lot which is designated the ``subject lot''.

14. The applicants and the respondent respectively called a witness who was knowledgeable about the types of costs incurred by building owners and bodies corporate in maintaining and providing services to those who inhabit the buildings and the means by which those costs might be allocated between apartment owners. There was little difference in the evidence given by the respective experts. To a large extent they performed a mechanical exercise: identifying the relevant costs, categorising them and then allocating them among the lot owners at Centrepoint.

15. It was common ground that the existing lot entitlements, deriving as they do from the *Building Units and Group Titles Act*, are not equal. There is a degree of arbitrariness between the allocation of lot entitlements to the various apartments. Both experts agreed that the present allocation of lots, and therefore the percentage of burden of contributing to maintenance, is not ``just and equitable''. The approach taken by both experts was identical in methodology and varied in result in only one particular.

16. The approach taken to the allocation of lot entitlements appears from the report of Mr Sheehan who gave evidence on behalf of the applicants. At pages 8 and 9 of his report he wrote:

``Certain administrative and sinking fund items should not be shared on an equal basis amongst all lots... Certain lots within the scheme place a greater demand for the underlying service then *[sic]* other lots...

8.1 Method 1 — Costs shared equally

There are certain administrative and sinking fund items that should be shared amongst all lots on an equal basis. These items of

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expense either are directly proportional to the number of lots in the scheme (eg body corporate administration contract) or are fixed without reference to the number of lots (eg fee for preparation of a tax return). No particular lot places any greater or lesser demand on the underlying services.

8.2 Method 2 — Support and shelter costs

The purpose of the structure of the building is to provide support and shelter to the lots.... The nature of the construction makes it appropriate to share the support and shelter costs based on the area of the lot in proportion to the total area of all lots. Intuitively, if lot A is twice as big as lot B then it requires twice the support and shelter.

8.3 Method 3 — Potential accommodation factor (bedrooms)

Some costs are directly related to the use of the common property. The use of the common property depends on —... the number of people who are resident... The most logical determinant of the number of residents... is the number of bedrooms,...

8.4 Method 4 — Lift Costs

The lift costs deserve unique treatment as the 2 towers benefit in different ways from the existence of the lifts. The costs associated with the provision of a working lift should be shared equally between the 2 towers and then equally between the lots in those towers.

8.5 Method 5 — Lattice Costs

... only [some] lots have lattice.... I have allocated the costs of the lattice only to these lots.''

17. The result of Mr Sheehan's examination of the expenditure of the respondent body corporate, and his categorisation of that expenditure in accordance with the quoted description, produced a table which showed what percentage of the total costs should be allocated to each category. From this analysis Mr Sheehan was able to arrive at a table of appropriate lot entitlements for each lot. The precise mechanism by which this was done was not explained and was not necessary.

18. Mr Linkhorn, who gave expert evidence for the respondent, adopted the same methodology. He differed only in that he allocated the costs of operating and maintaining the lifts separately between the apartments in each tower, though equally between the apartments in each. This produced a different set of lot entitlements but the difference is quite small.

19. In reaching their conclusion that the existing contribution lot entitlement schedule is not ``just and equitable'', and that it would not be ``just and equitable'' to make the lot entitlements in respect of all apartments equal, both Mr Sheehan and Mr Linkhorn had regard only to the expenses incurred by the respondent in operating and maintaining its buildings and the extent to which the apartments ``consume'' those expenses differentially. The exercise undertaken, and the basis for the opinions as to the proper allocation of lot entitlements, did not go beyond identifying and classifying the extent to which different apartments plead greater financial burden on the body corporate than other apartments.

20. The learned District Court judge thought that this approach was too narrow. His Honour considered that a determination of lot entitlements among apartment owners could take other factors into account. Having considered other factors his Honour concluded that it was just and equitable to depart from the principle that all apartment owners should contribute equally to the expenses. He rejected the proposition, advanced by the experts, that any departure from the principle of equality should be determined only by ascertaining the extent to which the apartments differed in the consumption, and therefore cost of services, or the extent to which they gave rise to differing levels of expenditure by the body corporate.

21. His Honour said [at 25-26]:

``[48] Even though there was no evidence how the original lot entitlements were established, I am satisfied that the existing lot entitlements reflect a differentiation between the lots based on the size of the lot, number of bedrooms... and location of the lot in the building. Further, this differentiation has been in existence since the Scheme's inception....

[50] [E]ven though Mr Sheehan and Mr Linkhorn used the size of a lot and the number of bedrooms in the lot, no weight appears to have been given... to the location of a particular lot. In my opinion the

nature, features and characteristics of a lot which is one of the matters the Court may have regard to when deciding just and equitable

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circumstances is wide enough to include the location of a lot.... [T]here are two aspects... These two aspects are the position of the lot in the building as in what level the lot is on and secondly the aspect that might be enjoyed by that particular lot.... [B]y definition Mr Sheehan and Mr Linkhorn have approached their task by considering the money required to fund the Body corporate's expenses and have sought to determine the costs incurred because of a particular lot.... I do not accept the Act demands the application of the user pays approach particularly when the application of size of the lot and number of bedrooms in the lot produces little by way of differentiation between the lots. That is I do not accept the approach taken by Mr Sheehan or Mr Linkhorn gives any weight to the location of a particular lot... having regard to both aspects of location..."

22. The first observation is not entirely accurate. The evidence showed that there was a degree of arbitrariness in the original allocation of lot entitlements. There was no distinct pattern though it could be said that, generally speaking, the higher an apartment was in the buildings the greater its entitlement. This probably reflects a connection between the value of the units and their lot entitlements.

23. The learned judge also pointed out that an adjustment to the schedule of lot entitlements would probably have an effect on the value of apartments. No valuation had in fact been conducted, but an indicative approach to valuation put before his Honour showed that if apartments were valued by reference to rental income only, an increase in contributions to body corporate expenses would result in a loss of value, assuming that the required rate of return on investment remained the same.

24. The point in issue is a narrow one. It is whether in determining an application for the adjustment of a contribution lot entitlement schedule and, in particular, in determining the extent to which it is just and equitable that respective lot entitlements not be equal, the enquiry is at large (save for the matter described in s 49(5)) or whether it is limited to matters which show how apartments differently effect the cost of running and maintaining a community title scheme. The learned trial Judge took the first view and thought it appropriate to consider the application by reference to the affect of the change on the value of apartments, and the amenity of the apartments. His Honour did so because of the terms of s 49(4), which provides that the court may have regard to the structure of the community titles scheme and the nature, features and characteristics of the apartments in the scheme. His Honour took the view, not unnaturally, that amenity and location were features or characteristics of apartments.

25. The submission for the applicants is that this Part of the Act is concerned with the just and equitable distribution of body corporate expenses among apartment owners and that in making an adjustment of a lot entitlement schedule the court must pay regard only to the origin and allocation of body corporate expenditure.

26. Although the Act gives no clear indication one way or the other, the preferable view is that a contribution schedule should provide for equal contributions by apartment owners, except insofar as some apartments can be shown to give rise to particular costs to the body corporate which other apartments do not. That question, whether a schedule should be adjusted, is to be answered with regard to the demand made on the services and amenities provided by a body corporate to the respective apartments, or their contribution to the costs incurred by the body corporate. More general considerations of amenity, value or history are to be disregarded. What is at issue is the ``equitable'' distribution of the costs.

27. There are a number of reasons for this conclusion. The first is to be found in the terms of the Explanatory Notes which accompanied the 2003 Act and the content of the second reading speech when the Bill for it was debated. Because the meaning of the Act is unclear it is permissible to consult these materials.

28. Section 10 of the 2003 Act inserted s 46(7) which is in these terms:

``(7) For the contribution schedule for a scheme for which development approval is given after the commencement of this subsection, the respective lot entitlements must be equal, except to the extent to which it is just and equitable in the circumstances for them not to be equal."

This replaced an earlier provision, which was repealed by the 2003 Act, to the effect that upon registration a community titles scheme did not have to provide for equal contribution lot

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entitlements. Explaining the change the Note said:

> ``The change is intended to reinforce the concept that usually all lot owners are equally responsible for the cost of upkeep of common property and for the running costs of the community titles scheme. However, it is recognised that there are many valid instances where the contribution schedules do not have to be equal. The amendment provides that usually the numbers in this schedule are equal, unless it can be demonstrated that it is just and equitable for there to be inequality.
>
> The need for difference is best shown by examples.
>
> ...
>
> Example 3 In a basic scheme, if all the lots are residential lots ranging in size from a small lot to a penthouse, the contribution schedule lot entitlements generally would be equal. However, the contribution schedule may be different if the penthouse has its own swimming pool and private lift. The contribution schedule should recognise this type of difference. The other lots in the scheme despite being of differing size or aspect would be expected to have equal contribution schedule lot entitlements.''

29. In the Second Reading Speech it was said:

> ``The issue of the nature of the contributions schedule for a body corporate scheme has created some discussion. The guiding principle for both setting and adjusting the contributions schedule is that it involves the equitable sharing of the costs of operating and maintaining the common property. These costs should be borne in proportion to the benefit, not in proportion to the unit's value. It is not a contribution linked to an ability to pay, but as a payment for services.... There is not an argument... against the fact that, in terms of costs related to a property's value — costs such as rates and insurance — owners whose properties are worth more should pay more. But when we are talking about those parts of a property where the benefits are shared more or less equally, we cannot apply the same formula.''

30. These materials make it tolerably plain that the Act is intended to produce a contribution lot entitlement schedule which divides body corporate expenses equally except to the extent that the apartments disproportionately give rise to those expenses, or disproportionately consume services. That determination can only be made by reference to factors which have a financial impact or consequence on the body corporate. It cannot be affected by factors which go to an apartment's value or amenity.

31. Secondly, the nature of a contribution lot entitlement schedule itself suggests that the allocation of lot entitlements is to be made on the basis of the impact that individual apartments make upon the costs of operating and running a community titles scheme. Contribution lot entitlements determine the apartment's share of the outgoings. The starting point is that the entitlements should be equal. A departure from that principle is allowable only where it is just, or fair, to recognise inequality. The departure must take as its reference point the proposition, from which it departs, that apartment owners should contribute equally to the costs of the building. The focus of the inquiry is the extent to which an apartment unequally causes costs to the body corporate.

32. The third consideration is that if this principle not be the applicable one then there is no basis on which applications for adjustment of a contribution lot entitlement schedules can consistently be made. As the evidence in this application shows, if the inquiry is limited to the extent to which an apartment creates costs, or consumes services, above or below the average, one can readily determine what the contribution lot entitlement should be. The high degree of similarity in the reports of Mr Sheehan and Mr Linkhorn demonstrates this. If the inquiry be wider and include such nebulous criteria as the structure of the scheme, or the nature, features and characteristics of the apartments in the scheme, and the purposes for which they are used, there is no intelligible basis on which there could be a consistent and coherent determination of applications for adjustment of lot entitlements. Each case would be determined idiosyncratically and a vast

variety of circumstances might be relied upon to depart from, and therefore erode, the principle said to be paramount, that there should be an equality of entitlements.

33. Accordingly I would construe s 49 of the Act, and in particular subsection (4), as

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[140420]

meaning that those identified matters to which a court may have regard are to be regarded only to the extent, if any, that they affect the cost of operating a community title scheme.

34. The evidence adduced by both parties proceeded on this basis. It established that:

- The present lot entitlement schedule is not equal
- The present lot entitlement schedule is not just and equitable
- An equal contribution lot entitlement schedule would not be just and equitable
- A contribution lot entitlement schedule in the terms compiled by Mr Sheehan or Mr Linkhorn would be just and equitable.

35. The applicants indicated that they would accept an adjustment to the schedule to be in the terms appearing in the reports of either Mr Sheehan or Mr Linkhorn, or so that the lot entitlements were equal. I think it appropriate to order the adjustment to be in accordance with Mr Linkhorn's schedule. The differences are small but his approach adjusted for the cost of the lifts with greater precision than did Mr Sheehan's. As well the order will affect existing rights so that it is appropriate to make the least adjustment necessary to give effect to the principles required by the Act. By adopting the proposal advanced by the respondent's witness this principle is respected.

36. I would propose that the application for leave to appeal be granted and that the appeal be allowed. I would set aside the order of the District Court and instead order that the lot entitlement contribution schedule for Centrepoint CTS 7779 be adjusted so that the respective contribution lot entitlements recorded in the community management scheme be as follows:

Lot Number	**Contribution Lot Entitlements**
Levy Per Entitlement	$19.18
1	189
2	198
3	192
4	194
5	192
6	194
7	190
8	197
9	192
10	192
11	193
12	189
13	190
14	191
15	191
16	193
17	189
18	198
19	192
20	191
21	198
22	204
23	192
24	191
25	195

26	202
27	192
28	191
29	193
30	201
31	192
32	196
33	185
34	185
35	207
36	198
37	185
38	185
39	206
40	197
41	185
42	185
43	206
44	219
45	209
46	211
47	207
48	211
49	207
50	211
51	207
TOTAL	10000

37. The respondent should pay the applicants' costs of the application for leave to appeal and of the appeal.

Atkinson J: I agree with the reasons for judgment of Chesterman J and the orders proposed.

PROPRIETORS OF STRATA PLAN 17226 v DRAKULIC

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(2003) LQCS ¶90-118

Court citation: [2002] NSWCA 381

New South Wales Court of Appeal

Judgment delivered 27/11/2002

Tort — Negligence — Duty of care — Existence — Breach — Personal injury — Misfeasance — Nonfeasance — Plaintiff victim of crime — Assault occurring on common property — Application of principle in Modbury Triangle Shopping Centre Pty Ltd v Anzil (2001) 205 CLR 254.

From 1983, Ms Drakulic owned Unit 1 in a building, 105 High Street, Mascot. The first defendant was the body corporate which owned the building and its members were the proprietors of the units. The second defendant was the manager of the building. At all material times the principal of the second defendant was Mr Warren Platt, its only other employee being his step-daughter. The foyer was common property owned by the defendant Strata Plan Proprietors and was fitted with a door of lockable design. On 3 May 1993 Mr Platt requested a locksmith to disarm the locking mechanisms. On 6 May 1993, this was done by removing the knobs from the handles and the internal locking mechanisms. On 9 September 1993 at 2.45 am the plaintiff returned from work, parked her car, came through the front door and was attacked by a male intruder who robbed her of her handbag and injured her badly. The plaintiff sued the defendants for negligence seeking damages for personal injury. The defendants appealed from a judgment by Nash DCJ on 15 June 2001 in favour of the Ms Drakulic.

The defendants submitted that ``the unpredictable criminal behaviour of the intruder'' was not reasonably foreseeable; that even if the intruder's behaviour was reasonably foreseeable, there was no duty of care owed to Ms Drakulic in relation to it, because the case did not fall within the limited category of circumstances in which the law of negligence imposed liability for omissions to prevent harm caused by third parties. There had been no ``high level of recurrent, predictable criminal behaviour'' in the language of Gleeson CJ in Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254 at 33 apart from evidence of two or perhaps more break-ins from the plaintiff's balcony into her unit: she was vague as to the precise number. Though there had been break-ins, there had been nothing to put the defendants on notice of any criminal conduct in the common areas. While the trial judge appeared to infer that the defendants had assumed control for the safety of occupants and their visitors by reason of the fact that until 6 May 1993 there had been a locked door (since he assumed that his conclusions would have been different if there had never been a lock), and by reason of the fact that on his characterisation, the building was a ``security building'', that inference was unsound. At no relevant time had the door been kept securely locked, and no relevant person ever regarded the block as a security block. Even if there was a duty of care, it had been discharged by measures short of locking the premises and providing security intercoms, such as external lighting. Even if there had been a breach of a duty of care, it was not causative of the plaintiff's injuries. If the door were locked permanently as the trial judge said it should have been, that fact would become known to any would-be assailant, who in consequence would either take one of the above steps to gain entry or would attack victims as they approached the door from the driveway.

Ms Drakulic's submissions relied on the trial judge's reasoning. First, the risk of the criminal conduct of third parties within the common property was reasonably foreseeable since they could gain entry merely by turning the handle of the door and pushing it open. Secondly, ``Having regard to the special relationship which existed between the plaintiff and the defendants — that is as a unit proprietor and occupier and the owner and manager of the common property of the building — the law did impose on the proprietors a duty to prevent harm to the plaintiff from the criminal conduct of a third party.'' In that regard Ms Drakulic

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relied on the trial judge's conclusion that ``The building can properly be described as a `security building'.'' Thirdly, the duty to prevent harm was breached by the disarming of the lock, since it created an increased risk of unauthorised entry. That act was not consented to by the members of the body corporate. It should not have been carried out unless a reasonably alternative safe system such as chimes or an intercom system was installed at the same time. Fourthly, Ms Drakulic's injury was caused by the breach because a locked door is a line of resistance to an intruder, the disarming of the lock created an increased risk of unauthorised entry, the assault would not have happened if the door had been locked and probably would not have happened if it had been capable of being locked, and the illegal entry followed by the assault on Ms Drakulic was the very kind of occurrence which could happen by reason of the proprietors' acts.

The defendants submitted that it could not be said that the door probably would have been locked on 9 September had it not been disarmed on 6 May. It was submitted that ``a more accurate finding would have been that the locking mechanism before May 1993 was on some nights effective and on some nights left unlocked.''

The defendants criticised the trial judge for never analysing the issue of whether a relevant duty existed. Two possibilities were left open in the Modbury case for liability outside existing categories, but according to the defendants neither applied. These were based on (a) criminal conduct attended by such a high degree of foreseeability, and predictability, that it was possible to argue that the case would be taken out of the operation of the general principle so as to impose a duty to take reasonable steps to prevent it; or (b) a duty to control the criminal conduct of others where the complaint that was made by the plaintiff was not about the occupier failing to control access to or continued presence on the premises. Nor did it warrant recognition of a duty of care on grounds of a special relationship or special circumstances. The defendants submitted that the contemplated ``exception'' should not be recognised in this case because it would not be a true exception: it would be contrary to the principle itself. The principle

itself rested on the capacity of a defendant to control a third party, but the present defendants were not in a position to control access to premises by persons seeking to carry out erratic, antisocial, unpredictable, irrational and criminal behaviour.

The defendants submitted that the essential basis of the Modbury doctrine was that defendants were not to be made liable for failure to act; these defendants were not made liable for failure to act but for their positive action in interfering with a viable system of security.

Held: appeal allowed

1. On balance the proprietors are correct in contending that the evidence casts great doubt on the trial judge's finding that the door ``was probably locked on most nights although on occasions it probably was not''. The frequency of its not being locked appears to have been much greater than the trial judge found. It was often not locked.

2. In view of past incidents and in view of the general risk of robbery late at night, there was a risk that an assault might occur. The risk was real and not far-fetched. Hence it is hard to avoid the conclusion that it was reasonably foreseeable. But while reasonable foreseeability is a necessary condition for liability in negligence, it is not sufficient. That is particularly so where the cause of injury is the criminal act of a third party.

3. Leaving aside contractual cases, it was only in exceptional categories — employer/ employee, school/pupil, bailor/bailee, parent and person whom the parent's child might injure — that defendants owe a duty to plaintiffs to prevent injury by reason of the criminal conduct of third parties. The facts did not fall within any of these categories. Indeed, the position advanced by Ms Drakulic was inconsistent with many key elements in the majority reasoning in the Modbury case.

4. Ms Drakulic did not rely on the proprietor to ensure that the foyer door was locked. She knew it was not locked.

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5. The defendants did not assume any responsibility for keeping the door locked. They deliberately unlocked it.

6. The defendants did not have any particular control over third parties who might commit crimes. They had no special knowledge about them. They did not assume any particular responsibility. Ms Drakulic had no special vulnerability within the building which exceeded her vulnerability just before crossing the outside boundary of the land on which it was built or just after crossing that boundary but before entering the front door of the building.

7. The present case did not fall within either of the two possible exceptions to the Modbury doctrine, nor did it warrant recognition of a duty of care on grounds of a special relationship or special circumstances.

8. Misfeasance: it had not been demonstrated that any harm suffered by Ms Drakulic would have been averted by taking the measures said to be required.

9. Nonfeasance: even if there were a duty to provide a more effective security system, failure to meet the possible requirements of that duty could not have caused the injury sued for.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

WP Kearns SC with AG Jamieson (instructed by WR Ghioni) appeared for the appellants.

JD Hislop QC with RJ Weaver (instructed Graham Jones) appeared for the respondent.

Mason P; Heydon JA; Hodgson JA.

Full text of judgment below

Mason P: I agree with the orders proposed by Heydon JA whose reasons I have had the benefit of reading. Subject to what follows, I agree with his reasons.

2. I prefer not to base my conclusion upon a finding as to causation. My first reason is the difficulty of determining the extent to which Mr Islam's evidence was accepted in light of the general acceptance of the plaintiff coupled with the failure to address the critical discrepancies between the plaintiff's and Mr Islam's evidence. Secondly, I am troubled about addressing the causation issue through the medium of asking, inter alia, whether the assailant might have got at the plaintiff by alternative means (such as waiting in the garden) if barred from entry into the vestibule. It is unclear to me whether that is a relevant inquiry to be made or whether the causation question should not remain focussed exclusively on the linkage between the actual assault and the defaults alleged against the defendants.

3. I base my decision upon absence of duty of care.

4. I am grateful to adopt Heydon JA's exposition of the principles and the authorities.

5. For reasons more fully expounded by Heydon JA, there was no special relationship between the defendants and the plaintiff sufficient to trigger a duty of care that extended to taking safety measures to protect the plaintiff from the risks of injury at the hands of outside assailants. No contractual or other assumption of such responsibility had occurred. Foreseeability of the possibility of injury at the hands of a criminal assailant was not enough to trigger a duty of such scope. Nor was there special vulnerability or

(known) reliance on the plaintiff's part. The plaintiff knew that the foyer door was not locked. The fact that some steps in providing safety lighting had been taken did not mean that the defendants thereby placed themselves in a relationship generating the requisite special duty. It was neither reasonable nor just to place such a duty of care on the defendants' shoulders.

6. In other words, the case falls within the general principles discussed in *Modbury Triangle Shopping Centre Pty Ltd* v *Anzil* (2000) 205 CLR 254. And it does not attract the possible exceptions discussed therein, relating to (1) ``a high level of recurrent, predictable, criminal behaviour'' (per Gleeson CJ at [30]. See also Hayne J at [117]. Cf Callinan J at [143], citing *WD & HO Wills (Australia) Ltd* v *State Rail Authority of New South Wales* (1998) 43 NSWLR 338 at 359); and (2) to occupiers who fail to control access to or continued presence on the premises (per Hayne J at [117]). I agree with Heydon JA's comments

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about these two possibilities and their inapplicability to the facts of the present case.

7. It remains for me to address the argument suggesting that the *Modbury* principles do not apply to the defendants' ``misfeasance'', using that term in the sense discussed by Heydon JA. In my view, the present case does not fall within any such qualification. There was no contractual or other assumption of binding responsibility on the part of the defendants that the earlier locking system would be kept in place. The locking system was withdrawn, either with or without the formal authority of the body corporate, but in circumstances which put the plaintiff fully on notice.

8. If and to the extent that there was some irregularity or lack of authority in the dealings of the body corporate and its agents regarding the lock, this cannot be invoked in the realm of duty of care. Whether the lock should or should not be disarmed was a matter of controversy on which different views were held by various residents. ``Cost'' factors played their part, in two related senses. First, to some residents the burden of having to come out from the units to open the front door of the vestibule outweighed the perceived benefit of the added protection of keeping it locked. Second, it would be costly to all to have to install an intercom system together with a facility for residents to cause the outer door to be opened to admit intended guests.

9. In these respects, the position was similar to that discussed in *WD & HO Wills*, where the shared cost of maintaining security at the outer perimeter of the rail terminal was one which some occupiers were not prepared to pay. Earlier security arrangements were therefore deliberately withdrawn by the State Rail Authority, with the full knowledge of the occupants, some of whom (like the plaintiff) were unhappy and protested. This left the several occupants to make their own arrangements for internal security. Such action, deliberate though it was on the part of the State Rail Authority, did not mean that an extended duty of care sprang up (see at 355. See also *Modbury* at 302 [147] per Callinan J.)

Heydon JA: This is an appeal from a judgment and verdict for $298,349 given by Nash DCJ on 15 June 2001 in favour of the plaintiff. He also ordered the defendants to pay the plaintiff's costs of the action (including costs on an indemnity basis from 31 March 2000). Judgment was reserved after a trial on 1-4 May 2001. Initially on 7 June a long and careful oral judgment was delivered and orders were pronounced on that day. The orders were revised on 15 June 2001.

11. The defendants appeal on both liability and damages.

Background

12. From 1983, the plaintiff owned Unit 1 in a building, 105 High Street, Mascot. That building comprised fifteen units on three floors above garages at ground level. The first defendant was the body corporate owning the building and its members were the proprietors of the units. The second defendant was the manager of the building. At all material times the principal of the second defendant was Mr Warren Platt, its only other employee being his step-daughter, Mrs Beverly McKeown.

13. The trial judge described the building thus.

> ``The building comprised fifteen units on three floors, there being a number of garages at ground level off a common driveway between it and 103 High Street. There were also some open car parking spaces at the rear of the building, one of which was available for and used by the plaintiff. The building

had two entrances from doors into foyers and upstairs and landings to the units. The first entry from the street, off the driveway, was to units 1 to 6 comprising three floors with two units per floor and the second entry was to units 7 to 15. There was no way a person could get from inside the building from units 1 to 6 to units 7 to 15 and vice versa."

14. The trial judge made the following findings about the entry doors to the building.

``The building was constructed somewhere about the late 1950s to mid-1960s. When constructed, the entry doors were lockable from the inside by pressing a knob or button on a circular handle which contained a lock. Egress was obtained by turning the circular knob handle which, if it was locked, would automatically unlock the door which would be pulled open. If it was then closed without touching the knob in the middle of the handle it would not lock. If that knob was pressed before it was closed the door was locked on closing. To gain entry, if the door was not locked, the handle merely had to be

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turned and the door pushed open. If it was locked a key had to be used. After gaining entry the door could be locked by pressing the knob in the handle. If this was not done the door remained unlocked. Consequently, the only time a key was needed to open the door was to gain entry if it had been locked from inside by pressing the knob on the handle; this being either on entry to or egress from the building.

I infer that, when the units were originally sold, the owner of each unit was provided with at least one key to the door giving entry to the foyer for that particular unit and, on leasing or re-sale of any unit, it was expected the key or keys would be provided to the tenant or purchaser in the same way as a key to the particular unit itself would be provided. On her purchase of unit 1 the plaintiff was provided with at least one key to the foyer door which she still has."

15. On 3 May 1993 Mr Platt requested a locksmith to disarm the locking mechanisms. On 6 May 1993 this was done by removing the knobs from the handles and the internal locking mechanisms.

16. From 1987 the plaintiff was employed in a bookbinding business. She worked in the afternoon shift and often did overtime. On those nights she habitually returned as late as 2.30-2.45am. On 9 September 1993 at 2.45am the plaintiff returned from work, parked her car, came through the front door and was attacked by a very tall and strong male intruder with considerable brutality. He came down the stairs as she began to go up them. He was wearing a dark stocking over his face. He had a cloth in his hand smelling of ``something similar to methylated spirits", which the plaintiff also described as ``some rag with some poison", and which police documents suggest was ammonia. He put the rag on her mouth and this made her dizzy. He had a large knife with which he threatened her and which cut her hand in the course of the struggle. He robbed her of her handbag and injured her badly.

The trial judge's reasoning

17. The trial judge considered the evidence in detail. He stated that the plaintiff was a credible and reliable witness, though mistaken on some aspects; that Mr Platt was not generally credible or reliable; and that Mr Islam, the occupier of Unit 2, was credible but in some respects unreliable. He then made certain findings of fact about hotly contested questions.

18. The trial judge found that the plaintiff telephoned the office of the second defendant at least a few times between May and September 1993 to complain about the fact, as she perceived it, that the lock was broken and to seek to have it fixed; that Mrs McKeown told her that Mr Platt was unavailable and that she would give him the message; that Mrs McKeown gave the messages to Mr Platt; but that he did not contact the plaintiff or do anything about the complaints before the plaintiff was assaulted. The trial judge said that the plaintiff saw Mr Platt and asked him to send someone to fix the door, and that he said they were going to make it a security door: but in fact this incident took place a couple of months after the attack, not before it.

19. The trial judge also found that there was a notice near the entry door to the plaintiff's part of the building purporting to be from Mr Platt stating that the door was to be locked from 9pm.

20. The trial judge found that the entry door was probably locked on most nights before 6 May 1993, although on occasions it probably was not. The accuracy of this important finding was challenged by the defendants in a significant way.

21. Finally, the trial judge found that no meeting of the body corporate or its executive committee ever took place at which a decision to disarm the lock was made. The decision had been made by Mr Platt and Mr Cavar, the occupant of Unit 5, who had complained to Mr Platt that the main entrance door lock was defective in that on occasion it stuck and would not turn, thus preventing entry.

22. The trial judge then set out what he called ``important facts".

> ``At all times prior to 6 May 1993 the building was what can properly be described as a `security building' because the entry door, for which all six occupiers of the relevant part of the building could have been provided with keys and for which the plaintiff had and used keys, was lockable. Admittedly, if it was locked all the time, this would cause some inconvenience for some of the occupants who had visitors because there was no direct contact available from outside the building to the various units.
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> This, however, could have been eliminated completely, at reasonable expense, by the installation of a radio-controlled chimes system to each unit where the cost for chimes locks and keys was in the vicinity of four hundred dollars for those six units.
>
> At all relevant times this system was known to Platt who referred to it at the AGM of the Body Corporate held on 21 September 1993; that is only twelve days after this assault on the plaintiff and which caused Platt to raise it at that meeting. A number (not known on the evidence) of the proprietors of units and Platt, the one who managed the building, did not have a key to the entry door. However, all of them should have and this should have been insisted upon by the first and second defendants.
>
> On 6 May 1993, without authorisation of a general meeting of the Body Corporate or its executive committee, but by arrangement between Cavar, the proprietor of unit 5 on the top floor of the building, and Platt, who contacted the locksmith, the lock to the entry door was disarmed so that it was impossible for it to be locked. A number (unknown) of proprietors were apparently not unduly concerned about intruders entering the building through an unlocked door, probably because they felt secure in their units and did not give thought to what could have happened as a result of the entry door being unlocked; that is people gaining entry to the building and knocking on unit doors to see if anyone was home or with a person such as the one who assaulted the plaintiff, if the door to a unit happened to be answered, forcing his way in and the consequences of course could be grave for any occupant.
>
> The assault upon the plaintiff occurred inside the building. It could not have happened if the entry door had been locked and would probably not have happened if, as it would probably have been prior to 6 May 1993, the door had been capable of being locked and particularly after 9pm in accordance with the notice near the door. It also could not have happened if the chimes system had been installed; even if only as a cheap temporary measure before an intercom system as was later installed.
>
> I am convinced that the lock to the entry door ought not to have been disarmed and rendered useless unless a reasonably safe alternative system such as the chimes or intercom system was installed at the time. I am also convinced that, as later happened, any alteration to the building, especially affecting security to the occupants and their guests, should be an agenda matter on a notice of the meeting so that all unit proprietors, or their proxies, who are interested in that particular item, can take part in discussions and any decision relating thereto and the defendants, that is the Body Corporate and manager, would only act on a resolution of such a meeting.
>
> The disarming of the lock to the entry door was such a matter and ought not to have happened without such consideration and decision. It was not in the category of urgent repair or maintenance within the discretion of the manager.It having happened, urgent attention should have been given to rectifying that situation, particularly after receiving complaints from the plaintiff about it. These complaints ought not to have been ignored as they were, no doubt because Platt realised he should not have arranged for the lock to be disarmed and hoped nothing, such as the assault on the plaintiff or any vandalism to the common property inside the entry door, would happen."

23. The trial judge then analysed the judgments in *Modbury Triangle Shopping Centre Pty Ltd* v *Anzil* (2000) 205 CLR 254. The first plaintiff in that case was the employee-manager of a video shop conducted by a tenant in a shopping centre owned by the defendant. The second was his wife. On leaving at about 10.30pm, the first plaintiff was attacked by three men in the shopping centre car park, the lights to which had been turned out no later than 10pm. The majority of the High Court held that there was in general no duty on occupiers to prevent harm to lawful visitors from criminals unless there was some special relationship; that there was no such relationship in this case; that there was no sufficient forewarning of the attack being likely; and that the failure to have the lights on had not caused loss. In the course of the trial judge's analysis of the *Modbury* case, he indicated that the causation difficulties in that case did not arise in this, because he considered that if the entry door had been locked the plaintiff would not have been injured. He also said, after drawing

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attention to the stress in that case on control as a factor leading to liability, that a locked entry door would have enabled control of the assailant.

24. The trial judge then expressed his conclusions as follows.

> ``Home unit occupation has been an integral part of living in our society for many years. Indeed, this building was probably built about forty years ago.For a long time it has been common knowledge that a desirable feature of home unit buildings is for access to them to be secure and this has been virtually taken for granted. The reason is obvious. There has also, for a long time unfortunately, been in our community a real fear that intruders, usually bent on some form of criminal activity including assaults, robberies, break enter and steal and the like upon occupiers and/or their guests and/or their property could gain access to the common property of the building and also even one or more of the units by forcing open the door to such unit or, as I have previously mentioned, merely by knocking on the door or ringing the door bell and, when it is opened, gaining entry to it. It is also well known that mere vandalism to parts of the common property can occur if such entry is available generally.
>
> Consequently, there can be no doubt that, if an intruder can gain entry to a block of home units such as the building in this case merely by turning the handle on the door and pushing it open, there is a foreseeable risk that, if the occasion arose, such an intruder would assault a person such as the plaintiff who is lawfully on the common property.
>
> Having regard to all the relevant principles I am satisfied, as owner and manager of the building, each of the defendants owed a duty of care to the plaintiff. To comply with this duty they must avoid acts and/or omissions which they can reasonably foresee would be likely to cause injury to the plaintiff. In the circumstances of this case, having regard to the special relationship which existed between the plaintiff and the defendants — that is as a unit proprietor and occupier and the owner and manager of the common property of the building — the law does impose on the defendants a duty to prevent harm to the plaintiffs from the criminal conduct of a third party, particularly within the common property of the building where a risk of such conduct is reasonably foreseeable.
>
> The defendants did give consideration to and acted upon their duty to the occupiers as far as they reasonably could by installing Vandalites and ensuring that the outside lighting was in reasonable condition. This would not only assist the occupiers in seeing any danger, such as a defect in the pathway or driveway or if there was some obstruction such as a ball left by a child which could result in injury to any of them and could also deter unauthorised persons from trespassing thereon or waiting outside the building to attack someone such as the plaintiff on returning to it from work or an outing, particularly at night. But the defendants did not give proper or any consideration, other than of convenience, to the risk of an intruder unlawfully entering the building, as happened here, and attacking an occupant lawfully returning to his or her unit or indeed, any of the guests of such an occupant.
>
> If the criminal conduct had occurred outside the building there would probably be no claim against the defendant for such an assault. This may also be the case if there had been no means of locking the entry door at any time and no suggestion that there should have been, but that is not the situation

here. The act of arranging for the disarming of the lock to the entry door of the building was no doubt a matter of convenience to some of the occupiers, but it also made them all, including the plaintiff, vulnerable to the attack which did occur to her. The mere fact that there is no evidence of such an assault occurring previously is irrelevant. There should have been no such assault in the first instance and, if the entry door was locked — as it probably would have been — the assault on the plaintiff would not have happened.

The plain fact is that between 6 May 1993 and 9 September 1993 the door could not be locked because of the act of the defendants in immobilising the locking device on the entry door in circumstances where, prior to that, there was a system in place that could,

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and in fact at times did, prevent entry of persons, especially unauthorised persons, into the building. The entry of the intruder and the assault on the plaintiff was the very kind of occurrence which could happen by reason of the acts of the defendant. The immobilisation of the lock and/or the failure to put in place a safe alternative system, such as the chime system which could be cheaply obtained, left the occupants, including the plaintiff and their guests, vulnerable to what in fact happened to her. This constituted a breach by the defendants of its duty of care to the plaintiff, allowed the intruder to gain entry to the stairwell of the common property of the building and caused the intruder to gain access to the building which he could not have done if the defendants had not breached their duty of care to the plaintiff.

In the circumstances the defendants were negligent as alleged and there will be a verdict for the plaintiff against them."

25. In its references to a ``special relationship'' and to the irrelevance of there having been no evidence of any earlier assaults, the passage is plainly written with the reasoning in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* in mind.

Preliminary analysis of the trial judge's reasoning

26. The plaintiff's case was put in two ways in the Statement of Claim. The first way concerned various failures to act. The second way concerned a wrongful positive act.

27. The alleged failures to act were described thus:

``(a) Failed to take any or any adequate or effective action or precaution to ensure that the foyer door was locked.

(b) Having been made aware, prior to the time and date of the attack, of the requirement for an effective lock to be placed on the foyer door failed to ensure that such a lock was so placed.

...

(d) Failed to take all reasonable measures to ensure the safety of the Plaintiff.

(e) Failed to take all reasonable measures to avoid damage to the Plaintiff.

...

(g) Failed to repair or adequately repair the common property of the Proprietor's building.

(h) Failed to maintain or adequately maintain the common property of the Proprietor's building.

(i) Failed to protect the Plaintiff by ensuring that the entrance door of the Proprietor's building was secure and relevantly locked.''

These allegations are wide enough to encompass contentions that the defendant had a duty to devise and install a better system of security than had existed either before or after May 1993.

28. The wrongful act relied on was described thus:

``(c) Caused and/or permitted to cause the lock mechanism on the foyer door to be inoperative by reason of the removal of a locking pin device which rendered the lock mechanism ineffective and non-operational.''

That, in focussing on a single positive act, naturally raises causation inquiries as to whether the retention of a lock mechanism in place would have saved the plaintiff from injury.

29. These two different ways in which the plaintiff's case was pleaded correspond with two separate strands in the trial judge's reasoning.

30. At times the trial judge proceeded on the basis that the case before him should be treated as a case like the *Modbury* case, namely a case posing the issue: ``Are the defendants liable for failing to install a satisfactory security system after 6 May 1993 and before 9 September 1993?'' It is convenient to call this the ``non feasance'' basis.

31. At other times the trial judge proceeded on the basis that the case was different from the *Modbury* case, and was a case posing the issue: ``Are the defendants liable for interfering on 6 May 1993 with a security system which was satisfactory up to that date?'' It is convenient to call this the ``misfeasance'' basis.

32. The indications that the trial judge was proceeding on the non-feasance basis include passages in which he describes the relationship between the plaintiff and the defendants as ``special'' in the *Modbury* sense of ``special relationship''. They also include the trial

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judge's quotation of passages in which Hayne J posed and left open the question whether a failure to control entry by criminals onto premises creates liability: the trial judge answered that question affirmatively.

33. The indications that the trial judge was proceeding on the misfeasance basis include passages such as the following:

``... The lock to the entry door ought not to have been disarmed and rendered useless unless a reasonably safe alternative system such as the chimes or intercom system was installed at the time....

The immobilisation of the lock and/or the failure to put in place a safe alternative system, such as the chimes system which could be cheaply obtained, left the occupants, including the plaintiff and their guests, vulnerable to what in fact happened to her....

... if there had been no lock at any time on the entry door handle and no suggestion that there should have been, there probably would have been no liability in the present case....

[There may have been no claim against the defendants] if there had been no means of locking the entry door at any time and no suggestion that there should have been, but that is not the situation here....

... The immobilisation of the lock and/or the failure to put in place a safe alternative system, such as the chimes system which could be cheaply obtained, left the occupants, including the plaintiff and their guests, vulnerable to what in fact happened to her.''

34. The third and fourth of these passages, in particular, contradict the non feasance case, and suggest that the heart of the trial judge's reasoning turns on a narrow point — namely, the proposition that if there had never been a locking system the defendants would not have been liable, but that to interfere with a workable locking system without providing a substitute generated liability. The trial judge himself does not appear to have been conscious of the two possible paths to liability or of their tendency, as expounded by him, to conflict.

The defendants' arguments to this Court in outline

35. It is convenient to take the defendants' submissions in a different order from that in which they were advanced.

36. First, the defendants submitted that ``the unpredictable criminal behaviour of the intruder'' was not reasonably foreseeable.

37. Secondly, the defendants submitted that even if the intruder's behaviour was reasonably foreseeable, there was no duty of care owed to the plaintiff in relation to it, because the case did not fall within the limited category of circumstances in which the law of negligence imposed liability for omissions to prevent harm caused by third parties. There had been no ``high level of recurrent, predictable criminal behaviour'' in the language of Gleeson CJ in *Modbury Triangle Shopping Centre Pty Ltd* v *Anzil* (2000) 205 CLR 254 at [33]. In that case, there had been a break in to a restaurant near the car park, two attempts to break into an automatic teller machine and the break in of the window of a car parked in the car park. There was no equivalent in the present case, apart from evidence of two or perhaps more breakins from the plaintiff's balcony into her unit: she was vague as to the precise number. Though there had been break ins, there had been nothing to put the defendants on notice of any criminal conduct in the common areas. While the trial judge appeared to infer that the defendants had assumed control for the safety of occupants and their visitors by reason of the fact that until 6 May 1993 there had been a locked door (since he assumed that his conclusions would have been different if there had never been a lock), and by reason of the fact that on his characterisation, the building was a ``security building'', that inference was unsound. Whatever the position had been soon after the building was constructed, at no relevant time had the door been kept securely locked, and no relevant person ever regarded the block as a security block.

38. Thirdly, even if there was a duty of care, it had been discharged by measures short of locking the premises and providing security intercoms, such as external lighting.

39. Fourthly, even if there had been a breach of a duty of care, it was not causative of the plaintiff's injuries. The only evidence was that when the plaintiff entered the building the intruder was on the stairs above her coming

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down. The intruder, seeking to avoid being seen in the hallway, may have gained entry by other means, such as an unlocked window or a balcony, as intruders had before. Even if the door had been locked, the lock could have been picked, or the door forced open in some way, or the door could have been left open by an occupant stepping outside for a short time, or the door could have been left ajar so that a lawful visitor might gain entry, or the assailant could have walked in behind an occupier who had opened the door. If the door were locked permanently as the trial judge said it should have been, that fact would become known to any would-be assailant, who in consequence would either take one of the above steps to gain entry or would attack victims as they approached the door from the driveway. If the duty was as high as the plaintiff said, it could only be met by the provision of a fulltime security officer at the door at all times, and this technique had not been investigated at the trial.

The plaintiff's arguments to this Court in outline

40. The plaintiff's written submissions did not advance independent arguments for the dismissal of the appeal. Instead they relied on the trial judge's reasoning, relevant parts of which may be set out in the following order.

41. First, the risk of the criminal conduct of third parties within the common property was reasonably foreseeable since they could gain entry merely by turning the handle of the door and pushing it open.

42. Secondly, ``having regard to the special relationship which existed between the plaintiff and the defendants — that is as a unit proprietor and occupier and the owner and manager of the common property of the building — the law does impose on the defendants a duty to prevent harm to the plaintiff from the criminal conduct of a third party.'' In that regard the plaintiff relied on the trial judge's conclusion that ``The building can properly be described as a `security building' because the entry door, for which all six occupiers of the relevant part of the building could have been provided with keys and [for] which the respondent had and used keys was lockable [up to May 1993]....''

43. Thirdly, the duty to prevent harm was breached by the disarming of the lock, since it created an increased risk of unauthorised entry. That act was not consented to by the members of the first defendant. It should not have been carried out unless a reasonably alternative safe system such as chimes or an intercom system was installed at the same time.

44. Fourthly, the plaintiff's injury was caused by the breach because a locked door is a line of resistance to an intruder, the disarming of the lock created an increased risk of unauthorised entry, the assault would not have happened if the door had been locked and probably would not have happened if it had been capable of being locked, and the illegal entry followed by the assault on the plaintiff was the very kind of occurrence which could happen by reason of the defendants' acts.

45. The plaintiff concluded:

> ``The respondent submits that his Honour's findings and conclusions were open to him on the evidence. There was a clear breach of duty. As Dixon J pointed out in *Betts* v *Whittingslowe* (1945) 71 CLR 637 at 649:
>
> > `breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach'."

The defendants in effect retorted that there were ``sufficient'' reasons to the contrary to rebut the allegation of causation.

Preliminary factual disputes

46. Before turning to the legal arguments for the parties, it is convenient to deal with various factual controversies raised in the appeal.

How often did the entry door lock at night before it was disarmed?

47. The trial judge said:

> ``On all the evidence I find it was probably locked on most nights although on occasions it probably was not. Any occupant returning after 9pm would probably have locked it but may not. For a long time after 6 May 1993 it could not be locked and this could lead anyone to forget that there were many times before then that it was locked."

A related finding appeared later:

> ``The plain fact is that between 6 May 1993 and 9 September 1993 the door could not be locked because of the act of the defendants in immobilising the locking device on the entry door in circumstances where, prior to that, there was a system in place that could,
>
> [140330]
>
> [140330]
>
> and in fact at times did, prevent entry of persons, especially unauthorised persons, into the building."

The trial judge also said:

> ``if the entry door, as it was, was capable of being locked and if it was locked, as it probably would have been, the crime would not have been committed."

48. The defendants submitted that ``a more accurate finding would have been that the locking mechanism before May 1993 was on some nights effective and on some nights left unlocked." They then submitted that it could not be said that the door probably would have been locked on 9 September had it not been disarmed on 6 May. The submission was made for the following reasons.

> (a) In chief Mr Platt said that before May 1993 he went to the premises at least five times and could get access even though he did not have a key. While the trial judge was critical of Mr Platt's evidence generally, he did not specifically reject that evidence.
> (b) Mr Islam, an occupant of a unit in the building, said in chief that he had no key and never locked the door. He never observed any occupant to be using a key. He had moved through the door without impediment. In about one week in four he would arrive at the units at 11pm or later and obtain access without a key. The trial judge said he lacked reliability in minor respects, but did not specifically criticise that part of his evidence.

(c) While the plaintiff always used her key, it would not have been possible for her to detect whether or not the door was in fact locked.

49. Counsel for the plaintiff submitted that Mr Platt and Mr Islam had not been believed. He submitted that the plaintiff unquestionably had a key and unquestionably used it. Further, once the locking mechanism had been deactivated, she complained about it, thinking it was broken. Hence it could be inferred that her usage of the key revealed that the door was normally locked.

50. What is to be made of Mr Platt's evidence? He adhered in cross-examination to his examination-in-chief and indeed said ``On the occasions that I visited the building frequently.... Yes, frequently, the door was never locked and I was never requested for a key by the owners.'' Under the heading ``Undisputed Facts'' the trial judge said:

> ``Strange as it may seem Platt did not have a key to the entry door. The entry door was not always locked but, particularly at night, it was at least sometimes locked. To get keys cut cost no more than five dollars each.''

Under the same heading the trial judge said:

> ``He agreed it was obvious from Cavar's complaints that the entry door had been locked, at least during the night, prior to 6 May 1993. He did not know if the occupants had a key or keys to the entry door prior to May 1993 but his belief was that there were no keys to this particular lock held by any of the occupants.''

It does not seem easy to ignore this evidence, but perhaps counsel for the plaintiff was correct in saying it was rejected by reason of the following words of the trial judge:

> ``I find that Platt was not generally credible or reliable. His evidence was, in many aspects, clearly wrong particularly when compared with objective documentary material. As I have said, he gave his evidence more in the nature of an advocate for the defendants and tailored it to endeavour to support their case and to discredit the plaintiff's evidence.''

Let Mr Platt, then, whose position was in various respects a difficult one, be put on one side.

51. Let it also be assumed that the plaintiff did believe the door was locked on many occasions and indeed that it was. There can be no doubt that it was if only because Mr Cavar complained about it.

52. It is not easy to put aside Mr Islam's evidence. Not only was it very strong in chief, but it remained so in cross-examination. One passage is as follows:

> ``Q. Well you didn't have any problems during the period that the lock worked properly did you?
>
> A. There wasn't any lock.
>
> ...
>
> Q. And from time to time the front door was locked up until about 6 May 1993, is that right?
>
> [140331]
>
> [140331]
>
> A. When I, in — when I was in a unit, when I moved in, I didn't have any key for the lock, I didn't have to open any, any time to get in.
>
> Q. We'll come to that. But up until 6 May 1993, from time to time the front door was locked wasn't it?
>
> A. That's what I'm saying like, when I moved in I didn't —
>
> HIS HONOUR: Q. No, you're not being asked that, whether or not you had a key, were there occasions on which the front door was locked?
>
> A. I don't remember.
>
> DUPREE: Q. You don't remember?
>
> A. No.

Q. But it's possible from time to time, up until 6 May 1993, from the time you moved in, it's possible that from time to time the front door was locked?

OBJECTION

A. I haven't seen any, any time."

53. Another passage was:

``Q. In 105, you purchased a unit?

A. Right.

Q. And when you bought your unit you were given a number of keys, is that right?

A. Yeah.

Q. And how many keys were you given?

A. I don't remember how many keys.

Q. A number was it?

A. A number of keys, yeah.

Q. And it may well be that one of those keys fitted the front door?

OBJECTION. QUESTION WITHDRAWN.

Q. Is it possible that one of those keys was a key to the front door?

OBJECTION. QUESTION PRESSED. QUESTION ALLOWED.

A. We never needed a key for the front door. Only one abnormal key was there, I remember that was after the outside door there was a storeroom, big storeroom, there was a key for that, I remember because it's a big room and later Solid Strata took that key from me and other people to make that area as a meeting place.

Q. But when you purchased the property you were given a number of keys?

A. Yes.

Q. Is that right?

A. Yes.

Q. And is it possible that one of those keys that you were given was a key to the front door?

A. Of course it might [be] possible, but I never, I never had to open the door with the key or anything.

Q. And it's quite clear isn't it, in your mind, that there was a locking device on that front door from the time when you moved in to at least 6 May 1993?

A. Whether there is a locking device or not, I don't remember, because never needed.

Q. Just have a look at photo 10 in exhibit C?

A. Yes, but I never needed it, that's why I didn't notice.

Q. You see that is photo 10 in exhibit C — just have a look on the back of it Mr Islam?

A. Yeah. You're talking about the knob?

HIS HONOUR: Yes that's what he's talking about.

WITNESS: Or this top, the top lock.

HIS HONOUR: Q. Show me?

A. There's a lock.

Q. He's talking about the bottom one?

A. The bottom one?

Q. The top one's the new one isn't it?

A. Yeah.

Q. The old one is the bottom one?

A. Yeah, the bottom one looks like a key slot there, yeah.

DUPREE: Q. And that key slot was there from the time when you moved in throughout the period to when you moved out, that's right isn't it? A. Now I can notice the thing, but I never, I never had to open with the key."

54. The trial judge said of Mr Islam:

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[140332]

``Generally speaking Islam was a credible witness but was lacking in reliability on some aspects which I consider he regarded as minor, no doubt because he was endeavouring to recall matters which did not really concern him, at short notice, from a long time previously. However he did demonstrate a recollection of some matters which were discussed at meetings attended by him but did not give specific details of any such discussions."

55. It is difficult to believe that when the trial judge said that, he was treating as a ``minor'' matter the question whether Mr Islam could gain access without a key. It was potentially a major matter. After the trial judge made the finding that the entry door was probably locked on most nights, he said that for a long time after 6 May 1993 it could not be locked ``and this could lead anyone to forget that there were many times before then that it was locked''. But it is difficult to believe this was an oblique rejection of Mr Islam's evidence about his ability to enter without a key, particularly after 11pm a quarter of the time. If Mr Islam's evidence on a potentially major matter was to be rejected, one would have expected this to have been done specifically, and with reasons. Further, earlier in the reasons for judgment, under the heading ``Undisputed Facts'', the trial judge said:

``Not all occupants of the building had front door keys. Indeed Mr Islam, whose family comprised himself, his wife and two children, did not use a key to the front door and no-one complained to him about not having a key. He occupied unit 2, on the same floor as the plaintiff's unit, from about June or July 1992 until about 1997. Islam worked during the relevant period and occasionally on late shift, about quarter of the time, he returned home about 11pm."

Further, although Mr Islam was cross-examined about his use of a key, he was not cross- examined about having come home around 11pm one quarter of the time. It was perhaps for that reason that the trial judge treated Mr Islam's evidence about never using a key and about gaining entry without it at 11pm a quarter of the time as establishing ``Undisputed Facts''. In short, it is not possible to regard the trial judge's findings about the frequency with which the door was left unlocked as credit- based in a manner preventing this Court from reaching conclusions of its own on the strength of the underlying evidence.

56. On balance the defendants are correct in contending that Mr Islam's evidence cast great doubt on the trial judge's finding that the door ``was probably locked on most nights although on occasions it probably was not''. The frequency of its not being locked appears to have been much greater than the trial judge found. It was often not locked.

Was the building a ``security'' building?

57. The trial judge characterised the building as a ``security building''. The defendants submitted that it was not, or if it was it was only so in the limited sense that its door had a locking mechanism on its knob. This point was said to go only to the question whether the existence of a ``security building'' founded some expectation that security might be maintained. The point is of no significance. The trial judge indicated the sense in which he used the expression: ``The entry door, for which all six occupiers of the relevant part of the building could have been provided with keys and for which the plaintiff had and used keys, was lockable.'' The term itself was not decisive in relation to any material step in the trial judge's reasoning.

Modes of entry

58. The defendants criticised the following statement of the trial judge:

``The assault upon the plaintiff occurred inside the building. It could not have happened if the entry door had been locked and would probably not have happened if, as it would probably have been prior to 6 May 1993, the door had been capable of being locked and particularly after 9pm in accordance with the notice near the door. It also could not have happened if the chimes system had been installed; even if only as a cheap temporary measure before an intercom system as was later installed."

59. The defendants said the passage contained the following errors. Their criticisms are in similar vein to their causation arguments.

(a) It assumed that the front door was the only possible point of entry, whereas there had earlier been two and possibly more entries through the plaintiff's balcony: her windows were barred but her balcony was not, and the intruders broke through the balcony door. Once an intruder got into a

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unit through a balcony, he could leave the unit and enter the hallway: there was no evidence that the units had deadlocks.

(b) The passage assumed that the person who attacked the plaintiff could not have entered via the front door with, or immediately following, another entrant even if the door had been locked.

(c) The passage assumed that the person who attacked the plaintiff was already in the building, in a unit or hidden elsewhere, when she entered. A masked armed bandit prepared to inflict the injuries on the plaintiff which the assailant had inflicted was not a person behaving according to normal standards of behaviour, and may have taken special steps to become familiar with the plaintiff's movements in coming home at 2 or 2.30am to an empty unit accessible from the street.

(d) The passage, in using the word ``probably'', failed to make allowance for the occasions when the door was unlocked — which it always was at 11pm on the twenty-five percent of occasions when Mr Islam tested the point, and hence which indicated that it was unlocked more often than not.

(e) The passage, in referring to a chimes system, did not make it plain what was meant, whether a chimes system was to operate in conjunction with the locked door, and how a chimes system could overcome criminals who gave some apparently plausible reason why the door should be open (for example that they were from the police, or were tradesmen, or were delivering groceries).

60. The difficulty with several of these criticisms is that they have to be applied to persons who obtained or wished to obtain illicit entry at 2am and in that context lack realism. Further, to some degree they are far-fetched. The actual slackness in the way the door was left unlocked before May 1993 remains a potentially important point.

Was the assault reasonably foreseeable?

61. In view of past incidents and in view of the general risk of robbery late at night, there was a risk that an assault might occur. The risk was real and not far-fetched. Hence it is hard to avoid the conclusion that it was reasonably foreseeable. But while reasonable foreseeability is a necessary condition for liability in negligence, it is not sufficient: *Sullivan* v *Moody* (2001) 183 ALR 404. That is particularly so where the cause of injury is the criminal act of a third party: *Modbury Triangle Shopping Centre Pty Ltd* v *Anzil* (2000) 205 CLR 254 at [34] note 21, [35] and [143].

Did the defendants owe the plaintiff a duty of care?

62. The defendants submitted that, leaving aside contractual cases, it was only in exceptional categories — employer/employee, school/pupil, bailor/bailee, parent and person whom the parent's child might injure — that defendants owe a duty to plaintiffs to prevent injury by reason of the criminal conduct of third parties; that the present facts did not fall within any of these categories; and that no new exceptional category should be created to cover the present facts. The relationship of occupier and lawful entrant alone did not suffice. Nor did the relationship between the owner of the home unit on the one hand and the body corporate or the building manager on the other. Whatever might be the position if the locking system had been secretly deactivated, in fact all the unit holders knew it had been deactivated or was not working months before the

assault, and the plaintiff had complained of this. The defendants criticised the trial judge for never analysing the issue of whether a relevant duty existed.

63. Two possibilities were left open in the *Modbury* case for liability outside existing categories, but according to the defendants neither applied. The first was raised thus by Gleeson CJ at [30]-[34] (see also Hayne J at [117]):

> ``There may be circumstances in which, not only is there a foreseeable risk of harm from criminal conduct by a third party, but, in addition, the criminal conduct is attended by such a high degree of foreseeability, and predictability, that it is possible to argue that the case would be taken out of the operation of the general principle and the law may impose a duty to take reasonable steps to prevent it. The possibility that knowledge of previous, preventable, criminal conduct, or of threats of such conduct, could arguably give rise to an exceptional duty, appears to have been suggested in *Smith v Littlewoods Ltd*. It also appears to be the basis upon which United States decisions relating to the
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> liability of occupiers have proceeded. A leading American textbook states that:
>
> > The duty to take precautions against the negligence of others... involves merely the usual process of multiplying the probability that such negligence will occur by the magnitude of the harm likely to result if it does, and weighing the result against the burden upon the defendant of exercising such care.
> > ...
>
> There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.
>
> That does not represent an accurate statement of the common law in Australia.
>
> The factor most commonly taken into account in the United States in determining whether criminal activity was reasonably foreseeable is knowledge on the part of the occupier of land of previous incidents of criminality.
>
> It could not reasonably be argued that the present is such a case. There had been illegal behaviour in the area. A restaurant near the car park had been broken into. During a period of a year before the incident in question, there had been two attempts to break into an automatic teller machine. About a year before the incident, the car window of an employee of the video shop had been smashed. This does not indicate a high level of recurrent, predictable criminal behaviour.
>
> It is unnecessary to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour. It suffices to say two things: first, as a matter of principle, such a result would be difficult to reconcile with the general rule that one person has no legal duty to rescue another; and secondly, as a matter of fact, the present case is nowhere near the situation postulated."

64. Even if Gleeson CJ's doubts about reconciling recovery even where there was a high degree of foreseeability and predictability of criminal behaviour with the absence of a legal duty on one person to rescue another are put on one side, together with Callinan J's similar doubts at [143], in the present case the foreseeability and predictability of the assault was not of a high order. There had been two, or perhaps more, prior break ins through the balcony of the plaintiff's unit, but not through the front door. There had not been ``a high level of recurrent, predictable criminal behaviour".

65. The other possibility left open in the *Modbury* case was put thus by Hayne J at [117]:

> ``Established principle provides the answer to the present problem because it reveals that there is no duty to control the criminal conduct of others except in very restricted circumstances. Being an

occupier of land should not be added to those exceptional cases, at least where the complaint that is made by the plaintiff is not about the occupier failing to control access to or continued presence on the premises. I would wish to reserve for consideration in a case in which they are raised the questions that are presented by a complaint of that last kind."

66. Here the plaintiff's complaint does not turn on the defendants' failure to control the assailant's continued presence on the premises. In one sense it does turn on their failure to control the assailant's access to the premises. However, the defendants submitted that the contemplated ``exception'' should not be recognised in this case because it would not be a true exception: it would be contrary to the principle itself. The principle itself rests on the capacity of a defendant to control a third party, but the present defendants were not in a position to control access to premises by persons seeking to carry out erratic, antisocial, unpredictable, irrational and criminal behaviour.

67. Counsel for the plaintiff argued that the last two paragraphs quoted from the trial judge's reasons for judgment in [13] above, and the passages quoted in [15] above, constituted a satisfactory analysis of whether and why there was a duty of care. In effect the trial judge held

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[140335]

that the system of locking the door was effective to ensure that it was locked on most nights. That system was terminated by a positive act, an act of commission, not a mere omission, and the defendants ignored the plaintiff's complaints. That created a reasonably foreseeable risk of entry by a criminal through the unlocked door.

68. Counsel for the plaintiff submitted that the *Modbury* case was not adverse to the conclusion of a duty of care based on those circumstances. He submitted that the essential basis of the *Modbury* doctrine was that defendants were not to be made liable for failure to act; these defendants were not made liable for failure to act but for their positive action in interfering with a viable system of security. He submitted that the occupier owed a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to the plaintiff arising out of the physical condition of the premises, and the plaintiff's injury arose from the defendants'change in the physical condition of the premises.

Conclusion on duty of care

69. It is convenient to deal first with the non feasance case.

The difficulties created by the Modbury doctrine

70. The argument advanced on behalf of the plaintiff, and the reasons for judgment of the trial judge, did not face up sufficiently to the difficulties created by the *Modbury* case.

71. It is true that one theme in the majority reasoning, particularly as expounded by Gleeson CJ, turns on the undesirability of imposing on occupiers of land a positive duty to act to prevent criminals causing harm. That aspect of the case will be dealt with in considering the plaintiff's arguments so far as they rest on the positive act of disarming the lock on 6 May 1993.

72. But there are many other key elements in the majority reasoning. One part, while acknowledging that criminal conduct is very often reasonably foreseeable, rests on the unpredictability, wantonness and randomness of criminal behaviour, and the corresponding difficulty of eliminating it or greatly reducing the risk of it: see particularly Callinan J at [136]. The reasoning rests on the lack of knowledge which the occupier is likely to have about that behaviour. It rests on the lack of control which occupiers have over criminal third parties, which stands in particular contrast to the control they have over the capacity of the physical condition of the premises to cause physical injury to visitors. Thus at [114] Hayne J said:

``I have emphasised the inability of the appellant to control the conduct of the assailants who injured the first respondent because a duty to take steps to control that conduct should not be found if the person said to owe the duty has not the capacity to fulfil it."

The *Modbury* reasoning also rests on the irrationality of making a defendant liable for not preventing conduct which the efforts of society as a whole through the legislature, the police force and the criminal courts are directed to preventing. Thus at [113] Hayne J said that the conduct which injured the first plaintiff in that case:

> ``... occurs despite society devoting its resources to deterring and preventing it through the work of police forces and the punishment of those offenders who are caught. That is, such conduct occurs despite the efforts of society as a whole to prevent it. Yet the respondents' contention is that a particular member of that society should be held liable for not preventing it.''

The *Modbury* doctrine further turns on the relatively minor role of civil defendants in contributing to the loss suffered by plaintiffs at the hands of criminals. Thus at [115] Hayne J said:

> ``The injuries which the first respondent suffered were caused by the wrongful acts of others. If those others could be identified and had sufficient assets to meet a judgment, the first respondent would have full compensation for his injuries. The present action is brought against a party who, if sued with the assailants, would be found liable to contribute little, if anything, to the damages awarded to the first respondent. Yet because the appellant was sued alone, it is said that it is liable for all the damage.''

Hayne J continued by pointing out that to impose liability on the appellant in that case was not only to hold it responsible for conduct it could not control, but to impose liability on a party whose contribution to the injury, compared with that of the assailants, was

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negligible. The law of tort depends on deterrence and individual responsibility. The imposition of a duty of care on the appellant ``does nothing to deter wrongdoing by the appellant or other occupiers. Further, it would shift financial responsibility for the consequences of crime from the wrongdoer to individual members of society who have little or no capacity to influence the behaviour which caused injury.'' Finally, the *Modbury* doctrine depends on the highly exceptional character of those cases in which a duty of care to avoid harm from the criminal acts of third parties is recognised in earlier authority.

73. In the case under appeal, like the many others falling outside the areas where there is liability for the criminal acts of third parties, one finds unpredictable, wanton and random criminal behaviour; a lack of knowledge by the defendants about the incidence of that behaviour; a lack of control over those responsible for that behaviour on the part of the defendants; irrationality in holding the defendants civilly liable for what the State has not been able to prevent despite intense efforts to do so and severe criminal sanctions; no more than a relatively minor contribution on the part of the defendants to the loss suffered by the plaintiff in comparison to the role of a criminal; and a lack of analogy between the present case and the standard relationships and circumstances which operate as exceptions to the general rule of non-liability.

Control

74. It is necessary to say something about the issue of ``lack of control'' in view of certain observations of the trial judge. The trial judge said ``the defendants did have control and failed to exercise that control by the act of disarming the lock without installing some other satisfactory means of locking the door''. He also said ``a locked entry door would have controlled the assailant''. And he said ``a lockable and locked door would control'' criminal conduct.

75. To some extent those conclusions are relevant to the avenue of liability left open by Hayne J which is based on controlling the access of persons to the premises, which is considered below. However, for other purposes those conclusions are questionable in several senses. First, for reasons given in more detail later, they are questionable if read as referring to the issue of ``control in fact''. The locked door could not have controlled the assailant so far as he chose to attack persons connected with the units outside the building, or after following them in, or after breaking the door. Secondly, the trial judge's conclusions are questionable as a matter of characterisation. At some parts of the majority judgments in the *Modbury* case, the word ``control'' is used to refer not to ``control in fact'', but ``right to control''. The defendants lacked ``control'' over the assailant, because he was not in the same position as a child in the care of a parent, or a prisoner who might attack another prisoner. A parent controls a child even if the child is behaving badly, because the parent has a right to control the child, and, as Hayne J said at [111], is ``expected to be able to control

the child." That is what Dixon J meant in *Smith v Leurs* (1945) 70 CLR 256 at 262, quoted by Gleeson CJ at [20], when he said:

> ``it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger.''

Officers in charge of Borstal boys have ``control'' of them even if the boys escape. That is what Lord Morris of Borth-y-Gest meant in *Dorset Yacht Co Ltd* v *Home Office* [1970] AC 1004 at 1038-1039, referred to with approval by Gleeson CJ at [21], when he said, after quoting the relevant passage from Dixon J's judgment in *Smith v Leurs*:

> ``In the present case there was... a special relation of this nature.
>
> There was a special relation in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand.''

A gaoler has control over prisoners even if those prisoners are running amok and injuring the plaintiff, because the gaoler has the right to control the dangerous prisoners. As Hayne J said at [111], if the gaoler in those circumstances owes a duty of care ``it is because the gaoler can assert authority over those other prisoners''. And, as Hayne J said at [110], an employer:

> ``may owe an employee a duty to take reasonable care to prevent the employee
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> [140337]
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> being robbed. If that is so, however, it is because the employer can prevent the employee going in harm's way. The employer has the capacity to control the situation by controlling the employee and the system of work that is followed. The duty which the employer breaks in such a case is not a duty to control the conduct of others. It is a duty to provide a safe system of work and ensure that reasonable care is taken''.

In none of these senses can it be said that the defendants here had control over the assailant: they had no power to assert control over him, they could not assert authority over him, they were not expected to be able to control him as of right.

76. Thirdly, the trial judge's assertions are questionable if they are meant to be taken into account in relation to the non feasance basis of liability as distinct from the misfeasance basis. If, in considering the non feasance case, it is right to say that the defendants had control over the assailant because a locked entry door would have controlled him, it would have been equally right to say that the defendant in the *Modbury* case had control over the criminals because a system of denying unauthorised access to the car park could have controlled them. The High Court, which analysed the *Modbury* case as a non-feasance case, did not regard that latter possibility as a relevant form of control. So here, considering the instant case as a non feasance case, the possibility of returning to a locking door after 6 May 1993 is not a relevant form of control. The present discussion concerns the issue whether the defendants were liable for failing to act at some time after 6 May 1993 by reason of not installing some security system. Later the separate question, probably central to the trial judge's reasoning, of whether the positive interference on 6 May 1993 was actionable, will be considered. The trial judge's assertion that control is to be found in the existence of the lock is irrelevant to the present inquiry, which examines whether there is liability in not having any lock.

77. Fourthly, the trial judge's reasoning in this context also begs the question to be decided. The question is whether there is a duty to provide a locked door. The proffered answer is affirmative, because there is control. But whence does control come? From the ability to provide a locked door. It cannot be right to infer a duty to do something merely from the fact that it is possible to do it.

Similarities between the present circumstances and the circumstances pointing against the existence of a duty in the Modbury case

78. In the *Modbury* case at [17] and [29], Gleeson CJ pointed out that if a duty were owed by the defendant shopping centre owner to the employee of one of its tenants who was attacked in the shopping centre car

park, it would also have been owed to other employees of tenants, visitors to the shopping centre (including customers of tenants and users of the automatic teller machines) and perhaps any member of the public using the car park at any time for any lawful purpose. If a duty were owed in the instant case by either of the defendants to the plaintiff, it must also have been owed to persons leasing or licensing units from unit holders. And it must also have been owed to lawful visitors of the plaintiff, lawful visitors of other unit holders and lawful visitors of their lessees or licensees — members of their families, friends, and other lawful visitors such as persons calling to deliver goods, supply services, attract business and solicit support for charitable, sporting, artistic or other activities. The trial judge accepted that among the objects of the relevant duty were not only the occupiers but also their ``guests''.

79. A further key matter mentioned by Gleeson CJ in the *Modbury* case at [29] was that if there were a duty on the defendant to prevent a physical attack on the plaintiff, the duty would have extended also to a duty to prevent criminal damage to property and to prevent the stealing of property. Similarly, Hayne J said at [109] that if the defendant owed the plaintiff a duty, ``it was to take *whatever* steps were reasonable in all the circumstances to hinder or prevent *any* criminal conduct of third persons which injured the first respondent or any person lawfully on the premises'' [emphasis in original]. So here, if there was a duty on the defendants to take reasonable steps to have a security system to hinder or prevent physical attacks on potential plaintiffs, there would also be a duty to have one to hinder or prevent criminal damage to the units and their contents and to hinder or prevent the stealing of their contents.

80. Indeed, if the defendants had a duty to prevent criminals entering via the front door to commit crimes, they must have had a duty to

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prevent criminals entering units through their balcony or window and thence moving into the common area of the building.

81. On the other hand, in the *Modbury* case it was accepted that the shopping centre owner could not be liable for criminal conduct occurring outside the premises it owned. In the instant case there would be no liability for criminal conduct outside the area of land owned by the body corporate on which the plaintiff's building stood. (The trial judge went further and said that if the criminal conduct had occurred outside the building but on the land owned by the body corporate, ``there would probably be no claim'': but if, as he thought, there was a duty relating to the inside of the building, that is questionable.)

Reliance as a possible source of duty

82 In the Modbury case at [22] Gleeson CJ pointed out that in that case the first plaintiff could not be said to have relied on the defendant to take security measures, and hence the duty contended for in that case could not be based on reliance. The same is true here. The plaintiff did not rely on the defendants to ensure that the foyer door was locked. She knew it was not locked. The trial judge found that at all times between the disarming of the lock on 6 May 1993 and the time of her assault, the plaintiff thought that the lock had been broken by the removal of the locking mechanism. The trial judge concluded that the plaintiff might have been mistaken in her evidence that she asked Mr Islam to complain about the broken lock. He said that she may have contacted Mr Cavar, but that he was unlikely to have acted on any request to complain. The trial judge found:

> ``that the plaintiff did telephone, at least a few times, the office of the second defendant to complain about the lock being broken and to have it fixed; that she spoke to Platt's secretary, Mrs McKeown about it; that she was, at all such times, informed by Mrs McKeown that Platt was unavailable but she would give him the message. In accordance with her usual procedure, Mrs McKeown handed the message to Platt but, for whatever reason, he did not contact the plaintiff or do anything about the complaints between May 1993 and 9 September 1993, when the plaintiff was assaulted.''

The sense of concern which the plaintiff experienced cannot have been alleviated, in view of the trial judge's finding that Mr Platt did not contact the plaintiff or do anything about the complaints before the assault. This pattern of complaints by the plaintiff which were not responded to is matched in the *Modbury* case, where the co-manager of the video shop whose other manager was the injured first plaintiff had made unanswered

complaints about the parking area lights not being kept on until after the video shop closed: see at [6] and [53].

Assumption of responsibility as a possible source of duty

83. In the *Modbury* case at [23]-[25] Gleeson CJ rejected the proposition that in that case the defendant had assumed any responsibility for the illumination of the car park. It was capable of effecting illumination of various kinds, but it did not take on any obligation to supply it.

84. Similarly, for the reasons just given, the defendants here did not assume any responsibility for keeping the door locked. They deliberately unlocked it. That it was unlocked, or, as the plaintiff perceived it, broken, was well known to the plaintiff. It was also apparent to the plaintiff that the defendants had failed to take steps to ensure that it was locked, and it was for that reason that she complained a few times about the matter.

Special vulnerability/special knowledge/ assumption of responsibility as possible sources of duty

85. In the *Modbury* case, Gaudron J said at [43]:

> ``There are situations in which there is a duty of care to warn or take other positive steps to protect another against harm from third parties. Usually, a duty of care of that kind arises because of special vulnerability, on the one hand, and on the other, special knowledge, the assumption of a responsibility or a combination of both. Those situations aside, however, the law is, and in my view should be, slow to impose a duty of care on a person with respect to the actions of third parties over whom he or she has no control.''

Thus the employment relationship as a source of duty to protect employees against the criminal conduct of third parties exhibits special vulnerability on the part of the employee; and control on the part of the employer. Where chattels are bailed by a bailor to a bailee, the bailor has special vulnerability because of loss

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of possession, the bailee has special knowledge in relation to protection of the goods, the bailee has assumed special responsibility for the goods, and the bailee has control over the goods. Though children who may cause injury cannot be readily controlled by persons who are not their parents, their parents are supposed to be able to control them. Where gaolers owe duties to protect prisoners from being injured by the crimes of other prisoners, liability depends on the special vulnerability of the prisoners to be protected, the special knowledge which the authorities have or ought to have of the risks of injury, the assumption of responsibility by the authorities as part of the process of punishment they are administering, and the control which the authorities have.

86. Here the defendants did not have any particular control over third parties who might commit crimes. They had no special knowledge about them. The plaintiff had no special vulnerability within the building which exceeded her vulnerability just before crossing the outside boundary of the land on which it was built or just after crossing that boundary but before entering the front door of the building. And, as already discussed, the defendants did not assume any particular responsibility.

Should a special relationship or the existence of special circumstances be recognised?

87. It is plain that the relationship of unit owner and body corporate, and the relationship of unit owner and manager, are not relationships of the type recognised as ``special'' under the existing case law. The trial judge asserted that they were ``special'', but without any attempt to explain why, or to cite prior authority for that conclusion, or to state a principle underlying some analogous prior authority which supported it. To this extent, at least, the defendants' criticism of the trial judge for failing to analyse whether a duty existed is sound. In holding that there was, under the existing law, a ``special relationship'' the trial judge was simply not correct. The question then arises: should those relationships be recognised as ``special'' by this Court?

88. In searching for a special relationship as an exception to the principle that an occupier does not owe a duty to take reasonable care to prevent or hinder harm to persons lawfully present from the criminal behaviour of third parties, it is necessary to remember what Gleeson CJ said in the *Modbury* case at [35]:

> ``The principle cannot be negated by listing all the particular facts of the case and applying to the sum of them the question- begging characterisation that they are special. There was nothing special about the relationship between the appellant and the first respondent. There was nothing about the relationship which relevantly distinguished him from large numbers of members of the public who might have business at the centre, or might otherwise lawfully use the car park. Most of the facts said to make the case special are, upon analysis, no more than evidence that the risk of harm to the first respondent was foreseeable.''

Callinan J required ``something special in the circumstances, or the nature of the relationship between the plaintiff and the defendant'' (at [ 147]). The search is for some defined relationship like employer-employee or bailor- bailee, or for circumstances which are ``special''.

89. If new categories of ``special'' relationship are to be created within which a defendant is to be liable for the criminal acts of third parties, the step is not merely factual. It would involve a matter of law — indeed a change in the law. A change in the law of that order of significance is not something which this Court should undertake. It is a matter for the High Court. That conclusion is fortified by the fact that Gleeson CJ was not prepared, because it was not necessary to do so, ``to express a concluded opinion as to whether foreseeability and predictability of criminal behaviour could ever exist in such a degree that, even in the absence of some special relationship, Australian law would impose a duty to take reasonable care to prevent harm to another from such behaviour'': at [34]. It is also fortified by the fact that Hayne J specifically left the matter open: at [117]. And it is fortified by Hayne J's decision to reserve consideration of a different question, namely whether an occupier owes a duty of care to control the criminal conduct of third parties by failing to control their access to or continued presence on the premises: [at 117]. When judges of the High Court decide to leave matters open for consideration in future cases, they do so because of a consciousness that to create an

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exception to the principle precluding recovery for the criminal acts of third parties is to take an important step not to be embarked on without careful consideration in a particular case requiring the step. The making of significant changes in the law by taking steps of that kind is, if not beyond the competence of intermediate appellate courts, something not to be done lightly. It is better for these matters to be left open for the consideration of the High Court.

90. There is one type of ``special'' relationship which may in future call for examination — the fiduciary relationship. In *Pyrenees Shire Council* v *Day* (1998) 192 CLR 330 at [102] McHugh J said:

> ``In the absence of a contract, fiduciary relationship or statutory obligation, the common law makes a person liable in damages for the failure to act only when some special relationship exists between the person harmed and the person who fails to act.''

In this passage McHugh J treated fiduciary relationships as not being ``special relationships''. But whether they are to be treated as a potential source of liability separate from special relationships or as an example of them, it is not necessary to consider whether the relationship between a unit owner and the body corporate, or between a unit owner and the manager of the building in which unit owners own units and the body corporate owns common areas is a fiduciary relationship. The Statement of Claim did not plead that these relationships created fiduciary duties, the plaintiff did not argue either at trial or on appeal that they did, and the relevant factual and legislative background was not examined.

91. The plaintiff cited *Ashrafi Persian Trading Co Pty Ltd* v *Ashrafinia* (2002) Aust Torts Reports ¶81-636, and in particular [57], [60], [62], [63], [66], [70] and [82]. Among other things, those paragraphs were said to support the conclusion that in the present case there was a special relationship. Nothing said either in those places or elsewhere supports that proposition or any other part of the plaintiff's case. Like the *Modbury* case, the *Ashrafi* case is wholly against the plaintiff's entitlement to recover.

High degree of foreseeability

92. Does a high degree of foreseeability of harm suffice for the recognition of a duty of care? The question was left open by two judges in the *Modbury* case. Each of them used language which would make that standard difficult to meet. Gleeson CJ spoke of ``a high degree of foreseeability, and predictability'' (at [ 30]) and ``a high level of recurrent, predictable, criminal behaviour''. Hayne J spoke of ``a high degree of certainty that harm will follow'' (at [117]). In *WD & HO Wills (Australia) Ltd* v *State Rail Authority of New South Wales* (1998) 43 NSWLR 338, Mason P, with whom Priestley JA and Beazley JA agreed, said that he had difficulty in seeing that the existence of a duty of care turned upon the level of the probability that harm would ensue. ``There may be a very high probability that criminal activity causing harm may take place in certain areas of Sydney, but non constat that the occupier or adjacent neighbour has a duty of care to those who suffer. The mechanism of foreseeability is ultimately an unsatisfactory touchstone of the duty of care in this area....'' In the *Modbury* case at [34] note 1 Gleeson CJ (with whom Gaudron J and Hayne J agreed) said that the reasons of which that passage in Mason P's judgment formed part were ``cogent''. Callinan J applied the passage at [143]. Even if the tests formulated by Gleeson CJ and Hayne J were the law, which they expressly declined to decide, the evidence here would not permit a conclusion that they were met. There was no evidence of earlier assaults in the hallway. There had been a small number of break ins, but only to the units from balconies. Mr Platt denied that the common property had ever been damaged. He also denied that the neighbourhood was ``susceptible to unlawful activity''. Mr Islam said that though there were unsavoury characters in the park next door to the units, even before the Vandalites were installed ``we didn't have much problem in there''.

The relationship between the content of an appropriate duty and the propriety of its recognition

93. The trial judge held that the content of the relevant duty owed by the defendants was to avoid acts or omissions which they could reasonably foresee would be likely to cause injury to the plaintiff, and included ``a duty to prevent harm to the [plaintiff] from the criminal conduct of a third party''. A duty to prevent harm is a duty embodying an extremely high standard. There would be no way of fulfilling

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that duty short of engaging armed guards. However, the trial judge's formulation of the duty, assuming one existed, must be wrong. The duty of a landlord of residential premises is only to take such steps as are reasonable in the circumstances, it is not to make the premises as safe for residential use as reasonable care and skill on the part of anyone can make them: *Jones* v *Bartlett* (2000) 205 CLR 166 at [90] and [92] per Gaudron J. Similarly, if there is a duty in relation to criminals, it is only a duty to take those steps to prevent harm from criminals which are reasonable in the circumstances, not an absolute duty to prevent harm. The circumstances relevant to reasonableness are those which control the response of a reasonable man to the risk: he would consider the magnitude of the risk; the degree of probability of its occurrence; the expense, difficulty and inconvenience of taking alleviating action; and any other responsibilities which the defendant may have. The outcome of that process of consideration might be that no response was called for.

94. But when assessing the response of the reasonable man, what goal is the court to take as the object of the response? What is the goal to be aimed at in defining a standard of care in particular circumstances? Sometimes it is described as eliminating the risk of harm: *Overseas Tankship (UK) Ltd* v *The Miller Steamship Co Pty (The ``Wagon Mound'') (No 2)* [1967] 1 AC 617 at 642. Sometimes it is described as ``alleviating'' the risk: *Wyong Shire Council* v *Shirt* (1980) 146 CLR 40 at 47. The latter approach is sounder, since a contention that reasonable precautions have been taken is not invalidated by showing that if some other course of action had been followed the harm would not have occurred: *Bressington* v *Commissioner for Railways (New South Wales)* (1947) 75 CLR 339 at 348. Hence Fleming, *The Law of Torts* (9th ed, 1998) p 130, formulated the goal as deciding upon precautions or alternatives ``that might eliminate or minimise the danger''. But the goal of minimisation cannot be taken literally. As Callinan J said in the *Modbury* case at [136] at 162, ``To require minimisation would literally be to require reduction in risk to the point almost of elimination''. That will often be an impractical goal. Hence there is some attraction in Hayne J's view in the *Modbury* case at [109] that, at least in the present context, the inquiry into the content of the duty must be influenced by a search for reasonable steps to ``hinder or prevent'' injurious criminal conduct.

95. The verb to ``hinder'' has in various other contexts been construed to mean ``to affect to an appropriate extent the ease'' of conduct: *Tennants (Lancashire) Ltd* v *CS Wilson and Co Ltd* [1917] AC 495 at 514 per Lord Dunedin; *Devonish* v *Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 45-46 per Mason J (the judgment was a dissenting one, but apparently not in this respect); *The Australian Builders' Labourers' Federated Union of Workers — Western Australia Branch* v *J-Corp Pty Ltd* (1993) ATPR ¶41-245 at 41,307-41,308 per Lockhart and Gummow JJ. ``Hinder'' can also mean ``interposing obstacles which it would be really difficult to overcome''; or making an outcome ``more or less difficult, but not impossible''; or interference with an outcome short of preventing it: *Tennants (Lancashire) Ltd v CS Wilson and Co Ltd* at 510, 518 and 522 per Lords Loreburn, Atkinson and Shaw of Dunfermline respectively. The goal of the reasonable man, then, is to consider how to eliminate the risk of harm or how to hinder the occurrence of the risk in the sense of significantly or substantially reducing it.

96. In assessing whether a duty of care should be recognised, which is the enterprise which the plaintiff requests the court to carry out, it must be relevant to inquire whether the content of the duty to be recognised would, if complied with, hinder harm in the sense of reducing, significantly or substantially, the chance of harm, even if compliance would not wholly eliminate the chance of harm. A precaution which significantly or substantially reduced the chance of harm would be a precaution which, depending on all other relevant factors, would be valuable. A precaution which only minimally reduced the risk of harm would not be worthwhile. At least in areas like the present, where it is controversial whether or not to take the step of creating a duty of care, if compliance will not reduce substantially the chance of the harm, what is the point of recognising the duty?

97. It is futile to recognise a duty of care where compliance would not at least reduce the risk of harm significantly or substantially. This requires consideration of the question whether having a door lockable in the way the door was locked before 6 May 1993 was enough, or

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whether some superior means of obtaining security should have been employed.

98. The evidence establishes that before 6 May 1993 the door was not always locked, and indeed that it was often not locked. It is highly questionable whether it would have significantly or substantially reduced the risk of the plaintiff suffering the injury which she in fact suffered, particularly since on one week in every month Mr Islam found the door open late at night, the time when the plaintiff was attacked.

99. Even if the door had always been locked, it is questionable whether it would have significantly or substantially reduced the risk of injury. One may leave out of account relatively far-fetched possibilities raised by the defendants, namely that a determined criminal could have obtained entry through the plaintiff's balcony or someone else's balcony to a unit and thence to the hallway, or obtained entry through the front door with a lawful entrant equipped with a key: these are not plausible events late at night, while the occupants of units were in all probability asleep, and at a time when it would not be easy to provide a lawful entrant with some apparently legitimate excuse for entering the building. But a determined criminal — and a tall strong man wearing a face mask, possessing cloth impregnated with a substance which appeared to be poisonous or to smell like methylated spirits or to be ammonia, and armed with a knife, who had somehow obtained entry onto the stairwell and lay in wait for the plaintiff was a determined criminal — could have waited outside the body corporate's land on which the building stood. While the plaintiff returned home on the night in question by car, so that she could not have been attacked off the premises, an attack on a person in the position of the plaintiff returning home late on foot, or after alighting from a taxi, could not possibly have created liability in the defendants if it took place off the premises, but the areas surrounding the premises may have offered suitable places to wait. Another possibility is that the assailant could have waited inside the land on which the building stood but outside the door — he could have waited inside the recessed part of the building in front of the door, and on hearing the plaintiff's approaching footsteps have coerced her inside the building through the door. Indeed, he could have waited in the garage and attacked persons in the position of the plaintiff returning by car from there or from parking areas to the rear of the building, or attacked persons in the position of the plaintiff approaching the front door on foot from there. If the movements of any potential victim were too fast and enabled the closing of the door before the criminal entered, he could have broken the glass in the door and followed the victim.

100. Of course, each of these possibilities carries potential dangers for the criminal. An attack carried out outside the premises, and an attack on the premises but outside the door, might be seen by a passer-by, but these would have been very few in number at 2.45am. An attack inside the garage might have been visible, but persons moving about the premises would have been even fewer in number than passers-by outside them. To follow the plaintiff through the door might cause noise, but no more noise than the criminal was prepared to risk in any event when he attacked the plaintiff by coming down the stairs. To break the glass and follow the plaintiff would cause noise, but the criminal's modus operandi obviously depended on speed — the speedy administration of some noxious substance or the speedy procurement of cooperation by the use of the knife. Even after the assailant departed, the plaintiff's screams and attempts to get assistance by knocking on unit doors did not, unsurprisingly, elicit immediate responses from the other unit holders. The difficulties facing her in that respect had no doubt been taken into account by the criminal. In these circumstances, if the duty to be recognised is one which would eliminate the risk of the type of harm which the plaintiff suffered, or substantially or significantly reduce it, what steps could satisfy it? The substitution of a door without glass and with a foolproof locking system would not significantly reduce the risk. The only remedy which would do so would be the employment of a night watchman, perhaps armed. Though the matter was not investigated at the trial, it seems safe to conclude that to engage a night watchman seven nights a week would cost significant sums of money — at least $20,000 per annum. The sum might be much greater. But if the duty is to take reasonable steps significantly to reduce the risk of criminal conduct, the duty would extend to taking appropriate measures in the daytime as well.

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Though no doubt in daylight the risk of armed robbery outside the building, in the garage, or on the stairs, might be reduced, it would not necessarily be reduced significantly. There would also arise new risks: many more people would be likely to pass through the building between the early morning and the early evening than would be likely to at 2.45am; the temptation to criminals to carry out burglaries by posing as lawful entrants would increase; the chances of break ins to units while their occupiers were out at work or engaged in other daytime activities away from the building would rise. A determined attempt to deal with all relevant risks — risks of injury to persons, risks flowing from malicious damage to property, risks flowing from offences of dishonesty in relation to property, would call for much more than simply restoring the locked door. It might call for twenty-four hour guards, at an expense likely to be well beyond the capacity of a body corporate and the fifteen unit owners, many of them no doubt not enjoying high incomes, to pay.

101. In the United States the courts have declined in general to recognise a duty to provide ``armed, visible security guards to deter criminal acts of third parties''. That is a duty to provide police protection, which is the duty of the State: to compel defendants to supply police protection is to compel a safer regime on the occupier's premises than the beneficiaries of the duty would experience in the community at *large: Nivens* v *Hoagy's Corner* 943 P 2d 286 (1997). In *Ann M* v *Pacific Plaza Shopping Centre* 863 2d 207 (1993) at [13]-[14] it was said that the duty to have security guards only arose if there was a ``high degree of foreseeability'', because of their cost, because it was difficult to assess how many patrols were sufficient to deter, and because ``the social costs of imposing a duty on landowners to have private police forces are... not insignificant''. This reasoning has little application in Australia. In the United States the threshold which must be passed before a duty is created is low, and the courts are understandably reluctant to hold that in the wide range of cases where there is a duty its content generally calls for the provision of guards. In Australia it is very difficult to pass the threshold which lies before a finding of duty; but once it is passed there is no point in having done so unless the content of the duty, if complied with, would eliminate or significantly or substantially reduce the risk of harm.

102. Further, the consequences of recognising a duty to take reasonable steps to eliminate or substantially or significantly reduce the risk of harm being caused by criminals might call for even more expense. It might call for the inspection of the totality of the premises by an expert in home security. It might call for the fortification of all external windows and all balcony doors: the sole past experience of criminal conduct had been of criminal entries through balcony doors. Yet the effectuation of such fortifications would not only cost more, but would raise aesthetic problems. It would also collide with the desires of any particular unit owner to preserve his or her property unchanged. See generally *Jones* v *Bartlett* (2000) 205 CLR 166 at [15], [19] and [23]-[25].

103. In *Sullivan* v *Moody* (2001) 183 ALR 404 at [42] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ said that reasonable foreseeability of harm was not the sole condition for the recognition of a duty of care.

> ``If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms."

104. The recognition here of a duty to eliminate or substantially reduce the risk of harm flowing from criminal conduct outside existing criteria for the recognition of duties of that kind might be said to subject the defendants, and behind them the unit holders, to ``an intolerable burden of potential liability" if they did not take appropriate measures, and ``constrain their freedom of action in a gross manner" by reason of the large expenditures called for if they did take appropriate measures. It might also be said to subvert statutory provisions ``which strike a balance of rights and obligations, duties and freedoms". The legislation which permits citizens to own strata units balances the rights and freedoms of each unit owner to deal with his or her unit as desired with the obligations and duties to conform to decisions of relevant organs of the body

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corporate. If the imposition of a tortious duty would compel the overriding of the balance which would otherwise exist, or expose the body corporate to liabilities which it could not avert because it could not compel unit holders to cooperate, these consequences point against the conclusion that the law recognises the existence of that duty.

105. Under the *Strata Titles Act* 1973, in force in 1993, a ``lot" was a cubic space designated as such on a strata plan. Which parts of the building were common property, over which the body corporate had a duty and a power to effectuate changes to improve security pursuant to s 68(1)(b) of the Act, and which were ``lots", over which only the relevant unit holder had that power? That is not a question on which the evidence throws light, because it was not a question seen as relevant at the trial. The strata plan designating the units is not in evidence. After the assault on the plaintiff, a question arose at an annual general meeting of unit holders as to whether the plaintiff had received permission from an earlier manager to install security bars blocking outside access to her unit. This implies a view by those present either that the outside of the plaintiff's unit was not part of her lot or that even if it was the body corporate could control what was done on it. But there is no other material casting light on the correctness of that view, apart from the not necessarily well instructed understanding of Mr Platt that the volume inside the coat of paint covering the walls of a unit was the unit holder's property, while what was outside that coat of paint was common property.

106. However, the lack of material evidence does not matter for present purposes. If security measures required attention to the windows and doors and balconies of individual units, and those windows and doors and balconies were part of each lot, the body corporate could not compel work to be done to them. If they were part of the common property, it could, but only if a majority of unit holders voted that way in a meeting of the body corporate or some other relevant organ of the body corporate reached a decision to that effect, which decision would require, from a practical point of view, some unit holder support. The courts should be reluctant to impose legal duties which would either collide with unit holder autonomy, or create a topic of dissension amongst unit holders.

``Control" issues

107. So far as the *Modbury* doctrine rests on the necessity for control, the defendants in one sense had little control over criminals; in another sense they had the potential for significant control depending on what measures they were prepared to take. So far as they had little actual control just beforeSeptember, they can take advantage of the principle of non- liability. They could have achieved control by the expenditure of money, perhaps substantial sums of money, and the obstacle to liability created by the absence of control would go. But the tort of negligence ultimately rests on criteria of reasonableness. As Gleeson CJ said in *Tame* v *New South Wales* [2002] HCA 35 at [8], the essential concept in the process of defining a duty of care is reasonableness. ``What is the extent of concern for the interests of others which it is reasonable to require as a matter of legal obligation, breach of which will sound in damages?" It is probable that what

would have to be spent to put the defendants in a position of control goes well beyond what the criteria of reasonableness would call for.

Failure to control access to the premises

108. In the *Modbury* case at [117] Hayne J reserved for consideration the question whether an occupier of land who failed to control access to or continued presence on the premises on the part of a criminal was liable for that criminal's conduct. He prefaced his reservation of the question by saying at [106]:

> ``The complaint made by the respondents in this case was that the first respondent suffered personal injury because the appellant did not leave the car park lights on when he was leaving the shop where he worked. The complaint was *not* that the appellant should have, but did not, control access by the assailants to the premises it occupied. It is important, then, to appreciate that the allegation of breach (and, by necessary implication, the scope of he duty alleged) concerned the state of the premises. It was not about third parties coming on to, or remaining on, the premises."

At [112] he said:

> ``The occupier of land has power to control who enters and remains on the land and has power to control the state or condition of the land."

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He went on to say that those powers of control established the relationship between occupier and entrant which sufficed to create a duty of care.

109. Counsel for the plaintiff did not seek to rely on Hayne J's reservation at [117], being content to argue that the facts of this case fell literally outside the *Modbury* prohibition on liability because the defendants were responsible for wrongs of commission in relation to the physical state of the premises, not mere omission. However, the trial judge appeared to rely on what Hayne J said, and to arrive at an answer to Hayne J's question favourable to the plaintiff. The trial judge quoted the passage just quoted from [106] and said:

> ``in this case the allegation is about a third party coming onto and remaining on the premises when he ought not to have been permitted to do so. There seems to me, therefore, to be a real connection between the state of the lock to the entry door and the assault by the assailant on the plaintiff."

110. It is therefore necessary to deal with the trial judge's reliance on what Hayne J said, or at least on one answer to the issue which he posed.

111. At the point in his reasoning where he reserved the question of whether a failure to control access to or continued presence on the premises, Hayne J referred to two cases which give guidance as to what he had in mind. These were *Chordas* v *Bryant (Wellington) Pty Ltd* (1988) 20 FCR 91 and *Public Transport Corporation* v *Sartori* [1997] 1 VR 168.

112. *Sartori's* case concerned the duty of an employer to an employee to prevent the employee from being injured on premises which were supposed to be closed so as to exclude members of the public. It was only in that sense that the case was about ``the occupier failing to control access to" the premises. The case involved the well-established ``special relationship", namely that of employer- employee. It does not illustrate any wider or more novel proposition about failure to control access.

113. Cases like the *Chordas* case are remote from present circumstances. They deal with a special factual position. They recognise that the duty to take reasonable care to avoid a reasonably foreseeable risk of injury to lawful visitors owed by the occupier or person in control of a restaurant or other outlet for the on- site consumption of alcohol extends to the injuries caused by tortious or criminal acts of other lawful visitors. A justification for this is that it is highly foreseeable that some patrons may either arrive intoxicated or become intoxicated, and a segment of these may become violent. Hayne J suggests that justification lies in a duty of the publican to supervise the behaviour of patrons, to desist from serving them while intoxicated, and in the last resort to eject them. In most jurisdictions there is usually a statutory duty to eject intoxicated persons,

and there is usually a statutory defence to criminal prosecution and tortious proceedings if no more than reasonable force is used. In the *Chordas* case at 99 Davies, Kelly and Neaves JJ said:

> ``Particularly in the case of an hotel, which provides a facility pursuant to a licence authorising the provision of liquor and pursuant to Acts and regulations which require or imply that the facility be open to the public, it is necessary to keep in mind that the licensee may have no control over his patrons save the power to eject them for good cause. As we have said, the manager of an hotel, like the manager of other facilities, must take reasonable care for his patrons and, if cause is shown which requires that a patron be closely supervised or ejected or that another patron be warned, the manager should take whatever may be the appropriate step in the interests of the safety of his patrons. However, what is the appropriate course in a particular case obviously depends upon the circumstances of the case."

See also *Oxlade* v *Gosbridge Pty Ltd* (NSWCA, unrep, 18 December 1998).

114. Normally the duty is owed to one patron to prevent injury caused by another: eg *Wormald* v *Robertson* (1992) Aust Torts Reports ¶81-180; *Guildford Rugby League Football and Recreational Club Ltd* [2001] NSWCA 139. One case which is arguably an extension of the principle is *Club Italia (Geelong) Inc* v *Ritchie* (2001) 3 VR 447, in which a police officer injured in a drunken brawl at a social club was held entitled to recover from the club. The Victorian Court of Appeal, however, at [45] treated the case not as being of the *Chordas* type or as suggesting any particular answer to the question reserved by

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Hayne J, but as one involving a ``special relationship" between the club and the officer. At [44] the Court of Appeal also raised an interesting possibility of characterising the case not as one of harm arising from criminal conduct, but rather as one of:

> ``harm arising from *disorder* — a commotion, a human eruption or convulsion or conflagration — not to be analysed in terms of the particular criminal acts which injured the plaintiff but to be viewed more broadly as a *state of affairs*, and as one created by the club. On this approach, the plaintiff was injured as a result of that state of affairs, the actual criminal kicks and blows being no more than the particular vehicles of injury. On this analysis, the club's position, as regards duty of care, might be no different if, instead of being attacked by a trouble-making ruffian, the plaintiff had been unintentionally struck by a peaceable patron defending himself against an assault, or accidentally knocked to the ground by non-violent patrons trying to avoid the melee. We think there is much to be said for this approach; but we need not pursue the question."

115. The duty of those who run establishments serving alcohol to avoid injury being caused by drunken patrons to other patrons (and perhaps other persons such as police officers, if that solution to *Ritchie's* case, not in terms adopted by the Victorian Court of Appeal, is available) has not in this State been widened into a duty to avoid injury being caused to drunken patrons by reason of their drunkenness: *South Tweed Heads Rugby League Football Club Ltd* v *Cole* [2002] NSWCA 205.

116. The authorities referred to by Hayne J do not point to any body of law which would make it right for this Court to answer the question he reserved in a manner favourable to the interests of the plaintiff in this case. To do so would be to change the law, and the law at least in this particular field should only be changed by the High Court.

Conventional occupiers' liability

117. There was an attempt on behalf of the plaintiff to fit her case into the general law of occupiers' liability, which imposes a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to plaintiffs arising out of the physical condition of premises. That is a disingenuous attempt to sidestep the *Modbury* doctrine, and it must fail. In the *Modbury* case Hayne J said at [106] that the alleged breach of duty concerned the ``state of the premises". The absence of a locking system from a door in this case was in a sense an aspect of the physical condition of the premises, but only in the same sense as the lighting system in the *Modbury* case. Despite the fact that the lighting system was capable of characterisation as being part of the ``state of the premises", the High Court was not prevented from declining to recognise

liability by that circumstance. It did not treat the harm caused by the criminals, which the lighting system would supposedly have prevented, as being equivalent to harm caused by some defect in the surface of the car park. In argument Gleeson CJ asked, at 256:

> ``What is the difference between saying that a council that owns and controls a public park is bound to take care that people do not trip and break their legs and saying that the council is bound to take reasonable care that people walking through the park do not get hit over the head with a baseball bat?"

The answer is that in the second instance the harm is caused by crime. The real issue is not whether there is an aspect of the physical condition of the premises complained of, but of what type of harm that physical condition might have caused or averted. Thus at [29] Gleeson CJ said:

> ``The control and knowledge which form the basis of an occupier's liability in relation to the physical state or condition of land are absent when one considers the possibility of criminal behaviour on the land by a stranger. The principle involved cannot be ignored by pointing to the facts of the particular case and saying (or speculating) that the simple expedient of leaving the car park light on for an extra half hour would have prevented the attack on the first respondent."

Similarly here, the principle involved cannot be ignored by saying that the simple expedient of placing a locking mechanism on the door after May 1993 or introducing some other security system would have prevented the attack on the plaintiff. The issue is not one of the physical condition of the premises in the sense in which that is relevant in conventional occupiers' cases.

The misfeasance case

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118. In one sense the failure on 6 May 1993 to employ some alternative security system was only non feasance — a failure to act. But it was not pure non feasance, because it was coupled with the positive act of deactivating the lock. Similarly, failure to brake while driving a car is not non feasance, because it is coupled with positive acts which put the car into motion: *Pyrenees Shire Council* v *Day* (1998) 192 CLR 330 at [102] per McHugh J.

119. While in a general sense the distinction between liability for failure to act and liability for positive acts, and the distinction between duties to abstain from causing harm and duties to carry out positive acts which will prevent harm can be important, it is difficult to see much merit in them in the particular circumstances of this case. If there had never been a locking system before or after 6 May 1993, but the plaintiff had complained about its absence a few times before 9 September 1993, she would have been injured in the same way as she was. If there had been a locking system up to 6 May 1993, but it wore out or broke on that day and the defendants failed to repair it, which the plaintiff thought had actually happened, she would have been injured in the same way as she was. It would be a reproach to the law if she could not recover in either of those two cases but could recover merely because the defendants had deliberately deactivated the locking system. It might make a difference if they deactivated it without the plaintiff becoming aware that the system had ceased to work, because the plaintiff might then have been able to mount a negligence case based on reliance: but in fact she knew that the system no longer worked and did not rely on it working. Counsel for the plaintiff attempted to negate the above argument by refusing to concede that there would have been liability if there had never been a locking system but the plaintiff had requested one. It would not follow from a mere request that the duty urged existed. Counsel for the plaintiff also contended that if the locking system had simply worn out or broken there would have been a statutory duty on the body corporate to have it repaired. He referred to s 68(1)(b) which imposed on the body corporate a duty ``properly [to] maintain and keep in a state of good and serviceable repair... the common property..." However, the cause of action would not have been in negligence. No attempt was made to demonstrate that a cause of action for breach of statutory duty would have lain, nor that any other identifiable cause of action would have lain.

120. A further anomaly is that counsel for the plaintiff conceded that if there had never been a locking system and no requirement by unit holders that there be one had ever been made, there would be no duty; yet counsel for the plaintiff said that if at some point in the period a locking system was installed, and at a later

time removed, there was a duty not to remove it. It is anomalous that the defendants are not liable if they do nothing, but are liable if they do something and then reverse what they did. Counsel for the plaintiff said there was no anomaly, because the plaintiff relied on the existence of the locking system. She may have until the point of time after 6 May 1993 when she concluded that it was not working, but after that time there was no reliance.

121. Yet a further difficulty in the misfeasance case is that it depends in an adventitious way on the point of time selected. If the plaintiff had been injured by a criminal attack immediately after the system was deactivated, the matter could be characterised as a piece of misfeasance on the part of the defendants. But as time passed after 6 May 1993, and as the plaintiff made her successive complaints without effective response, the conduct of the defendants is more to be characterised as non feasance: assuming all other matters in the plaintiff's favour, the defendants had a duty to respond to her requests but they did not respond to them. It would be a further reproach to the law if the plaintiff could recover in relation to an assault soon after 6 May 1993, but not some months after.

122. While Gleeson CJ in particular stressed that one reason why the plaintiff should fail in the *Modbury* case was that the law does not favour the creation of positive duties to act, and while Gaudron J and Hayne J agreed with his reasons for judgment, there were many other elements in his reasoning and the reasoning of Hayne J and Callinan J adverse to the plaintiff's success — lack of a high degree of foreseeability, lack of control, lack of reliance, lack of an assumption of responsibility, and absence of any general duty to prevent harm to plaintiffs arising from the crimes of third parties whether one element in the harm was non

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feasance by the defendant or misfeasance by the defendant.

123. What Gleeson CJ actually said about non feasance and misfeasance was:

> ``the general rule that there is no duty to prevent a third party from harming another is based in part upon a more fundamental principle, which is that the common law does not ordinarily impose liability for omissions.''

It does not ordinarily impose liability for omissions, but it may do. There is nothing in the *Modbury* case which says that where a defendant is responsible for acts of commission and in consequence the plaintiff suffers harm from criminals, all the other objections to allowing recovery dissolve. In particular, where the law does not impose liability for particular omissions, it is hard to see why it should impose liability for positive conduct coupled with omissions where all other material considerations are the same.

124. Further, if the proposition that even though there might be no liability for pure non feasance there was liability for misfeasance by interfering with the existing system were sound, and if it were the only bar to relief in the *Modbury* case, the plaintiffs ought to have won that case. But they did not. Their case was that if the lights had been on at 10.30pm on 18 July 1993 when the male plaintiff approached his car, instead of being turned off at 10pm or perhaps earlier, his attackers would have been deterred from attacking him. The factual position was not that the landlord's system had always been to turn the lights off at 10pm. Rather it was described thus by Gleeson CJ at [6]:

> ``Before July 1992 the practice had been to leave the car park lights on until 11pm. This practice had ceased in July 1992, but in December 1992 the lights were left on until around 10.15pm for a few weeks over the holiday period, following a request by the co-manager of the video shop. In early 1993, the co-manager... made complaints to the appellant's representatives about the time at which the lights went off. From the beginning of 1993 until the attack on the first respondent in July 1993, the lights were not left on after 10pm.''

Allowing for the fact that in the *Modbury* case what was in issue was a system pursuant to which lighting automatically went off by reason of the operation of timing devices, while what is in issue in the present case is a physical locking system, these facts reveal a close parallel with the present case. Until July 1992 the system conformed to what, according to the plaintiffs in the *Modbury* case, the defendant's duty of care required and to what would have averted the injury. It then changed, more than once, but it never took a form which would have complied with the plaintiffs' contention as to the defendant's duty. If the difference between

the defendant in the Modbury case being liable and not liable turns on a difference between a failure to ensure that the lights were on and a positive act of changing the system with the result of the lighting being turned off earlier, the defendant ought to have lost. It was not the case that the defendant had simply failed to guard against the harm. At one stage it had guarded against the harm, but it engaged in positive conduct to change that so that thereafter it ceased to guard against the harm.

125. Though one strand in the reasoning in the *Modbury* case turns on the law's dislike of compelling positive conduct by defendants to prevent harm to plaintiffs, that was not a decisive part of the reasoning. The reasoning which caused the plaintiffs in the *Modbury* case to lose and which stands in the path of the plaintiff in this case is reasoning which applies as much to misfeasance as non feasance.

126. The matters mentioned in [109]-[116] indicate difficulties in the plaintiff's argument. See also *WD & HO Wills (Australia) Ltd* v *State Rail Authority of New South Wales* (1998) 43 NSWLR 338 at 355. However, it is not necessary to decide conclusively whether a duty of care was owed in relation to misfeasance, because it is possible to decide the misfeasance case on causation grounds, and reject it for the reasons given in [121]-[134] below. Since it is not necessary to decide whether a duty of care was owed in relation to misfeasance, it is desirable not to attempt to decide that difficult question.

United States authorities

127. There has been a significant degree of successful litigation in the United States of America brought against landlords in relation to injuries caused by criminals to tenants in apartments or in areas of tenanted buildings owned by the landlord; or brought by the owners of condominiums against the equivalent

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of the body corporate in relation to injuries caused to the owners either in their condominiums or on the common property. The test is reasonable foreseeability, and that may flow from knowledge of prior crimes, even if they are rather different from the crime sued on (eg *Sturbridge Partners Pty Ltd* v *Walker* 482 SE 2d 339 (1997)). See also *Kline* v *1500 Massachusetts Ave Apartment Corp* 439 F 2d 477 (1970); *O'Hara* v *Western Seven Trees Corporation Intercoast Management* 142 Cal Rptr 487 (1978); *Holley* v *Mt Zion Apartments Inc* 382 So 2d 98 (1980); and *Frances T* v *Village Green Owners Association* 723 P 2d 573 (1986). In the *Modbury* case, a case on the liability of a commercial landlord, Gleeson CJ referred to *Kline's* case, *Holley's* case and *Sturbridge's* case as authorities on the United States law; he declined to treat them as accurate statements of Australian law on the general question of an occupier's liability for third party criminal activities, which suggests that they are not to be treated as accurate statements of Australian law in the specific context with which they in the present case are concerned. The same follows from Callinan J's handling of the *Sturbridge* and *Holley* cases. Kirby J (dissenting) distinguished *Kline's* case and *Holley's* case by saying that the *Modbury* case ``was not a case about the liability of an absentee landlord responsible for common areas in an apartment or like building'': at [47]. In all the circumstances it is not open to this Court to apply the American authorities even if it considered them sound in principle.

Conclusion on duty

128. For the above reasons the trial judge erred in concluding that the defendants owed the plaintiff a duty of care to prevent harm to her from the assailant.

Breach

129. The defendants accepted that if there were a relevant duty, there was little that could be said for the proposition that it had not been breached. In fact nothing was said.

Causation

Misfeasance

130. If the duty breached was a duty not to deactivate the locking system without replacing it with an equally effective, but not necessarily more effective, security system, the plaintiff has not demonstrated that the harm she suffered would have been averted. That is because before 6 May 1993 the locking system was

ineffective and the door was often open, particularly, to Mr Islam's observation, late at night at the time when the plaintiff was injured.

Non feasance

131. If the duty breached was a duty to have a more effective security system in place by 9 September 1993 than that which existed before 6 May 1993, whether the breach of duty caused the plaintiff's loss depends on precisely what the unperformed duty required.

132. If the duty were merely to have a chimes system or an intercom, it is questionable whether this would have prevented the assailant from doing what he did. What the trial judge meant by the ``chimes'' system arose thus. One defect in the pre 6 May 1993 system was that if the door was kept locked all the time, it was inconvenient for occupants who had visitors, because persons outside the building could not contact particular units. ``This, however, could have been eliminated completely, at reasonable expense, by the installation of a radio- controlled chimes system for each unit where the cost for chimes locks and keys was in the vicinity of four hundred dollars for those six units.'' Another system of the same kind, though somewhat more expensive, was an intercom system: those who arrived at the front door could contact the occupants of the unit they desired to visit; if no response was received, in theory the visitor could not obtain entry.

133. Either a ``chimes'' system or an intercom system, coupled with a door that could only be opened from the outside by a person in possession of a key and from the inside by a unit occupant who triggered the opening of the door would prevent the type of entry which the plaintiff's assailant effected if he came through the disarmed front door, provided that any given occupant of a unit declined to let strangers into the building and let in only persons who desired to visit that particular occupant.

134. That theory assumes the following:

> (a) that no occupant would let in a visitor from outside unless that visitor advanced an incontestably sound justification for entry;
> (b) that no lawful visitor let in from outside would permit another person to enter at the same time;
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> (c) that no would-be assailant would attempt to accompany an intended victim into the building;
> (d) that no would-be assailant, seeing an intended victim entering the building, would abstain from breaking the glass door and gaining entry in that fashion;
> (e) that no would-be assailant desiring to rob someone moving towards the building late at night, would effectuate the robbery just outside the front door, or in the garage, or wherever else in the common property outside the door seemed convenient.

135. Even if assumption (a) is sound in many instances, it is not likely to be universally true. Assumption (b) is likely to be true in many, but fewer, instances: it is harder for a visitor gaining entry to prevent another person coming in than for a unit occupant to refuse entry to that other person. The occasions when assumptions (a) and (b) will not apply are likely to be daylight or early evening occasions, since persons without keys attempting to gain entry from unit holders late at night are not likely to be numerous, and if they lack sound justification, are not likely to succeed in their attempts. Assumptions (c)-(e) are much more likely to be falsified late at night: the chances of daylight attacks are lower than night time attacks because more people are likely to be about in the daytime than late at night. Each of assumptions (c), (d) and (e) is unlikely to be universally true, depending on the determination of the assailant and depending on his perception of the best way in the particular circumstances to effectuate his desires.

136. The person who attacked the plaintiff was professional and determined: he had already gained entry, he was disguised, he was equipped with a means of subduing victims (the cloth smelling of something like methylated spirits), and he was armed with a dangerous weapon.

137. Even if the door were locked, it is probable that the assailant would have waited outside in a dark place and attacked there, or adopt one of the other methods described above of achieving his goal. In the *Modbury* case at [152] Callinan J said:

``What strikes me as very likely, and at least as likely as the competing inference, is that the assailants, having brought their bat with them to commit an assault, would not take it home without first using it for that purpose, lighting or not. In short, in my opinion, the respondents' case should have failed on the issue of causation as well as the issue of duty of care.''

So here, the plaintiff's attacker, having brought his mask, cloth and knife to commit a robbery, would not have gone away without using them, locked door or no locked door, chimes or intercom or no chimes or intercom. The trial judge did not make findings excluding the possibility of an assailant finding some dark area in the garage or elsewhere on the premises or near them in which to wait until a victim came in sight. Nor was that possibility excluded by the evidence.

138. The plaintiff argued that breach of duty coupled with harm of the type that might flow from it was enough to justify an inference of causation, ``in the absence of any sufficient reason to the contrary'', in the words of Dixon J in *Betts* v *Whittingslowe* (1945) 71 CLR 637 at 649. The present discussion proceeds on the assumption that there was a breach of duty of the type described by the trial judge, and that the attack which occurred was of the kind which might flow from that breach. However, there are sufficient reasons to conclude that the breach did not cause the harm. Those reasons, in a nutshell, turn on the feeble nature of the measures prescribed by the trial judge when measured against the evident determination and skill of the assailant.

139. The plaintiff has not demonstrated that the measures which the trial judge held would satisfy the defendants' duty of care would, on the balance of probabilities, have prevented the attack.

140. One strand in the trial judge's reasoning on breach was that the defendants had a duty to give consideration to the interests of the occupiers and visitors so far as physical safety from attack by criminals was concerned and act on that consideration. The trial judge found that this duty of consideration and action was performed in part but not in whole. The defendants performed it by considering whether to install, and installing Vandalites and considering whether to maintain, and maintaining, outside lighting in reasonable condition. These measures inter alia served to deter criminals from waiting to attack persons on their way into the building. But according to the trial judge the defendants did not perform

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their duty of consideration in relation to the risk of an intruder unlawfully entering the building and attacking an occupant or other lawful visitor. They should have extended the consideration to the point of deciding upon the introduction of chimes or an intercom.

141. There is force in the view that if the defendants owed a duty of care, it required compliance with a duty of consideration entailing a general survey of security problems, perhaps with expert assistance, since security measures sufficient to overcome the skills of determined criminals are not necessarily obvious to lay people or to managers such as Mr Platt. There was no evidence of what an expert would have recommended or what a general survey would have suggested as desirable. However, in view of the determination and skill of the assailant, the wide range of potential victims, the wide range of interests of potential victims which might be damaged by an assailant, and the real possibility of damage being caused before the victim ever passed through the front door, it cannot be said that the plaintiff has shown on the balance of probabilities that compliance with a duty of consideration would exclude much wider safety measures than chimes or an intercom, and in particular that it would exclude security guards.

142. Further, if there was a duty to have carried out a survey of security measures resulting in the maintenance of a locked door together with chimes or an intercom, the duty would probably extend more widely. See *Jones* v *Bartlett* (2000) 205 CLR 166 at [15] and [19]. The duty of consideration and the survey of problems would include a search for other reasonably foreseeable risks of harm caused by criminals intruding into the building or criminals attacking persons near the building. Indeed, the trial judge appeared to accept that the duty extended as far as criminals operating near the building, because of his acceptance that the relevant duty was fulfilled by installing Vandalites and maintaining outside lighting. That appears to be why he said that if the criminal conduct had occurred outside the building there would probably be no claim against the defendants. That the duty of consideration extends to the position of the guests of occupiers

outside the building as well as occupiers flows from the trial judge's application of the duty to the guests of occupiers inside the building.

143. But why should the duty of consideration and expert survey stop there? If the defendants owed a duty of care to persons in the common areas who might be injured by assailants coming through the front door, why is there not a duty owed to persons in those areas who might be injured by assailants gaining entry through the units? The duty of consideration and expert survey would thus extend to an examination of windows, balconies, the doors to units, the area outside the front door, the drive, and the garage. If the standard of care required is to take measures which will prevent or substantially eliminate a risk of injury, guards at least at night time and probably all the time would be called for. That would call for considerable expenditure, and the level of that expenditure would make it unlikely that a failure to provide guards would be a breach of duty. In that event the breach of duty, and in particular the breach of duty found by the trial judge, would probably not have prevented the attack.

Conclusion

144. The appellants' criticisms of the trial judge's reasoning in relation to liability are sound and the appeal on liability should be allowed. That makes it unnecessary to consider the correctness of the appellants'challenges to the trial judge's reasoning on damages.

Orders

145. The following orders are proposed.

1. The appeal is allowed.
2. The orders of the trial judge are set aside.
3. Judgment is entered for the appellants.
4. The respondent is to pay the appellants'costs of the trial.
5. The respondent is to pay the appellants'costs of the appeal and is to have a certificate under the *Suitors Fund Act* 1951 if qualified.

Hodgson JA: I agree with the orders proposed by Heydon JA and with his reasons concerning the non feasance case. As regards the misfeasance case, I also would prefer to rest my decision on the question of causation.

147. In the light of the primary judge's acceptance of Mr. Islam's evidence that the front door was always unlocked on those occasions when he entered the premises about 11pm, being one week in four, a finding that, but for the appellants' interference with the

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front door lock, it would more probably than not have been locked on the night of the assault, would be an unreasonable finding. If the door had been locked on average as often as one night in two, it is improbable in the extreme that Mr. Islam would always have found it unlocked on one night in four or five.

148. Furthermore, even if the front door had been locked on that night, it is for reasons given by Heydon JA far from certain that this would have prevented the assault; and accordingly, in my opinion, a marginal preponderance of probability that the door would have been locked (even if this had been established) would not have been enough to establish on the balance of probabilities that, but for the interference with the lock, the assault would not have occurred.

149. Accordingly, the finding that the assault was relevantly caused by the interference with the lock was wrong and should be overturned.

150. If the evidence had established that an existing security system, on the balance of probabilities, had been consistently used and would have prevented the assault, the question would then have arisen whether removal of that system breached a duty to the respondent. I would prefer not to decide that question. I think it does raise different issues from the non feasance case. I think it also raises different issues from those decided in *Modbury*: although in one sense, the change from leaving lights on until 11pm to turning them off

at 10pm was a positive act, it can also be regarded as non feasance in not paying the extra cost of keeping the lights on for the additional hour.

CARRE v OWNERS CORPORATION

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(2003) NSW Conv R ¶90-119

Court citation: [2003] NSWSC 397

New South Wales Supreme Court

Judgment delivered 14 May 2003

Strata title — Real property — Strata title — Derivative claims by strata proprietors — Plaintiff sought damages in respect of air conditioning system serving her lot in strata plan — Air conditioning system constituted common property to strata plan — Whether plaintiff entitled to bring derivative action on behalf of owners corporation as exception to proper plaintiff rule — Corporations Act 2001 (Cth), Pt 2F.1A — District Court Rules 1973, Part 7 rule 8 — Strata Schemes Management Act 1996 (NSW), sec 11; 62 — Strata Schemes (Freehold Development) Act 1996 (NSW), sec 18; 21; 24; 25; 26; 27.

The plaintiff (``Ms Carre'') was the registered proprietor of a lot in a strata plan (``the strata plan'') which related to a residential flat building. The second defendant (``Mr Johnson'') and the third defendant (``Ms Johnson'') were the other two registered proprietors of the lots on the strata plan. The schedule of unit entitlements provided Mr and Ms Johnson an entitlement of 25 and Ms Carre an entitlement of 50. Ms Carre, Mr Johnson and Ms Johnson thus constituted the whole of the membership of the first defendant, the owners corporation (``the owners corporation'') of the strata plan for the purposes of sec 11 of the Strata Schemes Management Act 1996 (NSW).

Ms Carre commenced proceedings in the District Court of New South Wales seeking damages for alleged defects in the air conditioning system serving her lot (``the District Court proceedings''). Mr and Ms Johnson were joined as defendants to the District Court proceedings because they had developed the building the subject of the strata plan and had acted as vendors to Ms Carre. In that context, claims in contract, for negligent misstatement and under the Fair Trading Act were made against Mr and Ms Johnson. Subsequently in the District Court proceedings, Mr and Ms Johnson pleaded that the parts of the air conditioning system serving Ms Carre's lot formed part of the ``common property'' as defined by the Strata Schemes (Freehold Development) Act 1996 (NSW). Pursuant to sec 18 of the Strata Schemes (Freehold Development) Act, that common property was said to have vested in the owners corporation upon registration of the strata plan.

In response, Ms Carre convened a meeting of the owners corporation and sought to have passed a resolution providing that it consent to be joined as a co-plaintiff in the District Court proceedings. Because Mr and Ms Johnson both voted against that resolution, it was not

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carried. Subsequently, Ms Carre filed a motion in the District Court proceedings seeking an order that the owners corporation be joined as a defendant pursuant to Pt 7 r 8 of the District Court Rules 1973. That motion was opposed by Mr and Ms Johnson and it was dismissed. It was held that because no cause of action was pleaded against the owners corporation no joinder could be effected.

Ms Carre then commenced proceedings in the Supreme Court seeking a declaration that she was entitled to commence or continue the District Court proceedings in the name of the owners corporation against the named defendants. Such declaratory relief relied on two assumptions: that the ``proper plaintiff rule'', or rule in Foss v Harbottle (1843) 2 Hare 461, applied to the owners corporation created by the Strata Schemes Management Act; and, second, that the Court could grant relief that overcame the effect of that rule by allowing Ms Carre to pursue the claims in the District Court proceedings that she thought that the owners corporation had against the named defendants. On the assumption that the Court could grant such discretionary relief (essentially through the ``justice'' exception to the rule in Foss v Harbottle), Ms Carre contended that the particular circumstances of the case compelled the exercise of that discretion in her favour. In that context, she submitted that she was put to expense and loss and suffered inconvenience, discomfort and diminution in the value of her property because the air conditioning unit in question had been inoperative.

On behalf of Mr and Ms Johnson and the owners corporation it was submitted that, if the Court had discretion to grant the relief sought, that discretion should be exercised against Ms Carre. The main contention in this respect was that the proceedings were an abuse of process. This was said to arise because: Ms Carre was seeking to re-open a decision already made by the District Court; the relief sought would entail the imposition of a jurisdiction upon the District Court which it did not enjoy; and the District Court's dismissal of the motion gave rise to a form of issue estoppel or res judicata. It was also claimed that the defects asserted to exist in the air conditioning system were latent and therefore statute barred.

Held: granting the relief sought.

1. The claims Ms Carre considered the owners corporation to have in the District Court proceedings were maintainable only by the owners corporation, unless Ms Carre was recognised as having attained a position from which she could act for it or in its place. Without the active assent of the owners corporation, Ms Carre could be put into such a position only by court order.

2. It was clear from the Strata Schemes Management Act that the owners corporation was not the beneficial owner of any common property. Its ownership was always in a representative capacity which was identified by the Strata Schemes Management Act as that of ``agent'', with each of the lot proprietors, as the owners in equity of undivided interests as tenants in common, identified as having a ``beneficial interest''.

3. The claim for relief Ms Carre made would entail an exception to the rule in Foss v Harbottle to which the Court's comprehensive equitable jurisdiction extended.

4. The case was not likely to be one in which the owners corporation was shown to have suffered other than nominal or modest loss through any negligence or other legal wrong that attended the development and construction of the building and the air conditioning system servicing Ms Carre's lot.

5. In the circumstances of the integrated nature and functions of the air conditioning system, any real loss would only accrue to Ms Carre as that lot's registered proprietor. Ms Carre therefore had a special interest in the assertion by the owners corporation of rights of action it had in relation to defects in the common property.

6. Because the owners corporation, which occupied a representative position qua the common property held by it as ``agent'', had refused to act, the Court was able to exercise its general equitable jurisdiction to recognise and give effect to an equity in Ms Carre to sue in

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the District Court proceedings in the name of the owners corporation to the extent that that was necessary.

7. Although the District Court's limited equitable jurisdiction did not permit it to recognise and give effect to the exceptions to the proper plaintiff rule, the equitable jurisdiction of the Supreme Court could be invoked in an auxiliary fashion.

8. No question of issue estoppel or res judicata arose because the application was merely procedural and interlocutory in nature.

9. Any argument that the claims were time barred would most appropriately be pursued in the District Court.

10. Discretionary considerations therefore did not compel refusing the equitable relief Ms Carre sought.

11. If the owners corporation was to become a plaintiff in the District Court proceedings, it would be exposed to the possibility of an adverse costs order. Accordingly, relief was to be framed so as to require Ms Carre to indemnify the owners corporation against all costs and expenses of, and incidental to, its participation as plaintiff in the District Court proceedings.

[Headnote by the CCH CONVEYANCING EDITORS]

G Sirtes (instructed by Pricewaterhouse Coopers Legal) for the plaintiff.

R Butler (instructed by Esplins) for the defendant.

Before: Barrett J.

Full text of judgment below

Barrett J: In these proceedings, the registered proprietor of a lot in a strata plan claims a declaration that she is entitled to commence or continue certain District Court proceedings in the name of the relevant owners corporation constituted under s.11(1) of the *Strata Schemes Management Act* 1996.

2. The plaintiff, Ms Carre, and the second and third defendants, Mr Johnson and Ms Johnson (father and daughter), constitute the whole of the membership of the first defendant, Owners Corporation — Strata Plan 53020. The three individuals, together with two companies (Lipman Pty Limited and Positive Air Services Pty Limited), are also parties to proceedings in the District Court in which Ms Carre sues the other four. To avoid what might be confusing references to various defendants, it is desirable that I refer to all parties by their names, with Lipman Pty Limited abbreviated to ``Lipman'', and Positive Air Services Pty Limited to ``Positive Air''; and with Owners Corporation — Strata Plan 53020 referred to simply as ``the owners corporation''. Mr Johnson and Ms Johnson will sometimes be referred [to] as ``the Johnsons''.

3. Ms Carre, Mr Johnson and Ms Johnson are the respective registered proprietors of lots 3, 1 and 2 in Strata Plan 53020 which relates to a residential flat building on the waterfront at Cremorne Point. There are no other lots in the strata plan. The building consists of only three residential flats. According to the schedule of unit entitlements endorsed on the strata plan, the entitlement of each of lots 1 and 2 is 25 and the entitlement of lot 3 is 50. Under current ownership, therefore, the entitlements of the Johnsons together equal the entitlement of Ms Carre.

4. In July 2001, Ms Carre commenced proceedings in the District Court seeking damages in respect of alleged defects in the air conditioning system serving lot 3. She sued Mr Johnson as first defendant, Ms Johnson as second defendant, Lipman as third defendant and Positive Air as fourth defendant. The causes of action asserted against the Johnsons were referable to the fact that they developed the property by construction of the present building and strata subdivision and were the vendors of lot 3 to Ms Carre. Ms Carre alleged a duty of care in negligence on the part of the Johnsons as developers towards Ms Carre as a successor to the owner of the premises. In their capacity as vendors, the Johnsons were subjected to claims in contract, for negligent misstatement and under the *Fair Trading Act*. The claims against Lipman

arose from its having constructed the building and were claims in negligence. The claims against Positive Air were connected with design and installation work it did on the air conditioning system in the course of the construction of the building and work subsequently done at the

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request of Ms Carre once she had become the owner of lot 3. These were claims in negligence and, as to the subsequent work, also claims in contract. I should mention here that Ms Carre's purchase of lot 3 from the Johnsons was by contract dated 13 December 1996 and that completion took place on 3 February 1997, the strata plan having been registered in September 1996.

5. Several heads of damage were asserted by Ms Carre in her original statement of claim in the District Court proceedings. She claimed for the cost of rectification works, the payments she made for remedial works and inconvenience, discomfort, vexation and distress.

The role of the owners corporation is raised

6. On 26 November 2001, that is, four months after commencement of Ms Carre's District Court proceedings, the Johnsons filed an amended defence in which they pleaded for the first time that parts of the total air conditioning system serving Ms Carre's unit formed part of the ``common property'', as defined by the *Strata Schemes (Freehold Development) Act* 1996, in relation to the strata scheme. The implications of that added element of the Johnsons' defence were spelled out in a letter of 14 December 2001 from the Johnsons' solicitors to Ms Carre's solicitors:

> ``In summary, [the Johnsons] plead in paragraphs 42 to 45 of their Amended Defence that components of the subject air conditioning system became part of the common property (`System Common Property') on registration of the strata plan and, at the time of registration, vested in the Owners Corporation in accordance with the Development Act. Hence the person or entity with standing to take action in respect of the System Common Property is the Owners Corporation, not your client.''

This is a reflection of the operation of s.18 of the *Strata Schemes (Freehold Development) Act* by which common property vests in the relevant owners corporation upon registration of a strata plan.

7. Further correspondence between the solicitors established which parts of the overall air conditioning system are said by the Johnsons to constitute part of the common property. These are, for the most part, fans, vents, grilles and ducting in and above the ceiling of Ms Carre's unit, as well as certain pipes. Other components of the system (that is, items not identified by the Johnsons' solicitors as the subject of their clients' assertion as to common property) include compressors and other items of machinery. Both groups of components together make up the air conditioning system. Neither group, it seems, can operate in any meaningful way without the other. Furthermore, I understand it to be common ground that the air conditioning system in question — that is, the totality made up of the two groups of components — provides air conditioning exclusively to lot 3, there being a separate system (or separate systems) providing air conditioning to lot 1 and lot 2.

8. On 24 January 2002, Lipman filed a defence in the District Court in which it is said that Ms Carre lacked standing to commence proceedings against Lipman because the system comprises common property; also that, for that reason, Ms Carre suffered no damage. In subsequent correspondence, Lipman's solicitors said that claims for rectification of common property can only be pursued by the owners corporation and that any loss attributable to defective common property must be regarded as loss suffered by the owners corporation as distinct from Ms Carre.

The plaintiff's attempts to involve the owners corporation

9. From December 2001, Ms Carre made attempts to have convened a general meeting of the owners corporation. Such a meeting took place on 17 January 2003, having been requisitioned by Ms Carre for the purpose of considering and, if thought fit, passing the following resolution:

``That the Owners Corporation of Strata Plan 53020 consent to be joined as a co- plaintiff in District Court proceedings No 7626 of 2001, and that such consent be evidenced in writing.''

10. Ms Carre and Ms Johnson were present at the meeting, the latter in her own right and as proxy for Mr Johnson. In attendance were Ms Carre's husband and Mr Sachs as the strata manager. Mr Sachs acted as chairman. Ms Carre's husband spoke briefly to the motion which was then put to a vote. Ms Carre voted in favour. Ms Johnson, both for herself and for Mr Johnson, voted against. Mr Sachs declared the motion not carried — or, as the minutes subsequently put it:

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``The motion was put and NOT RESOLVED to be a co-plaintiff. (Two votes against one in favour.)''

11. On 30 January 2003, Ms Carre filed in the District Court proceedings a notice of motion by which she sought

(a) an order that the owners corporation be joined as a defendant pursuant to Part 7 rule 8 of the *District Court Rules* 1973; and
(b) leave to file an amended statement of claim in the form attached to the notice of motion.

12. The form of amended statement of claim added the owners corporation as fifth defendant and referred to and denied the allegations of the Johnsons and Lipman that part of the air conditioning system servicing unit 3 constitutes part of the common property. It then went on to allege that the Johnsons (or either of them) owed to the proprietors of lots in the strata plan (including, presumably, themselves) and to the owners corporation a duty of care with respect to the construction of the building as a whole, which duty was breached. The claims against the Johnsons as vendors of lot 3 remained in their original form. In relation to Lipman, there was added an allegation that it owed to the proprietors of lots in the strata plan and to the owners corporation a duty of care in relation to the carrying out of the work involved in the construction of the building, plus breach of that duty. A claim similar in concept against Positive Air was added in relation to the design and installation of the air conditioning system and the carrying out of subsequent remedial work. Ms Carre, as plaintiff, then claimed orders that damages be paid by the respective defendants to the proprietors of the lots ``and/ or'' the owners corporation.

13. The amended statement of claim also expanded the heads of claim, adding claims in respect of loss of opportunity of negotiating a purchase price commensurate with the true market value of the property in its defective state, diminution in the market value and the cost of relocation while rectification works were carried out.

14. Ms Carre's notice of motion came on for hearing before the District Court on 14 February 2003 and was dismissed. No transcript of the District Court proceedings has been tendered; nor has any copy of reasons for judgment. The following account is given in an affidavit of Ms Given, Ms Carre's solicitor:

``On 14 February 2003, I attended at the hearing of the plaintiff's Joinder Motion with Gregory Sirtes of counsel, who appeared on behalf of the plaintiff before his Honour Acting Justice Bowden of the District Court of New South Wales.

At the hearing of the Joinder Motion referred to in paragraph 14 above, the Joinder Motion was opposed by the Johnsons and Lipman and the Court dismissed the Joinder Motion with costs, on the basis that no cause of action was pleaded against the Owners Corporation and such joinder could not be effected under Part 7 Rule 8 of the *District Court Rules* 1973.''

15. Part 7 rule 8 of the *District Court Rules* is in virtually the same form as Part 8 rule 8 of the *Supreme Court Rules*. It reads as follows:

``(1) Where a person who is not a party to an action:

(a) ought to have been joined as a party, or
(b) is a person whose joinder as a party is necessary to ensure that all matters in dispute in the action may be effectually and completely determined and adjudicated upon, the Court, on application by him or by any party or of its own motion, may, on

terms, order that he be added as a party and make orders for the further conduct of the action.

(2) A person shall not be added as a plaintiff unless he has consented in writing to be so added."

16. In light of the approach taken in the form of amended statement of claim, it is, in one sense, understandable that the motion to join the owners corporation as a defendant should have been unsuccessful. No claim for relief against the owners corporation was included in the proposed amended statement of claim, its role in the proceedings being confined to that of what might best be described as a non-plaintiff recipient of damages sued for by Ms Carre. The owners corporation was, in truth and in substance, put forward by Ms Carre as effectively co-plaintiff so that the objection raised by the Johnsons and Lipton [sic] might be overcome. But joinder as a plaintiff would have required, under Part 7 rule 8(2), its active

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consent — which consent, of course, Ms Carre had failed to secure at the general meeting of the owners corporation held on 17 January 2003.

17. It should be noted at this point that the approach taken in the amended statement of claim was that traditionally regarded as appropriate when a derivative claim is advanced by a shareholder suing in reliance upon some claim vested in his or her company. Speaking of one such situation (where a minority shareholder sues in circumstances where the majority are attempting to appropriate property or advantages which belong to the company or to shareholders as a body), McPherson JA (with whom Williams JA and Wilson J agreed) said in *Metyor Inc* v *Queensland Electronic Switching Pty Ltd* (2002) 42 ACSR 398:

> ``Proceedings of that kind for fraud on the minority were required to be brought in representative form on behalf of all members and were contingent on the company being joined as a co-defendant, so that any judgment for relief or recovery that might be given would both bind and operate in favour of the company found to have been wronged: see *Spokes* v *Grosvenor Hotel Co Ltd* (1897) 1 QB 124; at 128-129. Otherwise the practical effect of the judgment would be to transfer property of the company to individual members and, to that extent, result in an unauthorised dividend or distribution of corporate assets to shareholders."

Relief sought by the plaintiff in this court

18. Having failed to persuade the District Court to allow her action to be reformulated in that way, Ms Carre's next move was to institute the present proceedings. The substantive sought by her statement of claim filed in this court on 4 March 2003 is:

> ``A declaration that the plaintiff is entitled to commence or continue proceedings in the name of the Owners Corporation of Strata Plan 53020 in proceedings number 7626 of 2001 in the District Court of New South Wales (Construction List), against the first to fourth defendants."

19. Implicit in Ms Carre's claim are two assumptions: first, that the ``proper plaintiff rule", or rule in *Foss* v *Harbottle* (1843) 2 Hare 461, applies to the species of corporation created by the *Strata Schemes Management Act*; and, second, that this court may grant relief that overcomes the effect of that rule in her District Court proceedings by allowing her to pursue the claims that she considers that corporation to have against the parties who are the defendants in those proceedings. I interpolate here, that, in view of s.11(2) of the *Strata Schemes Management Act*, it is clear that the statutory derivative action created by Part 2F.1A of the *Corporations Act* 2001 (Cth) is not available in this case.

Does the rule in Foss v Harbottle apply to an owners corporation?

20. The first of the assumptions to which I have referred as implicit in Ms Carre's claim is, in my view, well-founded. *Foss v Harbottle* itself concerned a company incorporated by statute, two members of which filed a bill against the directors and others charging them with a variety of fraudulent and illegal acts by which the company's property was wasted. The members sought orders that the defendants make good to the

company the losses complained of. A demurrer was upheld, the court answering adversely to the plaintiffs the question:

> ``... whether the facts alleged in this case justify a departure form [sic] the rule which, prima facie, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative."

21. This ``proper plaintiff rule" was said by the English Court of Appeal in *Prudential Assurance Co Ltd* v *Newman Industries Ltd (No 2)* (1982) Ch 204 to be based on

> ``... the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested."

22. In *Peninsular and Oriental Steam Navigation Co* v *Johnson* (1938) 60 CLR 189, Dixon J said (at p 223):

> ``The company itself is, prima facie, the proper plaintiff in an action to enforce rights vested, not in the shareholders, but in the company. An action cannot be maintained by a shareholder for the purpose of securing the enforcement of rights against others,
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> vested not in himself but in the company, unless, speaking broadly, the failure of the company itself to pursue its alleged rights is attributable to an attempt on the part of the directors to further some interest at the expense of the company's or to some other mala-fide, fraudulent or *ultra-vires* conduct on their part or on the part of members of the company in a position to exercise control (See per James L.J. in *Gray v. Lewis* (1873) 8 Ch App 1035, at p. 1050 and in *MacDougall v. Gardiner* [1875] 1 ChD 13, at p. 21, and per Lord Davey in *Burland v. Earle* [FN80])."

23. The capacity of a corporation, as a person distinct from its members, to sue and be sued in its corporate name is one of the central incidents of corporate status. That capacity must be taken to be possessed by an owners corporation created by s.11(1) of the *Strata Schemes Management Act*, given the explicit statement that it is ``a body corporate". At the same time, however, the occasions on which and circumstances in which the capacity may be exercised will be circumscribed by the provisions of the Act: *Humphries* v *The Proprietors ``Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597.

24. The application of the proper plaintiff rule in relation to the kind of body corporate created by analogous Queensland strata titles legislation was confirmed by Macrossan CJ and McPherson JA in *Dynevor Pty Ltd v The Proprietors Centrepoint Building Units Plan No 4327* (Unreported, QCA, 12 May 1995). Their Honours there said:

> ``In the area of company law the existence of an action to recover dispositions of corporate property that are ultra vires or otherwise improper, or to restrain an illegitimate exercise of corporate power that seeks to do so, is well established. It is available as one of the exceptions to the rule in *Foss* v *Harbottle* (1843) 2 Hare 461, that, apart from those exceptions, the corporation is the only competent plaintiff for redress in proceedings of that kind. See *Hawkesbury Development Co Ltd* v *Landmark Finance Pty Ltd* (1969) 92 WN (NSW) 199, 213. The exceptions permitting such actions to be brought are closely controlled. A suit to recover corporate property is considered as derivative, in the sense that, although instituted in the name of the plaintiff, it is regarded as brought for the benefit of the corporation, in whose favour any restitutionary relief to be granted must in the end be made. At the same time, a plaintiff employing this form of action must make out a title to do so as a member of the corporation whose claims or interests it is sought to protect.
>
> The defendant is the corporate creature of a statute, and the rule has been held to apply to statutory corporations capable of suing in their own names: *Hodgson* v *National Local and Government Officers Association* [1972] 1 WLR 130, 139. The principle underlying it is appropriate to the case of a corporation of this kind. For a wrong done to a corporation like the defendant, the body corporate is prima facie the only proper plaintiff in an action claiming to redress that wrong, unless the person claiming to sue in the corporate interest comes within one or more of the recognised exceptions to the rule. No such question arose in *Humphries* because it was the defendant body corporate itself that

relied on ultra vires in answer to the claim of the plaintiffs to enforce the agreement which was held by the High Court to be beyond power."

25. These observations apply with equal force to an owners corporation brought into existence and governed by the *Strata Schemes Management Act*. It follows that the claims Ms Carre considers the owners corporation for strata plan 53020 to have against the Johnsons, Lipman and Positive Air may be pursued in the District Court only by that owners corporation, unless Ms Carre is recognised as having attained a position from which she can act for it or in its place. Without the active assent of the owners corporation, Ms Carre can be put into such a position only by court order. She asserts an entitlement to such an order on the basis of an exception to the proper plaintiff rule.

Jurisdiction of this court to grant appropriate relief

26. That leads to a consideration of the second assumption implicit in Ms Carre's initiation of the present proceedings, namely, that this court is able to grant relief that will have the effect she desires in relation to the District Court proceedings. It is, to my mind, clear that the claim Ms Carre makes in this court is one to which the court's comprehensive equitable jurisdiction extends. She seeks to rely

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on an exception to the proper plaintiff rule. In doing so, she says that, in the particular circumstances, the rule operates to produce an injustice so that, in granting an order of the kind she claims, the court will, in the words of Lord Davey in *Burland* v *Earle* [1902] AC 83 at 93, ``give a remedy for a wrong which would otherwise escape redress''. Correction and avoidance of such injustices are the province of equity. The role of courts of equity in the present context was referred to by Browne- Wilkinson LJ in *Nurcombe* v *Nurcombe* [1984] BCLC 557 at 565:

> ``Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company's claim. The case is analogous to that in which equity permits a beneficiary under a trust to sue as plaintiff to enforce a legal right vested in trustees (which right the trustees will not themselves enforce), the trustees being joined as defendants. Since the bringing of such an action requires the exercise of the equitable jurisdiction of the court on the grounds that the interests of justice require it, the court will not allow such an action to be used in an inequitable manner so as to produce an injustice.''

27. It is thus clear that, in these proceedings, Ms Carre seeks to invoke general equitable jurisdiction. The District Court's limited and specific equitable jurisdiction is created by express statutory prescription the boundaries of which are not always easy to identify: see *Commonwealth Bank of Australia* v *Hadfield* (2001) 53 NSWLR 614. It is not necessary to decide whether the present claim falls within that jurisdiction. It is not clear whether the issue of equitable jurisdiction and the power of the District Court to make, on equitable grounds, the orders unsuccessfully sought by Ms Carre was debated when her notice of motion was before the District Court on 14 February 2003. The limited evidence available suggests that it was not and that the matter was approached solely by reference to the District Court Rules. It is, I think, safe to assume that the District Court did not consider itself to have any relevant jurisdiction in relation to the subject matter of the notice of motion over and above that arising from Part 7 rule 8, so that any assertion that the claim could have been (or should now be) pursued there rather than here cannot confidently be made. It is therefore appropriate that I proceed to the merits of the claim.

28. At this point, I pause to examine more closely the scheme of the strata titles legislation. I have already mentioned s.11(1) of the *Strata Schemes Management Act* which causes the owners of the lots from time to time in a strata scheme to constitute a body corporate and s.18(1) of the *Strata Schemes (Freehold Development) Act* which causes common property in a strata plan to vest in the body corporate upon the registration of the plan. I have not, however, referred to the way in which an owners corporation holds common property. In a case such as the present, where different persons are the proprietors of lots, the estate or interest in common property vested in the owners corporation is held by it ``as agent... for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots'':

s.20(b). Each such proprietor accordingly has what s.24(2) calls a ``beneficial interest'' in the estate or interest of the owners corporation in the common property. The statute seems clearly enough to proceed on the footing that each proprietor of a lot is to be regarded as the equitable owner of an undivided interest as one of several tenants in common in the estate or interest of which the owners corporation is the legal owner. Section 21 renders common property incapable of being dealt with except in accordance with the Act. Section 24(2) makes a lot proprietor's beneficial interest in the estate or interest in common property held by the owners corporation incapable of being ``severed from, or dealt with except in conjunction with, the lot''. The owners corporation has a limited power to deal with common property in certain ways pursuant to a ``special resolution'' passed at a general meeting of the owners corporation, but only in the circumstances expressly provided: see ss.25, 26 and 27. Under s.62 of the *Strata Schemes Management Act*, an owners corporation is obliged to maintain common property, to keep it in repair and to renew or replace ``any fixtures or fittings comprised in the common property''.

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29. It is clear from this statutory scheme that an owners corporation is in no sense the beneficial owner of common property. Its ownership is always in a representative capacity identified by the Act as that of ``agent'', with the lot proprietors, as the owners in equity of undivided interests as tenants in common, each identified as having a ``beneficial interest''. The restrictions upon alienation and other dealings and the provisions with respect to repair, renewal and replacement proceed on the assumption that common property exists for the benefit of the lot proprietors as a general body. While the legislation makes provision for a particular lot proprietor to be granted special rights in relation to common property, there is no suggestion in the present case that Ms Carre has been granted any such rights in respect to so much of the common property as is said to form part of the air conditioning system serving her lot. As was observed in *Houghton* v *Immer (No 55) Pty Ltd* (1997) 44 NSWLR 46 by Handley JA (with whom Mason P and Beazley JA concurred), a provision that vests common property in an owners corporation as ``agent'' for lot proprietors makes the proprietors equitable tenants in common.

30. It is also relevant to look at the way in which an owners corporation is structured. Its members are the ``owners'' from time to time of the lots in the strata scheme. This, as already noticed, is the effect of s.11(1) of the *Strata Schemes Management Act*. Having regard to the definition of ``owner'', the persons who are the members, in the case of a freehold scheme such as this, are the registered proprietors of the lots unless, in the case of a particular lot, some other person is recorded in the strata roll pursuant to s.98. Under clause 18 of Schedule 2, voting at general meetings of an owners corporation is on the basis that, in general, each person voting has one vote for each lot in respect of which the person is entitled to vote; but if a poll is demanded or the legislation requires a special resolution, the voting power of a person entitled to vote in respect of a particular lot is the unit entitlement of that lot.

The ``justice'' exception to the rule in Foss v Harbottle

31. I proceed now to the question whether the present case is one in which a departure from the proper plaintiff rule should be allowed. Mr Sirtes of counsel, who appeared for Ms Carre, did not seek to bring the present case within any of the four uncontroversial exceptions to the proper plaintiff rule, being (as described at p.732 of Meagher Gummow & Lehane's ``Equity Doctrines & Remedies'' (4th edition, 2002, by Meagher, Heydon and Leeming):

> ``(a) actions where the plaintiff alleges that the company is acting, or is about to act, ultra vires; (b) actions where the act in question would only be valid if passed by more than a simple majority vote of shareholders, and it has not been so passed; (c) where the plaintiff complains that his personal rights have been infringed; (d) where the directors are exercising their powers as a fraud on the minority.''

32. Mr Sirtes' contention is, rather, that the case is within a fifth exception described by the same authors as:

> ``(e) in any other case where justice requires it.''

33. Mr Butler of counsel for the Johnsons conceded the existence of this fifth — or ``justice'' — exception but submitted that it must be regarded as narrow; indeed, too narrow to cover the present case.

34. It is, in my opinion, too late to argue the non-existence of the ``justice'' exception. The proper plaintiff rule has never applied rigidly. In *Foss v Harbottle* itself, Sir James Wigram V- C contemplated that:

> ``[i]f a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators... the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.''

In *Russell* v *Wakefield Waterworks Co* (1875) LR 5 Eq 474, Sir George Jessel MR referred to the proper plaintiff rule and said:

> ``But that is not a universal rule; that is, it is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case; that is, the necessity for the Court doing justice.''

35. In a real sense, therefore, there is only one exception to the proper plaintiff rule, being a comprehensive ``justice'' exception. This has always been recognised and the four specifically defined classes of exception traditionally referred to are but particular examples of it. It is nevertheless necessary to

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consider the cases from which an exception beyond the established four may be seen to have been recognised.

36. In *Biala Pty Ltd* v *Mallina Holdings Ltd* (1993) 13 WAR 11, Ipp J [reviewed the then state of Australian judicial statements on the question of the existence of a fifth ``justice'' exception. I quote as follows from his Honour's judgment at p.69 and following:

> ``In this State Malcolm CJ has indicated views contrary to the existence of the fifth exception. In *Eromanga Hydrocarbons NL v Australis Mining NL* (1988) 13 ACLR 804; 14 ACLR 486; the learned Chief Justice said at 910: `In my opinion, in the present circumstances, I am not persuaded that the fifth exception ought to be recognised as having been established.'
>
> Again, however, the mode of expression employed by the learned Chief Justice (and in particular the reference to not `being persuaded' in `the present circumstances') does not, with respect, suggest a firm and final view.
>
> In *Scarel Pty Ltd* v *City Loan and Credit Corporation Pty Ltd (No 2)* (1988) 12 ACLR 730; 6 ACLC 219 Gummow J reviewed many of the authorities on this issue without coming to a firm conclusion. One of the cases which he mentioned was *Campbell* v *Kitchen & Sons Ltd and Brisbane Soap Company Ltd* (1910) 12 CLR 515. He discussed it in the following terms:
>
> > `In that case, half of the shares of company B were owned by company A or its nominees. Company A brought an action against company B and recovered judgment in its favour. The directors of company B were equally divided in opinion on the question of whether an appeal should be brought to the High Court. The other half of the shares in company B were held by C or his nominees. In the High Court, leave was given to C to appeal on behalf of himself and all other members of the company B, Griffith CJ saying (at p 514):
> >
> > > ``Under these circumstances there must be some remedy, and I think we ought to apply the analogy of the practice of the Court of Chancery, which is now adopted by the Supreme Court of Judicature, and give leave to some person who is substantially interested to come in and institute the appeal.''
> >
> > Counsel had cited *Foss v Harbottle* and such decisions as *Burland v Earle* [1902] AC 83. The case does not appear to fall clearly within any of the four recognised exceptions to the rule in *Foss v Harbottle*.'
>
> In *Hawkesbury Development Company Ltd v Landmark Finance Pty Ltd* [1969] 2 NSWR 782 Street J discussed the issue at 789 and said:
>
> > `It is, perhaps, a useful door to be left open lest in some extremely unusual circumstances injustice would result from applying the rule. No exhaustive or even descriptive statement

> of such circumstances has been propounded... It is the absence of definition or example of such exception that, no doubt, underlies such observations as are to be found to the effect that there is in truth no admissible ground for further exception. It would, however, be regrettable if the difficulty of foreseeing a possible need for allowing any further exception were to be elevated to an anticipatory refusal to recognise any future case as being justly treated as an exception.
> For the purposes of the present judgment I am prepared to accept the existence of a further exception to the rule in *Foss v Harbottle* where justice so requires.'

I note that the learned authors of *Equity, Doctrine and Remedies* 3rd ed Meagher, Gummow and Lehane at paras 21-30 accept that apart from the four recognised exceptions to the rule in *Foss v Harbottle* there is a further exception `in any other case where justice requires it'."

37. Ipp J continued:

``In coming to a conclusion on this particularly difficult question I have been particularly persuaded by the sentiments expressed by Sir Robert Megarry V-C in *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2 at 11-12 where he said:

> `Plainly there must be some limit to the power of the majority to pass resolutions which they believe to be in the best interests of the company and yet remain
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> immune from interference by the courts. It may be in the best interests of the company to deprive the minority of some of their rights or some of their property, yet I do not think that this gives the majority an unrestricted right to do this, however unjust it may be, and however much it may harm shareholders whose rights as a class differ from those of the majority. If a case falls within one of the exceptions from *Foss v Harbottle* I cannot see why the right of the minority to sue under that exception should be taken away from them merely because the majority of the company reasonably believe it to be in the best interests of the company that this should be done. This is particularly so if the exception from the rule falls under the rubric of ``fraud on a minority".'

Although Sir Robert Megarry made express reference to `fraud on a minority', his views equally justify the existence of a fifth exception so as to protect minority shareholders in those rare cases where they are unable to bring themselves within the recognised exceptions and where a serious injustice would arise if they were precluded from pursuing a derivative action.

I take into account further that as Gummow J said in *Scarel Pty Ltd v City Loan and Credit Corporation Pty Ltd (No 2)* at 223:

> `(T)he rule in *Foss v Harbottle* and its exceptions have generally been considered part of the powers and procedures of modern courts of equity...'

Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well recognised exceptions and to deny jurisdiction to a court of equity even where an unjust or unconscionable result may otherwise ensue."

38. His Honour upheld the plaintiffs' argument ``that the court may allow a derivative action by shareholders in circumstances whenever the justice of the case so requires". He then went on to consider the particular case the facts of which were not analogous with those before me. In *Mesenberg* v *Cord Industrial Recruiters Pty Ltd* (1996) 39 NSWLR 128, Young J referred to *Hawkesbury Development Co Ltd* v *Landmark Finance Pty Ltd* (1969) 92 WN (NSW) 199 and *Scarel Pty Ltd* v *City Loan & Credit Corp Pty Ltd* (1988) 17 FCR 344 (mentioned by Ipp J) and expressed the opinion that the law of Western Australia expressed in *Biala* ``appears to be the same as the law of New South Wales as tentatively accepted by Street J in the *Hawkesbury Development* case". In *Cadwallader* v *Bajco Pty Ltd* ((2001) 189 ALR 270), Austin J said:

``... although the matter is still open to some doubt at appellate level, *Mesenberg's* case is authority for the proposition that the fifth exception is part of the law of New South Wales, and I am happy to adopt his Honour's analysis of the cases..."

Austin J held that the fifth exception was applicable to the case before him, a conclusion that was apparently not challenged upon the subsequent appeal and cross-appeal: see *Cadwallader* v *Bajco Pty Ltd* (2002) NSWCA 328.

39. Reference must also be made to the decision of the High Court in *Campbell* v *Kitchen & Sons Ltd and Brisbane Soap Co Ltd* (1910) 12 CLR 513. The judgment of Griffith CJ (in which O'Connor, Isaacs and Higgins JJ concurred) may be quoted in full:

``This is a case in which judgment was given in the Supreme Court of Queensland in an action between parties involving an amount over £300. This Court has jurisdiction to entertain an appeal from that judgment, but, owing to the curious circumstances of the case, it cannot be instituted because those who would be respondents have an equal voice in the company which would be appellants. Under these circumstances there must be some remedy, and I think we ought to apply the analogy of the practice of the Court of Chancery, which is now adopted by the Supreme Court of Judicature, and give leave to some person who is substantially interested to come in and institute the appeal. I therefore think that leave should be given to the applicant to appeal from the judgment on behalf of himself and all other members of the defendant company. Of course the defendant company must be made a respondent. If the judgment is to be

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regarded as being interlocutory, the leave we now give will cover that also."

40. One of the important themes running through the cases in this area is the reluctance of the courts to interfere in a situation that is capable of being resolved by an appropriate resolution of the members of a company. Where an individual shareholder seeks to assert a claim of the company in relation to some supposed cause of action and the company declines to proceed, the court will be reluctant to assist or to play any role at all unless and until it is seen that the matter cannot be resolved by a resolution of shareholders. The rationale was explained thus by Lawrence Collins J in *Konamaneni* v *Rolls Royce (India) Ltd* (2002) 1 WLR 1269 at 1277-1278:

``Where what has been done amounts to a fraud and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that if they were denied that right, their grievance would never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue: *Edwards v Halliwell* [1950] 2 All ER 1064, 1067; the *Prudential Assurance Co Ltd* case [1982] Ch 204, 211. As Browne-Wilkinson LJ said in *Nurcombe v Nurcombe* [1985] 1 WLR 370, 378:

> `Since the wrong complained of is a wrong to the company, not to the shareholder, in the ordinary way the only competent plaintiff in an action to redress the wrong would be the company itself. But, where such a technicality would lead to manifest injustice, the courts of equity permitted a person interested to bring an action to enforce the company's claim.'"

Particular circumstances of this case

41. Many of the cases about the rule in *Foss v Harbottle* concentrate on wrongs done (or possibly done) by directors. Others (of which *Johnson v Gore Wood & Co* [2002] 2 AC 1 is an example) are concerned with distinctions between wrongs suffered by the company which reflect in diminution in share value and wrongs suffered by shareholders, whether directly or less directly because of impacts on the value of shares held by them. Particular features of the present circumstances make much of the thinking in those cases of limited relevance. In the first place, although the owners corporation is made up of persons who are regarded as its members, the present case does not involve any decision of a body or organ analogous to a board of directors. In relation to the relevant matters, the members alone are the decision-makers for the corporation. Second, the subject matter in issue in the District Court proceedings, being the air conditioning unit serving

lot 3, is, regardless of the technicalities of ownership of the various components that make up the whole, intended to be enjoyed solely by whichever member of the corporation is for the time being the proprietor of lot 3. The unit as a whole and any parts of it included in the common property are irrelevant to the enjoyment by other lot proprietors of the rights they have as participants in the strata scheme.

42. If the air conditioning unit is faulty and inoperative, the corporation suffers no direct inconvenience although, to the extent that repairs may be needed in relation to any system components vested in it as common property, the corporation may incur a liability to effect repair, renewal or replacement under s.62 of the *Strata Schemes Management Act* — I say ``may'' because of the possibility that the particular components that are common property might, in a physical sense and when separately examined in their own right, be found to be perfectly sound even though they do not interact with the other components owned by the lot proprietor in such a way as to function as a fully operating air conditioning system. Importantly, any diminution in value suffered by reason of the system's being inoperative is diminution in the value of lot 3, not diminution in value of the common property.

43.

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The absence of acts of persons analogous with the directors of a company means that fiduciary duties are unlikely to be at work in a case such as the present. Members of the body corporate, being proprietors of lots, are not, in any obvious sense, charged with a duty to be attentive to the interests of a body of persons whose welfare is placed in their hands except as the statutes expressly require. Such members are, in a sense, co-venturers but, unlike partners and joint venturers (cf *United Dominions Corporation Ltd* v *Brien Pty Ltd* (1985) 157), they have not chosen to come together in order to pursue some common interest. The only bond between them is ownership of parts of a building. None chooses to become a member of the corporation because of its nature, its activities or the attributes of the other members. Membership is merely a statutory and compulsory by-product of a decision to acquire particular real property.

[140364]

44. In these special circumstances (and where the owners corporation occupies, in relation to the relevant property, the purely representative position for which the strata titles legislation makes provision), analogies drawn from company law cases are limited and must be approached with care. Rather than attempting to fit the circumstances within (or to scrutinise them against) company law precedents, the court should deal with their own special reality.

45. Ms Carre says that she was put to expense and loss and suffered inconvenience, discomfort and diminution in the value of her property while the air conditioning unit in question was inoperative. She alleges that responsibility for its defective condition, in the form of legal liability, should be laid at the feet of the Johnsons, Lipman and Positive or some one or more of them. Her attempt to sheet home that perceived liability through proceedings in the District Court suffered a setback when first the Johnsons and then Lipman said that she is not technically the owner of some parts of the system and that her proceedings must fail unless the owners corporation becomes a party to the action and asserts its own claims in parallel with hers. She attempted to achieve that result by repleading her case and making the owners corporation a defendant so that she might assert the parallel claims on its behalf. That attempt failed. The full reasons are not known, but it should, I think, be inferred that the District Court was unwilling to accommodate or grant the form of equitable relief entailed in allowing proceedings to be reformulated in the way traditionally employed to recognise an exception to the proper plaintiff rule. Ms Carre then sought directly a decision, by resolution of its members, that the owners corporation should become a co-plaintiff. That decision was not forthcoming because the Johnsons, being persons the owners corporation would sue, decide that the owners corporation should not be allowed to initiate claims against them. They were in a position where they could decide conclusively whether or not someone else would sue them. Not surprisingly, their decision was against that person's making them the subject of an attack through litigation.

46. The case is not, it seems to me, likely to be one in which the owners corporation is shown to have suffered other than nominal or modest loss through any negligence or other legal wrong that attended the development and construction of the building and the air conditioning system servicing lot 3 or the design and installation of that air conditioning system. And to the extent that the owners corporation may be shown

to have suffered loss, that loss will have been incurred by it in the representative capacity that is the only capacity it has in relation to common property. The real loss attributable to any such wrong done in relation to common property will, in the circumstances of the integrated nature and functions of the air conditioning system, accrue to Ms Carre as the proprietor of lot 3.

47.

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In these circumstances, there is to my mind, some analogy to be drawn with the case where a trustee holds trust property for the benefit of a cestui que trust but will not take action to protect that property. According to s.24(2) of the *Strata Schemes (Freehold Development) Act*, Ms Carre has a beneficial interest in the common property vested in the owners corporation, including such of it as consists of components of the air conditioning system servicing lot 3. Each of Mr Johnson and Ms Johnson also has a beneficial interest in the common property although in circumstances where, as I have said, those components are useful only to Ms Carre as the proprietor of lot 3. Ms Carre therefore has a special interest in the assertion by the owners corporation of rights of action it may have in relation to defects in the common property. The owners corporation, by the votes of the Johnsons (two of the persons against whom the rights of action on the part of the owners corporation are seen as lying), has declined to become party to the proceedings in which the rights of action will be asserted in company with the parallel right vested in Ms Carre alone. The owners corporation, which occupies a representative position qua the common property held by it as ``agent'', has refused to act. The following passage in the judgment of Sir WM James in *Sharpe* v *San Paulo Railway Co* (1873) LR 8 therefore becomes relevant:

> ``Is it to be permitted that every one of the persons who has an interest in a thing assigned to a trustee... should file a distinct bill in a distinct branch of this Court against the debtors to the estate? I had lately occasion to consider that question, and I came to the conclusion, very clearly, that a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the *cestui que trust* was to file his bill against the trustee for the execution of the trust, or for the realization of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this Court. That view I still adhere to, and I say it would be monstrous to hold that wherever there is a fund payable to trustees for the purpose of distribution amongst a great number of persons, every one of those persons could file a separate bill in equity, merely on the allegation that the trustee would not sue.''

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48. In *Ramage* v *Waclaw* (1988) 12 NSWLR 84, Powell J surveyed the cases in which courts of equity have recognised special circumstances allowing a beneficiary to sue in his own name in equity or in the trustee's name at law when the trustee fails to institute proceedings. One such case is where ``the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners'': *Travis v Milne*; *Milne* v *Milne* (1851) 9 Hare 141. In the present case, it is the relation between the Johnsons and the owners corporation, represented by their majority voting power, that has presented a substantial impediment to the prosecution by the owners corporation of the rights of the lot proprietors interested in the common property against the Johnsons and others.

Relief warranted unless discretionary considerations otherwise indicate

49. My conclusion on the special and unusual facts of this case is that, subject to anything to the contrary arising from the considerations of a discretionary kind referred to by Mr Butler in opposing the grant of the relief sought by Ms Carre (which I shall consider presently), this court should, in the exercise of its general equitable jurisdiction, recognise and give effect to an equity of Ms Carre to sue in the District Court in the name of the owners corporation to the extent that it is necessary for the owners corporation to be joined as a plaintiff to permit the claims that Ms Carre wishes to prosecute in relation to the air conditioning unit serving lot 3 alone to be fully and effectively constituted through presence of the owners corporation as a party and

assertion of such like claims as it may have in relation to that air conditioning system. Such orders will, in my judgment, be justified on the basis of the fifth ``justice'' exception to the rule in *Foss v Harbottle* and by reference to the principles I have just mentioned relevant to actions by a beneficiary in the name of his or her trustee, assuming always that none of the discretionary disqualifying factors asserted on behalf of the Johnsons is found to operate. It is to those factors that I now turn.

Submissions on discretionary considerations

50. Mr Butler's first submission is that Ms Carre's present application is an abuse of process because it does no more than to seek to re-open a decision already made by the District Court. For reasons I have given, the District Court, on the evidence before me, was apparently not invited to exercise the equitable jurisdiction that is involved in a claim to pursue a derivative action; nor is it clear that it possesses that jurisdiction. In those circumstances, the principle that might cause a subsequent application which is effectively a re- run of an earlier unsuccessful one to be regarded as an abuse of process cannot be applicable here, even if such a principle exists: see Nominal *Defendant* v *Manning* (2000) 50 NSWLR 139.

51. As part of the abuse of process submission, it was said on behalf of the Johnsons:

> ``[I]f the plaintiff's contention is that the District Court does not have jurisdiction to hear a derivative action then the declaration sought in the summons is nonsensical: the
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> Supreme Court cannot make a declaration that the plaintiff be allowed to commence proceedings in the District Court, if the District Court does not have jurisdiction.''

52. The plaintiff's contention is not, as I understand it, that the District Court does not have jurisdiction to hear a derivative action. It is, rather, that the District Court's limited equitable jurisdiction does not permit it to recognise and give effect to the exceptions to the proper plaintiff rule. That does not mean that that rule must be left to apply immutably and inflexibly in District Court actions; merely that, if advantage is to be taken of an exception and grounds can be shown, the equitable jurisdiction of this court must be invoked in an auxiliary fashion.

53. An alternative version of the abuse of process submission was based on the existence within the strata titles legislation of dispute resolution mechanisms which ultimately devolve upon the Consumer, Trader and Tenancy Tribunal. I must confess that I cannot see how this is so. Mr Butler did not take me through the relevant provisions of the legislation. These provisions are in Chapter 5 of the *Strata Schemes Management Act*. The most the provisions could achieve, it seems to me, is to impose some regime upon lot owners and a body corporate in relation to matters relevant to functions in relation to the strata scheme or the operation, administration or management of the scheme. No submission has been made which identifies how any such regime would or could achieve the results Ms Carre seeks in relation to the District Court proceedings.

54. It was also submitted on behalf of the Johnsons that the dismissal of Ms Carre's notice of motion in the District Court gave rise to some form of issue estoppel or res judicata. This seems to me to overlook the reality that the application was merely procedural and, as I have said, there is no reason why one interlocutory application, if unsuccessful, should not be followed by another — although successive applications obviously entail increased risk of an adverse exercise of judicial discretion.

55. Mr Butler next says that the relief Ms Carre seeks from this court should be refused because the claims she wishes to have the owners corporation pursue are statute barred. Mr Sirtes makes several points in response. He says that any such argument might be met by an assertion that any defect was a latent defect not discovered until late 1997. Also, the claims against the builder (Lipman) is a claim in tort (presumably on the basis of *Bryan* v *Maloney* (1995) 182 CLR 609) so that the cause of action does not arise until damage has been suffered: *Christopoulos* v *Angelos* (1996) 41 NSWLR 700. Determining the start of a limitation period is, in any event, a fact driven exercise and, as Mr Sirtes submitted, this court is not really in a position to make relevant findings of fact in the present proceedings. Any argument that the claims by the owners corporation were time barred would most appropriately be pursued in the District Court.

56. The matters advanced on behalf of the Johnsons provide no basis on which the court's discretion should be exercised against the grant of relief to the effect Ms Carre seeks.

Form of relief

57. It remains to consider the form of relief. If the proceedings in question were proceedings in this court, the appropriate course would be as described in *Metyor Inc v Queensland Electronic Switching Pty Ltd* (above): Ms Carre would be required to join the owners corporation as a defendant so that it would be bound by and have the benefit of any judgment obtained through efforts made by Ms Carre on its behalf. The same approach was referred to by Griffith CJ in *Campbell's* case (above): ``Of course, the defendant company must be made a respondent''.

58. Here, however, it has already been determined by the District Court that, having regard to the *District Court Rules*, the owners corporation may not be made a defendant in connection with moves by Ms Carre to advance claims on its behalf. Furthermore, joinder of the owners corporation as a plaintiff without its written consent would be contrary to the *District Court Rules*. This court will not make orders that cannot be implemented consistently with the *District Court Rules*. The relief it grants to vindicate Ms Carre's equity to set the owners corporation in motion must therefore be framed in a way that causes the owners corporation to become a plaintiff, rather than a defendant; moreover this must be done in a way that conforms with the requirement of the *District Court Rules* as to written consent.

59. If the owners corporation becomes a plaintiff in the District Court proceedings, it will be exposed to the possibility of an adverse

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costs order. Measures to counter that are necessary. The likelihood is that, if Ms Carre is successful in the District Court, it will be she rather than the owners corporation that reaps the whole (or substantially the whole) of the resultant benefit and reward. As the price of having the owners corporation added as a co-plaintiff, she should indemnify the owners corporation against all costs and expenses of and incidental to its participation as plaintiff including, but not limited to, costs ordered to be paid in the District Court proceedings by the owners corporation. The possibility that the owners corporation might, in the fullness of time, derive some separate benefit from the District Court proceedings warranting some contribution by it to costs thus cast upon Ms Carre may be accommodated by liberty to apply in these proceedings.

Orders

60. The orders I consider appropriate are as follows:

1. Order that the first defendant execute and deliver to the plaintiff a consent in writing to be added as a plaintiff in District Court proceedings 7626 of 2001, such consent being pursuant to Part 7 rule 8(2) of the *District Court Rules*.
2. Order that the plaintiff be at liberty

(a) to apply to the District Court for an order that the first defendant be added as a plaintiff in District Court proceedings 7626 of 2001;
(b) to tender in support of that application the consent in writing executed and delivered in accordance with order 1; and
(c) to prosecute on behalf of the first defendant as a plaintiff in District Court proceedings 7626 of 2001 claims by the first defendant substantially as set out in the form of amended ordinary statement of claim which is the annexure ``A'' to the plaintiff's notice of motion filed in the District Court proceedings on 30 January 2003.

3. Order that the second and third defendants consent to the making by the District Court of any order for joinder applied for by the plaintiff in exercise of the liberty granted by order 2(a).
4. Order that, if the plaintiff exercises the liberty granted by order 2, the plaintiff shall, except to the extent (if any) that the court hereafter otherwise orders, indemnify and hold harmless the first defendant from and against (and promptly pay and discharge for the first defendant) all such costs and expenses [th] at shall be incurred by the first defendant (or to which it shall be subjected) by

reason of its being a party to District Court proceedings 7626 of 2001 including but not limited to any and all costs ordered by the District Court to be paid by the first defendant.

5. Grant to the plaintiff liberty to apply to the Duty Judge in the Equity Division on fourteen days notice for any order of the kind referred to in order 4.

61. The first defendant (owners corporation) did not file a defence in these proceedings. The second and third defendants (the Johnsons) did file a defence and were represented by Mr Butler in opposing the grant of the relief sought. The orders I have enunciated, although not in the form sought in the plaintiff's statement of claim filed on 4 March 2003, achieve for her in substance the position sought. The plaintiff is therefore entitled to costs against the second and third defendants. The statement of claim seeks costs on the indemnity basis but, having regard to the novelty of the application and the issues involved, I am not at all persuaded that the resistance of the second and third defendants was so devoid of merit that such an order is warranted. The order will be that the second and third defendants pay the plaintiff's costs on the party and party basis.

PARKER v BRAVO BUILDING

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(2003) NSW Conv R ¶90-120

Court citation: [2003] NSWSC 451

New South Wales Supreme Court

Judgment delivered 28 May 2003

Strata title — Real property — Contracts — Variation of contracts relating to interest in land — Specific performance — Plaintiff entered into contract to purchase strata unit from defendant — Performance of contract conditional upon defendant completing certain work and finishes — Whether contract orally varied in respect of work required to be completed — Whether finishes installed by defendant of equivalent or greater quality to those specified in contract — Whether defendant entitled to terminate contract — Whether plaintiff entitled to specific performance.

The plaintiff (``Mr Parker'') entered into a contract (``the contract'') to purchase from the defendant (``Bravo'') a strata title property (``the property'') which Bravo was to construct. Pursuant to the contract, the vendor was obliged to obtain registration of the strata plan to which the property pertained. By clause 7 of the contract, Mr Parker was permitted to make claims with respect to the property before completion but if the total amount claimed exceeded 1% of the contract price Bravo was entitled to rescind. Clause 37 of the contract provided that Mr Parker could provide Bravo with a list of substantial defects within three months of completion which Bravo was obliged to rectify. The date of completion was specified by clause 53 of the contract, which also provided that either party could serve on the other a notice to complete in the event that completion did not take place on the specified date. Clause 65 dealt with Bravo's obligations with respect to the finishes applicable to the property; however, clause 66 permitted it to alter any such finish or related item to one of equivalent or higher quality. The Schedule of Finishes detailed the type of kitchen that was to be installed in the property. Certain works were required by clause 70 to be carried out by Bravo at the cost of Mr Parker. Those works included the installation of an ensuite skylight, a laundry door, and an external garage door (``the works'').

At the time Bravo gave Mr Parker notice of registration of the strata plan, the works required by clause 70 of the contract had not been carried out. Additionally, the kitchen installed was not in accordance with the Schedule of Finishes. Mr Parker accordingly provided to Bravo a list of defects. Bravo then served upon him a notice to complete on a specified date. When completion did not occur on that date, Bravo purported to terminate the contract. Bravo subsequently claimed that the list of defects provided by Mr Parker amounted to a claim for compensation that exceeded 1% of the contract price thus giving it a right to rescind pursuant to clause 7. Mr Parker contended that the list of defects did not fall within clause 7 but that if it did then he would reduce the claims to 1% of the contract price.

Proceedings were subsequently commenced by Mr Parker seeking specific performance of the contract. He submitted that Bravo had not validly terminated the contract because the defects that he had listed pertained to Bravo's obligations pursuant to clause 70 and with respect to the finishes. In reply, Bravo contended that it had validly terminated the contract because it had met its contractual obligations at the specified time of completion. More specifically, it submitted that it had exercised its right to vary the Finishes as contemplated by clause 66 and that the works provided for by clause 70 had been the subject of an oral variation between the parties. In particular, it was argued that Mr Parker had orally agreed that an ensuite skylight was not required, that certain kitchen tiles and bathroom door handles were satisfactory, and that the laundry and garage doors were unnecessary.

Held: granting specific performance.

1. It was not possible to accept that there was agreement for deletion of the ensuite skylight or in relation to the kitchen tiles or bathroom door handles. Moreover, it was to be accepted that the plaintiff insisted on the laundry and garage doors.

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2. Even if clause 70 had been subject to an oral agreement to vary it, that variation was not enforceable. That followed because it was not severable from the contract which related to an interest in land. In those circumstances, writing was required for any relevant variation.

3. Bravo was not entitled to rely on clause 66 of the contract to vary the finishes relating to the kitchen. It had not adduced evidence to demonstrate that it had compared what was supposed to be provided pursuant to the Schedule of Finishes with what was in fact installed.

4. Accordingly, because Bravo had not fulfilled its obligations under the contract at the relevant time it was not entitled to give a notice to complete. Following from that, because Mr Parker was ready, willing and able to fulfil his obligations under the contract he was entitled to an order in the nature of specific performance.

5. The list of defects given by Mr Parker to Bravo did not amount to a claim within the meaning of clause 7 of the contract.

[Headnote by the CCH CONVEYANCING EDITORS]

A Ogborne (instructed by Turner Freeman) for the plaintiff.

J Armfield (instructed by Gells) for the defendant.

Before: Windeyer J.

Full text of judgment below

Windeyer J:

Outline

1. The plaintiff seeks an order for specific performance of a contract for the sale by the defendant company to him of a strata title property. The defendant claims to have terminated the contract after the plaintiff failed to comply with a notice to complete.

Facts

2. By contract 1 May 2001 the plaintiff, Mr Parker, agreed to purchase from Bravo Building Pty Ltd (Bravo) a property which could be described as a townhouse and garage which was part of a strata title development to be constructed by Bravo in Kumbardang Avenue, Miranda.

3. The building work had not progressed far, if it had progressed at all, at the date of the contract. The contract itself is a most unsatisfactory document. It is clear that no proper attention could have been given to it. What the parties obviously intended was to enter into a contract for the sale and purchase of a townhouse property to become a lot in the strata plan in a development to be constructed in accordance with a development consent of the Sutherland Shire Council. That consent document is annexed to the contract. There is no term requiring the building to be completed in accordance with the consent and approved plans. There are two clauses as to the vendor's obligations to obtain registration of the strata plan. The special conditions are in no sensible order and appear clearly to be some sort of cut and paste job. The lack of attention given to the contract can be shown by setting out clause 52 which is as follows:

> ``52. BENEFITS TO ENSURE [SIC]
>
> The parties hereby acknowledge that the benefit of the obligations warranties covenants and contracts contained in this contract having application after the date of completion shall ensure [sic] notwithstanding the completion of this contract."

4. There are many other ridiculous provisions. Clause 39 provides that requisitions under printed clause 5.1, must be the form of attached requisitions. And if that were not bad enough, no form is attached. There is little to be gained by setting out other examples of poor draftsmanship. It is hardly surprising that this sort of contract results in litigation.

5. The following clauses are included in the contract:

> ``7 Claims by purchaser
>
> The purchaser can make a claim (including a claim under clause 6) before completion only by serving it with a statement of the amount claimed, and if the purchaser makes one or more claims before completion —
>
> 7.1 the vendor can rescind if in the case of claims that are not claims for delay —
>
> 7.1.1. the total amount claimed exceeds 5% of the price;
> 7.1.2 the vendor serves notice of intention to rescind; and
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>
> 7.1.3 the purchaser does not serve notice waiving the claims within 14 days after that service; and
>
> 7.2 if the vendor does not rescind, the parties must complete and if this contract is completed —
>
> 7.2.1 the lesser of the total amount claimed and 10% of the price must be paid out of the price to and held by the depositholder until the claims are finalised or lapse;
> 7.2.2 the amount held is to be invested in accordance with clause 3.1;

7.2.3 the claims must be finalised by an arbitrator appointed by the parties or, if no appointment is made within 1 month after completion, by an arbitrator appointed by the President of the Law Society at the request of a party;
7.2.3 the purchaser is not entitled, in respect of the claims, to more than the total amount claimed;
7.2.5 any net interest on the amount held must be paid to the parties in the same proportion as the amount held is to be paid; and
7.2.6 if the parties do not appoint an arbitrator and neither party requests the President to appoint an arbitrator within 3 months after completion, the claims lapse.

(By Clause 30.1.10 5% is substituted for 1%.)

...

37. Building Defects

37.1 Within three (3) months after the completion date the Purchaser shall conduct an inspection and be entitled to provide to the Vendor a list of substantial defects due to faulty materials or faulty workmanship which apply to the Property and the Vendor shall rectify such defects as soon as practicable after the vendor has agreed that the items in the list of defects are defects falling with clause 37.1. The rectification may be done after the date of completion. (*This last sentence results from an unthought out amendment to the first line*.)
37.2 The Vendor has the right to reasonably object to any of the items in the list of defects.
37.3 The Vendor, its tradespeople and representative, shall have access to repair and make good any of the items in the list of defects.

...

53. COMPLETION

(a) Completion of this contract shall take place on the later of:

(i) forty-two (42) days from the date of this Agreement; and
(ii) twenty-one (21) days after the date on which the Vendor serves written notice on the Purchaser or the Purchaser's solicitor that the Strata Plan is registered at the Land Titles Office.

(b) This contract must be completed by 2.00 pm on the completion date.
(c) If completion does not take place by the time and date set out in paragraph (a) and (b) of this clause then either party may serve on the other party at any time after that time and date a notice stipulating a date for completion being not less than 14 days after the date of service of the notice and stipulating that time is of the essence in respect of the time and date specified in the notice.

...

65. FINISHES

65.1 The Purchaser acknowledges that the Purchaser must accept the finishes as applicable to the Property and identified in the Schedule of Finishes and may not request the Vendor to vary the finishes to any alternative scheme.

65.2 The Vendor shall cause the items specified in the Schedule of Finishes to be installed in a proper and workmanlike manner in the Property and the Common Property.

66. ALTERATIONS TO FINISHES

66.1 The Vendor reserves the right to:

66.1.1 alter any finish specified in the Schedule of Finishes to another finish of equivalent or higher quality; and

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66.1.2 alter any item specified in the Schedule of Finishes to another item of equivalent or higher quality.

66.2 The Purchaser cannot make a claim or objection or requisition or rescind or terminate in respect of any alteration referred to in clause 66.

...

70. The Vendor acknowledges that both the Purchaser and the Builder have agreed to carry out the following works (Works) at the cost of the Purchaser:

1. Supply and install skylights to en suite and above stairwell at the cost of $2,000.00 to the Purchaser;
2. Supply and install additional TV outlets to bedrooms two and three at the cost of $130.00 to the Purchaser;
3. Supply and install additional double power outlets to bedrooms two and three at the cost of $90.00 to the Purchaser;
4. Supply and install an additional telephone outlet to the master bedroom at no cost to the Purchaser.
5. Supply and install a laundry door to the courtyard in lieu of a window at the cost of $80.00 to the purchaser;
6. Supply and install an external door from the garage to the courtyard at the cost of $175.00 to the purchaser;
7. Supply and install a gas log fire in the lounge room as per drawing supplied by Mr Afroz Ali. There is to be a 200mm wide hearth supplied and fixed by the builder with tiles to match the entry floor tiles. The fire box, insert and glue are to be supplied by the purchaser at the cost of $1,500.00 to the purchaser.

The Vendor agrees that the completion of this Contract is conditional upon the works completed by the Builder unless the carrying out of the Works has not been completed prior to the Completion Date due to any breaches by the Purchaser of this agreement with the Builder."

6. The Schedule of Finishes is somewhat strange. In one part it sets out ``PC items'' with a description of items and prime cost sums. Quite what is intended by the price indicators is not apparent. Under the heading ``kitchen'' and above some typewritten material is written ``kitchen to be completed in accordance with the enclosed selection sheet provided by Nobby Kitchens''. The selection sheet provides for a Bordeaux style kitchen, colour: white woodgrain; benchtop colour: Paradiso; kickplate: white; benchtop edge: chamfered edge. There is then a note: ``If granite not acceptable, Laminex gloss Canyon Black Wilsonart 1755-1''.

7. Under item B ``Internal, Floors & Walls'', all typed words are deleted and the following substituted

``tiling to be completed in accordance with the enclosed quotation of `Tiles & More'.

C'Bon Carpet 469 Mandarin Cut Pile installed throughout the property wall to wall.''

A quite detailed quotation from Tiles & More is attached to the contract.

8. The vendor's solicitor gave notice of registration of the strata plan on 2 July 2002. At that time and up to the present time certain works required by Clause 70 to be completed as a condition of contract completion had not been carried out. They have not yet been carried out. Those works are the installation of a skylight in the en suite bathroom, the installation of a laundry door to the courtyard and a door from the garage to the courtyard. In addition the kitchen installed was not a Nobby's Bordeaux kitchen. The tiling was not that as specified in the Tiles & More quotation and the door handles were not of the lever type also specified in that quotation.

9. On 5 August 2002, the plaintiff provided to the defendant a list of defects. On 5 September 2002, the defendant served a notice requiring completion by 2.00 pm on 25 September 2002. That did not take place and probably later that day the defendant served a notice purporting to terminate the contract.

10. By two notices in February 2003, much to the same effect, the second one being served because there was some doubt expressed as to service of the first, Bravo claimed that the plaintiff had made a claim for compensation exceeding 1% of the purchase price and stating that it would rescind unless the notice was

withdrawn. The plaintiff responded that the notice of defects did not fall within clause 7 of the contract, but if it did then it would reduce its claim to 1% of the price and withdraw any claim over and above that amount.

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Issues

11. The question is whether the vendor has validly terminated the contract and if not whether an order for specific performance of the contract or like order should be made.

12. The purchaser says that the notice was not a valid notice because: (1) the vendor had not carried out the work required by clause 70; (2) the vendor has not installed the items required by clause 65. In response to this the vendor relies upon clause 66 of the contract and its rights to alter the finishes. This appears to be claimed in respect of the clause 70 obligations as well as the finishes. In addition the vendor says that so far as clause 70 is concerned there was an agreement to vary the contract by deleting the requirement for the en suite skylight and the doors from the laundry and garage to the courtyard and in respect of the skylight substituting a skylight in the kitchen. An agreement for variation is also said to have been made for the tiles and the doorknobs.

13. By cross-claim the defendant seeks a declaration that it has validly terminated the contract and in the alternative a declaration that if it has not done so the plaintiff has made a claim for compensation within clause 7 of the contract and that this has either been waived or is reduced to 1% of the purchase price.

Was there an agreement for variation?

14. The plaintiff was a regular visitor to the property during construction. It was of significance to him as it was to be his retirement home.

15. Mr Anthony Lazzaro, who is a director of the defendant at the present time, and who, with a Mr Joe Leto, appear to have been the directors in charge of the project, gave evidence to the effect that he had a meeting in September or October 2001 with the plaintiff which was attended by the plaintiff, Mr Doug Anderson, who is a cousin of the plaintiff and who had assisted him with the purchase details, Mr Robert Casaceli, who was the real estate agent for the vendors on the sale, a Mrs Barbuto, a friend of Mr Anderson, and his father Mr Frank Lazzaro and Mr Leto. He said that they first went into the kitchen when it was arranged that the window would be eliminated to make room for the kitchen which the plaintiff required. He said there was discussion about light into the kitchen. Mr Lazzaro gave evidence that he had said that a skylight could probably be put in the ceiling and that: ``on the subject of skylights we will leave the skylight in the hallway as proposed and eliminate the skylight in the en suite as there is no sense in having the skylight there as there is sufficient light there. You do not really need a skylight in the en suite because there is a window there already". He said that he then went upstairs with the plaintiff, who agreed that a skylight was not required in the en suite. Mr Lazzaro said that they next went into the laundry and Mr Anderson questioned the lack of the laundry door leading to the courtyard. Mr Lazzaro gave evidence that he said that in view of the size of the laundry and the washer and the dryer and the sink there would be no room for a door. He said that Mr Anderson raised the question of demolishing the wall between the laundry and the toilet which would give room for the door and that he, Mr Lazzaro, said that this was not possible due to a structural beam, to which Mr Parker made no response. His evidence that the party then went into the garage where Mr Anderson questioned the lack of a door from the garage into the courtyard. He said that he had explained that the wall had to be moved to avoid being built on top of a Water Board manhole, so that it was not possible to put the door where it had been proposed. According to Mr Lazzaro Mr Anderson had said that he was not happy and there was no further conversation.

16. So far as the tiles were concerned, Mr Lazzaro said that about one month later the plaintiff and one of his sons had come to the site with a case of beer for the workers, and that he had taken the plaintiff into the garage of unit no 4 and had shown him some tiles which were to be used. He said that the plaintiff had accepted these by saying after inspecting them ``Yes, that is not a problem, I like it. I cannot wait to move in." He said that the tiles which had been shown to the plaintiff were fitted to unit 5 apart from the kitchen floor tiles. He said that he then went to a container to get a specimen door handle and met the plaintiff and his son

outside unit 5 where he had shown him the door handle. There was discussion about the carpet. There was discussion about tiles on the kitchen floor. He said that there was discussion about getting tiles to match the carpet and the plaintiff had said ``Ok, I will leave it up to you.'' He said that he had shown the plaintiff and his son some chrome door handles which

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he had said could be used instead of the door handles selected. He said that the plaintiff had agreed to this saying, ``Ok, fantastic thanks for that.''

17. Mr Lazzaro said that about a month after the second meeting the plaintiff had gone into the laundry and said that the tiles were not the tiles quoted, to which he had responded that they were the ones agreed to on the previous occasion. There was the same discussion about the kitchen tiles, Mr Lazzaro saying that they were better quality and had been made in Italy. There was some discussion about the bathroom tiles which I do not think to be significant.

18. Mr Frank Lazzaro gave some evidence which was somewhat different from that of his son, but he did say that the staircase was in place at the time of the first inspection. He said he did not go into the laundry or the garage.

19. So far as these alleged conversations are concerned the plaintiff and all his witnesses denied that any agreement for alteration had been made. Mr Anderson, who had assisted Mr Parker through all the negotiations with the present defendant and the previous owner, denied there was ever any conversation about deleting the skylight from the en suite bathroom. He said that this had been an important requirement in negotiations with the original developer and had remained so. He said that there was no stairway access to the first floor at the time of the inspection in question. Mrs Barbuto gave the same evidence as to lack of a staircase, although it is fair to say that she was not available for cross-examination. The plaintiff denied there was a staircase and denied any conversation about deleting the skylight.

20. According to Mr Anderson, whose evidence I accept, the conversation about the door from the laundry to the courtyard ended with either Mr Leto or Mr Frank Lazzaro saying, ``Look, if that's what you want we will have to organize council approval.'' So far as the door from the garage is concerned he said that the plaintiff was not present during the beginning of the conversation. It seems that he accepted that it would not be possible to put the door into the courtyard area but it would have been possible to put in an external door giving access to the common property. The evidence of Mrs Barbuto as to the access doors was similar to that of Mr Anderson. The evidence of Mr Parker was to much the same effect. Two of the persons who were present at these meetings and could have been expected to have been called by the defendant were not called. The persons were Mr Joe Leto and the agent, Mr Casaceli. There was some explanation given for the failure to call Mr Leto, in that he and Mr Anthony Lazzaro have fallen out and he is no longer a director of the defendant company. There is, however, no reason to think that he would give false evidence just because of this falling out and as some of the conversations were attributed to him the fact that he was not called does, I think, give rise to a reasonable inference that his evidence would not assist the defendant. It is also significant that the agent for the vendor was not called, he being present throughout the vital inspection. The same inference can be drawn. In any event I find that there was no staircase access from the ground floor to the first floor at the time of the first inspection. On that basis it is not possible to accept there was agreement for deletion of the en suite skylight. I do not accept the evidence of Mr Lazzaro and his father as to this. I accept the evidence of the plaintiff and his witnesses that there was insistence on the requirement of the doors from the laundry and the garage and there was discussion about the necessity to obtain council approval for this. Whatever the position, even as put by the defendants' evidence of the conversations, apart from the skylight, those words would not amount to agreement to vary the terms of clause 70 of the contract. I should add that, apart from the exchange of skylights, there was no consideration for the claimed agreement to delete the doors. It could, however, be thought that deletion of the PC cost would be the consideration, although the solicitor for Bravo, perhaps in error, claimed in correspondence it was payable in any event.

21. So far as the tiles and door handles are concerned I do not accept the evidence of Mr Anthony Lazzaro as to any agreement with Mr Parker. The evidence of Mr Parker's son as to what happened on the second

occasion, which I accept, is against any such agreement having been made. Both he and his father said there was no discussion in Unit 4. It is clear that the plaintiff went to considerable trouble to select his tiles and door handles, the door handles being selected to overcome or help overcome a particular problem that he has with his hands. Lever type handles were far more convenient for him than knob type handles. I accept the

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plaintiff's evidence that the defendant was warned, through the agent, that the tiles were not correct. Bravo made no contact with Tiles & More. It is not suggested there was any agreement to change the type of kitchen. A further reason to reject the claim of variation is that in correspondence about contract requirements over more than three months the defendant's solicitors gave many reasons for non-compliance, but restricted any claim about variation to the skylight variation. What appears to have happened is that the builder was determined to go ahead regardless. However, whether it could or not depends upon the terms of the contract.

If an oral agreement for variation were made is it enforceable?

22. The answer to this question depends upon whether or not the contract in question consists of two parts, one of which is not referable to an interest in land and is severable from the contract relating to an interest in land with a separate consideration attached to it. Counsel for Bravo relied on the passage from *Stonham: Vendor and Purchaser* p 35 para 46.

46. If the contract relates to matters partly within and partly outside the provisions of the Statute, and the consideration for the promise is an entire one, the contract is unenforceable unless the Statute is complied with. But, where the consideration and promise relating to the part of the contract, which is within the section, can be severed from the consideration and promise relating to that part not within the section, so that the promises are severable, and really two separate contracts, one within the section and one outside the section, the latter can be enforced, though not evidenced in writing.

23. The cases cited by the learned author in support of that passage — none of which was referred to by counsel — for the most part relate to collateral agreements separately enforceable very different from the contract here under consideration. In this case there is certainly a separate consideration for the skylight and for the doors provided for in clause 70 under its rather extraordinary wording. On the other hand provision of those items is a condition of completion of the contract and the contract was for the sale and purchase of the land and the particular townhouse building to be erected upon it to become part of the land. The purchaser was entitled to have what he contracted to buy. In those circumstances I have come to the conclusion that clause 70 is not severable as argued by the defendant. In those circumstances writing is required: *Tallerman & Co Pty Ltd* v *Nathans Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 113. I would reach the same conclusion for the tiling. It is not claimed there was a variation agreement about the kitchen.

Kitchen tiles and door handles — changes to finishes

24. So far as the kitchen is concerned it is not suggested that there was ever any discussion about the change. Bravo just put in the kitchen which it decided to put in without consultation. So far as the tiles and the door handles are concerned I have rejected the question of any agreement.

25. The question then is whether or not clause 66.1 of the contract can be relied upon by the vendor so far as the change of finishes is concerned.

26. So far as the kitchen is concerned it is not a Nobby's kitchen and it is not a Nobby's Bordeaux kitchen. It has different colouring, different items, the bench top is not granite, the edges are not chamfered edge. The bench top is not the alternative of Laminex gloss Canyon Black Wilsonart 1755-1. There is no breakfast bar as there is with a Nobby's kitchen. The evidence of Mr Parks, who gave evidence for the defendant included the following:

> ``In my opinion the kitchen installed in the premises is a good quality kitchen, satisfactorily installed. The kitchen installed is of equivalent quality to a Nobby Kitchen, Bordeaux kitchen taking into account: the limited information in the selection sheet; the room space available (including the rear window);

the selection of material for the overhead cupboards, under bench cupboard, bench top and fridge enclosure; and the standard of workmanship. The difference between the kitchen installed and a Nobby Kitchen Bordeaux kitchen is a [sic] aesthetic difference. In my experience Nobby Kitchens supplies kitchens in the low- middle economic range."

27. As was elicited from Mr Parks in cross- examination, this opinion was given on the basis of the selection sheet and not on the basis of what was included in a Bordeaux kitchen. He accepted that a kitchen with a breakfast bar

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would be one of a higher quality than one without a breakfast bar. His evidence does not really compare the elements and finishes in a Nobby's kitchen with those which were used. What has been done is to compare what is there with the selection sheet and to relate this to the opinion of Mr Parks that what has been installed is a good quality kitchen. I do not consider that this fulfils the requirements of clause 66.1. So far as the tiles are concerned, the evidence of Mr Parks is more limited. In essence he says that good quality floor and wall tiles have been installed to a satisfactory standard of workmanship. This in no way compares them with those specified in the Tiles & More quotation. The contract in clause 65.2 required the vendor to cause the specified items in the Schedule of Finishes to be installed in a proper and workmanlike manner in the property. It has not done so. As it was not entitled to the benefit of clause 66.1, it has not performed its obligations under the contract.

Was the vendor entitled to give a notice to complete?

28. It follows from my conclusions as to the breach of clause 70 and the breach of clause 65.2 that the vendor was not entitled to give a notice to complete as it had not fulfilled its obligations under the contract at the time the notice was given, nor at the time when it purported to terminate. The failures were matters of substance. It follows from this that as the purchaser has established that he is ready, willing and able to fulfil his obligations under the contract he is entitled to an order in the nature of specific performance.

29. In dealing with finishes I have not dealt with the question of shower roses in the bathrooms, nor the Porto door handles, both of which were specified in the Tiles & More quotation. There is no evidence that would support the view that alternative items, fulfilling the requirements of clause 66.1 have been furnished. Therefore, in the same way, breach of contract by the vendor applies. I should add that after the notice to complete was given, but not before objections were made, the solicitor for the plaintiff, by letters of 8 November, 15 November 2001 and 27 January 2002 made complaints in respect of the kitchen, the tiling and the skylight and apparently about the lack of the laundry door. The first response to this was that all items were covered by clause 66 of the contract and at a later stage there was a response that the council would not approve the laundry door. The evidence was that it had not been asked to. There was later a suggestion by the vendor's solicitors that alterations in accordance with a list were made at the request of the purchaser and that a further $40,326 was payable for those alterations. There was no possible basis for that assertion. The correspondence continues up to July and August 2002. One letter included a demand for the additional amounts provided for by clause 70, even though the external doors had not been fitted.

Claim about defects

30. On 5 August 2002, the solicitor for the purchaser sent to the solicitor for the vendor the list of defects and ``items of non-compliance with the contract''. After these proceedings had been commenced, and an affidavit of Mr John French filed, the solicitors for the vendor claimed that the claim for damages concerning the property had been quantified by that affidavit that the amount claimed was $40,763.60, not including the kitchen, and that as that exceeded 1% of the contract purchase price notice was given that the vendor would rescind the contract unless the claim was withdrawn. There was a response to this by the plaintiff's solicitors stating that it was not a claim under the contract, but that if it was, the claim was withdrawn insofar as it exceeded 1%. There was another contention by the plaintiff's solicitors that as the vendor had purported to elect to exercise a right to terminate the contract, it could not thereafter rescind it. It does not seem to me to be necessary to discuss that matter. The claim as to defects was never a claim for compensation. The fact that Mr French set out various figures for costs of rectification does not turn it into a clause 7 claim. Most

of the items were items which in the normal case would have been within clause 37 of the contract. Clause 37.1 was amended so that the list of defects was to be provided after the completion date. It is possible that some doubt arose because ``completion date'' is defined in the contract in the events which happened as being 21 days after the date on which the vendor served notice of registration of the strata plan. It would be an extraordinary construction of clause 37 if it meant that if, at the date of registration of the strata plan, a lot of the work required by the contract had not been completed by the vendor, then nevertheless the

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list of defects had to be given by that date. It seems to me that the only sensible way in which the contract could be interpreted is that for the purposes of clause 37 completion date means, in the case when it is the vendor's fault that completion has not taken place, the actual date of completion. In any event that does not matter because no claim has been made within the meaning of clause 7.

31. It may be that if it does turn out that the vendor is unable to provide what it contracted to provide, because it cannot get the necessary approvals for the external doors, then there could be some claim for compensation. That is not a matter which needs to be considered at the present time. In the same way if it is not possible to provide for a door from the garage to the courtyard as a result of changes requires in construction to access a water mains manhole, that can be determined on further consideration. The vendor would not be required to substitute access if it became impossible to fulfil a particular term.

Proposed orders

32. I will hear argument on the form of orders but set out proposed orders for consideration:

1. Declare that the defendant is in breach of its obligations under the contract so far as its provision for a kitchen, tiling and handles are concerned.
2. Order the defendant to perform such obligations.
3. Declare that the defendant is in breach of the requirement under clause 70(1) as to an ensuite skylight and 70(5) and 70(6) of the contract and is bound by its obligations so far as clause 70(1) is concerned and is bound to take all steps necessary to obtain approvals to enable it to comply with its obligations under clause 70(5) and (6) and subject to obtaining such approvals is bound by its obligations under the said provisions of the contract.
4. Order the defendant to perform the said obligations.
5. Order the cross-claim be dismissed.
6. Order the defendant to pay the plaintiff's costs of the proceedings up to the date of these declarations and orders.
7. Further consideration reserved.

CHURNIN v PILOT DEVELOPMENTS PTY LTD

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(2003) NSW Conv R ¶90-121

Court citation: [2003] NSWSC 592

New South Wales Supreme Court

Judgment delivered 2 July 2003

Strata title — Rescission — Specific performance — Plaintiffs entered contracts off-the- plan to buy units in proposed development site — Contracts contained clauses requiring vendor to exercise due expedition to lodge plan for registration — Separate contractual provision gave either party option to rescind if plan not registered within 24 months — Problems encountered in excavation and shoring meant that development could not be completed in estimated period — Vendor exercised option to rescind — Whether contract imposed a form of non-delegable duty on the vendor to comply with its contractual obligations regardless of the circumstances — Whether plaintiffs entitled to specific performance.

The plaintiffs were all off-the-plan purchasers of strata units in a 28-unit development. That development was to be constructed upon land in respect of which Pilot Developments Pty Limited (``Pilot'') was registered as proprietor. Each of the plaintiffs entered into a contract with Pilot before it contracted a builder for the development's construction. Those contracts contained a special condition (``clause 10.7'') requiring Pilot to proceed with all due expedition to complete the subdivision and comply with Randwick Council's (``the Council'') conditions of approval in respect of it. Pilot was also required to obtain the consent of the Council to the plan and thereafter lodge it for registration. A separate special provision ("clause 10.8") in each of the contracts allowed each party to rescind the contract if the plan had not been registered within

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24 months.

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The strata plan was not registered within 24 months of any of the contracts' execution. Although Pilot entered into a building contract that envisaged completion of the work within 46 weeks of its commencement, difficulties in construction and logistical complexities made that impossible. More specifically, the process of excavating and shoring up the development site encountered significant and protracted problems. It took approximately 38 weeks of the 46 week building contract period for the site to be properly stabilised. This arose not because the relevant contractors were not qualified, competent, or diligent, but as a consequence of natural factors like the amount of sand requiring removal and vibrations and movement causing damage to adjoining buildings. For its part, Pilot did a great deal to assist the development's completion. It engaged the services of a qualified geo-technical engineer, civil and construction engineers, mechanical engineers, hydraulic engineers and acoustic engineers. It also provided progress payments to the builder each fortnight, rather than each month, to assist with funding and obtaining materials. Arrangements were additionally made for work to be done on the site on Saturdays, during the Olympic games period and over Christmas. Moreover, Pilot did give consideration to finding a different builder but the pre- Olympic Games building boom made that option unviable.

Subsequently, Pilot exercised its right to rescind pursuant to clause 10.8. However, the plaintiffs refused to accept that rescission as valid. They contended that clause 10.7 imposed a form of non-delegable duty on the vendor to comply with its obligations regardless of the circumstances. That is, the plaintiffs submitted that Pilot was responsible for the deficiencies of its contractors regardless of the reasons or circumstances. In this context, it was contended that Pilot should have removed the builder and appointed a different one.

Held: claims dismissed.

1. Clauses 10.7 and 10.8 could not be taken as amounting to an admission by Pilot that it would proceed with all due expedition to complete the work required to obtain registration of the strata plan within 24 months.

2. Pilot made a great effort to push the project forward and exerted whatever pressure it could on the contracted builders. The fact that Pilot continued to press the builder after rescission demonstrated that it did not obviously slow down the project to bring about the right to rescind and then speed it up thereafter.

3. Clause 10.7 did not place some form of absolute non-delegable obligation on Pilot. It could not be suggested that it had not taken proper steps in the engagement of the builder or the engineering specialists. It also could not be contended that Pilot should have continued working on the site when to do so was unsafe.

4. Constant interference and chivvying of the builder on Pilot's part would not have produced a better result. Nor was it possible in the circumstances to engage a different builder.

[Headnote by the CCH CONVEYANCING EDITORS]

S Faulkner SC (instructed by Picone & Co) for the plaintiffs.

B Rayment QC with S Balafoutis (instructed by Piper Alderman) for the defendant.

Before: Windeyer J.

Full text of judgment below

Windeyer J:

Outline

1. The question for decision in all of these actions is whether the defendant company was entitled to rescind a contract under which it agreed to sell a particular apartment or home unit at Clovelly to the plaintiff purchaser. If it was entitled to do so the claims fail. If not then the plaintiffs seek specific performance or in some cases damages.

2. An order was made at an earlier stage that the actions be heard together, the evidence in one being evidence in the others so far as is relevant. Apart from one of the actions where there is an additional estoppel claim and apart from evidence as to values in the actions where the claim is for damages rather than specific

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performance, all of the evidence is relevant to all of the actions.

Facts

3. Pilot Developments Pty Limited (Pilot) was registered as proprietor of a substantial area of land at 2-6 Walker Street and 44-46 Melrose Parade, Clovelly (the property). A number of smaller residential properties had been erected on this land when it was purchased by Pilot. Pilot intended to construct on the land a 28 unit home unit development. The average sale price of a unit was over $500,000 so that it was a substantial project.

4. Development approval was granted by Randwick Council on 14 October 1998. Building approval was obtained on 23 July 1999. In the months of March and April 1999 contracts were entered into between Pilot and each of the various plaintiffs for a sale and purchase of one of the units to be constructed on the property. In other words these were what is generally called contracts for sale and purchase off the plan. All of these contracts were entered into by the vendor before a contract with the builder was signed.

5. Each of the contracts included the following special conditions:

> ``9. WORK
>
> 9.1 Without prejudice to any other express or implied condition of this Contract, before completion the Vendor will use its best endeavours to cause the following work to be done in a property [sic] and workmanlike manner. The work comprises the construction of a building generally in accordance with the draft strata plan annexed and marked `C', the requirements of all relevant authorities and the schedule of finishes (annexed and marked `SF').
>
> ...
>
> 10. REGISTRATION OF STRATA PLAN
>
> ...
>
> 10.7 The Vendor shall proceed with all due expedition to complete the subdivision and comply with all Council's conditions of approval in respect of the subdivision and the Purchaser shall not raise any objection or requisition or make any claim for compensation in respect of any work carried out by the Vendor or its agents pursuant to the said conditions of approval and the Vendor shall obtain the consent of the Council to the plan and thereafter to lodge the same for registration.
>
> 10.8 In the event that the plan shall not have been registered within twenty-four (24) months of the date hereof or within such further period as the parties may mutually agree upon in writing, either party may thereafter rescind this Contract whereupon the provision of clause 19 hereof shall apply.
>
> ..."

6. The strata plan was not registered within twenty four months of the date on which any of the contracts were signed. On 9 March 2001 the vendor's solicitor wrote to the solicitor for each of the purchasers stating that as the strata plan would not be able to be registered within the two year period from the date [of the]

contract, the vendor would exercise its rights to rescind. When the two year period expired in respect of each contract then the vendor purported to exercise its rights. The question is whether or not it was entitled to do so.

7. Most of the plaintiffs refuse to accept the notice rescission as valid and claim specific performance. Two claim that the issue of the notice amounted to a repudiation which they accepted and those plaintiffs claim damages.

Plaintiffs' claims

8. By their further amended statement of claim each of the plaintiffs plead as follows:

``4A. There was an express term of the contract that the defendant would proceed with all due expedition to complete the work required to obtain registration of the strata plan within 24 months.

Particulars

Special Condition 10.7

5. There was an implied term of the contract that the Defendant would use all reasonable endeavours to ensure that the strata plan was registered within 24 months.

6A. The Defendant admitted that if the work for the development, including construction work, proceeded with all due expedition, it was quite feasible to complete the work and register the strata plan before 16 March 2001, as was the fact.

Particulars

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The admission is to be inferred from contract special condition 10.7 and 10.8.

7. The strata plan for the development was not registered within 24 months of the contract.

8. By letter dated 20 March 2001, the Defendant purported to rescind the contract on the grounds that the strata plan had not been registered within 24 months of the date of the contract.

9. The purported rescission of the contract by the Defendant was ineffective as a rescission of the contract in that the failure to complete the works and register the strata plan before 16 March 2001, resulted from the Defendant's failure to perform its contractual obligations.''

Particulars

(i) The Defendant had not proceeded with all due expedition or used all reasonable endeavours to ensure that the strata plan was registered within 24 months of the contract.
(ii) The Defendant was in breach of the terms referred to in paragraphs 4A and 5 above, and this arises as a matter of implication and conclusion from the admissions referred to in paragraph 6A above and from the Expert Reports of Malcolm Paul Woods dated 4 April 2003, Andrew Peter Box dated 4 April 2003, John Frederick Poiner dated 2 April 2003 and Robert Bendeich (Evans and Peck) dated 4 April 2003, filed and served on behalf of the Plaintiffs in these proceedings.

13. If the Defendant had proceeded with all due expedition and used all reasonable endeavours to construct the development and obtain registration of the strata plan, the strata plan would have been registered within 24 months of the contract and the Defendant would not have been entitled to rely on Special Condition 10.8 of the contract.

14. The failure of the defendant to proceed with all due expedition and use all reasonable endeavours to construct the development and obtain registration of the strata plan was a breach of the defendant's obligations under the contract, and caused the plaintiffs to suffer loss, which is continuing.

Particulars

The plaintiffs will give particulars of the loss prior to the hearing.

9. The plaintiffs seeking specific performance claim by way of relief specific performance on the ground that there was no right to rescind or in the pleading on the alternative ground that it was unconscionable to rely on the rescission clause.

Comment

10. The express term pleaded in paragraph 4A of the further amended statement of claim is not a term of the contract. Clause 10.7 is quite clear. It was the obligation of vendor and purchaser to so act so far as possible as to enable the other to have the benefit of the agreement. The pleaded implied term in paragraph 5 ``to take all reasonable endeavours to ensure the registration of the plan within 24 months'' is not a necessary implication and is not made out. Special conditions 10.7 and 10.8 do not amount to some sort of admission as pleaded by the plaintiffs. Completion within a two year period was expected, not admitted, whatever is meant by that.

11. In the long run no reliance was placed on special condition 9.1 of the contract. The case of the plaintiffs was based on special condition 10.7. If the vendor had not performed its obligations under that clause it was in breach. If it was in breach, and the breach brought about failure to obtain registration within 24 months, it was not entitled to rely upon the right given by 10.8. This was not in dispute. What was in dispute was whether or not Pilot had ``proceeded with all due expedition to complete the sub-division (meaning the strata sub- division) and comply with council conditions of approval in respect of the sub-division''. Completing the sub-division required completion of the development in accordance with clause 9.1 and registration of the strata plan of sub-division.

Further facts

12. Pilot appointed Melocco and Moore as architects for the project in April 1998. It also obtained a geo-technical report on the site from SMEC Testing Services at that time. The site was a difficult one as it consisted of fine sand to a considerable depth, which it was agreed would require stabilisation and shoring, both to enable the building in accordance with the proposed plans to be constructed and to protect properties above the property from damage from movement caused as the result of

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excavation of the site. Conditions 26 and 53 of the Development Approval are as follows:

> ``26. There shall be no loss of support to the Council's footpath area as a result of the excavation within the site. Details of how this support will be maintained during construction shall be submitted for approval with the Local Approval Application.
>
> 53. A report shall be prepared by a professional engineer and submitted to Council with the Local Approval application, detailing the proposed methods of excavation, shoring or pile construction, including details of vibration emissions and possible damage to adjoining premises.''

13. On 6 May 1999 Pilot entered into a building contract with G & N Developments Pty Limited, trading as RMA Design and Constructions (RMA) for the construction of the building. The contract provided for completion within forty-six weeks of the commencement date of the work, the date of commencement being determined in a way defined by the contract and in fact being 9 June 1999. The contract provided the normal provisions for extension of time upon certain events. Had all gone well the date for practical completion was 26 April 2000 subject to this being extended by accepted extension of time claims. The evidence establishes an occupation certificate was not issued until 4 September 2002 and the strata plan was registered on 19 November 2002. Building contracts seem to assume that it will never rain. But even allowing for claims dealt with as at April 2002 the agreed extended date for practical completion was 5 February 2001.

14. There had been other builders tender for construction work, but the RMA tender was the lowest. Pilot asked Mr Melocco to make some checks about the builder and its work, which he did, reporting that two projects at Strathfield built by RMA were of a high standard of construction.

15. It was I think accepted that an efficient builder would have completed the project within the two year period. However Pilot was not the builder and it is necessary to give some attention to the periods of delay and to the actions of Pilot during the period of construction up to termination.

16. Apart from the architect and builder, Pilot engaged the services of a qualified geo- technical engineer, civil and construction engineers, mechanical engineers, hydraulic engineers and acoustic engineers. It is not suggested these people were not competent.

17. The first problem in construction arose during shoring. Messrs James Taylor and Associates were originally engaged as structural engineers, although they were later replaced. They were consulted by the architect about conditions 26 and 53 of the development consent. They said contiguous piling was proposed which would support the footpath along Melrose Street and that temporary shoring along Walker Street could be achieved by contiguous steel shoring. So far as condition 53 was concerned they said that the perimeter would be supported by contiguous piling and anchoring as required.

18. There is some confusion about the shoring. The building contract included some details of the builder's quotation. Under item 3 — Excavation, — piling and shoring is not mentioned. Under item 6 — Piers to depth of 8 metres, — there is reference to sheet piling at a cost of $123,675. Engineering drawings of Ibrahim Consulting Group, who took over from James Taylor and Associates as consulting structural engineer for the project, refer to a sheet retention system, but this was otherwise unexplained. The specifications relating to excavation appear at page 2167 of Exhibit B and item 306 refers to shoring and includes the following:

> ``All shoring to be designed and certified by the supplier's engineer. These certificates to be supplied to the structural engineer prior to any further work.''

19. The shoring and excavation work was sub-contracted by the builder to a company Emanon Pty Limited, which did engage its own engineers to design the work. Considerable difficulties were encountered with the excavation and the shoring. Some of the problems were caused because the sheet shoring was not sufficiently strong to resist the pressures, some seem to have been caused by the amount of sand above the rock requiring removal, and some by vibration and movement during excavation causing damage to adjoining buildings. Threats of legal proceedings by adjoining property owners and risk of injury to workers on the property from collapse caused the building site to be closed for some time. It was necessary to redesign the shoring works,

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more contiguous piling was required, and this required some redesign of the building. Numerous consultants were engaged during this period including the original geo-technical engineer, the consulting engineer for RMA and various engineers engaged by Emanon. Eventually shoring designed by Dr Ring, an engineer engaged by Emanon, was installed. The excavation and shoring were commenced early in July 1999. The first collapse occurred a few weeks later and the first damage to the adjoining property before the end of July 1999. There was some spasmodic starting and stopping, and the shoring and piling as designed by Dr Ring was not completed until March 2000. While it was possible to proceed with some construction on the southern end of the property, about thirty-eight weeks of the forty- six weeks contract period had been taken up by the time the site was properly stabilised.

20. Mr Hansen was a director of Pilot as was a Mr Whitten. They controlled the project although Mr Hansen seems to have taken the lead role so far as Pilot was concerned. Pilot appointed various project managers for this development, namely Mr Bernasconi from early 1998 for about 12 months, then a Miss Lewis for about 15 months with an assistant, Mr Cusack for some of that time and in April 2000 a Mr Bonus who was both an architect and project manager. It was not suggested that these people were not well qualified nor that they did not work diligently towards progression of building works. Shortly after Mr Bonus was appointed consideration was given to termination of the contract with the builder. It was decided to do so for a number of reasons, including a question of whether there was ground for termination and the possibility of legal proceedings arising from this, the very busy pre-Olympic Games building period, during which there was great difficulty obtaining builders and tradesmen, and the fact that, according to the evidence, there would be a delay of about six months in engaging a new builder to take over the works and a considerable increase in the costs of the works.

21. Mr Bonus reported to Pilot that he thought RMA needed planning and organisational assistance to progress the works more satisfactorily. Pilot agreed and a company Solid Support Pty Limited was engaged to provide a programme which if adhered to would have resulted in the project being completed by December 2000. In fact RMA immediately slipped behind in performance under that programme. In October 2000, Solid Support provided a further programme which if adhered to would have resulted in practical completion by the end of February 2001.

22. Regular meetings were held on site, usually attended by Mr Hansen, Mr Melocco, Mr Rahme, the builder, Mr Bonus and from time to time other consultants. At the commencement these were held each fortnight and later, when the construction was obviously falling behind schedule, every week. I am satisfied that great effort was made to push the project forward and that whatever pressure could be exerted on the builders was exerted. To assist the builder in the funding and obtaining the necessary materials, progress payments were made each fortnight rather than each month. Arrangements were made for the work to be carried [out] on Saturdays, during the Olympic period, and over the Christmas period.

23. In September, October and November 2000 substantial delays were incurred as a result of acoustic requirements and plumbing or hydraulic problems. So far as the hydraulic problems were concerned this, for the most part appears to have arisen from deficient work undertaken by the plumber sub-contracted to the project by RMA. In November the hydraulics engineer resigned and a new hydraulics engineer was appointed. In spite of all this even in early January 2001, RMA advised that practical completion would be achieved by the end of January, although I do not understand how that could have been thought possible.

24. There is little purpose in setting out the events which took place after the rescission. There is also little purpose in going into the correspondence with the builder alleging breach of contract in February 2001. There were ongoing problems with the project right up to the end. Pilot and RMA finally entered into an agreement on 6 June 2002 which brought their association to an end. The fact that Pilot continued to press the builder after rescission without much success is only relevant to show that it did not obviously slow down the project to bring about the right to rescind and then speed it up thereafter.

25. I have not set out a complete history of the events as this is unnecessary. The history is

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recounted in some detail in the evidence of Mr Hansen, Mr Bonus and Mr Melocco to which there was no serious challenge. The minutes of the project site meetings support their evidence.

Plaintiffs' contentions

26. The main argument of the plaintiffs was based on special condition 10.7 of the contract for sale. I have already dealt with the implied terms. It is of course apparent that clause 10.7 is tied to clause 9.1 as delay in 9.1 obligations would run over to 10.7 obligations. There is no doubt the builder was slow even taking into account the site difficulties. To a large extent the evidence of the plaintiffs' expert witnesses can be discounted because they were dealing with the project in an abstract manner without having regard to the particular difficulties involved with this contract or with the site. That was accepted by counsel for the plaintiffs. At May 2000 Mr Bonus thought progress was unsatisfactory and the site minutes confirm this. Limited extensions of time granted against the claimed extensions also show delay on the part of the builder. Mr Hansen agreed with this. The question though is whether or not this can be sheeted home to the vendor so as to be a breach of special condition 10.7. The purchaser plaintiffs knew that Pilot was not the builder. They knew that pursuant to clause 9.1 Pilot was to cause the building work to be done.

27. The question is whether clause 10.7 places some absolute non-delegable obligation on the vendor. I do not consider that could be so. It was not suggested or argued that Pilot did not take proper steps in selecting RMA as a builder. It was not suggested that it did not engage the appropriate engineering specialists. It could not be and was not suggested that it should have continued working on the project site at times when the safety of adjoining buildings or of persons working on the site was not assured or when a stop work order was placed on the project.

28. Provisions of contract clauses similar to those at issue here have been considered in a number of cases by judges in the Equity Division of this Court and by the Court of Appeal. There is some conflict

in those decisions. In question is the view of Hodgson CJ in Eq (as his Honour then was) in *Masters* v *Belpate Pty Limited* [2001] NSWSC 169 that while a vendor required by contract to do everything reasonably necessary to bring about registration of a plan within a certain time is responsible for work done by agents the responsibility does not extend to work which a developer would reasonably leave to independent contractors such as architects, engineers or builders. Bryson J in *Hawes & Ors* v *Cuzeno Pty Limited* [1999] NSWSC 1167 was of a different view to which he adhered in *Hardy* v *Wardy* [2001] NSWSC 1141. In those cases he was considering wording of contracts which required the vendor to do everything required to have the plan registered within a certain period. He considered that the vendor was responsible for deficiency of his contractors. The Court of Appeal in *Hardy* v *Wardy* [2002] NSWCA 215 on appeal from Bryson J did not really resolve this difference of opinion but upheld the decision of Bryson J on the basis of the wording of the particular clause under decision. While the matter is not easily resolved it seems to me that there are different obligations in different factual situations. What is clear is that the contract wording is of paramount importance. A vendor has obligations in selecting contractors; a vendor who can see that delays are occurring must overcome them if they can be overcome: for instance, a surveyor who delays should be replaced by a surveyor undertaking to perform within a fixed time; a project manager not following matters through should be replaced. If a builder in default can be replaced so as to fulfil the contractual obligations that should be done.

29. The particular contract terms 10.7 and 10.8 do not require the vendor to proceed with all due expedition to complete the sub-division within two years, although of course the expectation is that will be done. Failure to complete within two years triggered the right to rescind if the vendor was not in default of its obligations under clause 10.7 and the default was the cause of the failure to complete within time. The requirement for causal connection was discussed by Powell JA in *Mitchell* v *Pattern Holdings Pty Limited* [2002] NSWCA 212 in reasoning which, although obiter there, I consider convincing and which I follow. Proceeding with all due expedition could not have required the vendor to do the building work itself. Apart from anything else it would not have had the licence to do so. The clause requires the vendor to do what it can do. While the decisions are difficult to reconcile I do not consider the Court of Appeal decision in *Hardy*

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requires a finding that fault on the part of any contractor must be laid at the feet of the vendor under the contractual provisions I am considering. I have come to the view that there is no absolute obligation.

30. The question then is whether Pilot was in breach of its obligations under clause 10.7. I have already set out relevant matters as to the action taken by Pilot to try to keep the project moving. In the long run counsel for the plaintiffs really relied on two matters. First he said that the builder should have been removed in about June 2000 and a new builder appointed. I accept the evidence of Mr Bonus and Mr Hansen as to the difficulties with this and reasons why it was not done, if in fact Pilot would have been entitled to do so under the contract. It is to be remembered that Mr Bonus, the builder and Solid Support all thought that the programme of works produced by Solid Support was one which could be adhered to and which could result in completion within the two year period. Counsel for the plaintiffs also argued that Pilot could have done more to force the project forward and to monitor it more closely. In essence he argued that there should be daily monitoring and daily presence on the site. The evidence of Mr Hansen was that this would have been unproductive and that it was necessary to agree with the builder prior to entry upon the site. While that is not quite correct on the contract terms, I am not satisfied that constant interference and chivvying of the builder would have produced a better result. There was very regular contact and there was very regular monitoring. Although counsel for the plaintiff argued that Pilot should have done so it is important to understand Pilot had no right to have a day by day and trade by trade monitoring role if that involved real interference with the builder. The strongest argument for the plaintiff was that the builder should have been dismissed by the end of June with all the risks that entailed; that it was in breach not doing so. For the reasons given I do not consider this correct. And even had it been correct the necessary causal connection would not have been established because dismissal would not have brought about completion within the 2 year period. I should add that although the arguments put forward for the plaintiffs do not necessarily accept the requirement for cause paragraph 13 of the statement of claim appears to do so.

31. It follows from this the plaintiffs' claims fail based on breach of contract. No separate argument was addressed to the claim based on unconscionability.

32. It is necessary to deal with the claim of Mr Glover based on estoppel. Mr Glover claimed 3 representations as to completion date. Neither the first nor the second turned out to be in accordance with the facts. But as to the third he claimed that Hansen said to him at a meeting at the offices of the architects on 17 October 2000, ``I give you my assurance that the development will be completed in January 2001.'' He said he relied on this, sold his house at Newtown and paid $330 to install special wiring for a sound system in the unit he was purchasing.

33. Mr Hansen denied the words. He said he had said the builder expected to complete in January or February. Mr Melocco did not remember the words claimed by Mr Glover. Mr Glover asked the agent to confirm that ``completion and therefore settlement, is expected for the end of January 2001.'' It thus seems unlikely he relied upon the representation if it were made as it was alleged. I am not satisfied it was. But if it were there are other problems for the plaintiff. The house that was sold was not in his name. Despite the evidence of joint ownership far more convincing evidence of the way ownership was dealt with including evidence of taxation returns would be needed. In any event no loss was established as a result of the sale. Mr Glover and Mr Hanbidge were successful dealers in real estate. If there was a loss it was limited to $330. On no basis could it be thought that equity required the representation be made good so as to make it unconscionable to exercise the right of rescission. In the long run the claim for damages was limited to the $330, but that was not made out.

34. These cases are unfortunate. There was no fault on the part of the plaintiffs who are entitled to feel dissatisfied that they will not get the unit they reasonably expected would be theirs. On the other hand Pilot may have suffered loss as a result of the delay. In a case where neither vendor nor purchaser is in breach, reliance upon a contractual provision giving a right of rescission is neither unreasonable nor unconscionable.

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Orders in each case

35. The plaintiff's or plaintiffs' claim be dismissed.

36. The plaintiffs pay the costs of the defendant.

37. The exhibits may be returned.

YOUNG & ANOR v THE OWNERS S/P 3529 & ORS

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(2002) LQCS ¶90-112

Court citation: [2001] NSWSC 1135

New South Wales Supreme Court

Judgment delivered 11 December 2001

Strata titles — Exclusive-use by-law foreshadowed which would deprive non-residential lot owners of previous right to use common property including swimming pool and leave it exclusively with residential lot owners — Validity of by-law under sec 52(1)(a) of Strata Schemes Management Act 1996 (NSW) — Whether challengeable as fraud on minority and as expropriation under Gambotto principles — Strata Titles (Freehold Development) Act 1973 (NSW), sec 20; Strata Schemes Management Act 1996 (NSW), sec 52(1)(a).

From April 1993, Young and Solenko (``the plaintiffs'') were registered proprietors of 37 Wolsely Road, Point Piper, and also of Lot 27 of Strata Plan 3529. The latter confers the right to two car-parking spaces in 45 Wolsely Road, Point Piper, an adjoining property but not to any residential rights. However, by virtue of their ownership of Lot 27, the plaintiffs also have an interest in the common property of Strata Plan 3529 which presently confers use of a swimming pool upon the plaintiffs.

The present proceedings follow the plaintiffs' strata titling of Lot 37 into three lots. They are directed at precluding an ``exclusive use'' by-law foreshadowed by the Owners' Corporation (``the first defendant''). If passed, that by-law would deny to the plaintiffs, and the other purchasers of the new strata-titled lots, any entitlement to the common property and thus to use of the swimming pool.

The first defendant first foreshadowed passing the exclusive-use by-law by letter dated 28 April 1999. This occurred just two hours before the advertised time for auction of one of the new lots (Lot 2), and according to the plaintiffs led to the cancellation of the auction. The effect of the foreshadowed by-law would be to limit the use of that swimming pool and common property exclusively to those who owned residential lots in the strata title development on 45 Wolsely Road. This would exclude the plaintiffs who merely have the parking lot entitlement and no residential entitlement.

The plaintiffs contended that the foreshadowed exclusive-use by-law was invalid or otherwise challengeable if passed without the plaintiffs' consent on one or other of the following contended bases:

> (a) that such a by-law contravenes sec 52(1)(a) of the Strata Schemes Management Act 1996 (NSW) (``the Act''), for lack of ``written consent'' from the plaintiffs;
> (b) that under principles of Corporations Law it is a fraud on the minority; or
> (c) that it is an expropriation which offends the principles regulating the entitlement of a majority to use its power under the Articles of Association to expropriate minorities, as enunciated by the High Court in Gambotto v WCP Limited & Anor (1995) 182 CLR 432 at 444-5 (``Gambotto'').

Held: for the plaintiffs, declaration that by-law cannot be validly passed without written consent of plaintiffs.

Whether proposed by-law contravenes sec 52(1)(a) of the Act

1. For an exclusive-use by-law to be capable of depriving the plaintiffs of a pre-existing use right in relation to the common property, sec 52(1)(a) of the Act, requires the written consent of the plaintiffs as owners of Lot 27.

2. His Honour stated that: ``... if a valid by-law were sought to be passed depriving the plaintiffs of a pre-existing right of exclusive use and enjoyment of that part of the common

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property as consisted of the swimming pool, first that by-law would need to specify both lots to be conferred with the right of exclusive use and enjoyment of the relevant part of the common property and second, the lots to be deprived of use and enjoyment of the relevant part of the common property. Then consent of the owner deprived (as well as owners benefited) becomes an essential requirement for such by-law to take effect.''

Whether proposed by-law constitutes fraud on the minority or a contravention of the Gambotto principles

3. Section 20 of the Strata Schemes (Freehold Development) Act 1973 provides that the relevant rights of the plaintiffs in the common property are proprietary; they are rights owned by them beneficially as tenants in common in the common property.

4. The doctrine of fraud on the power can apply to the exercise by an owners corporation and its members of their by-law making power. This was resolved by the Court of Appeal in Hougton & Anor v Immer (155) Pty Ltd (1997) 44 NSWLR 46 at 53. That case also resolved that the principles governing the expropriation of minority shareholders in Gambotto were capable of application to the operation of a strata title body. The majority in Gambotto described its principles as applying to ``an actual or effective expropriation of shares or a valuable proprietary right attaching to shares'' (at CLR 444).

5. ``In circumstances where no written consent has been sought or foreshadowed in the relevant correspondence, the doctrine of fraud on the minority is capable of application in relation to the contemplated expropriation of the plaintiffs' minority rights to a shared use of the relevant part of the common property. Such a use of a by-law prima facie would be a fraud on the power being for an improper purpose, on the assumption that such power existed."

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Dr C Birch SC and JJ Loofs for the plaintiffs (instructed by John McEncroe & Company).

MD Young for the first defendant (instructed by David Le Page).

Before: Santow J.

Judgment, in full, below

Santow J:

Introduction

1. Can a strata titles ``exclusive use'' by-law validly take away a right to share in the use of common property, without the consent of those so deprived? This is a question posing important issues both under strata titles legislation and by reference to *Corporations Law* principles of fraud on the minority and under the Gambotto doctrine. It arises in the following circumstances.

2. From April 1993, the Plaintiffs were registered proprietors of 37 Wolsely Road Point Piper and also of Lot 27 of Strata Plan 3529. The latter confers the right to two car parking spaces in 45 Wolsely Road Point Piper, an adjoining property but not to any residential rights. However, by virtue of their ownership of Lot 27, the Plaintiffs also have an interest in the common property of Strata Plan 3529 which presently confers use of a swimming pool upon the Plaintiffs. The present proceedings follow the Plaintiffs' strata titling of Lot 37 into three lots. They are directed at precluding an ``exclusive use'' by-law foreshadowed by the Owners' Corporation (the First Defendant). If passed, that by-law would deny to the Plaintiffs, and the other purchasers of the new strata titled lots, any entitlement to the common property and thus to use the swimming pool.

3. The First Defendant first foreshadowed passing that exclusive use by-law by letter dated 28 April 1999. This was just two hours before the advertised time for auction of one of the new lots (Lot 2), and according to the Plaintiffs led to the cancellation of the auction. The effect of the foreshadowed by-law would be to limit the use of that swimming pool and common property exclusively to those who owned residential lots in the Strata Title development on 45 Wolsely Road. That excludes the Plaintiffs who merely have the parking lot entitlement and no residential entitlement.

4. The questions for resolution are set out below. The parties have agreed that these questions should be answered first. Then, depending on those answers, the question of

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damages, if any, should be separately determined by a Master.

Questions for resolution

5. I start with the central question to be determined, followed by the remaining questions. The answers to the latter are in varying degrees affected by resolution of that central question.

6. *Question 1: Validity of exclusive use by- law passed without consent:* ``Is a by-law invalid or otherwise challengeable which purports to deprive the Plaintiffs, as non- residential lot-owners, of the right to use common property particularly as regards the swimming pool, by conferring exclusive use on only the residential lot-owners, when this is done without the Plaintiffs' consent''? This is on one or other of the following contended bases:

> (a) that such a by-law contravenes s 52(1)(a) of the *Strata Schemes Management Act* 1996 (NSW) (``the Act''), for lack of ``written consent'' from the Plaintiffs as ``owner or owners of the lot or lots concerned'', that is to say if and insofar as they come within that statutory description in the Act;

(b) that under principles of Corporations Law, it is a fraud on the minority, constituted by the proposed purported exercise by an Owners' Corporation and its members of its by-law making power for a purpose said to be foreign to the power, namely expropriating the Plaintiffs' share in, or right to enjoyment of, the common property, or
(c) that it is an expropriation of what is said to be the Plaintiffs' right to a share of the common property or the right to its enjoyment, being (it is said) a proprietary and not merely contractual right, which expropriation is said to offend the principles regulating the entitlement of a majority to use its power under the Articles of Association to expropriate minorities, as enunciated by the High Court in *Gambotto* v *WCP Limited & Anor* (1995) 13 ACLC 342 at p 348-349; (1995) 182 CLR 432 at 444-5.

7. *Question 2: Slander of Title:* Having regard to the answer to Question 1 above, did the letter of 28 April 1999 on behalf of the First Defendant convey representations, either expressly or by implication, which constituted a slander of the Plaintiffs' title, giving rise to damage by reason of the Plaintiffs' auction of Lot 37 having to be aborted with consequent loss of the commercial opportunity to effect a sale on that evening?

8. *Question 3: Declaration:* Despite absence of malice as an element of actionable slander of title, are the Plaintiffs nonetheless entitled to a declaration that their rights are not liable to extinction in the fashion asserted by the First Defendant in that letter of 28 April 1999?

9. *Question 4: Fair Trading Act:* Having regard to the answer to Question 1, were there representations in the letter of 28 April 1999 in breach of s 42 of the Fair Trading Act 1987(NSW) which were:

(i) conduct in trade or commerce;
(ii) false in the respects asserted by the Plaintiffs, and hence
(iii) misleading and deceptive?

10. *Question 5: Relief:* Having regard to the answers to the foregoing questions, can and should relief nonetheless be refused on discretionary grounds advanced by the Defendants, namely:

(i) prematurity of the dispute;
(ii) availability of relief through the Strata Schemes Adjudicator;
(iii) grant of relief sought would preclude the Owners' Corporation from testing the reasonableness of any refusal by the Plaintiffs to provide consent to the proposed exclusive use by-law, were such consent required, contrary to the First Defendant's submission; and
(iv) so far as injunctive relief is concerned the Plaintiffs by letter dated 17 November 2000 wrote asking that an extraordinary general meeting be held to deal with the passing of the proposed by-law which was refused, such that the Plaintiffs are said to have sought both to ``approbate and reprobate'', taking into account a further letter of 12 April 2001 concerning possible mediation.

11. I turn now to Question 1

Question 1: Validity of exclusive use by-law passed without consent.

12. Before turning to the legislative scheme now contained in the 1996 legislation (The *Strata Schemes Management Act* 1996 (NSW) (``the Act''), there is an anterior question. It concerns the proper classification of the

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Plaintiffs' current entitlement in relation to the common property; is it a proprietary or merely contractual right? The First Defendant contends that the protection or enforceability of such entitlement is denied by reason of the statutory provisions and their application to what it contends is a mere contractual right.

13. The *Strata Schemes (Freehold Development) Act* 1973, s 20 provides as follows:

``20 *Body corporate to hold common property as agent for proprietors*

The estate or interest of a body corporate in common property vested in it or acquired by it shall be held by the body corporate as agent:

(a) where the same person or persons is or are the proprietor or proprietors of all of the lots the subject of the strata scheme concerned — for that proprietor or those proprietors, or
(b) where different persons are proprietors of each of two or more of the lots the subject of a strata scheme concerned — for those proprietors as tenants in common in shares proportional to the unit entitlements of their respective lots."

14. It follows from the statutory provision that the relevant rights of the Plaintiffs in the common property are proprietary; they are rights owned by them beneficially as tenants in common in the common property.

15. It is true that the rights which flow from the estate or interest in the common property so held are delineated by the by-laws. These define the nature of its use and enjoyment, any constraints upon it and any conditions applicable such as payment for maintenance and the like. That flows from the statutory scheme under the companion legislation namely the *Strata Schemes Management Act* 1996 to which I now turn. The relevant rights nonetheless remain proprietary in nature, though their detailed articulation stems from the by-laws.

16. This analysis bears on whether the doctrine of fraud on the power applies to the exercise by an owners corporation and its members of their by-law making power. That this doctrine is capable of so applying in the context of a strata scheme was resolved by the Court of Appeal in *Hougton & Anor* v *Immer (155) Pty Ltd* (1997) 44 NSWLR 46 at 53. That case also resolved that the principles governing the expropriation of minority shareholders in *Gambotto v WCP Limited & Anor* (supra) were capable of application to the operation of a strata title body. The majority in *Gambotto* described its principles as applying to ``an actual or effective expropriation of shares or a *valuable proprietary* right attaching to shares'' (at ACLC 348; CLR 444). The present right to exclusive possession can properly be described as a valuable proprietary right in relation to a share in the common property. It is, at the least, proprietary in character, though its delineation be the subject of by-laws pursuant to statute.

17. The First Defendant sought to argue that rights the subject of such exclusive use or special privilege by-laws operated merely in contract, citing *North Wind Pty Limited* v *The Proprietors Strata Plan No. 3143* (1981) 2 NSWLR 809 at 813 to 814 and s 44 of the *Strata Schemes Management Act* 1996 whereby owners corporation and owners are bound to comply with by-laws.

18. As I have explained I do not accept that the proper characterisation of the legal nature of the Plaintiffs' right in the common property is to equate it merely to the contractual right of a lot-holder entitled to exclusive use of common property. That is the position discussed in *North Wind* and addressed by s 44 of the Act. It is true that s 44 renders the by-laws binding upon the owners corporation and the owners (as well as upon any mortgagee or covenant chargee in possession or lessee or occupier). But that does not, of itself, override the proprietary character of the estate or interest held in common property through the body corporate as agent for the relevant proprietors.

19. I turn next to the statutory scheme itself. This is for what light it throws upon the proper construction of those provisions of the current Act (ss 51 and 54 in particular quoted in 26 below) which bear upon whether an exclusive use by-law is capable of depriving a lot owner of a pre-existing interest in common property without his or her consent. The interpretation favoured by the Defendants is that the statutory scheme does go so far as to permit a by-law to be passed which, without the lot owner's consent, took away entirely any exclusive right to use the common property or any shared right of that character; even where, unlike the position here, the owner so deprived is still

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required to contribute to the proper maintenance of the relevant facility within the common property. I deliberately state the matter at its extreme for that oppressive result is the consequence of the Defendants' interpretation. I do so having regard to the ordinary legislative presumption that a statute could not be intended to take away or alienate vested proprietary interests without adequate compensation. That proposition has been confirmed in a long line of cases commencing with *Clissold* v *Perry* (1904) 1 CLR 363. There a person, whose only title to land was ten years adverse possession, was held entitled to compensation on acquisition. Griffith CJ at 373 said: ``In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of statutes such as that with which we are

now dealing, that they are not to be construed as interfering with vested interests unless that intention is manifest." See generally the authorities cited in Pearce and Geddes, ``Statutory Interpretation in Australia" 4th edition at 5.1 to 5.13.

20. However, that principle is not unqualified and the Defendants seek to distinguish its application from the present circumstances. In particular the presumption against interference with vested proprietary interests may not, as the authors point out, be applicable to rights which are the creature of statute. Since the rights of an owner of common property is a creature of statute, it may be said that that which the Legislature has given, it may take away. The intention of the legislation in dealing with rights so created by statute must therefore be derived from the legislation itself, without recourse to such a presumption against that deprivation; compare *Penney* v *Penney* [1965] NSWR 495 at 498.

21. Whether or not that presumption can be called in aid, for the reasons which I develop below I consider that the Statute does not have the effect that the Defendants contend for. In particular I have concluded, for reasons developed below, that the statute does require the consent of the Plaintiffs before a new by- law can deprive them of their right to share in the exclusive use of the common property relevantly as regards the swimming pool. I so conclude, notwithstanding that the Statute does provide a mechanism for subsequent appeal to the strata schemes adjudicator (s 157) with the adjudicator able thereafter to make an order declaring a by-law to be invalid and for appeal against that order to the Supreme Court (see ss 158 and 159 of the Act). I do not consider the legislature, by conferring such an appeal mechanism, thereby evinced a legislative intention to render such proprietary rights liable to extinction, though it may render a regime said to do so marginally less oppressive.

Legislative history

22. It is convenient that I start with the legislative history of the *Strata Schemes Management Act* 1996. Its current version is first recognisable in the amendments to the 1973 *Strata Titles Act* effective in 1987 but now appearing in the 1996 legislation in rearranged form from the 1987 version.

23. The *Strata Titles Act* in 1973, the predecessor legislation to the 1996 legislation provided in s 58(7) as follows:

> ``58(7) *[Exclusive use by-laws]* Without limiting the generality of any other provision of this section, a body corporate may, with the consent in writing of the proprietor of a lot pursuant to a unanimous resolution make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part thereof upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the body corporate) as may be specified in the by-law and may, pursuant to a unanimous resolution, make a by-law amending, adding to or repealing any by-law made under this subsection if the proprietor of the lot at the time the by-law is made to effect the amendment, addition or repeal has given written consent to its being made."

24. In 1987, that legislation was amended in two significant respects. The 1973 version of s 58(7) required unanimity of all lot-holders in the passing of the resolution, and in addition the written consent only of the lot-holder expressly stipulated to have benefited from the proposed by-law. However, the 1987 amendment removed that unanimity requirement and substituted the passing of a special resolution. It then however *removed* the express reference limiting written consent to the lot-holder benefited by such by-law. That latter

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requirement was replaced in favour of what I consider to be a more comprehensive requirement, that of written consent from ``the proprietor or proprietors of the lot or lots concerned". The question then becomes, are those deprived of a (shared) exclusive use included in that expression as proprietor or proprietors of ``lots concerned", or is that expression still limited only to those benefited, despite the changed and wider wording? It would, prima facie, be surprising indeed if those injured by the deprivation were omitted from the need for consent, whilst those benefiting — and only those — were covered by that safeguard of consent.

25. The Plaintiffs correctly point out that had the legislature intended that there be thereafter no protection at all for disenfranchised lot holders (disenfranchised in the sense that unanimity was no longer required), it would have been open to have kept the express terminology employed in the 1973 version (s 58(7)). The 1973 legislation limited the need for written consent only to lot holders benefited, or benefited with a reciprocal obligation to contribute to proper maintenance. Instead, the legislature discarded that terminology in favour of a more comprehensive category of ``the proprietor or proprietors of the lot or lots concerned''. That reference to lot(s) concerned includes reference to their proprietors. That suggests that the phrase ``lot or lots concerned'' was intended to cover comprehensively all those affected by the new by-law, whether beneficially or otherwise.

26. The later 1996 legislation, apart from some rearrangement of the relevant provisions from the 1987 version, produced the following corresponding provisions, namely ss 51 and 52. I shall also quote the immediately contextual s 53 and s 54(1), the latter of which is strongly relied upon by the Defendants.

``*Division 4 Special provisions for by-laws conferring certain rights or privileges*

51. *Application of Division*

(1) This Division applies to a by-law conferring on the owner of a lot specified in the by-law, or the owners of several lots so specified:

> (a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
> (b) special privileges in respect of the whole or any specified part of the common property,

and to a by-law that amends or repeals such a by-law.

(2) This Division does not prevent an owners corporation making a by-law in accordance with section 54 of the *Community Land Management Act* 1989

52. *How does an owners corporation make, amend or repeal by-laws conferring certain rights or privileges?*

(1) An owners corporation may make, amend or repeal a by-law to which this Division applies, but only:

> (a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and
> (b) in accordance with a special resolution.

(2) A by-law to which this Division applies may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

(3) After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed

53. *Can a by-law contain conditions?*

A by-law to which this Division applies may confer rights or special privileges subject to such conditions as may be specified in the by-law (for example, a condition requiring the payment of money by the owner or owners of the lot or lots concerned, at specific times or as determined by the owners corporation.

54. *By-law must provide for maintenance of property*

(1) A by-law to which this Division applies must:

> (a) provide that the owners corporation is to continue to be responsible for the proper maintenance of, and keeping in a

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> state of good and serviceable repair, the common property or the relevant part of it, or

(b) impose on the owner or owners concerned the responsibility for that maintenance and upkeep...."

27. The Defendants contend that no consent is required from the lot owner whose prior rights are to be extinguished but only from those lot owners who are to acquire exclusive use. Such a construction, ex facie, would deny the right to consent to those most adversely affected and confer it on those who are thereby benefited. A conclusion so absurd and unreasonable in effect invites a very careful reading of the legislation to see if it is compelled by its plain words. The onerousness of such a result, if it indeed is the legislative consequence of the plain words used, would not be sufficiently mitigated by the fact that the deprived lot owner was relieved thereafter from any associated maintenance obligation, as may or may not occur. Here it is true the Plaintiffs will henceforth be released from the costs of maintenance of the relevant common property, though correctly described by the Defendants in their submissions as microscopic. As I have said, the construction contended for by the Defendants must as a matter of logic apply equally to the situation where there were no extinguishment of the obligation to contribute to maintenance, an even more oppressive result. On the Defendant's contention, that would leave the deprived lot owner with only such rights of a limited kind to object (and appeal) after the event as are allowed by the statute. Those rights are to seek revocation of the amendment of the orders by recourse to ss 157 to 159 of the Act to which I have earlier made reference. It is well-settled that a construction of legislation that leads to a manifestly absurd result is not to be adopted unless compelled by sufficiently clear language which leaves no room for an interpretation that avoids such consequence.

28. The Defendants urge that the process of interpretation should be informed also by recourse to the Minister's second reading speech introducing the 1987 amendments to the 1973 *Strata Titles Act*. The Defendants contend that recourse thereto throws light on the legislative scheme that was then repeated in the 1996 Act (subject to some minor re- arrangement of the relevant sections). The particular passage relied upon by the Defendants is underlined and I have quoted it along with its immediate context as that context bears upon the remedial purpose as well.

``These amending bills arise from the most recent recommendations of this committee and reflect the Government's desire to simplify the management provisions of the *Strata Titles Act* by removing unnecessary regulation. They also reflect the Government's determination to keep the Strata Titles Act in step with industry practices, thus providing bodies corporate with the means to equitably manage more complex schemes such as mixed commercial-residential strata schemes. In this latter area the major proposals, which are contained in schedule 1 of the bill, seek to remedy an increasing problem whereby special services are being provided to only some proprietors — for example, an airconditioning system servicing a ground floor shopping arcade — are being paid for by all proprietors. This is because of the management provisions of the Act which require that all of the proprietors have to contribute to the cost of operating and maintaining a service if it is located on common property.

This is clearly inequitable and it is proposed to introduce the concept of limited common property to enable the body corporate to charge those who use the service its cost in proportion to the benefit they derive from it. This will be achieved by allowing a developer or body corporate to make a limited common property by-law granting exclusive use of part of the common property to certain proprietors. The by-law would contain all necessary details to ensure the effective upkeep and maintenance of the common property. The developers or original proprietors would be able to make such by-laws at the time of registration of the strata scheme, thus allowing them to provide in advance for the equitable operation of special services. Also, consumers buying into a strata scheme would be able to clearly establish their responsibility for the operating and maintenance costs of any service provided from common property. Bodies corporate will be able to make such by -laws in the

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same manner s they can for any general by- law.

The proposals also include a number of measures to protect the interests of both individual proprietors and bodies corporate. The first is that for such a by-law to be valid, the body corporate must first obtain the written consent of the proprietors who will be given the exclusive use of the common property.

This provides a proprietor with a safeguard against unknowingly being given responsibility for the maintenance of part of the common property. For example, a proprietor absent on vacation might otherwise return to find that he had been granted exclusive use of the roof of the building with attached responsibilities for its upkeep and maintenance. The other measures centre around the ability of the body corporate or a proprietor to apply to the Strata Titles Board for a determination if either the body corporate has unreasonably refused to make a limited common property by-law, a proprietor has unreasonably withheld his or her consent to the by-law, or a dispute arises over the method of determining contributions towards the upkeep of the common property."

[emphasis added]

29. The Defendants rely upon the emphasised passages as supporting strongly a reading that would treat as the exclusive remedial purpose elimination of the requirement of unanimous consent. Its purpose (it is said) is then to substitute a regime where written consent is only required of the owner or owners of the lot or lots ``concerned''; that is to say, concerned in the limited sense of receiving the *benefit* of exclusive use but not in the sense of *deprived* of a pre-existing exclusive shared use. The justification for what must prima facie be an entirely paradoxical result is said to be that the Minister in that second reading speech is dealing *only* with the circumstances where exclusive use is conferred over common property accompanied by an obligation for effective upkeep and maintenance of that common property, thus reciprocally burdening those who are thereby to be benefited. It is said that it would be quite unreasonable for such persons to be so burdened without their having first to give written consent.

30. One may readily accede to that last proposition as an example of where consent should be required. This is without acceding to the supposed consequence that this is the exclusive ambit of the regime which replaced the requirement for unanimous consent. It appears moreover that the Defendants would also treat the new regime as covering, as a matter of logic, the situation where the lot owner was given exclusive use of the common property with no obligation to contribute to its upkeep, further emphasising the absurdity and anomaly of such a regime.

31. Moreover there is a difficulty in the way of that regime being compatible with what the Minister says elsewhere in her second reading speech. She refers to what is said to be ``an increasing problem whereby special services are being provided to only some proprietors — for example an airconditioning servicing a ground floor shopping arcade'', which are being paid for by all proprietors. It is said that this legislation will remedy that inequity by allowing a developer or body corporate to make a limited common property by-law grounding exclusive use of part of the common property to certain proprietors, such a by-law containing all necessary details to ensure effective upkeep and maintenance of the common property, presumably only by those proprietors that are granted the exclusive use.

32. Significantly, it is then said by the Minister that this would enable the developers or original proprietors ``to make such by-laws at the time of registration of the strata scheme''. However, this would be a circumstance where no-one would be yet the owner of a lot and thus there would be no-one who would be deprived of a pre-existing user right. That emphasises that the Minister would have been conscious that thereafter depriving any *existing* lot owner of a pre-existing user right, exclusive or not, could work an inequity if it was without consent. That would hardly be expected in remedial legislation having the purpose described by the Minister of effectuating ``the Government's desire to simplify the management provisions of the *Strata Titles Act*''.

33. In any event, that the Minister chose to highlight one circumstances in which written consent would be required is hardly to justify the conclusion that this is the only circumstances contemplated by the legislation as requiring such consent, when construing the words ``the owner or owners of the lot or lots

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concerned'' who by s 52(1)(a) are required to give written consent.

34. In any event, there has been repeated judicial cautioning against drawing general conclusions from the limited exposition possible in a second reading speech; see, for example, Mahoney JA, on appeal at *Metal Manufacturers Limited* v *Lewis* (1988) 6 ACLC 725 at 734; (1988) 13 NSWLR 315 at 326 and Palmer J in *Southern Cross Interiors Pty Ltd (in liq)* v *DCT* (2001) 39 ACSR 305 at 329. Thus in *Monier* v *Szabo* (1992)

28 NSWLR 53 at 61-2 per Kirby JA (as he then was), noted that there was often a disharmony between the words of a statute and that of a second reading speech, and that the court's ultimate loyalty was to ``the purpose of Parliament as expressed in the legislative language'', citing Mason CJ, Wilson and Dawson JJ in *Re Boulton*; *ex parte Bean* (1987) 162 CLR 514 at 518.

35. Turning now to the other arguments put by the Defendants related to the specific text of the 1996 legislation and its predecessor amendments of 1987, I find that none of these compel that interpretation contended for, with its manifestly oppressive result.

36. Perhaps the strongest argument which the Defendants mount is that s 54(1)(b), in using similar language to the reference in s 52(1)(a) to ``the owner or owners of the lot or lots concerned'' (compare ``the owner or owners concerned'') could not have intended a different sense to that phrase. Furthermore, if s 54(1)(b) were capable of applying not only to the owner or owners granted exclusive use but also to the owner or owners who are thereby deprived of pre-existing use rights, this would enable a by- law to impose on the deprived owner who has suffered the injury of deprivation, the further injury of being made responsible for maintenance and upkeep, though having no further use rights of that which had to be maintained.

37. There is however a short answer to that argument. The language used in s 52(1)(a) flows from that in s 54(1)(b) in a way which could justify a narrower reading of the ambit of s 54(1)(b) in terms of what it denotes. Thus s 52(1)(a) connects the word ``concerned'' to the expression ``the lot or lots'' whereas in s 54 ``concern'' qualifies ``the owner or owners''. It would be perfectly logical for s 52(1)(a) to refer in a broad sense to the ``lot or lots concerned'' with ``concerned'' having the dictionary sense of ``involved''. ``Involved'' is a word of wide denotation, capable of embracing both those benefited and those injured by the relevant law. ``Lots'' as inanimate objects are hardly to be thought of as having the alternative dictionary meaning of ``interested'', or ``troubled or anxious''. It is true that the ultimate connection is back to the owners. They alone have the capacity to use and enjoy the specified part of the common property or suffer its deprivation, or to enjoy special privileges or suffer their deprivation. But the language of ``concerned'' in s 52(1)(a) is still apt to pick up both categories, namely those upon whom is conferred the right of exclusive use and enjoyment of the special privilege, and those who are deprived of that use, exclusive or otherwise, of the relevant special privilege. Such an interpretation avoids the absurdity and anomaly to which I have earlier made reference.

38. Thus I consider that when it comes to s 54(1)(b), the focus is more narrowly upon the owner or owners concerned in the subject matter of maintenance and upkeep to which s 54(1)(b) is alone directed. It precludes the by- law leaving no one responsible for maintenance and upkeep. The owner would cease to be ``concerned'' in maintenance and upkeep if by the by-law that owner were henceforth released from that responsibility, with the owners corporation taking it over. Whereas that owner would remain ``concerned'' if the by-law continued to impose that obligation on the owner(s) concerned. That suggests, in its context, that the instances denoted by the word in s 54(1)(b) are narrower in scope than those covered by s 52(1)(a). That said ``concerned'' in each of s 54(1)(b) and s 52(1)(a) still has the same essential connotation of defining features.

39. To sum up. While one would not ordinarily expect to find a different meaning given to the same phrase in adjacent legislative provisions, first the language and context here is sufficiently different to justify what is a difference only in denotation, not connotation or essential meaning. Second, that difference in denotation is the more readily justified where not to make it would produce its own manifest absurdity in that context.

40. The Plaintiffs' construction of s 58(7) of the 1987 Act and s 52(1) of the 1996 Act still permits a relaxation of the management provisions of the Act and the removal of unnecessary regulation as identified in the

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Minister's second reading speech. A principal vice of the 1973 version of s 58(7) was no doubt that owners who had no interest at all in relation to the making of an exclusive use by- law, such as owners who never had an exclusive or other use and would not acquire that use by virtue of the by-law, were still able to frustrate the making of such by-laws by denying the consent required for a unanimous resolution. The possibility for such capricious behaviour was removed by the twofold amendment effected by the 1987 Act. That required only the passing of a special resolution and, sensibly, the written consent of the owners

``concerned''. This is either in the sense of those who are to receive the benefit of exclusive use, with the possibility of an accompanying burden, and those who are deprived of pre- existing use rights. Each are ``concerned'', not just the former.

41. The fact that the 1987 amendments permit the owners corporation to determine who ``owner or owners of the lot or lots concerned'' might be, in place of the unanimous consent requirement, is an important de-regulation. It liberates owner corporations of the veto power of the vexatious lot holder. In the vast majority of cases, it is not difficult to determine whether a lot-holder might be an ``owner of a lot concerned''. It will be readily apparent whether existing rights are threatened or an economic burden created, or for that matter even where a privilege is conferred with no economic burden, since some owners may not wish that for themselves for whatever reason, unusual as that may be. In each case, the relevant lot is ``concerned''. For the small percentage of cases where some complexity may attach, that does not diminish the value of the intended reform or lead to the conclusion that the language does not have the meaning which its words are capable of bearing and which avoids the anomalies earlier identified.

Summing up

42. Section 52(1)(a) of the Act requires the written consent of the owner or owners of Lot 27 for a by-law to be capable of depriving such owner or owners of a pre-existing use right in relation to the common property, whether or not that deprivation were accompanied by release from any further obligations in relation to maintenance and upkeep. In particular, the Plaintiffs who would be in that position as owners ``concerned'' are not reduced to persuading an adjudicator or court that such a by-law should be subsequently revoked, following the procedure first of adjudication and then of appeal to the Supreme Court pursuant to the provisions of ss 157 to 159 of the Act. The proposed by-law foreshadowed in the faxed letter of 28 August 1999 could not therefore be passed so as to be rendered valid and effective in the absence of written consent from the Plaintiffs. Nor would such a by-law escape the requirement of written consent, merely because the by-law specified only the lots which were to be granted the right of exclusive use and enjoyment and made no express mention of the lots to be thereby deprived of such use and enjoyment. I view s 51(1) as enabling such a by-law to be passed and being part of a code which states exhaustively the statutory basis which alone permits such a by-law. Put simply, if a valid by- law were sought to be passed *depriving* the Plaintiffs of a pre-existing right of exclusive use and enjoyment of that part of the common property as consisted of the swimming pool, first that by-law would need to specify both lots to be conferred with the right of exclusive use and enjoyment of the relevant part of the common property and second, the lots to be deprived of use and enjoyment of the relevant part of the common property. Then consent of the owner deprived (as well as owners benefited) becomes an essential requirement for such by-law to take effect.

Fraud on the minority and expropriation

43. It is convenient that I deal with both these bases of challenge together, though my earlier conclusion means that it is not strictly necessary to consider these alternative bases of attack.

44. I have already identified the nature of the proprietary interest conferred by the relevant legislation, albeit by-laws may bring about its delineation. The Plaintiffs' right as a tenant in common of the common properties is sufficient to permit them to lodge a caveat had they so chosen to prevent the registration of any by-law affecting common property alleged to be invalid; see *Mulwala & District Services Club Ltd* v *Owners Strata Plan 37724* (2001) NSW ConvR ¶55-962; (2000) 50 NSWLR 458, implying that such a right must be an interest in land and accordingly a property right.

45. But in any event, the doctrine of fraud on the minority is capable of application in the present circumstances, save insofar as statute

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precludes that. In circumstances where no written consent has been sought or foreshadowed in the relevant correspondence, the doctrine of fraud on the minority is capable of application in relation to the contemplated expropriation of the Plaintiffs' minority rights to a shared use of the relevant part of the common property. Such a use of a by-law prima facie would be a fraud on the power being for an improper purpose, on the

assumption that such power existed. As I have earlier concluded, such statutory power does not exist, absent written consent. If I were wrong, the exercise of that power could be restrained as I explain.

46. The Defendant attempts to avoid this consequence by contending that the rights held by the Plaintiffs are undeserved, or somehow unnatural, or are inadequately paid for in terms of a contribution to maintenance charges. Those contentions are quite beside the point. Even if it were in some sense true that the rights were morally undeserved and unduly generous having regard to the miniscule contribution made by the Plaintiffs, the fact remains that they have those use rights legitimately (presumably reflected in what they paid to buy Lot 37 limited Lot 27 by Deed). The proposed by-law would extinguish them. Indeed the disparity between their cost and their worth emphasises the extent of the foreshadowed deprivation.

47. It is true that in *Gambotto* the majority considered that the exercise by members of their power to alter the constitution of the company to expropriate the shares of a minority would still be capable of being exercised for a proper purpose and indeed only be so capable of being exercised, if it were to remove a detriment to the company.

> ``(i) It is exercisable for a proper purpose; and (ii) its exercise will not operate oppressively in relation to minority shareholders. In other words, an expropriation may be justified where it is reasonably apprehended that the continued shareholding of the minority is detrimental to the company, its undertaking of the conduct of its affairs — resulting in detriment to the interest of the existing shareholders generally — and expropriation is a reasonable means of eliminating or mitigating that detriment.
> Accordingly, if it appears that the substantial purpose of the alteration is to secure the company from significant detriment or harm, the alteration would be valid if it is not oppressive to the minority shareholders'' at 445.
> ``The majority emphasised that an expropriation merely to advance the interests of the company as a legal and commercial entity or those of the majority, albeit the great majority, would be insufficient justification'' at 446.

48. It is impossible to conclude from the facts in the present case that the Plaintiffs' use rights, which in practice merely adds a further family to the two families in the duplex previously constituted by Lot 27 as users of the pool, constitutes a material detriment in the sense used in *Gambotto*. Nor could it be said that the relatively miniscule contribution for that use is itself detrimental to the owners corporation, its undertaking or the conduct of its affairs as used by the majority in *Gambotto*. This is because it is clear that ``detriment'' is not demonstrated merely by showing that the proposed expropriation would advance the interests of the company as a legal and commercial entity or those of the majority. Moreover given the willingness of the Plaintiffs to submit to an order calling for a more proportional contribution, even such detriment as its absence bespeaks will be removed.

49. It is nothing to the point for the Defendants contend that the only natural use of common property by the car parking spaces is to walk or drive to and from Wolsely Road on the western boundary of the land to the car parking spaces and there to park. Nor that the use made of the rear pool and garden area is an entirely unnatural one (whatever that may mean) since this too misses the point. Speculation as to why the miniscule contribution to maintenance was arrived at add nothing either.

50. As to detriment, though the Plaintiffs do not concede that they are obliged to do so, they have indicated that if imposed, they would not object to a condition of relief being the requirement to make a reasonable contribution to maintenance. Moreover, in the events that have happened, subject to consideration of the matters pertaining to relief to be discussed latter, my earlier conclusion concerning the need for, and lack of, consent under the Statute

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means that the Plaintiffs are not required to resort to common law or equitable remedy in any event.

51. Finally, it is simply nonsense to say that in considering reasonableness, the loss of any right to use the physically remote pool and garden is counter-balanced by the foreshadowed provision which places the financial burden of maintenance and upkeep on the residential lots. The fact of the matter is that the

Plaintiffs' contribution is miniscule in relation to that cost. Whether that be reasonable or not, that is the valuable right which the First Defendant intends to extinguish by the foreshadowed by-law.

52. It remains to consider in relation to the *Gambotto* principles whether ``expropriation'' comprehends extinction of rights as distinct from the compulsory taking of another's property to oneself by way of transfer. The Court of Appeal in *Heydon* v *NRMA* (2001) Aust Torts Reports ¶81-588; (2001) 36 ACSR 462 provided differing interpretations as to the meaning of ``expropriation''. Clearly enough were the statutory scheme to have been followed by obtaining written consent, the issue of expropriation would not arise. But it not having been followed, there is the question whether the view expressed by Malcolm AJA, defining ``expropriation'' as limited to the transferring of another's property to oneself (at 516-8) should be accepted. While the view expressed by Malcolm CJ is to be treated with respect, I prefer the reasoning of Ormiston AJA who rejected the submission that *Gambotto* does not apply to the mere removal of rights by way of their compulsory destruction in the following passage (para 577):

> ``Thus I would conclude that, although the word `expropriation' is ordinarily wide enough to comprehend not merely compulsory acquisition but also compulsory destruction of rights, the High Court in *Gambotto* was concerned primarily with amendments to articles which have the effect of destroying the minority's shareholding or other membership rights or of placing those rights in the hands of the majority shareholders, even if the amendments are not necessarily intended principally to give the majority the financial advantages attaching to those shares but are more directed to excluding the minority from continuing to exercise membership or other related rights in the corporation.''

53. The limited view of expropriation suffers from its preference for form (legitimate compulsory extinction artificially distinguished from illegitimate compulsory transfer) over substance. To work a compulsory extinction is just as much a deprivation or expropriation as a compulsory transfer. Extinction leaves the remainder to ``inherit the earth'' just as they would if beneficiaries of a compulsory transfer.

54. There is nothing in the judgment of McPherson AJA to the contrary of that view.

Conclusion

55. Unless I were wrong in my earlier conclusion that written consent is required to effect an extinction of the rights of the Plaintiffs in the manner contemplated by the proposed by-law, pursuant to s 52 of that Act, the absence of such consent would make the extinction not only invalid under the Act but also successfully challengeable as either a fraud on the minority or a contravention of the *Gambotto* principles, as constituting an expropriation of the Plaintiffs' rights, being rights which are more than merely contractual but have a proprietary basis or character.

Question 2: Slander of Title and

Question 3: Declaration

56. It is convenient to deal with these questions together. The Plaintiffs' contentions start with the proposition that the letter of 28 April 1999 from Mr Le Page, solicitor for the Defendants, to the auctioneer on the day of the proposed auction of 37A Wolsely Road, Point Piper, upon its proper construction, conveyed to the auctioneer the following representations,

> ``(a) The Defendant was entitled to make a by-law extinguishing the plaintiffs' right to use of the swimming pool and other common property of SP 3529.
>
> (b) That the defendant intended and would in due course make such a by-law.
>
> (c) That owners of Lot 27, including purchasers of any interest in Lot 27 would consequently not be entitled to enjoy use of the swimming pool and other common property of SP 3529.''

57. I agree with that first proposition. There is no suggestion that the letter contemplated any written consent. Rather it contemplates, as a matter of sufficiently formed intention as would

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require warning to potential buyers, that the by- law would be passed extinguishing the Plaintiffs' right to use the swimming pool. This is with the clear implication that this would be done without seeking the Plaintiffs' consent. It is disingenuous for the Defendants to suggest that the Owners' Corporation could in any event appeal any lack of written consent from the Plaintiffs (s 158(1)(b) of the Act), when there is no suggestion that the Owners' Corporation intended to seek the written consent in the first place.

58. The elements in the action for slander of title are set out in Halsbury's Laws of England, 4th edition (Vol. 28) at para 276. The Plaintiffs must prove:

(i) falsity;
(ii) publication and disparagement of the Plaintiffs' title;
(iii) malice; and where necessary,
(iv) special damage to the Plaintiffs.

59. The Plaintiffs then contend that malice in the requisite sense might be inferred, in the present case in the following circumstances:

(i) the letter of 28 April 1999 was sent only several hours prior to the auction;
(ii) the letter was sent to the auctioneer without notice to the Plaintiffs;
(iii) on the evidence of the Defendants' witness, Mr Notley, stopping the Plaintiffs or their successors in title making use of the swimming pool facility had been considered by members of the First Defendant for many months beforehand;
(iv) although the Defendants' executive committee had obtained legal advice, it appears that the advice contained at least the proviso that any decision by a special majority under the Act might be liable to challenge before the appropriate tribunal under the legislation (see Notley affidavit, para 6);
(v) letter of 28 April 1999 made no reference to the entitlement to challenge before the appropriate tribunal;
(vi) after causing the auction to abort the First Defendant and its members failed to properly follow up and respond to the Plaintiffs' request for explanation regarding their threat (see affidavit of Plaintiff Mr Young sworn 13 August 1999); and
(vii) after aborting the auction the First Defendant's members promptly abandoned the proposal to immediately pass the by-law, once faced with the threat of legal action.

60. It is then contended that it may be concluded from the above facts that the most probable explanation of the letter of 28 April 1999 was the desire of the First Defendants and its members to inconvenience the Plaintiffs in their attempt to sell the property, in the hope this would give a tactical advantage, perhaps a settlement upon favourable terms.

61. It is then said (and I would accept) that the 28 April 1999 letter was the cause of the auction aborting on that date, and that the Plaintiffs lost the commercial opportunity to effect the sale that evening. It is then contended that there is no difficulty in the present instance in the Plaintiffs establishing special damage, for example the loss of an opportunity, although the prospective opportunity is to be determined as a separate issue; see *Sellars* v *Adelaide Petroleum NL* (1994) ATPR ¶41-301; (1994) 179 CLR 332. Any action for damage, if otherwise available, still depends on whether that loss of opportunity actually gave rise to damage taking into account any subsequent increase (if such there were) in the value of the property.

62. Hence it can be said that the gravamen of the Plaintiffs' case is that there is an implied false representation that the by-law could be passed without the requirement of first obtaining written consent, even if the absence of such consent could itself be the subject of proceedings brought pursuant to s 158(1)(b) of the Act, based on such consent being unreasonably refused. Further, that this involves a published disparagement of the Plaintiffs' title, so far as it impliedly represents that the title is defeasible in that way, that is defeasible without obtaining written consent.

63. While I accept that a representation was made broadly to the effect stated, more precisely it is a representation as to the effect of a by-law but not a representation as to title itself. In that sense, the potential extinction of the Plaintiffs' title still presupposes that the title exists. What is false is the suggestion that it can be defeated by a by-law without obtaining the requisite consent either voluntarily or pursuant to the procedures in s 158 being successfully pursued. To my mind that is not a disparagement of the title itself.

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64. If I were wrong in that, I would nonetheless conclude that the relevant disparagement did not occur with the necessary malice but represented more likely a genuinely held view as to the entitlement of the Defendants to pass a by-law without requirement for written consent, even if, as I have concluded, that view was misconceived. Failure to refer to the other matters identified by the Plaintiffs (see para 30 of the Plaintiffs' written submissions of 26 July 2001) does not sufficiently support an allegation of malice.

65. Assuming in the Plaintiffs' favour that there was nonetheless publication, on the basis that publication to a plaintiff's agent is publication (see Gately on Libel and Slander (Sweet & Maxwell) 9th ed, para 6.1 citing *Duke of Brunswick* v *Harmer* (1849) 14 QB 185 and the authorities and footnotes 45 to 50) nonetheless there is a further difficulty in the way of the Plaintiffs. As I have said, it has not yet been shown even in a general sense that loss of the economic opportunity to sell that evening would indeed have led to the Plaintiffs suffering special damage, as that depends upon whether or not the property increased in value thereafter. However, as damage has not been argued before me, it would be open to the Plaintiffs to remedy that omission should that aspect be pressed further.

66. As to the question of whether, absent malice on the part of the First Defendant, the Plaintiffs are nonetheless entitled to a declaration that their rights are not liable to extinguishment in the fashion that the First Defendant has asserted in his letter (see *Loudon* v *Ryder (No. 2)* [1953] 1 Ch 423), I do not need to reach any conclusion on that matter. This is because even if relief should be denied on discretionary grounds (as to which see Question 5 below) my answer to Question 1 confirming the requirement for statutory consent means that the Plaintiffs are entitled to such a declaration on that footing in any event.

Conclusion

67. The Plaintiffs' claim based on slander of title is not made out. The occasion for making a declaration based on slander of title does not arise, as such a declaration may sufficiently be made by reason of the answer to question 1, but subject to consideration of any relevant discretionary ground under question 5.

Question 4: Fair Trading Act

68. I have earlier concluded that there was an implied (false) representation that the First Defendant was entitled to make a by-law extinguishing the Plaintiffs right to use of the swimming pool and other common property of S/P 3529, without obtaining the Plaintiffs' written consent in circumstances where refusal of that consent might be the subject of challenge pursuant to s 158 of the Act. It follows that such representation, though implied, was misleading and deceptive. I do not accept the Defendants' contention that all the letter amounted to was a mere statement of future intention (see 76 and 77 below). Quite clearly the context in which the letter was written and the request in relation to the auction from the auctioneer was calculated in a misleading way to convey the probability of a future defeasance or extinction of the Plaintiffs' rights with respect to the common property. In that sense it was to influence the outcome of the auction if not to cause it to be aborted. It matters not whether or not the statements expressed and implied were made with malice so far as s 42 of the *Fair Trading Act* is concerned.

69. The remaining question is whether the conduct of the First Defendant in sending the letter was conduct ``in trade or commerce'' for the purposes of s 42 of the *Fair Trading Act*.

70. The Plaintiffs' argument is that although the letter was sent by Mr Le Page, solicitor, it was clearly sent on the instructions of the First Defendant; see the affidavit of Mr Notley sworn 12 November 1999. The First Defendant is a corporation formed for the management of S/P 3529. There are some ten proprietors who are members of the Corporation and who pay fees to the Corporation in exchange for the services associated with the management, repair and maintenance of the property. Thus it is clearly to be concluded that the First Defendant is itself engaged in trade and commerce, namely the business of managing a residential block of units.

71.

However the Defendants contend that the letter merely foreshadowed an intention to pass a by-law; accordingly, that the communication of that intention fell short of the test for engagement ``in trade or commerce'' set forth in the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ in *Concrete Constructions (NSW) Pty Limited* v *Nelson* at 51,363-51,364; (1990) 169 CLR 594 at 602 to 605. Thus ``conduct in trade or commerce'' refers only to ``conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed... the words in `in trade or commerce' refer to the `central conception of trade or commerce' and not to the `immense field of activities' in which corporations may engage in the course of carrying on some overall trading or commercial business.'' (at 603) At 604 the court concluded: ``what the section is concerned with is the conduct of a corporation towards persons be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character.''

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72. With some hesitation, I would conclude that the conduct of the First Defendant in writing the relevant letter was in the course of carrying on the business of managing a residential block of units in that central sense laid down by the High Court as prerequisite for s 42(or s 52) jurisdiction to be enlivened. To characterise a letter dealing with a proposed by- law as somehow peripheral to that central conception of trade or commerce could not ultimately be sustained once it is recognised that the writing of such a letter would be very much a core activity of the management of the residential property being itself trade or commerce. In that regard, the trade or commerce certainly need not be engaged in by the recipient of the letter being the auctioneer, though he was in any event also engaged in trade or commerce. In that regard, the observation of Toohey J in *Concrete Constructions (NSW) Pty Limited v Nelson* (supra) at 613 is pertinent, as explained by Hely J in *Data Flow* v *Goodman* (1999) 168 ALR 169 at 172. Toohey J held that for s 52 jurisdiction to be enlivened, conduct must be in trade or commerce, but not necessarily that of a person engaging in the relevant conduct. Examples of the application of this principle are usefully collected in *Data Flow* (supra) at 172 to 173.

Conclusion

73. Section 42 of the *Fair Trading Act* was contravened by the implied representation earlier identified, as constituting misleading and deceptive conduct in trade or commerce.

Question 5: Relief

74. The principle ground put by the Defendants for denying relief on discretionary grounds is prematurity. I agree with the Plaintiffs' contention that the construction of the letter of 28 August 1999 contended for by the First Defendant is not sustainable. That is, in seeking to reduce the impact of that letter upon a reader to a mere indication that strict compliance with the requirements of the 1996 Act was proposed by the First Defendant in making the proposed by-law, and that a democratic vote would determine the fate of the existing use right, such that the letter could be said to have contemplated the possibility of the by-law not being made.

75. In particular I agree with the Plaintiffs' contention that the clear words of the letter, particularly the last sentence of paragraph 3, exclude this construction. In paragraph 3 having indicated that the proposed by-law will confine the use of the swimming pool to residential owners, the last sentence provides that the by-law ``*will* exclude the owner of Lot 27'' from such entitlements and their responsibility from paying such entitlements; [emphasis added]. Moreover, the letter does not suggest that there is any doubt that the by-law will be passed and has no statement of any qualification upon the capacity so to pass it, in particular the essential qualification of obtaining written statutory consent.

76. Thus the reasonable meaning conveyed in the letter is that the First Defendant intended then and there to pass a by-law which had the effect of precluding the use of the swimming pool. That intention has never been withdrawn. On the contrary, the Defendants' actions including the vigorous and unyielding defence of the matter on this preliminary point make it clear that the Defendants intend to pass their by-law which (if valid) would have such effect if permitted to do so. Whether or not the by-law has been properly formulated is nothing to the point given the clear evincement of that intention. Indeed paragraph 8 of Mr Notley's affidavit

of 12 November 1999 makes it perfectly clear that the intention of the Owners' Corporation was to pass an exclusive use by- law as quickly as possible.

77. That the First Defendant has still not passed the proposed by-law is not to the point

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given that it has not withdrawn the threat to do so. The Plaintiffs are entitled to have that threat removed by vindication of the actions they have brought in the present proceedings. They are likewise entitled to have removed the blight upon their future sale prospects from this continuing threat. It is nothing to the point to say that until the by-law has been made, no rights under ss 157 or 158 accrue, since the non-consenting Plaintiffs' rights do not depend on ss 157 or 158. That consent is a fundamental integer of the validity and efficacy of any by- law passed pursuant to s 52 of the Act. In those circumstances, it could not properly be said that the dispute is not at a sufficiently advanced stage so as to render the Plaintiffs' proceedings premature or in any way hypothetical. The Plaintiffs still wish to sell the remaining lot; see para 57 of the Plaintiffs' affidavit of 13 August 1999, though Lot 37A has been sold.

78. The foregoing deals with the second discretionary ground relied upon by the Defendants, namely the availability of relief from the Strata Scheme's adjudicator pursuant to ss 158 and 159 of the Act. Given that consent has not been sought, the Defendants are not in a position to argue that by bringing the action in the way the Plaintiffs have done they are precluding the Owners' Corporation from testing the reasonableness of any refusal to provide consent to the proposed by-law.

79. Finally, there is said to be conduct by the Plaintiffs which should preclude any injunctive relief. That conduct is first that the First Defendant has made an offer which is said to be unreasonably refused by the Plaintiffs. However, that offer contained in DX7 would exclude the Plaintiffs' entitlement to any damages whatsoever or any costs whatsoever.

80. Then it is said that by letter dated 17 November 2000 the Plaintiffs' solicitor wrote asking that an extraordinary general meeting be held to deal with the passing of a proposed by- law, which was subsequently refused. It is then said that the Plaintiffs would thereby be both approbating and reprobating were they permitted to obtain injunctive relief.

81. However the refusal by the First Defendant to call the proposed meeting made it impossible for the Plaintiffs to have even the possibility of any relief under the Act. The Plaintiffs were then left in a position where no relief was available and the threat to pass the by-law remained. I fully agree with the Plaintiffs' contention that persisting with these proceedings became the only practical vehicle by which the dispute might be resolved in a cost effective manner.

82. Finally, a letter of 12 April 2001 is relied upon by the Defendants (DX3) as betraying a misleading and deceitful attitude to mediation that had been suggested by the Court at the pre- trial conference. However, not having been cross-examined on that letter, it is not now for the Defendants belatedly to rely upon the apparent breakdown of any mediation and the other allegations made in the Defendants' written submissions at para 49 as their basis for denial of discretionary relief, even if such contention otherwise had any validity, as must be dubious.

Overall conclusion and costs

83. The Plaintiffs succeed in relation to each of the questions posed under Question 1 and Question 4 and are not denied relief on any of the discretionary grounds in Question 5. The Defendants succeed in relation to Question 2 but the Plaintiffs are entitled to a declaration that in the absence of written consent from the Plaintiffs the by-law cannot be validly passed. In that regard I note that the issue of the reasonableness of the Plaintiffs' contribution *may* be a relevant factor should any application be made pursuant to ss 157 and 158 of the Act in the event that such written consent is sought and declined.

84. As to any damage, if it be pressed, that claim will need to be separately determined.

85. The parties are directed to submit orders giving effect to this judgment as soon as possible and in any event by 14 December 2001. Costs, prima facie, should follow the event but the parties may address me on costs if they wish.

SATTEL and ORS v THE PROPRIETORS BE BEE'S TROPICAL APARTMENTS BUILDING

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(2002) LQCS ¶90-113

Court citation: [2001] QCA 560

Supreme Court of Queensland, Court of Appeal

Judgment delivered 14 December 2001

Building Units and Group Titles — Body corporate — Appeal against determination that body corporate liable in damages for repudiation of caretaking agreement — Whether agreement ultra vires — Whether body corporate required to authorise by by-law the assumption of an obligation to pay for cleaning service with respect to reception area — Whether respondents required to provide cleaning and maintenance services at appellant's expense with respect to common areas over which it enjoyed exclusive use — Building Units and Group Titles Act 1980 (Qld), sec 30, sec 37 and sec 50.

The respondents (``Sattel'') instituted an action in the Supreme Court in which they sought declarations relating to a caretaking agreement as well as damages for breach of contract and other relief. The appellant (``Be Bees'') was sued as a body corporate constituted under the provisions of the Building Units and Group Titles Act 1980 (Qld). The complaint Sattel made against Be Bees was that it had wrongfully repudiated certain agreements said to have been made between the two parties.

The learned judge held that the agreement was in two respects ultra vires the appellant, although he went on to hold that those provisions could be severed from the rest of the agreement. He concluded that the communication of the appellant's resolution of 3 April 1997 amounted to the appellant's repudiation of the contract, which the respondents accepted, effectually terminating the contract and entitling the respondents to damages in respect of any consequent loss. He then remitted the assessment of damages to the District Court, and ordered the appellant to pay the respondents' costs: (2002) NSW Titles Cases ¶80-065.

The appellant challenges the trial judge's findings as to the validity of the agreement. The appellant submitted that the caretaking agreement was beyond the powers of the appellant.

Held: appeal dismissed.

By-law authorising payment for cleaning of reception area

1. Section 30(7) provides that a body corporate may make a by-law conferring, upon the proprietor of a lot, the right to the exclusive use and enjoyment of all or part of the common property. Such a by-law was made in this case, with the proprietor of Lot 1 being given such rights in relation to common property areas, including the reception area, adjacent to four other lots.

2. Section 30(7A) requires that a by-law deal with the question of who carries the financial burden of providing services in relation to areas of common property over which proprietors have been given rights of exclusive use and enjoyment. This applies only where the provision of the relevant services is a duty imposed upon the body corporate by sec 37(1)(b) and (c).

3. As the services were not activities which sec 37(1)(c) compels a body corporate to undertake, the payment for these services did not have to be the subject of a by-law. Section 30(7A), being tied to sec 37(1), does not operate to cast onto the respondents any financial burden associated with the maintenance of the reception area.

Acceptance of repudiation

4. The Court unanimously held that the appellant's conduct was repudiatory, in that it evinced in clear, express terms an intention not to be bound by the caretaking agreement.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

DA Savage for the appellant (instructed by Attwood Marshall).

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[140248]

CJ Carrigan for the respondents (instructed by Munro Thompson).

Before: de Jersey CJ, Chesterman and Atkinson JJ.

Judgment, in full, below

de Jersey CJ: The body corporate appeals against declarations and orders made by the learned primary judge which effectively determined that it is liable to the respondents in damages. The damages, to be assessed in the District Court, would reflect any loss sustained by the respondents (their managers) consequent upon acceptance of what the judge held to be the appellant's repudiation of a caretaking agreement. That agreement related to Be Bee's Tropical Apartments, a relatively small, motel style holiday resort in suburban Cairns.

[2] The resort is subject to a building units plan registered on 21 January 1994. The plan provides for 10 lots, with lot 1 as the caretaker's residence and office. On 22 August 1994 the appellant entered into the subject caretaking agreement with the original proprietors of lot 1. (The original proprietors are not parties to the appeal.) On 8 May 1995 those original proprietors sold their interest in lot 1 and assigned the caretaking agreement to the respondents, the sale and assignment being completed on 26 May 1995. At an extraordinary general meeting on 9 February 1996, the appellant resolved that, the caretaking agreement ``being void and unenforceable'', payment of remuneration under the agreement should cease, with no further performance under that agreement being required of the respondents. The respondents had been obliged to act as resident caretaker for the body corporate for a consideration of $11,000 per annum (subject to annual adjustment).

[3] The respondents in fact then ceased duties, but in March 1996 commenced court proceedings for the specific performance of the agreement. Those proceedings were practically overtaken by the appellant's further resolution on 3 April 1997, at another extraordinary general meeting, that ``without prejudice to the contention... that the caretaking agreement... is ultra vires... or alternatively has been discharged...'', the caretaking agreement be terminated by the appellant ``pursuant to s 50(9) of the *Building Units and Group Titles Act* 1980''. By their solicitors' letter of 4 July 1997 to the appellant, the respondents accepted what they contended amounted thereby to the appellant's repudiation of the caretaking agreement.

[4] Before the learned judge, the appellants submitted that because of a number of features, the appellant had lacked the power to enter into this particular caretaking agreement. Determining those issues involved consideration of the precise terms of the agreement, the appellant's by-laws and the Act. unfortunately the determination of the appeal has involved consideration of issues not properly raised below.

[5] The learned judge held that the agreement was in two respects ultra vires the appellant, although he went on to hold that those provisions could be severed from the rest of the agreement. He concluded that the communication of the appellant's resolution of 3 April 1997 amounted to the appellant's repudiation of the contract, which the respondents accepted, effectually terminating the contract and entitling the respondents to damages in respect of any consequent loss. He then remitted the assessment of damages to the District Court, and ordered the appellant to pay the respondents' costs.

[6] It may for the record be noted at once that the *Body Corporate and Community Management Act* 1997, which commenced on 13 July 1997, has no relevant application to the circumstances of this case.

[7] The appellant challenges the learned judge's findings as to the validity of the agreement. Those findings should logically be considered first. The appellant submitted that the caretaking agreement was, in five respects, beyond the powers of the appellant. I deal with them in turn.

1. *Reception area: location, payment for cleaning*

The appellant's first contention was that contrary to the apparent scheme of the *Building Units and Group Titles Act* 1980, the body corporate did, by this agreement, undertake a responsibility to remunerate the respondents for carrying out services in relation to their own unit, lot 1. The point was raised in these terms in the amended defence:

> ``[B]y the first schedule to the Agreement (service (i)) the (respondents) are required to provide services to clean and maintain Lot 1 in building units plan 71593 at the expense of (the appellant).''

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[8] It may for present purposes be accepted that the Act generally assumes that it falls to a proprietor to meet the cost of providing such services to the proprietor's own unit, the body corporate ordinarily being responsible for defraying the cost of maintaining only the common property. [9] The issue arises because the schedule to the caretaking agreement, in specifying the services to be provided by the respondents, includes cleaning the ``reception area''. (The matter was raised and developed by reference specifically to the reception area.) As consideration for the provision of the range of services specified in schedule 1, the appellant is required to pay the respondents $11,000 per annum (subject to annual adjustment) (clause 4.1).

[10] The caretaking agreement does not specify any location for the reception area. To develop its pleaded contention, the appellant sought recourse to extrinsic evidence. That evidence established that the original caretaker, from whom the respondents took an assignment of the agreement, positioned the reception area within the boundaries of lot 1. But shortly after acquiring lot 1 and the caretaking rights, the respondents moved the reception area, as the learned judge found, ``to an outside passageway which was part of the common area under the control of (the appellant)''.

[11] In view of the way the matter was pleaded and developed before his Honour, the critical point is however that the appellant did not enter into an agreement which provided for a reception area within the caretaker's own private lot. That being so, the contention could not be sustained on the pleadings.

[12] Mr Savage SC, who appeared for the appellant, submitted nevertheless that having found that the reception area was on the common property, with the respondents entitled to be paid by the appellant for cleaning it (via the annual fee), the judge should have held the agreement in conflict with s 30(7AA) of the Act. He submitted that the effect of that provision, because of the absence of a by-law authorising such payment by the appellant, is that the burden remained with the respondents, as proprietors of lot 1.

[13] Although this contention was not pleaded, as it should have been were it to be pursued, the court should, consistently with authority, determine its validity unless its not having been raised led to the respondents' not calling relevant evidence (cf. *Water Board* v *Moustakos* (1988) 180 CLR 491,497).

[14] While the positioning of the reception area was plainly established, it is possible, had this point been taken below, that the respondents would have led evidence relevant to the possibility of severance.

[15] That evidence may have concerned the extent of the cleaning required and the cost of providing it. The extent may conceivably have been small, and the cost minimal, warranting a conclusion that no significant part of the $11,000 lump sum annual fee should rationally have been attributed to the provision of that service.

[16] But that is speculative, and one would hesitate before determining the appeal on that basis. That matter aside, it is questionable whether the body corporate's assuming an obligation to pay for that cleaning service, via the first schedule and the annual fee, necessitated any authorising by-law.

[17] The arguable need for a by-law authorising payment by the body corporate arises from s 30(7) and s (7A). Subsection 7 provides that a body corporate may in certain circumstances make a by-law conferring, upon the proprietor of a lot, the right to the exclusive use and enjoyment of all or part of the common property. Such a by-law was made here, with the proprietor of lot 1 being given such rights in relation to common property areas adjacent to four other lots. The reception area was located within that area.

[18] I set out s 30(7):

> ``(7) With the written consent of the proprietor or proprietors of the lot or lots concerned, a body corporate may, pursuant to a resolution without dissent make a by- law—
>
> (a) conferring on the proprietor of a lot specified in the by-law, or on the proprietors of the several lots so specified—
>
> (i) the exclusive use and enjoyment of; or
> (ii) special privileges in respect of;
>
> the whole or any part of the common property, upon conditions (including the payment of money at specified times or as required by the body corporate, by the proprietor or proprietors of the lot or several lots) specified in the by-law;''

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[19] Such a by-law may specify conditions. In this case, the condition was that the proprietor might use the space for:

``... receiving the proprietors or occupiers of Lots and their licensees and for the purposes referred to in Clause 33(a) hereof on the proviso that he or his licensees shall keep such area in a clean and tidy condition and not litter the same or use the same as to create a nuisance or eye sore.''

[20] Accordingly, in the first schedule to the caretaking agreement, which specifies the services to be provided by the caretaker, being the proprietor of lot 1, there is reference to work to be carried out by the caretaker in relation to the reception area. The relevant provisions follow:

``A: The Resident Caretaker covenants with the Body Corporate to perform the following services and to carry out the following obligations on a daily basis or as and when required:

...
(ii) RECEPTION AREA
Clean floors and walls
Empty ash trays and wipe clean
Empty rubbish receptacles and wipe clean
Wipe down all counter tops, furniture and facings
Remove obvious rubbish. Tidy brochures and magazines
Clean inside and out entry doors
Sweep and mop with detergent and or disinfectant
Clean mirrors
Replace any blown light globes
Spray area with room freshener
...

B. The Resident Caretaker covenants with the Body Corporate to perform the following services and to carry out the following obligation on a weekly basis or as and when required:

(i) RECEPTION AREA
Clean all windows
Water plants, remove any dead fall, wipe clean all planters and spray leaves lightly with white oil as necessary
Wipe clean all wallpaper frames and door frames
Wipe clean all exit and lift indicator lights
Dust and wipe clean all furniture pieces''

[21] Because of clause 4.1 of the caretaking agreement, the lump sum remuneration provided for by the third schedule is payable by the body corporate annually for the range of services specified in the first schedule. The by- laws contain no express authority for the body corporate to assume such an obligation in relation, as presently relevant, to the cleaning and tidying of the reception area. Need such authority have been accorded through the by- laws?

[22] Section 30(7A) requires that a by-law deal with the question of who is to carry the financial burden of providing services in relation to areas of common property over which proprietors have been given rights of exclusive use and enjoyment. That only applies, however, where providing the relevant services is a duty imposed upon the body corporate by s 37(1)(b) and (c). In the absence of such provision in the by-laws, in relation to such duties, the responsibility for carrying out the duties falls upon the proprietor, at that proprietor's own expense.

[23] I set out subsections (7A) and (7AA):

``(7A) A by-law referred to in subsection (7) shall either provide that—

(a) the body corporate shall continue to be responsible to carry out its duties pursuant to section 37(1)(b) and (c), at its own expense; or
(b) the proprietor or proprietors of the lot or lots concerned shall be responsible for, at the proprietor's or proprietors' expense, the performance of the duties of the body corporate referred to in paragraph (a);

and in the case of a by-law that confers rights or privileges on more than 1 proprietor, any money payable by virtue of the by-law by the proprietors concerned—

(c) to the body corporate; or
(d) to any person for or towards the maintenance or upkeep of any common property;

shall, except to the extent that the by-law otherwise provides, be payable by the

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proprietors concerned proportionately according to the relevant proportions of their respective lot entitlements.

(7AA) If a by-law does not provide as required by section (7A)(a) or (b), the proprietor or proprietors shall be responsible at his, her or their own expense, for the duties of the body corporate referred to in subsection (7A(a)).''

[24] It is necessary now to turn to the terms of s 37(1):

``37.(1) A body corporate shall—

...
(c) subject to section 37A, properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof)—

(i) the common property;
(ii) any fixture or fitting (including any pipe, pole, wire, cable or duct) comprised on the common property or within any wall, floor or ceiling the centre of which forms a boundary of a lot;
(iii) any fixture or fitting (including any pipe, pole, wire, cable or duct) which is comprised within a lot and which is intended to be used for the servicing or enjoyment of any other lot or of the common property;
(iv) each door, window and other permanent cover over openings in walls where a side of the door, window or cover is part of the common property;
(v) any personal property vested in the body corporate:''

Section 37A has no particular relevance to this case.

[25] These by-laws apparently do not comply with s 30(7A), with the consequence that the respondents would be responsible, at their own expense, for carrying out the duties otherwise falling upon the body corporate under s 37(1)(b) and (c) in relation to the areas of common property over which the respondents have been given the right of exclusive use and enjoyment. For the purpose of determining this case, the ultimate question is whether the attenuated cleaning and tidying obligation imposed upon the respondents falls within the maintenance and repair obligation of the body corporate under s 37(1)(c). If it does, then the proprietor of lot 1 should bear the cost of it. Otherwise, it fell, in my view, within the body corporate's powers itself to pay for the provision of that service, through the caretaking agreement, having regard to the body corporate's general responsibility for maintenance and administration of the common property for the benefit of the proprietors (s 37(1)(a)), in respect of which it may disburse moneys (s 38(3)(b)).

[26] My conclusion is that this cleaning and tidying activity does not fall within s 37(1)(c). The obligation under that provision to ``maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew(al) or replace(ment) (of) the whole or part'', is quite different in kind from mere cleaning and tidying. It centres on the preservation of the fabric of the premises. Section 30(7A), being tied to s 37(1)(c), does not therefore operate to cast onto the respondents any financial burden associated with that cleaning and tidying requirement. It fell within the authority of the body corporate to include the provision of that service within the range of services specified in schedule 1, attracting the annual lump sum payment from the body corporate as provided by clause 4.1 of the caretaking agreement.

[27] For these reasons, the challenge to the agreement on this account, even as developed on appeal, should not be upheld.

2. *Payment for cleaning of restaurant*

The second contention was pleaded by the appellant in these terms:

> ``[B]y clause 11(3) of the Agreement the (respondents) are required to provide services to clean and maintain areas of common property of which the (respondents) have exclusive use at the expense of the (appellant).''

Clause 11(3) provides:

> ``The Resident Caretaker shall at all times ensure that the restaurant and outdoor dining area are maintained in a clear and tidy condition clear of rubbish and vermin and shall ensure that such areas are regularly and thoroughly cleared.''

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Clause 11(1) authorised the caretaker to conduct a restaurant, but did not oblige the caretaker to do so.

[28] The scheme of the agreement is, as I have said, that the remuneration of $11,000 per annum, subject to adjustment, is payable for the provision of the range of services specified in the first schedule (clause 4.1). That schedule does not mention a restaurant, although it does specify ``barbecue (sic) area'', an aspect to which I will come.

[29] The agreement does not provide separately for the appellant to remunerate the caretaker for the performance of the particular obligation under clause 11(3), an obligation which, as I have said, is not mentioned in the first schedule. The learned judge pointed out that the respondents were not obliged to conduct a restaurant business, by way of contrast with other schedule 1 services. Differential treatment of who should bear the cleaning costs may not therefore have been surprising.

[30] In fact, as the judge found, the respondents at no stage claimed or were paid anything for the performance of the work required of them under clause 11(3).

[31] The learned judge correctly, with respect, determined this point against the appellant, essentially on the ground that the only services attracting a right to compensation were those listed in the first schedule, the matter of the maintenance of the restaurant area being the subject of quite separate provision in clause 11(3), provision which did not extend to obliging the body corporate to pay for it. It fell to the respondents to meet the costs associated with the restaurant maintenance, and they did so.

[32] Under the first schedule, the respondents were obliged to clean the barbeque area, for which they would notionally be recompensed from the annual fee. Mr Savage contended in argument that the ``restaurant and outside dining area'' referred to in cl 11(3) were likely the same as the barbeque area referred to in the first schedule. But there was no evidence to which he could point establishing that. The issue was not pleaded on that basis, nor was it argued in that way before the learned judge — as is apparent from his reasons. This avenue cannot therefore at this stage lead to a successful outcome for the appellant in relation to this issue.

3. *Payment for provision of PABX*

The third contention concerns the respondent's obligation under the first schedule ``to provide day and night PABX answering services''.

[33] The appellant's submission before the learned judge was that requiring the respondents to provide such a service was not authorised by the by-laws, and conflicted with s 37(2)(a) of the Act. The judge held, however, that by-law 33(a)(xii) provided sufficient justification for this aspect of the agreement, because ``the provision of the PABX service (was) part of the business activities of the (respondents)''. Under that by-law, the proprietor of lot 1 was entitled to carry on a range of activities from lot 1 or any other area over which it had been granted rights of exclusive use. Those specified activities included the hiring of television sets, the conduct of the business of selling and letting the lots provided for in the plan, the business of providing service to ``partners'' (sic) in respect of the lots, and, under subclause (xii), ``any other related service or activity''. His Honour, in my view, reasonably observed that providing the PABX answering service ``would be of particular importance to the letting business''.

[34] Reference was made to s 37(2)(a) of the Act which empowers a body corporate to enter into an agreement with a proprietor of a lot for the provision of services by the body corporate to the lot or to the proprietor. But that provision was inapplicable here. That is because the provision of this service was potentially more broadly beneficial, to *all* proprietors. The provision of the agreement establishing the requirement was consistent with the by-law, on the basis expressed by his Honour.

[35] On the hearing of the appeal, the appellant again sought to advance a different case: not that the PABX service was not an activity authorised by the by-law, but that there was no by-law authorising its being paid for by the appellant. That case was not pleaded, and was not argued before the learned judge — as may be gathered from his reasons. I doubt it should be entertained for the first time on appeal. The by-law in terms authorises the body corporate to enter into reasonable agreements governing the provision of such services, and evidence may have borne on the reasonableness of a provision for recompense by the body corporate.

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[36] In any case, the learned judge held, alternatively, that the provision, if invalid, could be severed. Mr Owen, whose evidence the judge in other respects accepted, said that had this provision become problematic, the respondents would not have quarrelled with its deletion (p 30). The finding of severability was in those circumstances, and in the alternative, justified (see para 41 below), so that this aspect of the appellant's challenge should also fail.

4. *Granting of ``special privileges'' without authority/severance*

The fourth and fifth contentions concern clauses 9.2 and 9.5 of the caretaking agreement, said to offend against s 30(7) of the Act. That subsection provides that in certain circumstances a body corporate may make a by- law conferring, on the proprietor of a lot, ``special privileges in respect of the whole or any part of the common property...''. These two provisions of the agreement had that effect.

[37] Clause 9.2 of the agreement is in these terms:

> ``The Body Corporate will not interfere with, hinder or compete with the Resident Caretaker in the running or operation of the Resident Caretaker's Business or any part thereof and without limiting the generality of the foregoing the Body Corporate will not lease, agree to lease, grant a licence or agree to grant a licence in respect of any part of the Common Property and will not enter into any agreement with or permit any person (other than the Resident Caretaker) to provide for any service or activity which the Resident Caretaker may or is obliged to perform under this Agreement.''

[38] Clause 9.5 says:

> ``The Body Corporate covenants with the Resident Caretaker that should any person other than the Resident Caretaker use or attempt to use any part of the building for the purpose of conducting a business or rendering a service in the nature of the Resident Caretaker's Business (or any part thereof) or in competition with the Resident Caretaker in respect of any service or activity provided under this Agreement then it will at its own expense take all practicable steps to bring about the immediate termination of that use.''

[39] Contrary to the requirement of s 30(7), there was not, at any material time, a by-law which would authorise the body corporate to grant such ``special privileges''. So much was common ground. The learned judge held, however, that the provisions could be severed from the agreement, leaving the balance enforceable.

[40] His Honour made the following findings:

> ``Mr Owen, giving evidence on behalf of the (respondents), regarded these privileges as of no moment. The letting of the lots other than Lot 1 was to tourists on short stay, typically let for a period less than one week. The likelihood of business competition in a resort of only nine units, to quote Mr Owen, was `irrelevant' and `immaterial'. Naturally, the privilege expressed in clause 9.5 was similarly regarded.

> Clauses 9.2 and 9.5 appear to me to have little relevance to the situation that existed at these premises. In larger resorts such a clause may have some importance and for that reason has probably become a standard provision in agreements of this kind."

[41] The learned judge referred to *Humphries & Anor* v *The Proprietors of ``Surfers Palms North'' Group Title Plan 1955* (1992-4) 179 CLR 597, and McHugh J's reference to the general test for severability laid down by Jordan CJ in *McFarlane* v *Daniell* (1938) 38 SR (NSW) 337, and additionally, as particularly relevant, to the observation by the Judicial Committee of the Privy Council in *Carney* v *Herbert* (1985) AC 301, 310 that in the case of ``an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff'', ``the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision''.

[42] As his Honour concluded:

> ``Clauses 9.2 and 9.5 are clearly for the exclusive benefit of the (respondents). But the (respondents) see no worth in either clause and none was expressly identified by the (appellant). The severing of these clauses would make no perceptible change to the general nature of the agreement.
>
> In conclusion, with clauses 9.2 and 9.5 deleted I have come to the view that the caretaking agreement is enforceable."

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[43] That reasoning is, with respect, unexceptionable. The respondents alternatively contended, on the appeal, that the appellant is estopped from raising the unlawfulness of the agreement in those respects. But because of the view I take on subsequent issues, there is no need for me to express any conclusion about that.

[44] *Acceptance of repudiation.*

The appellant's challenge proceeded to the learned judge's finding that the appellant repudiated the agreement, the respondents' acceptance of that repudiation effectually terminating the agreement. Relying on *DTR Nominees Pty Ltd* v *Mona Homes Pty Ltd* (1977-8) 138 CLR 423, 431-2, the appellant submitted that the respondents' contention that the agreement was valid in its entirety precluded their terminating the agreement, its having been found partly invalid, in reliance on any repudiatory conduct on the part of the appellant: the respondents, it was submitted, were, by holding to that position, themselves in breach, with the consequence that they could not rely on the appellant's contention that the agreement was wholly invalid, as amounting to repudiation.

[45] It is trite law that a party who is not ready willing and able to perform a contract is not entitled to terminate for the other party's breach (DTR, supra, p 433; *Foran* v *Wight* (1989) NSW ConvR ¶55-491; (1989) 168 CLR 385, 398-402, 451; *Segacious Pty Ltd* v *Fabrellas* [1991] 1 QdR 471, 478).

[46] On any reasonable view, the appellant's conduct was repudiatory, in that it evinced in clear, express terms an intention not to be bound by the caretaking agreement. The contrary position maintained by the respondents was marginally in error, in light of the learned judge's conclusions. But especially in view of the evidence of Mr Owen which the judge accepted, there is no reason for not thinking that had the unlawfulness of clauses 9.2 and 9.5 been established prior to the appellant's repudiation, the respondents would readily have conceded that position in the interests of maintaining the balance of the agreement in which they had a real interest. So far as the respondents were concerned, the case comfortably falls within the following situation as described by the High Court in *DTR* (p 432):

> ``... there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him."

The position with the appellant was, by contrast, plainly repudiatory.

[47] *Termination under s 50(9) Building Units and Group Titles Act.*

The appellant's resolution of 3 April 1997 was in terms that the caretaking agreement be terminated ``pursuant to s 50(9) of the *Building Units and Group Titles Act* 1980''. That subsection provides:

> ``Notwithstanding any agreement between a body corporate and a body corporate manager, there shall be implied in the agreement or instrument of appointment of a body corporate manager appointed pursuant to this section who is the body corporate manager at the expiration of a period of 3 years from the date of the first annual general meeting of the body corporate a term that the body corporate, within 30 days after the expiration of that period, may terminate the body corporate manager's appointment as body corporate manager.''

[48] The first annual general meeting of the body corporate was held on 7 March 1994. The appellant accordingly submitted that it was entitled to terminate within 30 days after the third anniversary of that meeting, and that it did so.

[49] The learned judge declined to entertain this argument, in view of the way the case had been conducted. He made the following observations:

> ``Counsel, on behalf of the body corporate, submitted (presumably seeking a finding from me) that... the body corporate was entitled to terminate the agreement without penalty and without giving reasons 30 days after the third anniversary of the original meeting on 7 March, 1994. That is not a matter which was raised on the pleadings nor in the statement of issues which was presented to me by consent at the commencement of the trial. The factual question of whether this agreement was
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> indeed one which came within the purview of s. 50 was not canvassed in the evidence. In those circumstances it would not be appropriate for me to make a determination on that issue first raised in addresses. I do however note the consideration by the Court of Appeal of a similar argument in *Humphries*...''

[50] While the issue was mentioned during addresses, it was not mentioned in the context of any acceptance by the learned judge that it was an issue truly arising in the case. Counsel for the appellant submitted on appeal that the issue was raised in precise terms in the pleadings. The only reference to the section in the pleadings is to be found in paragraph 21 of the amended statement of claim, where the respondents pleaded the terms of the resolution of 3 April 1997. That was insufficient to raise the matter for determination. It fell to the appellant to plead this matter distinctly by way of defence, if it wished to rely upon it. There was no application before his Honour for leave to amend. The important question whether the caretaking agreement fell within s 50, in view of the Court of Appeal's analysis in *Humphries*, Appeal 105/1992, 29 October 1992, unreported, was not canvassed before his Honour, and embraced factual as well as legal considerations. No ground has been shown which would warrant departing from the learned judge's approach to this aspect of the matter.

[51] I may add that it seems highly unlikely that this caretaking agreement fell within the purview of s 50, which concerns agreements between bodies corporate and body corporate managers, characterised by the delegation to the body corporate manager of the body corporate's powers. On the hearing of the appeal, we were taken to evidence (p 650) of a resolution, apparently as contemplated by s 50(1), authorising an agreement between the body corporate and another entity as ``body corporate manager'', an agreement which subsisted throughout the period of this caretaking agreement.

[52] I set out the terms of that resolution:

> ``That Cairns Strata Management (herein called `the manager') be appointed as the Body Corporate Manager of the Body Corporate `Be-Bees Tropical Apartments' in Building Units Plan No 71593 and that the common seal be affixed to an instrument in writing pursuant to the provisions of Section 50(1) of the Building Units and Group Titles Act 1980-1990 appointing the manager and delegating all the powers authorities, duties and functions of the Body Corporate and its committee and the chairman, secretary and treasurer of the committee and of the Body Corporate, other than the power to make a decision on a restricted matter within the meaning of Section 46 and the power to make a delegation

under Section 50(1) at a cost of $1,300.00 per annum in the first year for a period of three years from 7th March 1994 as per the attached agreement."

[53] That strongly suggests this caretaking agreement was of a different species, with s 50 inapplicable.

Damages

[54] There was separate challenge to his Honour's not having made findings in relation to damages. The judge remitted the assessment of damages to the District Court. He made clear from the outset that he would follow that course. What loss can be established will fall for determination in the District Court. It was not necessary for his Honour to make further findings in that area.

[55] Mr Savage submitted that because certain matters of principle may have to be resolved as part of that process, it was not properly styled an ``assessment of damage''. Assessments not uncommonly, indeed usually, involve determination of both factual and legal issues, passing beyond mere arithmetic computation. His Honour's course was in my view appropriate, even though another judge may have felt it expeditious to resolve the whole matter, comprehensively, at once.

Costs

[56] There is no ground on which this court should interfere with his Honour's exercise of discretion in relation to costs. It was appropriate that the costs of determining these issues, concerning the validity of this agreement and its termination, follow the event. As pointed out by Mr Carrigan, who appeared for the respondents, the learned judge effectively determined the issue of liability separately from and in advance of any determination on issues of quantum. His determination concluded the proceedings in this court. There is no reason why those costs need not have followed the event. The determination of who should bear those costs need not in my

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view have awaited the outcome on damages, or been substantially influenced by the quantum of any damages awarded.

[57] We were informed that when the learned judge pronounced his judgment on 23 March 2000, which included the costs order, the parties made further submissions in writing in relation to costs. Mr Savage informed us that the judge did not subsequently communicate with the parties. If that is so, it would obviously have been better had the parties been expressly informed of the outcome. But it must be taken that having considered the further submissions, the judge determined not to vary the costs order made on 23 March. It fell to the solicitors for the appellant to make inquiry of the judge's associate if in doubt as to whether the judge had considered the further material, or as to the outcome.

Orders

[58] I would order that the appeal be dismissed, with costs to be assessed. I would also order, as sought by Mr Carrigan pursuant to s 124 of the Act, that the costs so payable by the appellant be paid only by the proprietors of lots 2-10 inclusive.

Chesterman J: I agree with the Chief Justice that, for the reasons given by his Honour, the appeal should be dismissed. I wish to add some brief observations on one point.

[60] The distinction drawn by the Chief Justice between the obligation found in s 37(1) of the *Building Units and Group Titles Act* 1980 (``the Act'') to:

> ``... properly maintain and keep in a state of good and serviceable repair (including, where reasonably necessary, renew or replace the whole or part thereof)—
>
> (1) the common property;
> (2) any fixture or fitting... on the common property...''

and the obligation imposed on the respondents by the care-taking agreement to clean walls and surfaces and to remove rubbish, is correct.

[61] An understanding of what is meant by maintaining and keeping the common property, its fixtures and fittings, in a state of good and serviceable repair is assisted by s 38(4), (5) and (6) and s 38A(2) of the Act.

These first mentioned provisions oblige a body corporate to establish and maintain a sinking fund the money in which may be used to discharge the liabilities referred to in s 38A(2). These are:

> ``(a) painting or treating of any part of the common property which is a structure... for the preservation and appearance of the common property; and
>
> (b)...
>
> (c)...
>
> (d) the renewal or replacement pursuant to s 37 of parts of the... common property, fixtures and fittings which the body corporate is required... to maintain and keep in good and reasonable repair..."

There is obvious duplication between some of the activities in (a) and in (d).

[62] The Act contemplates that as part of maintaining the common property and keeping it in good repair a body corporate will have to renew or replace parts of it. There is a reference to such activity both in s 37(1)(c) as well as s 38A(2). This activity is to be funded *inter alia* from contributions paid regularly by the proprietors of lots. The repair and maintenance referred to in s 37 is clearly a more substantial operation than cleaning and tidying.

[63] The *Concise Commercial Dictionary* by Osborne & Grandage relevantly defines maintenance as:

> ``The keeping of fixed assets in good order to enable them to discharge the function for which they are required, eg premises plant and machinery."

An Engineering Contract Dictionary by Powell- Smith, Chappell & Simmonds define it as:

> ``The carrying on of or keeping up to a particular standard. In relation to civil engineering works, for example, the word may refer to the resurfacing of roads, in mechanical engineering works it would include the repair and possible replacement of pipe work and fittings over a period of time..."

The same work defines ``maintenance period", a term which appears in standard form building and engineering contracts, as the time after works are complete during which the contractor is to make good defects which appear in the newly built structure.

The underlying notion is that the function of maintenance of plant or equipment is to avert or remove defects which would prevent their functioning as intended.

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[64] There is a passage in a judgment by Jessel MR in *Sevenoaks Maidstone and Tunbridge Railway Co* v *London Chatham and Dover Railway Co* (1879) 11 Ch D 625 at 634-5 which is to the same effect. The passage is lengthy but worth quoting in full because it gives flavour to the concept.

> ``It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. And if a railway station were found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms, or to alter the access or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the Legislature; that is, you may

maintain by keeping in the same state, or you may maintain by keeping the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose."

[65] Maintenance, so understood, is different in kind and degree from the services which the respondents had to perform in and about the reception area. Those services were concerned with the appearance of that part of the common property. They are not the activities which s 37(1)(c) of the Act compels a body corporate to undertake. Those activities are concerned to preserve the integrity of the physical structure of the common property. Accordingly payment for the services by the body corporate did not have to be the subject of a by-law. There is no substance in the appellant's point. The appeal should be dismissed.

Atkinson J: I agree with the orders proposed by de Jersey CJ and with His Honour's reasons.

MUNRO & ANOR v BODREX P/L

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(2002) LQCS ¶90-114

Court citation: [2002] NSWSC 122

New South Wales Supreme Court

Judgment delivered 6 March 2002

Conveyancing — Contract for sale of land — Sale off-the-plan of unit in proposed Strata Plan — Special condition gave vendor right of rescission if Strata Plan not registered by specified date — Strata plan registered after specified date in contract — Whether vendor was entitled to rescind contract — Whether purchaser entitled to have contract for sale of land specifically performed.

By a contract for sale (``contract'') dated 8 October 1999 the vendor (``defendant'') agreed to sell and the purchasers (``plaintiffs'') agreed to buy a home unit for $720,000 in Sydney, NSW. The plaintiffs paid a deposit of $36,000. The home unit was described as Lot 3 in an unregistered plan, and incorporated a garage. The contract was on the 1996 edition contract form but Printed cl. 28 was deleted. Building plans were annexed.

Special Condition 37 provided, among other things:

> 37. REGISTRATION OF THE STRATA PLAN
> 37.1 Completion of this contract is conditional on and subject to registration of the Strata Plan with the Land Titles Office.
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>
> 37.2 The vendor undertakes to use its reasonable endeavours to have the Strata Plan, registered. However, in the event that the Strata Plan is not registered by the expiration of the period specified in Schedule 1, then either party may, by notice in writing to the other, rescind this contract and the provisions of clause 19 will apply.

The period specified in Schedule 1 and referred to in cl. 37.2 was ``Date: 24 months from the date of this contract''.

The Strata Plan was not registered on or before 8 October 2001, and on 17 October 2001 Mr Luke McKenzie, the principal and the only director of the defendant, delivered a written notice of rescission to the plaintiffs. According to the terms of the notice, the deposit and all moneys paid to the defendant on account of variations made to the property at the plaintiff's request were to be repaid to the plaintiffs. It was an agreed fact that the Strata Plan was registered on 5 November 2001.

Work on the home units were sufficiently advanced by 14 June 2001 for Mr Surveyor Paul Keen to then complete and certify a Strata Plan, and on 3 July 2001 the defendant applied to Pittwater Council for development consent for development consisting of subdivision of the building into strata units in accordance with the plan. There were two applications, or so the application was treated: for approval of the Strata Plan and for subdivision. These events show that very little building work can have remained to be performed as of 3 July 2001. However an Occupation Certificate had not been issued, which was required by Council before it could give development consent relating to the Strata Plan. Early in July 2001 Mr McKenzie told Mr Munro, the second plaintiff, ``The building is ready to occupy. It may take a few weeks to get the Strata Plan registered. You can move in under licence and pay $200 a week rent until completion''.

With the permission of the defendant they moved belongings to Unit 3 on 19 July 2001, and they took up occupation of Unit 3 on 25 July 2001. The defendant and the plaintiffs made an agreement in writing on 25 July 2001 under which the defendant agreed to allow the plaintiffs to have possession before completion for residential purposes for the weekly licence fee of $1000, but the licensor to accept $200 per week if completion took place on or before the completion date set out in the contract.

On 1 August 2001 Mr Dunbar, an officer of Pittwater Council, telephoned Mr McKenzie and said to the effect that Mr Dunbar required the final Occupation Certificate to be submitted for consideration, and required the restriction on occupation to persons over 55 years and disabled persons to go on the title. The Occupation Certificate was sent to the Council on 13 August 2001, by which time it appears that the restriction had been created.

Mr McKenzie sent a message to Council on 3 August 2001 setting out the proposed restrictive covenant. A Council officer made a note on this message on 3 August saying ``Covenant needs to be approved by Council and incorporated into the Strata Plan prior to its submission to Registrar General, Land Titles for registration, all of which will only take place once occupation has been issued''.

On 29 August 2001, Mr Dunbar told Mr McKenzie that the council had problems with the applications as the roof over townhouse No. 1 was 220mm higher than provided for on the plan and that air-conditioning units placed in the gardens of some of the townhouses reduce the area of landscaping described in the approved plans. Mr McKenzie said to the effect that Council could presume that development had been constructed in accordance with the plans when an Occupation Certificate had been issued and Mr Dunbar said to the effect that Council was thinking of getting legal advice relating to the effect of an Occupation Certificate. Later, on 4 September 2001, Mr Dunbar informed Mr McKenzie that Council was considering refusing the applications on the above grounds and that the matter should go back to the Land and Environment Court where the plans were originally approved. Mr McKenzie argued that in the face of an Occupation Certificate Council should approve the application.

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On 10 September, Mr McKenzie met with the plaintiffs and two other purchasers. Mr McKenzie informed them that the Council would not approve the Strata Plan and of the Council's reasons. He raised the difficulties of going back to the Land and Environment Court and the time and expense that that would involve and asked the purchasers to settle without strata title. He reminded the purchasers of his right to rescind the contracts if the Strata Plan was not registered by 8 October 2001. He offered to waive this right if the purchasers agreed to an immediate settlement.

The plaintiff's solicitors on 12 September 2001 declined the above proposal and stated that any attempt to rescind the contract would be resisted and that the plaintiffs expected the defendant to fulfil its obligations under the contract by taking all legal steps necessary to have the plan registered.

On 14 September 2001, the Mr McKenzie was informed that the Council was no longer concerned about the height issue but has problems with the planter box and landscaping issue. The defendant could lodge a bond to cover the construction of the planter box and additional planting around the aircon units that might allow the expedition of the approval of the Strata Plan.

Mr McKenzie first became aware that PhD Building Services had decided not to construct the planter box at the end of July 2001. On 18 September 2001, PhD Building Services paid the Council $3000 by bank cheque accompanied by a letter saying that that amount represented ``Bonds for additional landscaping required at the townhouse complex at the above address. We understand that the bond will be released once the additional planter box is in place. I trust that this will facilitate the early release of the strata title plan".

Construction of the planter box commenced on 3 October 2001 and was completed on the morning of 5 October 2001. Mr McKenzie also made arrangements for Mr Payne of BCA Logic to inspect the planter box which he did on the afternoon of 8 October 2001; then on 9 October 2001 he completed a certificate showing approval. Mr McKenzie collected the certificate on 10 October and Council's Development Consent for Development Application for Strata Plan subdivisions was dated 16 October 2001. The approval of the Strata Plan was collected on 17 October 2001. Thereafter Mr McKenzie arranged for its registration which (as earlier stated) took place on 5 November 2001.

On 17 October 2001, the defendant served on the plaintiffs two documents; a notice of rescission of the agreement for sale and a notice of rescission of the licence agreement.

On 25 October 2001, the plaintiffs claimed that they were entitled to have the agreement for sale of land specifically performed, and declarations establishing that the defendant failed to use reasonable endeavours to have the Strata Plan registered, that the defendant was not entitled to rescind the contract and that the notice of rescission was of no effect.

Held: for the plaintiffs; order for specific performance of the contract

1. The principle of restricting the right of rescission would prevent the defendant from exercising the right of rescission if breach of the undertaking to use reasonable endeavours to have the strata plan registered caused the strata plan not to be registered within the specified time: Plumor Pty Ltd v Handley (1996) 41 NSWLR 30.

2. The defendant's responsibility lay not with failures of the builder within the scope of his independence as a contractor but with the fulfilment of the defendant's own contractual duties under cl. 40.1 and cl. 37.2 to obtain performance by the builder of the work the builder was contracted to do.

3. The defendant also had a contractual obligation to the plaintiffs in Special Condition 40.1 to ensure the building was constructed in accordance with the building plan and in a good and workmanlike manner. If the defendant had complied with this Special Condition, the building would have been completed to the correct height before the application for development consent was made on 3 July 2001.

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4. The Strata Plan not being registered within the specified time was caused by breaches by the defendant of contractual obligations to the plaintiffs. As such, it was unreasonable of the defendant to exercise the purported right of rescission, and that right should be prevented by ordering specific performance of the contract.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R J Powell for the plaintiffs (instructed by Loder & Loder).

T Lynch for the defendant (instructed by Sachs Gerace Lawyers).

Before: Bryson J.

Judgment in full below

Bryson J: The purchasers (the plaintiffs) challenge an exercise by the vendor (the defendant) of a right of rescission of a contract for the sale ``Off-the-Plan'' of a home unit where the Strata Plan was not registered within the period for which the contract provided.

2. By Contract dated 8 October 1999 the vendor agreed to sell and the purchasers agreed to buy home unit 3 at 2 Myola Street, Newport, for $720,000; and the purchasers then paid the agreed deposit of $36,000. The home unit was described as Lot 3 in an unregistered plan, and incorporated a garage. A building containing 5 units was to be built on part of Lot 24 Deposited Plan 7424, an irregularly shaped parcel at the northern

intersection of Ross Street and Myola Street where there had formerly been a dwelling which was to be wholly redeveloped. The contract was on the 1996 edition contract form but Printed cl. 28 was deleted. Building plans were annexed.

3. Special Condition 40.1 provided:

``40. CONSTRUCTION OF BUILDING AND DEFECTS LIABILITY

40.1 The vendor will cause the Building to be constructed in accordance with the Building Plans and in a good and workmanlike manner and in accordance with all approvals, consents and requirements of all relevant Authorities.''

4. Special Condition 37 provided, among other things:

``37. REGISTRATION OF THE STRATA PLAN

37.1 Completion of this contract is conditional on and subject to registration of the Strata Plan with the Land Titles Office.

37.2 The vendor undertakes to use its reasonable endeavours to have the Strata Plan, registered. However, in the event that the Strata Plan is not registered by the expiration of the period specified in Schedule 1, then either party may, by notice in writing to the other, rescind this contract and the provisions of clause 19 will apply.''

5. The period specified in Schedule 1 and referred to in cl. 37.2 is ``Date: 24 months from the date of this contract''. Clause 37.3 contained the following subcl. (a):

> (a) The vendor reserves to itself the right to alter the dimensions, the position of the property, the unit entitlement of any lot or lots or the lot number of any lot or lots set out in the Building Plans, as is considered desirable by the vendor or as is required by any Authority.

Subclauses (b), (c) and (d) went on to limit the purchasers' remedies if there were alterations and to give the purchasers a qualified right of rescission (and there has been no attempt by the purchasers to rescind).

6. Clause 38 provided:

``38. COMPLETION DATE

Completion of this contract will take place on the later to occur of:

> (a) 42 days from the date of this contract; or
> (b) 14 days after the purchaser is notified in writing by the vendor that the Strata Plan has been registered with the Land Title [sic]Office.''

7. Printed cl. 21 relates to time limits in the provisions of the contract and includes the following:

``21.1 If the time for something to be done or to happen is not stated in these provisions, it is a reasonable time

...

21.6 Normally, the time by which something must be done is fixed but not essential.''

8. The requirement relating to a reasonable time in cl. 21.1 applies to the vendor's obligations to cause the building to be constructed (cl. 40.1) and to use reasonable

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endeavours to have the Strata Plan registered (cl. 37.2).

9. The Strata Plan was not registered on or before 8 October 2001, and on 17 October 2001 Mr Luke McKenzie, the principal and the only director of the defendant, delivered a written notice of rescission to the purchasers. According to the terms of the notice, the deposit and all moneys paid to the vendor on account of variations made to the property at the purchasers' request were to be repaid to the purchasers. It was an agreed fact that the Strata Plan was registered on 5 November 2001.

10. In the Summons issued on 25 October 2001 the purchasers claim a declaration that they were entitled to have the agreement for sale of land specifically performed and an order for specific performance, and declarations establishing that the defendant failed to use reasonable endeavours to have the Strata Plan registered, that the defendant was not entitled to rescind the contract and that the notice of rescission is of no effect. The purchasers claimed other relief: relief against forfeiture of their interest in the land and an injunction restraining interference with their actual possession of the home unit and ancillary orders. There were no pleadings and the issues appear from the parties' affidavits and from submissions at the hearing.

11. The vendor applied to Pittwater Council for approval of its Development Application late in 2000 and appealed to the Land and Environment Court when Pittwater Council had not determined the application. The Court approved the Development Application subject to conditions by its order of 22 February 2000. The conditions included the following:

> ``A(i) This consent is not an approval to commence building work and these works can only commence following the issue of a Construction Certificate.
>
> (ii) The use or occupation of this building shall not commence until an Occupation Certificate has been issued."

12. General Condition B was as follows:

> ``The development shall be carried out generally in accordance with plans numbered 99016, dated July 99, prepared by Marchese & Partners Architects Pty Ltd as amended in red in Court or as modified by any condition of this consent, the landscape plans prepared by N. Sonter and an amendment as contained in Exhibit S."

13. The plan referred to in General Condition B is the same plan as the building plan annexed to the Agreement for Sale of Land, although it had been amended in the course of the Court proceedings.

14. Condition C included the following:

> ``C6 A 1.2 m wide footpath is to be provided from the site along Ross Street to Bramley Avenue, giving access to shops and services and installed at the expense of the applicant.
>
> C7. A covenant is to be placed on the title of the property restricting occupation to persons who are over 55 years or disabled."

15. Condition F entitled ``Compliance Certificate" set out a number of conditions which must be complied with by the time of issue of the Compliance Certificate and one of which was:

> ``(8) A Survey Certificate prepared by a Registered Surveyor is to be submitted, confirming that the roof ridge complies with the levels shown on the approved plans. A copy of this Certificate is to be forwarded to the accredited certifier or Council, prior to installation of the roofing material (see copy of form available from Council)."

16. Condition G entitled ``Issue of Certificate of Occupation" stated many conditions which must be complied with by the issue of the Occupation Certificate including:

> ``G13 A restriction on use of the land is to be created on the title of any new lots, the terms of which burden the said lots, benefit Council and restrict the occupancy of the lot to persons defined in State Environment Planning Policy No. 5 as `older people' or `people with a disability'. All matters relating to this restriction on use of the land are to be finalised prior to release of the Occupation Certificate.
>
> G15 The building is not to be occupied or used until an Occupation Certificate has been issued, confirming that the project complies with the relevant standards and the conditions of development consent. The request for an Occupation Certificate is to be accompanied by a copy of all of the Compliance Certificates required by the

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> conditions of development consent (see copy of form available from Council)."

17. Condition D6 required submission of a detailed landscape plan before release of the Construction Certificate showing compliance with Council landscape policy, and Condition G8 required, as a condition for the issue of the Occupation Certificate, certification that site landscaping had been completed in accordance with the details shown in the approved landscape plan.

18. Condition J stated a number of supplementary conditions one of which was:

> ``J1 A footpath shall be constructed along the northern side of Ross Street from a point directly opposite the Ross Street driveway to the intersection of Ross Street and Bramley Lane. A kerb ramp is to be provided on Ross Street directly opposite the Ross Street driveway. These works are to be completed to Council's normal footpath and ramp specification prior to the issuance of a Certificate of Completion."

19. On 24 July 2000 BCA Logic Pty Ltd, Building Regulation and Fire Safety Engineers, by letter informed Pittwater Council that Stuart Boyce of that company had been engaged by Mr Luke McKenzie of the vendor to act as Accredited Certifying Authority to issue the Construction Certificate for the development and to act in the role of Principal Certifying Authority. The letter stated that all conditions of the Court Order that needed to be satisfied prior to the issue of the Construction Certificate had then been met, and enclosed [the] Construction Certificate.

20. Construction then proceeded, but there is little evidence establishing the rate of progress or the dates of particular events until what can be understood from a fax message dated 23 April 2001 from PhD Building Services, the vendor's builder, to BCA Logic, asking for review of a proposed location of the Ross Street footpath referred to in Condition J1. PhD Building Services set out some details of the proposed construction of footpath and said ``Time is running out and I need to build it. Please investigate and confirm ASAP."

21. The footpath so required by Condition J1 was not on the development site but was on land dedicated as a road and owned by Pittwater Council, on the opposite side of Ross Street. This raised some question about the authority of the Private Certifier to deal with that part of the works. Whatever difficulties existed, they were overcome and the construction of the footpath proceeded.

22. The concerns raised on 24 April 2001 seem to show that the progress of work on the development was well advanced. The evidence of Mr Luke McKenzie is that at April 2001 the works had not reached practical completion and several major items of work and numerous other miscellaneous items had not been completed.

23. Work was sufficiently advanced by 14 June 2001 for Surveyor Mr Paul Keen to then complete and certify a Strata Plan, and on 3 July 2001 the vendor applied to Pittwater Council for development consent for development consisting of subdivision of the building into strata units in accordance with the plan. There were two applications, or so the application was treated: for approval of the Strata Plan and for subdivision. These events show that very little building work can have remained to be performed as of 3 July 2001. However an Occupation Certificate had not been issued, and Mr McKenzie knew that Council would require an Occupation Certificate before it could give development consent relating to the Strata Plan. Early in July 2001 Mr McKenzie told Mr Munro, the second plaintiff, ``The building is ready to occupy. It may take a few weeks to get the Strata Plan registered. You can move in under licence and pay $200 a week rent until completion." Mr Munro replied ``We will agree to that". On 16 July the vendor's solicitor told the purchaser's solicitor in answer to enquiry that the Strata Plan would be registered perhaps late in August.

24. The purchasers previously lived in a home unit in Narrabeen; they entered into an agreement to sell that home unit on 24 May 2001 and came under an obligation to settle that sale on 23 July 2001; they in fact completed the sale on that day. With the permission of the vendor they moved belongings to Unit 3 on 19 July 2001, and they took up occupation of Unit 3 on 25 July 2001. The vendor and the purchasers made an agreement in writing on 25 July 2001 under which the vendor agreed to allow the purchasers to have possession before completion for residential purposes for the weekly licence fee of $1000, but the licensor to accept $200 per week if completion took place

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on or before the completion date set out in the contract. It is doubtful whether the licence agreement had any legal effect as there was no Occupation Certificate and occupation was a breach of Condition G15 of development consent; however no question of illegality was in issue before me and the vendor terminated the licence on 17 October 2001. There can have been very little work remaining to be done, if there was any, when the vendor was prepared to license the purchasers to go into possession.

25. During July Mr McKenzie made many attempts to speak by telephone to Mr Trevor Dunbar, an officer of Pittwater Council, about the application. On 1 August 2001 Mr Dunbar telephoned him and said to the effect that Mr Dunbar required the final Occupation Certificate to be submitted for consideration, and required the restriction on occupation to persons over 55 years and disabled persons to go on the title. Mr McKenzie said to the effect that he expected the Occupation Certificate to be completed soon and ``I will send it to you today or tomorrow.'' He also said that he would get the s. 88B instrument to Mr Dunbar straight away. (The s. 88B instrument would when registered create the restrictive covenant required by Conditions C7 and G13.) In fact the Occupation Certificate was sent to the Council by BCA Logic on 13 August 2001, by which time it appears that the restriction under s. 88B had been created.

26. The vendor sent a message to Council on 3 August 2001 setting out the proposed restrictive covenant. Mr Ross Payne, a Council officer made a note on this message on 3 August saying ``Covenant needs to be approved by Council and incorporated into the Strata Plan prior to its submission to Registrar General, Land Titles for registration, all of which will only take place once occupation has been issued. The above addresses Condition C7 of the original Land and Environment Court Order No. 10743 of 1999.''

27. No evidence deals in detail with events in bringing the s. 88B instrument into existence and registering it but insofar as the vendor's evidence can be understood, these events happened between 1 and 13 August 2001. No evidence suggested there was ever any difficulty in creating the restriction, or explains why its creation was not attended to until prompted by Mr Dunbar although it was a necessary condition for issue of the Occupation Certificate which in turn was a necessary condition for development consent for the Strata Plan. In my finding the preparation of the s. 88B instrument and its registration could have been attended to before 3 July when the application for development consent was lodged, just as the Strata Plan was prepared before then, or could have been attended to at about that time when the need presented itself to obtain an Occupation Certificate to support the application for development consent.

28. The Newport Progress Association wrote to Council on 17 August seeking information about the Development. However the next event in Council's consideration of which evidence speaks is a conversation between Mr Dunbar and Mr McKenzie about 29 August 2001. Mr Dunbar said to Mr McKenzie, among other things, to the following effect: ``Council has difficulties with the applications. The roof over townhouse No. 1 is 220mm higher than provided for on the plan. This is identified in the material supplied with the Occupation Certificate by BCA Logic to Council. Also the air-conditioning units placed in the gardens of some of the townhouses reduce the area of landscaping described in the approved plans. '' Mr McKenzie said to the effect that Council could presume that development had been constructed in accordance with the plans when an Occupation Certificate had been issued and Mr Dunbar said to the effect that Council was thinking of getting legal advice relating to the effect of an Occupation Certificate.

29. The problem relating to the height of the roof became known to the vendor about March 2001 as a result of a survey of the partly built building as required by Condition F8; this was pointed out to BCA Logic, apparently by the builder, and BCA Logic said that it should be indicated within one or two weeks that it would not prevent a Certificate of Occupation. BCA Logic specifically addressed the non- compliance in the height of the roof, referred to it in an attachment to the Occupation Certificate and must be taken to have decided that the non- compliance was not significant. (This is the position that Council officers eventually reached, and it appears to be a reasonable position.) The problem was not inherently important, but it was a cause of delay, and if the building had been constructed in accordance with the plan there would not have been any such problem.

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30. After 29 August Mr McKenzie endeavoured to further Council's obtaining legal advice about the effect of the Occupation Certificate, and over some days he had conversations with Council officers and the

Council's solicitor. In one of these conversations, on 4 September 2001, Mr Dunbar said to Mr McKenzie to this effect ``The Council is considering refusing the application because of the roof issue and the landscaping issue. The Council officers feel the matter should go back to the Land and Environment Court for resolution because the plans were approved by the Court and in the circumstances where there is a departure from those plans that should be dealt with by the Court''. Mr McKenzie again put his view that in the face of an Occupation Certificate Council should approve the application.

31. Mr McKenzie also retained Mr David Tow, a Consultant Town Planner to represent the vendor in negotiations with Pittwater Council to get the applications approved. Mr Tow gave some attention to those negotiations on and after 4 September, speaking to Council officers and also to solicitors who had earlier acted for the vendor in the Land and Environment Court proceedings; Mr McKenzie did not favour proceedings in the Land and Environment Court which would involve some months' delay and also significant expense. Mr Tow spoke to Mr Lindsay Dyce who was Pittwater Council's Manager, Planning and Assessment.

32. On 10 September a meeting with Mr McKenzie took place, which was attended by the purchasers Mr and Mrs Munro, by Mr and Mrs Williams who were the purchasers of Unit 2, and by Mr and Mrs Morgan, who were the purchasers of Unit 4. Mr McKenzie told them to the effect that he called the meeting to tell them that the Council would not approve the Strata Plan; he referred to Council's relying on the roof of Unit 1 being 220mm above the plan height and on the air-conditioning units taking up landscape space; he reviewed the difficulties of going back to the Land and Environment Court and the time and expense that that would involve and asked the purchasers to settle without strata title. He said ``I remind you all that under cl. 37 of the Contract I can rescind if the Strata Plan isn't registered within two years. However I will give this right up if there is an immediate settlement if you agree to settle now and make the cheques payable to National Australia Bank. I am not saying this as a threat but I will use this clause if necessary either to complete settlement or cancel the contracts.'' The Munros did not agree.

33. The vendor circulated to the various purchasers including the Munros an Information Memorandum dated 11 September 2001 reviewing the difficulties which Mr McKenzie then saw, stating that he would apply to the Land and Environment Court that week, referring to cl. 37 which he called ``a Sunset Clause'' and saying ``I will agree to the removal of the `Sunset Clause' from the contracts if you agree to settle now.'' He went on to say that he would create a company title structure and he would continue action to register the Strata Plan after which each townhouse would be converted from company title to strata title. He went on to discuss the stamp duty which this would incur and attendant difficulties. The purchasers' solicitors on 12 September 2001 declined his proposal and said among other things ``Any attempt by your client to rescind the contract would be resisted'' and ``Our clients expect the vendor to fulfil its obligations under the contract by taking all legal steps necessary to have the plan registered.''

34. In a conversation with Mr Dyce on 14 September 2001 Mr Dyce told Mr Tow to this effect: ``Council is no longer concerned about the height issue and accepts that it was a minor variation of little consequence. However, a new issue has come to light. This is the non construction of the planter box.'' Mr Dyce also said ``If Bodrex lodges a bond to cover the construction of the planter box and additional planting around the aircon units, I may be able to expedite the approval of the Strata Plan. You should speak to Trevor Dunbar, sort out the details of the bond and its payment.''

35. Mr Tow reported this conversation to Mr McKenzie who then, also on 14 September, telephoned Mr Dunbar and discussed the amount of the bond and means of payment. He said to the effect that it would cost $2,500 to build the planter box and that Bodrex would pay a bond of $3000 which Mr Dunbar said would be sufficient. Mr McKenzie reported this arrangement to Mr Munro, also on 14 September. Mr McKenzie's account of this conversation is that he said to this effect: ``Agreement has been reached with the Council

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to pay a bond for the construction of the planter box between townhouses 4 and 5. The Council said they would approve the Strata Plan if the bond is paid on Monday.'' Mr Munro's affidavit gives a different account, that Mr McKenzie said to the following effect: ``Council would issue the Strata Plan if we build a planter box between units 4 and 5. They offered me a bond but wanted all sorts of money which I was not prepared to

pay. I said `I'll build it myself' and they said `If it were built we'd issue the plan on Monday'." Mr McKenzie's evidence is that it was not until about 27 or 28 September that he reported to Mr Munro to the effect that Council had agreed to approve the Strata Plan if Bodrex built the planter box between townhouses 4 and 5. The most significant point of difference in these two accounts is that, according to Mr Munro, Mr McKenzie was already speaking of a proposal actually to build the planter box on 14 September. Mr Munro's account is substantially supported by his contemporaneous diary note.

36. The omission of the planter box is explained in evidence only by a letter from PhD Building Services to BCA Logic dated 3 August 2001 in relation to the Occupation Certificate. The letter said ``With reference to planter box detail Unit 5 1st floor balcony above garage. Due to perceived structural and waterproofing problems in the long term with placing this particular planter box in the location indicated, it was decided that it would be more prudent to delete this item and replace it with planter boxes/pot plant in lieu of, to be supplied by purchasers at a later date."

37. Mr McKenzie first became aware that PhD Building Services had decided not to construct the planter box at the end of July 2001. It was Mr McKenzie's evidence that the absence of the planter box was drawn to Council's attention in documentation which accompanied the Occupation Certificate (t.11). Mr Dunbar told Mr McKenzie, at some time after 15 August, to the effect that Mr Dunbar and a Council officer concerned with landscaping had inspected the site and observed that the landscaping plan had not been adhered to. Although the attachments to the Occupation Certificate are not all in evidence, it was Mr McKenzie's belief that the Occupation Certificate did not point out this non- compliance.

38. By a letter dated 14 September 2000 Mr McKenzie writing for Bodrex Pty Ltd said to Mr Dyce ``... I am able to provide the following undertakings:

> (a) A planter box would be constructed on the decking above the garage of Unit 5, in accordance with plans approved by the Land and Environment Court;
> (b) Additional screen planting will be provided around air-conditioning units that have been placed in garden beds.
> These works will be completed within 1 week of this letter."

He went on to refer to the provision by the builder of $3000 to be held until the works outlined were complete and asked that Council issue a strata plan. Pittwater Council did not make a written response, and Mr McKenzie's evidence seems to show that he regarded himself as having an arrangement for Council to accept a deposit of $3000, and for Council then to issue the strata plan. The terms of the letter of 14 September assist acceptance of Mr Munro's account of what he says Mr McKenzie told him on 14 September.

39. As the undertaking which it was said in the letter of 14 September the vendor was in a position to give was not accepted, it did not have any standing as an undertaking, but the offer of an undertaking does admit and demonstrate that it was then possible to complete the work within a week. If it was possible to complete the work in a week then, it had been possible to complete the work within a week at earlier times.

40. I accept that Mr McKenzie was already considering and speaking to Mr Munro of a proposal actually to construct the planter box between units 4 and 5 as early as 14 September; he may well also have been speaking to a similar effect on 27 or 28 September. Although this difference in the evidence of the protagonists was treated at the hearing as if it was of considerable importance, I do not see it as important.

41. Mr McKenzie gave an explanation in oral evidence of his not having proceeded to carry out the works within one week of the letter of 14 September to the effect that Mr Tow and Mr McKenzie formed the view that having paid the bond was as good as having built the works and the application should go to Council on 8 October in that state. In my finding this is not a

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reasonable explanation for not proceeding to construct the planter box and provide the additional screen planting soon after 14 September; and indeed there has been no reasonable explanation for their not having been constructed long before that date as an ordinary part of the building process.

42. The builder PhD Building Services paid the Council $3000 by bank cheque accompanied by a letter of 18 September 2001 saying that that amount represented ``Bonds for additional landscaping required at the townhouse complex at the above address. We understand that the bond will be released once the additional planter box is in place. I trust that this will facilitate the early release of the strata title plan."

43. Mr Tow continued to seek to facilitate matters by communicating with Council officers. Mr McKenzie urged the purchasers including Mr and Mrs Munro to make representations for the Council in favour of approving the application. On 26 September Mr Dunbar made an internal report to Mr Lindsay Dyce; he said to the effect that there were two main areas of variation/departure from the court approved plan and development consent being the increase in the roof height and ``2. deficiencies in level of planting of approved landscape plan and omission of terrace planter box from Unit 5 (unit fronting Ross Street)". He reported that the increase in the overall roof height was considered acceptable and that it would be difficult to discern any appreciable impact of the increase in roof height. He also reported ``Item 2 is acceptable in terms of the number of plants provided being adequate and the prescribed/detailed number of plantings on the approved landscape plan being unachievable for the areas available. The omission of the planter to the 1st floor terrace of Unit 5 is not considered to be acceptable. The reasons provided for the omission of the planter are not considered justification for the omission. The provision of smaller planters in similar locations (decks over garages) has been undertaken for Units 2 & 3. It is considered appropriate that the planter detail upon the Court approved plans for the roof terrace of Unit 5 be provided." Mr Dunbar went on to report on the payment of the $3000 bond as an undertaking for the works to be completed.

44. Mr McKenzie had a conversation with Mr Dyce on 27 September. Mr Dyce was then unreceptive to arrangements involving a bond and said ``If the planter box is completed prior to 8 October 2001 the applications can proceed to the meeting of the Councillors on that day." On the following day 28 September Mr Tow spoke to Mr Dyce who said to the effect ``I am prepared to approve the application by way of delegation if the planter box is constructed and the additional planting around the air-condition units is done. The matter no longer needs to go before a Council meeting. Trevor Dunbar will not be able to approve the planter box and Bodrex's private certifier should do this. "

45. Mr McKenzie then arranged for construction of the planter box to be completed by PhD Building Services. In Mr McKenzie's evidence, his decision to move towards actually constructing the planter box was a response to a suggestion made by Mr Dyce on 27 September 2001 that an appropriate amount for a bond was $15,000 to $20,000. Construction of the planter box commenced on 3 October 2001, and although there is a conflict of evidence my finding is that it was completed on the morning of 5 October 2001. Mr McKenzie also made arrangements for Mr Payne of BCA Logic to inspect the planter box which it seems he did on the afternoon of 8 October 2001; then on 9 October 2001 he completed a certificate showing approval.

46. BCA Logic's letter of 9 October certified that the planter box originally proposed for the upper terrace to Unit 5, omitted from the original construction, together with the provision of screen planting adjacent to a number of pad-mounted air-conditioning units, installed late in the original construction program and located in the garden edge adjacent to each unit, had been inspected; the planter box was considered to have been constructed in accordance with the original proposal and to be structurally adequate and the planting when fully developed should provide an adequate screen to the units.

47. Mr McKenzie collected the certificate on 10 October and arranged for a further enquiry by Mr Dunbar relating to waterproofing the planter box to be answered by the builder. There were further communications. Council's Development Consent for Development Application for Strata Plan subdivisions was dated 16 October 2001. The approval of the Strata Plan was collected on 17 October 2001. Thereafter Mr McKenzie arranged for its

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registration which (as earlier stated) took place on 5 November 2001.

48. On 17 October 2001 Mr McKenzie served on Mr and Mrs Munro two documents; a notice of rescission of the agreement for sale and a notice of rescission of the licence agreement. The claim to rescind the agreement for sale led to the issue of the summons on 25 October.

49. Restrictions on exercise of rights of rescission recurringly come under consideration in contracts for the sale ``Off-the-Plan'' of dwellings in proposed strata developments. The contractual terms are the primary source of any supposed restriction, and an apparent right of rescission may be restricted by implied terms to be discerned on the whole view of the parties' contract, or by the application to them of implications arising under general contract law of kinds illustrated by the following passage in *Peters (WA) Ltd* v *Petersville Ltd* (2001) 75 ALJR 1385 at 1393 [36] ``The law already implies an obligation by the respondents to do all such things as are necessary on their part to enable Peters WA to have the benefit of those licence arrangements *Butt* v. *McDonald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd* v *St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607-608. It is not now necessary to consider the basis of the implication. The law also implies a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made in Art. 5 *Shepherd* v. *Felt & Textile of Australia Ltd* (1931) 45 CLR 359 at 378''.

50. Important statements about the principles involved were made in *Plumor Pty Ltd* v. *Handley* (1996) 41 NSWLR 30 (McLelland CJ in Eq). At 34C-E his Honour made observations showing the need for a sufficient causal relation between a breach by the party rescinding of a contractual obligation on that party and the happening of the event giving rise to a right of rescission, unless the parties' contract made performance of the obligation a condition of the exercise of the right of rescission. At 34E-G McLelland CJ in Eq said:

> ``The plaintiff's third submission is based on the proposition that in addition to the express obligation to apply for the requisite `consent' within twenty-four hours of the date of the contract, special condition 28 imposed on the defendant an implied obligation to take all reasonable steps available to him to obtain that `consent' within the stipulated fourteen day period. That proposition is undoubtedly correct: see, eg, *Butts* v *O'Dwyer* (1952) 87 CLR 267 at 279-280. If the failure by the defendant to obtain `consent' within the fourteen day period resulted from any default by him in the performance of either his express or implied obligations, then the defendant was not entitled to exercise the right of rescission of the contract otherwise available to him under special condition 28: see *Suttor* v *Gundowda Pty Ltd* (1950) 81 CLR 418 at 440-443 applying *New Zealand Shipping Co Ltd* v *Societe des Ateliers et Chantiers de France* [1919] AC 1. This is an application of the principle that a party to a contract is not entitled, as against the other party, to rely on an event resulting from the first party's wrongful act. The history of that principle was, in *New Zealand Shipping Co* (at 7-8 and 12), traced back to a passage in *Coke Upon Littleton* (at par 206b): see also *Alghussein Establishment* v *Eton College* [1988] 1 WLR 587 at 591-594.''

51. In my opinion this statement of the law is applicable to the rights of the vendor to rescind under Special Condition 37.2. The principle referred to in the passage cited prevents the vendor from exercising the right of rescission if breach of the undertaking to use reasonable endeavours to have the strata plan registered caused the strata plan not to be registered within the specified time. So too, if breach of the vendor's obligation in cl. 40.1 to cause the building to be constructed and to do so in a reasonable time caused the strata plan not to be registered within the specified time. So too would any other breach of the vendor's contractual obligations which caused that result.

52. Another important subject dealt with in the same judgment is the onus of proof; see in *Plumor v Handley* p. 35A to 36B, particularly the concluding observation at 36 ``... the onus of proof on the issue of whether the non- obtaining of the requisite consent or advice within the period stipulated in special condition 28 resulted from a breach by the defendant of his contractual obligations, rests on the plaintiff''. In other words, the relevant principle can be briefly formulated as: ``Non-fulfilment of a condition will justify rescission unless it is proved to be self-induced'', rather than as: ``Non-fulfilment of the condition will not

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justify a rescission unless it is proved not to be self-induced''.

53. In *Hunyor & Anor* v. *Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631 McLelland CJ in Eq referred to this passage and also said ``It is necessary however to bear in mind that all evidence is to be weighed according to the proof which it was reasonably within the means of one party to produce or of the other to contradict. This has particular significance in respect of evidentiary facts which are peculiarly within the knowledge of

one party rather than the other, see eg: *Apollo Shower Screens Pty Ltd & Anor* v. *Building and Construction Industry Longer Service Payments Corporation* (1985) 1 NSWLR 561 at 565-6".

54. McLelland CJ in Eq on p 15,631 stated a further important matter frequently calling for consideration as follows: ``For the purpose of considering the question of the defendant's default, the knowledge, acts and omissions of the defendant's solicitors or other agents, in that capacity, are to be attributed to the defendant (see *CSS Investments Pty Ltd* v *Lopiron Pty Ltd* [1987] 76 ALR 463 at 474-5), although the knowledge, acts and omissions of independent contractors otherwise than in the capacity of agents for the defendant are not to be so attributed: see *Woodcock* v. *Parlby Investments Pty Ltd* (1988) 4 BPR 97301". In my opinion the vendor is not responsible for failures of the builder within the scope of his independence as a contractor but is responsible for the fulfilment of the vendor's own contractual duties in cl. 40.1 and cl. 37.2: these require the vendor to obtain performance by the builder of the work the builder has contracted to do.

55. In the present case then I am of the view that the plaintiffs are entitled to succeed if they discharge the onus of showing that the defendant was in breach of a contractual obligation, and that the breach caused the strata plan not to be registered within the contractual time.

56. The exercise of a right of rescission, even if authorised by the terms of the parties' contract, may be deprived of effect by equitable remedies referred to by Viscount Radcliffe speaking for the Judicial Committee in *Selkirk* v *Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-3 in these terms:

> ``It does not appear to their Lordships, any more than it did to the judge who tried the action, that there is nay room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges, and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of sale `brevi manu,' since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of `recklessness' in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their Lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission: see *In re Jackson and Haden's Contract* [1906] 1 Ch. 412, C.A.; *Baines* v. *Tweddle* [1959] Ch. 679."

57. Part of the passage cited was referred to, evidently with approval, by Gibbs J in *Pierce Bell Sales Pty Ltd* v *Frazer & Ors* (1973) 130 CLR 575 at 590. See too *Woodcock v Parlby Investments Pty Ltd* (1988) 4 BPR [97301] 9568 (Young J).

58. The vendor's counsel contended that there was no breach of the vendor's obligation in Special Condition 37.2, or of any other obligations in this respect because General Condition B of the Conditions of the Court's Development consent required that development to be carried out *generally* in accordance with the plan, that this was complied with and that the issue of the Occupation Certificate shows this. Submissions by counsel for the vendor on the subject of reasonable endeavours addressed the subject as

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if what was under consideration was limited to responses to difficulties raised by Pittwater Council. This limited the subject in quite a wrong way; the ambit of reasonable endeavours included compliance with conditions of the earlier development consent in the course of construction, and compliance with the obligations of Special Condition 40.1; and if there had been such compliance, there would not have been any matters for Pittwater Council to raise.

59. In my view the vendor's obligations are not limited to complying with the development consent and negotiating a way through the approval process for any matter of detail of the construction of the building.

The vendor also had a contractual obligation to the purchasers in Special Condition 40.1, to cause the building to be constructed in accordance with the building plan and in a good and workmanlike manner. There was not a compliance with Special Condition 41 in the respect that the roof was built too high. The non-compliance was not of any real significance and it seems surprising that Pittwater Council gave attention to it, but if the vendor had complied with Special Condition 40.1 and caused the building to be constructed in accordance with the approved plans this difficulty would not have arisen. Delay caused or contributed to by the roof height was caused by breach by the vendor of Special Condition 40.1. If the vendor had complied with that Special Condition, the building would have been completed to the correct height as an ordinary part of the building process, before the application for development consent was made on 3 July 2001. This cause of delay continued until 14 September.

60. Not building the planter box between Unit 5 and Unit 4 was a failure to comply with the building plans, and a failure to comply with the contractual obligation to the purchasers to construct the building in accordance with the building plans. There was no less a breach by the vendor of its obligation in this respect because the builder wholly omitted to build the planter box, or because the builder offered the reason given in the builder's letter of 3 August 2001; the reasons offered by the builder were no reasons at all and could not be regarded by anyone responsible for certifying completion, or by the vendor, as excusing the entire omission of the planter box for which the building plans provided. (An incidental and unexplained mystery is that the Strata Plan certified by the surveyor on 14 June 2001 shows the planter box, although without any detail.) If there were any sufficient reason for the planter box's [sic] not having been erected earlier, the need to erect it became plain during the process of obtaining the Occupation Certificate early in August, when the builder's reasons were given in writing and their inadequacy was available to be clearly discerned.

61. The vendor's counsel contended that Pittwater Council was not entitled to go behind the Occupation Certificate in respect of the height of the building and (as I understood his position) in respect of the absence of the planter boxes or other matters because of the provisions of subs. 79C(4) of the Environmental Planning and Assessment Act 1979, which relates to Evaluation in relation to Development Assessment and to Procedures for Development that Needs Consent and provides:

> ``(4) **Consent where an accreditation is in force.**
>
> A consent authority must not refuse to grant consent to development on the ground that any component, process or design relating to the development is unsatisfactory if the component, process or design is accredited in accordance with the regulations."

62. In my view it is far from clear that Council was precluded by subs. (4) from refusing to grant consent to development consisting of the strata plan and strata subdivision by the existence of the Occupation Certificate from addressing and (it may be) refusing to grant consent on the ground that the planter boxes were simply not built at all, so that the conditions of the previous development and consent had not been complied with, or on the ground that the landscaping was not satisfactory, (a subject with which, so far as appears, the Occupation Certificate did not deal). The proposition is certainly not so clear that it was reasonable to proceed without attending to those matters on the basis that Council was precluded from having regard to them. In its dealings with Pittwater Council the vendor did not adhere to the position that attention by Council to these matters was precluded by the Occupation Certificate, and did not simply refuse to attend to the matters of the planter box and the landscaping. It would not have been the use of reasonable endeavours

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to take that line, and attending to the problems by doing the works, as was obviously required in the use of reasonable endeavours, was a measure which should reasonably have been taken long before it was taken.

63. Pittwater Council did not adopt the view that Council's inquiry or concern was precluded by the issue of the Occupation Certificate. It does not seem to me that inquiry or concern were so precluded. Even if inquiry and concern were so precluded, it was hardly to be expected that when Council came to consider a Development Application relating to the Strata Plan Council would not concern itself with whether the building had been finished or with the state of compliance with the conditions of development consent. When on 14 September it became clear that the absence of the planter box was regarded by Council as significant the

vendor did not arrange to have the planter box erected. This was a simple enough task when it was finally addressed, and took only two or three days' work; no reasonable ground has been shown for not having done it in the course of earlier building work, and again no reasonable ground has been shown for not having done it shortly after Council's attitude that it was important was expressed on 14 September. More than two weeks passed before Mr McKenzie addressed actually having the work carried out, rather than pursuing the prospects of making some arrangement to lodge money as a bond to secure that it would be carried out at some future time.

64. No substantial reason had been shown either for not providing screening vegetation either before embarking on the application for consent to the Strata Plan or as soon as it appeared that Council officers regarded it as significant.

65. My conclusion on Mr McKenzie's evidence particularly the passage at t.11, l.41-43 is that Mr McKenzie made it his objective to achieve certification of the building work and did not give his attention to whether the building work required by the terms of the vendor's contract with the purchasers had all been carried out and the obligation in Special Condition 40.1 had been complied with. He did not know on 3 July that the planter boxes had not been constructed, and this came to his knowledge late in July. It should have been obvious that the builder could not dispense with some part of the building work indicated on the building plans, and that the omission was bound to lead to inquiry and could lead to delay. Learning of the omission did not prompt Mr McKenzie to take any action to have them constructed; his attention was directed to getting the Occupation Certificate and getting approvals from Council. It was not a large or difficult project actually to have the planter boxes constructed, either in the course of building work generally when other planter boxes were constructed, or soon after learning of their not having been constructed late in July, or soon after learning in mid-August that Council officers regarded their not having been constructed as a problem.

66. When he did encounter difficulties with Council officers Mr McKenzie's efforts were not well directed; he gave attention and energy to projects of getting Council to accept a bond or a deposit of money instead of constructing the planter boxes, and pursued a project of persuading these purchasers and the purchasers of other units to agree to accept company title, a very unattractive project involving considerable attention and expense, for stamp duty and otherwise, altogether out of scale with any difficulty of attending to the planter boxes and the landscaping.

67. In my finding the delays which led to the vendor having or appearing to have a right of rescission arose out of the vendor's own failures to comply with its contractual obligations to the purchasers. The matters which in fact were referred to by Council officers while they had the application under consideration were all matters which, in any reasonable course, should have been attended to while the building was being constructed and before the Development Application was lodged on 3 July. If they had been attended to then it is improbable that there would have been any great delay in Council's officers giving consent under delegated authority after the Occupation Certificate was available; this is improbable because the reasons for delay which they gave would not have existed. The time taken between lodging the application for Development Consent on 3 July and obtaining the Occupation Certificate and submitting it on 13 August is not really explained, bearing in mind that it was and must have been clearly seen that the Occupation Certificate was necessary for the approval. However that may be, the Occupation Certificate was available on

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13 August, and if there had not been matters for Council officers to consider relating to the building work not being completed it is probable that Pittwater Council's consent would have been given under delegated authority within several weeks after 13 August and with ample time for the plan to be registered before 8 October. When the plan did become available on 17 October it was registered on 5 November, 19 days later.

68. It was Mr McKenzie's evidence (t.12) that on a few occasions throughout construction he was told by Council that if the vendor were [sic] to depart in any way from the plans it would need to go back to Court, as the Council's view was that Council took no part in further changes to the plans which the Court had referred to in its order. This was a strong indication to Mr McKenzie that he and the vendor should be very attentive to detail and not leave openings for contentions about departures from the plans. Mr McKenzie did not turn

to actually building the planter boxes until the end of September, and he but used significant time pursuing Council approval on the basis of depositing money referred to as a bond to secure that the work would be done later. He gave no real explanation for failing to comply with the building plans and building a planter box either in the general course of construction, or as soon as their absence was drawn to his notice.

69. Mr McKenzie's evidence in cross- examination at t.18 and 19 shows that at the time the decision to rescind the contract was taken he, and the persons who controlled Bodrex, were aware that the value of Unit 3 was several hundred thousand dollars higher than the contract price of $720,000; counsel's advice was taken as to their rights, and as a result of the advice notice of rescission was given. I find that pursuit of the advantage of the increase in value was a dominating factor in the decision to rescind, as the decision was taken just at the time when the difficulties in the path of registering the strata plan had ended. The purchasers were already in occupation and had moved their goods into the unit, and they were unlikely to make delays about settlement. In the context of delay caused by failures of the vendor, this use of the right of rescission was unreasonable. It was unreasonable to make a precipitate rescission immediately after overcoming all substantial difficulties in the way of registration of the Strata Plan. However the rescission lacked effect for other reasons than those referred to in the passage cited from *Selkirk v Romar Investments*.

70. I conclude that the Strata Plan's not being registered within the time referred to in Special Condition 37.1 was caused by breaches by the vendor of contractual obligations. I also conclude that it was unreasonable of the vendor to exercise the purported right of rescission, and reliance on that right of rescission should be prevented by granting to the purchasers equitable remedies in enforcement of their rights as purchasers.

71. The plaintiff's counsel put forward as further grounds for relief a claim that rescission had brought about a forfeiture of the plaintiffs' equitable interest in the home-unit and that there are equitable grounds on which the plaintiffs should be relieved against that forfeiture. That case requires consideration only if the plaintiffs are not entitled to succeed having regard to the contractual relationship between the parties, and I will not address the equitable claim.

Orders

(1) Declaration in terms of Claim 2 in the Summons dated 25 October 2001.
(2) Injunction in terms of Claim 1.
(3) Order for specific performance of the Contract referred to in Declaration 1.
(4) Reserve further consideration of time, manner and conditions of specific performance, and of the claim for damages.
(5) Order that the defendant pay the plaintiffs' costs of the proceedings.

SCHENK & ANOR V ACN 081 123 140 P/L

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(2002) LQCS ¶90-115

Court citation: [2002] NSWSC 123

New South Wales Supreme Court

Judgment delivered 6 March 2002

Conveyancing — Contract for sale of land — Sale off-the-plan of home unit in proposed Strata Plan of building not yet built — Special condition gave vendor right of rescission if Strata Plan not registered by specified date — Vendors power to extend specified date for delays — Whether vendor was entitled to rescind contract — Whether purchaser entitled to have contract for sale of land specifically performed.

The defendant (``vendor'') was formerly named The Satellite Group (Pyrmont) Pty Ltd. By a contract dated 26 June 1998, the vendor agreed to sell and the purchasers (``the plaintiffs'') agreed to buy Apartment 106 together with Car-parking space 120 in The Bauhaus Apartments, a building which had not then been constructed, at 209-221 Harris Street, Pyrmont (NSW). The agreed sale price was $420,000 and a deposit of $42,000 was payable in a scale of payments provided for by Special Condition 16; $5000 on exchange, $16,000 on or before 31 October 1998 and $21,000 on or before completion of the contract. The plaintiffs made payments totalling the whole deposit of $42,000 in or before October 1998.

The contract for sale was on the 1996 edition standard form, but Printed Clause 28 was deleted. Special Condition 1 contained definitions including a definition of ``development consent'' which showed that development consent had been obtained and that there were proposed modifications, a definition of ``building approval'' which showed that building approval was still to be obtained and a definition of ``building contract'' which showed that the building contract was still to be entered into. The vendors agreed to purchase the land on 20 February 1998. The development approval was granted on 3 September 1996. An application for a construction certificate (or building approval) was lodged with Sydney City Council on 6 February 1999.

Special Condition 2.3 stated that the vendor ``warrants that it will cause the Development including the Apartment and the Car Parking Space to be constructed with reasonable expedition''.

Special Condition 3 related to registration of strata plan, easements etc and provided:

> 3. REGISTRATION OF STRATA PLAN, EASEMENTS ETC.
> 3.1 The Purchaser expressly acknowledges to the Vendor that completion of this Contract cannot take place until beforehand:
>
> > (i) The Vendor has caused to be registered in the Land Titles Office the Strata Plan on which the Apartment together with the Car Parking Space to be acquired by the Purchaser will be shown collectively as one lot on the Strata Plan, subject nevertheless to any amendments thereto as may arise pursuant to Special Condition 2.2''

Special Condition 4 related to the completion date and included cl 4.2.

> 4.2 If the Strata Plan of Subdivision and any necessary easements which are referred to in Special Condition 3.1 above has not been registered by the Registrar General on or before 16 March 2001 or by any extension of this date pursuant to the terms of 4.3 hereunder, then either party may rescind this Contract whereupon the Purchaser shall be entitled to a refund of all monies paid but the Purchaser shall not otherwise be entitled to any claim or remedy against the Vendor for the payment of any damages, costs or expenses arising out of the fact that the Strata Plan together with any necessary Instrument(s) and/or easement(s) have not then been registered by the Registrar General.

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Clause 4.3 enabled the vendor to extend the time provided for in cl.4.2 in one or more extensions which were not to exceed nine months, on the happening of various events and upon an architect's certificate relating to the delay.

The vendor sent to the plaintiffs a letter dated 25 January 1999 which stated, ``We are pleased to provide you with an update on your investment for your information'' and went on to say that Consolidated Constructions had been chosen as builder to undertake construction of The Bauhaus Apartments, described off-site work which the builder must undertake and said ``over the next four to six weeks you will begin to see machinery on-site which will be testing soil conditions.''

On 24 February 2000, solicitors representing the vendor advised the plaintiff's agents by letter that the date for registration of the strata plan in Special Condition 4.2 had been extended from 16 March 2001 to 21 August 2001 and forwarded an architect's certificate supporting the extension.

In July 2000, there were large changes in the affairs of the vendors. Finnbell Pty Ltd and Consolidated Byrnes Holdings Pty Ltd between them acquired all the shares in the vendors from The Satellite Group Ltd. Mr Ian Widdup became Managing Director, and Mr Widdup and a new group of individuals associated with the new shareholders took control of the vendors affairs, and proceeded to obtain its books, records and files, and to establish what had happened. Mr Widdup established that no Construction Contract had actually been entered into with Consolidated Constructions, although it appeared that the Early Works Contract had been carried out. Mr Widdup established that according to information available to him the Bauhaus land was worth $8,000,000 and was subject to six mortgages the total debts on which were greater than $15,000,000. The vendors received a

statutory demand from Consolidated Constructions dated 31 July 2000 claiming $1,609,850 under the Early Works Contract and soon became engaged in litigation with one of the puisne mortgagees over an attempt to auction off the property.

On 28 March 2001, an in-principle finance agreement was reached for bank finance, and finance agreements with the ANZ Bank were executed in July 2001. Multiplex took possession of the site on 4 December 2000 and began building work; the building contract was not completed and signed until 28 March 2001, and the building contract was later renegotiated so as to involve a Multiplex subsidiary. The building contract provided for practical completion by 26 March 2002. Work proceeded continuously from 4 December 2000 onwards. At the time of the hearing on 6 February 2002 practical completion was expected in the immediate future.

Mr Christopher Heap, a consultant in the construction industry, acted as an in-house project or development manager for the vendors on the Bauhaus Development from about mid-August 2000. Upon review of the contracts of sale entered into by the vendors with various purchasers in early to mid-1998, he established that, in the case of the plaintiffs, the date for registration of the strata plan in contracts of sale was 16 March 2001 and had been extended to August 2001. He also formed the view, in August 2000 that the project could not be completed by August 2001.

Mr Heap said in evidence that following his review of the pre-sale contracts Mr Widdup and consultants made decisions in early 2001 as to which contracts the vendors should seek to rescind and which it should seek to extend and keep on foot. However a decision about Apartment 106 and the contract with the plaintiffs must have been taken earlier because the vendors entered into a contract for the sale of Apartment 106 and its related car-parking space for $480,000 to Richard Graham Bach and Christine Moira Witlock on 19 December 2000. On 10 April 2001, solicitors representing the vendors wrote to the plaintiff's conveyancing agents and said ``We have now received instructions from our clients that they do not intend proceeding with the sale to your clients and at the expiry of the sun-set clause date in August of this year will exercise their rights of rescission. Alternatively if your client

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wishes to rescind now rather than wait until August our client will consent to a mutual rescission immediately.''

The plaintiffs then retained solicitors who initiated correspondence challenging the proposed rescission. The vendor's solicitors did not reply, but on September 2001 wrote again to the plaintiffs' conveyancing agents referring to the right of rescission, stating that the strata plan had not been registered and that the vendor exercised its right to rescind pursuant to cl 4.2. The plaintiffs' solicitors again sent correspondence disputing entitlement to rescind and the effect of the purported rescission. The plaintiffs also lodged a caveat. The vendor then appointed new solicitors who stated the vendor's position fully on 12 November 2001, maintained the effectiveness of the rescission, acknowledged that the deposit had been paid and authorised its release to the plaintiffs, and called for withdrawal of the caveat. They forwarded a Lapsing Notice on 22 November 2001 and the purchasers initiated these proceedings on 12 December 2001. The plaintiffs claim a declaration that their contract is valid and subsisting, extension of their caveat, damages and ancillary orders.

Held: for the plaintiffs, order for specific performance of the contract.

1. The relevant principle is that a party to a contract is not entitled, as against the other party, to rely on an event resulting from the first party's wrongful act. If the failure by the rescinding party to obtain some relevant consent or registration within the contractual period resulted from any default by him in the performance of express or implied obligations, that party is not entitled to exercise a right of rescission otherwise available. The failure to obtain consent or registration by the wrongful act must be proved unless the terms of the contract make obtaining the consent or registration a condition for the exercise of the right of rescission: Plumor Pty Ltd v Handley (1996) 41 NSWLR 30 at 34 and 35 by McLelland CJ in Eq.

2. A further important principle is that the law implies an obligation of a contracting party to do all things necessary on that party's part to enable the other party to have the contracted benefit, and a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises: Peters (WA Ltd) v Petersville Ltd (2001) 75 ALJR 1385 at 1393. This is an obligation implied by law and is additional to the warranty of constructing the development with reasonable expedition in Special Condition 2.3, and breach of either the implied obligation or of the warranty, causing the strata plan not to be registered within the prescribed time disentitles the vendor from reliance on its right of rescission.

3. The facts of this matter indicate that the vendor had no economic strength, and had entered into commitments with the plaintiffs and others which could not be carried out with the vendor's own resources, and depended for execution on finding a builder which would design and construct the works and obtain financing. The delays arose from the vendor having made contractual commitments without having appropriate resources, and that with reasonable expedition on the vendor's part, the building would have been completed at the latest in the early months of 2001, and could well have been completed about six months earlier than that.

4. The vendor was, by July 2000, and thereafter always remained in breach of its warranty that the development would be constructed with reasonable expedition. This breach of warranty caused the strata plans not being registered by the extended date, and remaining unregistered at the date of the hearing. This breach precluded the vendor from reliance on or exercise of its right of rescission in Special Condition 4.2.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

PH Blackburn-Hart for the plaintiffs (instructed by The Law Firm of Solari's).

M Pesman for the defendant (instructed by Verekers).

Before: Bryson J.

Judgment in full below

Bryson J: The purchasers (the plaintiffs) challenged an exercise by the vendor (the defendant) of a right of rescission of a contract for the sale ``Off-the-Plan'' of a home-unit

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where the strata plan has not been registered, and was not registered within the period for which the contract provided.

2. The vendor was formerly named The Satellite Group (Pyrmont) Pty Ltd. I will use ``Satellite Pyrmont'' to refer to the vendor. By contract dated 26 June 1998 the vendor agreed to sell and the purchasers agreed to buy Apartment 106 together with Car-parking space 120 in The Bauhaus Apartments, a building which had not then been constructed, at 209-221 Harris Street, Pyrmont. The agreed sale price was $420,000 and a deposit of $42,000 was payable in a scale of payments provided for by Special Condition 16; $5000 on exchange, $16,000 on or before 31 October 1998 and $21,000 on or before completion of the contract. In fact the purchasers made payments totalling the whole deposit of $42,000 in or before October 1998. The description of the property sold in the contract showed that the Apartment and Car-parking space were shown in an unregistered plan, and a draft strata plan was attached to the contract. The draft strata plan showed Apartment 106 on Levels 9 and 10 and Carspace 120 on Parking level 3B-4A. The plan showed a proposed brick building of 18 levels on land generally rectangular with frontages to Harris Street, Gipps Street and Ada Place, with 137 lots and 219 car parking spaces. The units may not all have been dwelling units; at other places the number of dwelling units is spoken of as 132, increased by a redesign to 133. Special Condition 2.2 provided to the effect that the Apartment and Car-parking space were to be substantially the size and location as shown on the draft strata plan; and dealt with possible variations.

3. The contract for sale was on the 1996 edition standard form, but Printed Clause 28 was deleted. Special Condition 1 contained definitions including a definition of ``development consent'' which showed that development consent had been obtained and that there were proposed modifications, a definition of ``building approval'' which showed that building approval was still to be obtained and a definition of ``building contract'' which showed that the building contract was still to be entered into. Satellite Pyrmont agreed to purchase the land on 20 February 1998. The development approval was granted on 3 September 1996. An application for a construction certificate (or building approval) was lodged with Sydney City Council on 6 February 1999.

4. Special Condition 2.3 was as follows:

> The Vendor warrants that it will cause the Development including the Apartment and the Car Parking Space to be constructed with reasonable expedition and in a proper and workmanlike manner with good quality materials in accordance with the Development Consent and the Building Approval when obtained and in accordance with the standard of finishes and with the materials equipment and fittings as are set out in the Schedule of Finishes being **Annexure ``B''** hereto subject nevertheless to the provisions of Special Condition 2.4 hereunder.

5. Special Conditions 2.4 and 2.5 dealt with and limited the remedies of the purchaser for any alteration in the standards set out in the Schedule of Finishes.

6. Special Condition 3 related to registration of strata plan, easements etc. and provided:

> **3. REGISTRATION OF STRATA PLAN, EASEMENTS ETC.**
> 3.1 The Purchaser expressly acknowledges to the Vendor that completion of this Contract cannot take place until beforehand:
>
> > (i) The Vendor has caused to be registered in the Land Titles Office the Strata Plan on which the Apartment together with the Car Parking Space to be acquired by the Purchaser will be shown collectively as one lot on the Strata Plan, subject nevertheless to any amendments thereto as may arise pursuant to Special Condition 2.2
> > (ii) The Vendor has caused any necessary easement(s) and rights of way to be varied, granted and reserved whether by Instrument(s) under Section 88B of the Conveyancing Act or by other dealing(s), such that the proprietor of each of the lots in the Strata Plan

shall be entitled to enjoy in common with the proprietors of all other lots those facilities of the Development which are to be shared in common and if necessary, for the provision of essential services for the Development or as may otherwise be required so as to comply or give effect to the Development Consent or any other condition of this Contract.

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7. Special Condition 4 related to the completion date. It included cll 4.1 and 4.2

> 4.1 Subject nevertheless to the provisions of 4.3 hereunder, completion of the sale and purchase as provided by this Contract shall take place within fourteen (14) days after the solicitor for the Vendor serves written notice upon the Purchaser or the solicitor for the Purchaser (as shown on the front page of this Contract or as otherwise previously notified in writing by the Purchaser to the solicitor for the Vendor), that the Strata Plan and any other Instrument(s) or easement(s) as are referred to in Special Condition 3.1 have been registered by the Registrar General.
> 4.2 If the Strata Plan of Subdivision and any necessary easements which are referred to in Special Condition 3.1 above has not been registered by the Registrar General on or before **16 March 2001** or by any extension of this date pursuant to the terms of 4.3 hereunder, then either party may rescind this Contract whereupon the Purchaser shall be entitled to a refund of all monies paid but the Purchaser shall not otherwise be entitled to any claim or remedy against the Vendor for the payment of any damages, costs or expenses arising out of the fact that the Strata Plan together with any necessary Instrument(s) and/or easement(s) have not then been registered by the Registrar General.

8. Clause 4.3 enabled the vendor to extend the time provided for in cl 4.2 in one or more extensions which were not to exceed nine months, on the happening of various events and upon an architect's certificate relating to the delay. The events included damage by fire and other adverse events, proceedings involving adjoining or neighbouring owners, delay by public authorities, inclement weather or other matters beyond the control of the vendor.

9. The vendor sent to the purchaser a letter dated 25 January 1999 which said among other things ``We are pleased to provide you with an update on your investment for your information'' and went on to say that Consolidated Constructions had been chosen as builder to undertake construction of The Bauhaus Apartments, described off-site work which the builder must undertake and said ``... over the next four to six weeks you will begin to see machinery on-site which will be testing soil conditions.'' The letter also said ``Consolidated Constructions are already well into the design component of their Design and Construction Contract'' and ``We are therefore well on track to complete the project many months prior to the Sydney Olympics.'' The letter conveyed much further information on a strongly positive note, indications of satisfaction with the contract and strong expectations of a favourable outcome.

10. On 24 February 2000 solicitors representing the vendor advised the purchaser's agents by letter that the date for registration of the strata plan in Special Condition 4.2 had been extended from 16 March 2001 to 21 August 2001 and forwarded an architect's certificate supporting the extension.

11. The vendor entered into an Early Works Contract with Consolidated Construction Pty Ltd on 28 May 1999 which provided for construction of early works in the nature of preliminaries, with an early works construction period of 8 weeks and a contract sum of $2,172,200.00. The Early Works Contract was conditional on furnishing a bond and on building approval. Provisions of the agreement show that the parties contemplated entering into a Construction Contract which had not then been executed. A request for an early works building approval was made on 20 February 1999, the early works building approval was issued on 11 June 1999 and work commenced on 16 June 1999. The architect's certificate of 4 February 2000 shows that work under the Early Works Contract was then still proceeding. In February 2000 Consolidated Construction said that they were close to completing the Early Works Contract.

12. In 1998 Satellite Pyrmont was controlled, directly or ultimately, by The Satellite Group Ltd, which issued a prospectus dated 13 August 1999 for an offer of shares. This prospectus contained statements about the Bauhaus Apartments development including a table which said that there were 132 units, that 72% had been pre-sold, that the stage of development was ``site being cleared Construction commenced in June 1999'' and estimated completion was ``December 2000''.

13. In July 2000 there were large changes in the affairs of Satellite Pyrmont. Finnbell Pty Ltd and Consolidated Byrnes Holdings Pty Ltd between them acquired all the shares in Satellite Pyrmont from The Satellite Group Ltd; the

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purchasers are not related to The Satellite Group Ltd. Satellite Pyrmont was not involved in later events and financial difficulties which overtook The Satellite Group Ltd. Mr Ian Widdup became Managing Director, and Mr Widdup and a new group of individuals associated with the new shareholders took control of Satellite Pyrmont's affairs, and proceeded to obtain its books, records and files, and to establish what had happened. Mr Widdup established that no Construction Contract had actually been entered into with Consolidated Constructions, although it appeared that the Early Works Contract had been carried out. There was a dispute with Consolidated Constructions about the satisfaction of pre-conditions for some documentation of the proposed Construction Contract, and also about payments due under the Early Works Contract. The responsibilities which Consolidated Constructions was to undertake in the contemplated Construction Contract were very comprehensive, including design and construction, referred to as the turn- key project, and also responsibilities for financing. Mr Widdup established that according to information available to him the Bauhaus land was worth $8,000,000 and was subject to six mortgages the total debts on which were greater than $15,000,000. Satellite Pyrmont received a statutory demand from Consolidated Constructions dated 31 July 2000 claiming $1,609,850 under the Early Works Contract and soon became engaged in litigation with one of the puisne mortgagees over an attempt to auction off the property.

14. After the change in control a newsletter was issued by Mr Widdup as Managing Director of Bridge Street Developments. Among other things this document under the heading ``Bauhaus Renaissance'' said ``Good news! The delayed Bauhaus Project is now back on track and is scheduled for completion in late 2001.''

15. Mr Widdup's attention had to be directed to dealings with the mortgagees, negotiations with proposed builders and review of the pre- sale contracts which had been entered into under the previous control. The builders with whom he negotiated included Multiplex Constructions (NSW) P/L, which later became the contracted builder. After lengthy and very difficult negotiations and some litigation the fourth, fifth and sixth mortgagees compromised their debts and assigned their mortgages to Multiplex, and the third mortgagee assigned its mortgage to a nominee company associated with Satellite Pyrmont's solicitors which paid its claims, debts and costs, with funds most of which were contributed by Mr Widdup. Mr Widdup addressed further financing arrangements with banks. He carried on negotiations with ANZ Bank and BankWest and eventually achieved agreement for financing with ANZ Bank. By 28 March 2001 an in-principle finance agreement was reached for bank finance, and finance agreements with the ANZ Bank were executed in July 2001. Multiplex took possession of the site on 4 December 2000 and began building work; the building contract was not completed and signed until 28 March 2001, and the building contract was later renegotiated so as to involve a Multiplex subsidiary. The building contract provided for practical completion by 26 March 2002. Work proceeded continuously from 4 December 2000 onwards. At the time of the hearing on 6 February 2002 practical completion was expected in the immediate future.

16. Mr Christopher Heap, a consultant in the construction industry, acted as an in-house project or development manager for Satellite Pyrmont on the Bauhaus Development from about mid-August 2000. The many tasks he undertook including reviewing the contracts of sale entered into by Satellite Pyrmont with various purchasers in early to mid-1998. He established that, as in the case of the plaintiffs, the date for registration of the strata plan in contracts of sale was 16 March 2001 and had been extended to August 2001; and he also formed the view, in August 2000 that the project could not be completed by August 2001. The reasons for this view included:

1. Draft construction programs received from potential builders indicated a remaining construction period of at least 13 months;
2. Arrangements had to be made with the various mortgagees in connection with obtaining construction finance; and
3. No building contract had been entered into or builder engaged.

17. The terms of the pre-sale contracts and the task of obtaining finance were interrelated because financiers imposed conditions under which they would examine pre-sale contracts

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closely. As an example, an offer of finance by the Bank of Western Australia Ltd (BankWest) dated 13 February 2001 imposed among other conditions of the initial drawdown a condition requiring pre-sale contracts to a minimum of $30,000,000, which were to conform and to be certified by the bank's solicitors to conform with requirements including the sunset clause no earlier than 31 July 2002, 10% deposits, arm's-length contracts, negotiated purchase price at a minimum of 95% of the lender's valuation and other conditions, with detailed progress reports. The bank finance finally obtained was obtained from ANZ Bank, not BankWest. Multiplex was involved in the ANZ Bank finance. The first draw-down was in July 2001. The terms imposed by ANZ Bank on its finance included exacting conditions precedent to drawdowns. Mr Heap's view was that a number of the pre-sale contracts had issues which would make them unacceptable to a new financier including (1) the sales were not at arm's-length: (2) some included vendor finance provisions: (3) some included buy-back provisions: (4) some provided for 5% deposits, and (5) some were exchanged at prices considerably less than original list prices.

18. Mr Heap said in evidence that following his review of the pre-sale contracts Mr Widdup and consultants made decisions in early 2001 as to which contracts Satellite Pyrmont should seek to rescind and which it should seek to extend and keep on foot. However a decision about Apartment 106 and the contract with the plaintiffs must have been taken earlier because the defendant entered into a contract for the sale of Apartment 106 and its related car-parking space for $480,000 to Richard Graham Bach and Christine Moira Witlock on 19 December 2000. On 10 April 2001 solicitors representing Satellite Pyrmont wrote to the plaintiffs' conveyancing agents and said ``We have now received instructions from our clients that they do not intend proceeding with the sale to your clients and at the expiry of the sun-set clause date in August of this year will exercise their rights of rescission. Alternatively if your client wishes to rescind now rather than wait until August our client will consent to a mutual rescission immediately."

19. The plaintiffs then retained solicitors who initiated correspondence challenging the proposed rescission; Satellite Pyrmont's solicitors did not reply, but on September 2001 wrote again to the purchasers' conveyancing agents referring to the right of rescission, stating that the strata plan had not been registered and that the vendor exercised its right to rescind pursuant to cl 4.2; they went on to propose return of the deposit (without admitting that the deposit had been paid). The purchasers' solicitors again sent correspondence disputing entitlement to rescind and the effect of the purported rescission; the purchasers also lodged a caveat. The vendor then appointed new solicitors who stated the vendor's position fully on 12 November 2001, maintained the effectiveness of the rescission, acknowledged that the deposit had been paid and authorised its release to the purchasers, and called for withdrawal of the caveat. They forwarded a Lapsing Notice on 22 November 2001 and the purchasers initiated these proceedings on 12 December 2001; they have been heard with expedition. The plaintiffs claim a declaration that their contract is valid and subsisting, extension of their caveat, damages and ancillary orders.

20. Challenges to rescissions of ``Off-the- Plan" contracts for the sale of residential units which are yet to be constructed frequently come before the Equity Division. The primary matter for consideration is the rights of the parties under the terms, express and implied, of their contract of sale. In this case the standard form, Printed Clause 28, was excluded and the special conditions which the parties adopted establish their relationship. Each of many decisions in this field is a decision on the particular contract in question, but some recurringly important general principles, which are applicable in the present case, were stated in *Plumor Pty Ltd* v *Handley* (1997) Aust Contracts R ¶90-073; (1996) 41 NSWLR 30 at 34 and 35 by McLelland CJ in Eq. The principles there stated and now relevant are to the effect that a party to a contract is not entitled, as against the other party, to rely on an event resulting from the first party's wrongful act; that if the failure by the rescinding party to obtain some relevant consent or registration within the contractual period resulted from any default by him in the performance of express or implied obligations, that party is not entitled to exercise a right of rescission otherwise available; and that causation of the failure to obtain consent or registration by the wrongful act must be proved unless the terms of the contract make obtaining the consent or registration a condition for the

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exercise of the right of rescission. Another important principle, stated by McLelland CJ in Eq at pp 35 and 36, is that the plaintiff bears the onus of proof on the issue of whether not obtaining the requisite consent or registration within the period specified resulted from a breach by the rescinding party of contractual obligations. This principle must be taken with the qualification, expressed by McLelland CJ in Eq in *Hunyor* v *Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631: ``It is necessary however to bear in mind that all evidence is to be weighed according to the proof which it was reasonably within the means of one party to produce or of the other to contradict. This has particular significance in respect of evidentiary facts which are peculiarly within the knowledge of one party rather than the other...'' (and McLelland CJ in Eq referred to authority).

21. A further important principle is that the law implies an obligation of a contracting party to do all things necessary on that party's part to enable the other party to have the contracted benefit, and a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises; see *Peters (WA Ltd)* v *Petersville Ltd* (2001) ATPR ¶41-830; (2001) 75 ALJR 1385 at 1393 [36]. The relevant operation of this implied obligation is that it was the obligation of the vendor to do all such things as are necessary on its part to bring about registration of the strata plan before the date stated in Special Condition 4.2 or any extension thereof, and there was a negative obligation not to hinder or prevent the fulfilment of the purpose of proceeding to completion of the sale. This is an obligation implied by law and is additional to the warranty of constructing the development with reasonable expedition in Special Condition 2.3, and breach of either the implied obligation or of the warranty, causing the strata plan not to be registered within the prescribed time disentitles the vendor from reliance on its right of rescission.

22. There are also circumstances in which the purchaser may be entitled to equitable relief against a rescission even though the rescission was made in accordance with the terms of the parties' contract. There are a number of grounds for equitable intervention. In summary the right of rescission must be exercised reasonably but this summary should not be substituted for the law as stated in *Selkirk* v *Romar Investments Ltd* [1963] 1 WLR 1415 at 1422; and see *Woodcock* v *Parlby Investments Pty Ltd* (1988) 4 BPR 9568 (Young J). Part of the passage in *Selkirk* was referred to and followed by Gibbs J in *Pierce Bell Sales Pty Ltd* v *Frazer* (1973) 130 CLR 575 at 590.

23. Predictions made by and on behalf of Satellite Pyrmont at about the time the contract was entered into and later, and the terms of the warranty in Special Condition 2.3, taken with the provisions of Special Condition 4 relating to the completion date, constitute admissions by Satellite Pyrmont that if work on the development including construction work proceeded with reasonable expedition it was quite feasible to complete the work and register the strata plan long before 16 March 2001. The defendant is no less bound by those admissions because there has been a change in its ultimate control and the individuals managing its affairs, and no evidence has been led to suggest that the admissions were wrong or that there were any reasons why reasonable expedition would not have produced the clearly contemplated outcome. Although the burden of proof of breach of the warranty is on the plaintiffs, regard has to be paid to the opportunity of each party to adduce relevant evidence dealing with this subject, and the plaintiffs are in no position to do more than rely on the admissions which I have referred to, whereas the defendant notwithstanding the change of control is in a position to establish any matter of fact which might explain delay. Indeed the defendant addressed the question of delay by obtaining the architect's certificate and justifying an extension of time to 15 August 2000.

24. No explanation has been given in evidence for the elapse of 29 months between Development Approval and Building Application, or for the time taken to perform the Early Works Contract, which took about eight months although the construction period provided for was eight weeks and the architects certified for an extension of 109 days. No explanation is forthcoming for not proceeding to make a Construction Contract, which the Early Works Contract shows was contemplated in May 1999. Correspondence from Consolidated Construction called attention to this need in February 2000, nothing significant had occurred at the time of the takeover of control in July 2000, no arrangement for any other builder to do work had effect until December 2000, and no building contract was

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made until March 2001. These unexplained delays are to be contrasted with predictions emanating from the defendant about the expected time of completion. There is no reason to think that the defendant was

overcome or impeded by adverse circumstances; the only reasonable inference is the defendant did not have the resources or the capacity to carry the development forward at a reasonable rate of progress, and never acquired the resources or capacity until the new management had been in control for almost half a year.

25. The defendant's own correspondence in Exhibit 1 shows a number of matters bearing on delay. On 14 September 1998 the defendant informed Consolidated Construction that the defendant looked favourably towards formally appointing Consolidated Construction as the builder, required commencement on site in November and asked Consolidated Construction to expedite finalisation of funding. In March 1999 (Exhibit 1 p 66) Consolidated Construction received a finance proposal from its bank which contemplated first draw-down to finance construction no later than 31 May 1999 and the term of the loan of 90 weeks, suggesting completion in the early months of 2001. On 17 March 1999 (Exhibit 1, p 70) Satellite Pyrmont told Consolidated Construction that given the time frame it was imperative that Satellite Pyrmont now move to commence construction. On 30 June 1999 (Exhibit 1, p 78) Satellite Pyrmont stated ``We anticipate the finalisation of the building contract and associated finance facilities in the next few weeks'' and also said ``... we are approaching the final stages of documentation of this transaction...''. Communications with Consolidated Construction continued, inconclusively. On 23 May 2000 (Exhibit 1, p 86) Consolidated was predicting signing a contract by 1 June 2000 and achieving completion on 1 September 2001.

26. The correspondence throughout shows that the defendant had no economic strength, and had entered into commitments with the plaintiff and others which could not be carried out with the defendant's own resources, and depended for execution on finding a builder which would design and construct the works and obtain financing. The defendant's troubles and delays arose from having made contractual commitments without having appropriate resources. In my finding, with reasonable expedition the building would have been completed at the latest in the early months of 2001, and could well have been completed about six months earlier than that.

27. The burden of the evidence adduced by the defendant was directed to explaining events from the time of change of control in July 2000. By that time there had already been in my finding serious failures to observe reasonable expedition, as the defendant had been in a position to enter into the Early Works Contract in May 1999 for early works which according to the contract would take eight weeks, but by July 2000 the early works had been completed, no construction contract had been entered into, and early works had not been paid for which (if nothing else had done so) would have disrupted any expectation that Consolidated Construction would enter into a construction contract and carry out the proposed Design and Construct turn-key operation. Further the defendant had not by July 2000 made financing arrangements which could carry the construction project forward, but was involved in six mortgages, and in disputes, threats of a mortgagee sale and litigation which were resolved with extended negotiations and significant difficulty. Apart from the early works, construction did not start until 4 December 2000, almost 30 months after contracting with the plaintiffs, less than four months before the original date for strata plan registration and less than 10 months before the extended date, in a building project estimated to take 13 months.

28. In my finding then the vendor was, by July 2000, and thereafter always remained in breach of its warranty that it would cause the development to be constructed with reasonable expedition, and I also find that this breach of warranty caused the strata plan's not being registered by the extended date of 15 August 2001, and remaining unregistered at the date of the hearing. This breach disqualified the vendor from reliance on or exercise of its right of rescission in Special Condition 4.2.

29. The defendant led a considerable body of evidence which, as well as being directed to explaining events bearing on carrying out the Bauhaus Development and the use of time, was directed to explaining, insofar as it can be explained, the defendant's decision to rescind its contract with the plaintiffs and to enter into another contract for the sale of Apartment 106 at a higher price. The defendant's evidence was

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directed to showing that its new management acted under practical constraints relating to the availability of finance and the need to conform with requirements of financiers relating to pre- sale contracts. Evidence, particularly that of Mr Heap, was directed to showing that many of the pre-sale contracts preceding the

change of control had features which would not be satisfactory to a financier, and that this explains the decision to rescind the plaintiff's contract and seek the commercial advantages available from sale to some other purchaser. Mr Heap listed in his affidavit some features which would make contracts unacceptable. These do not apply to the plaintiffs' contract. It was an arm's-length contract; or in any event there was no reason, either in facts shown by evidence or in facts shown to be known to the defendant, to think that it was not, or to think that there was some association between the plaintiffs and The Satellite Group which would place the matter in any doubt. The plaintiffs' contract included no vendor finance provision or buy-back provision, and provided for a 10% deposit; the effect of Special Condition 16 was that the purchasers could have deferred paying half the deposit until completion, but in fact they did not, but paid the full 10% deposit in or before October 1998. By paying the full deposit before they were contractually obliged to they gave an unusually strong indication that they were purchasers in earnest.

30. Another matter mentioned by Mr Heap was that contracts had been exchanged at prices considerably less than original list prices. He sought to maintain that this was true of the plaintiffs' contract. There were suggestions in documents preceding the exchange of contract that the price was below list price; the sales advice notice dated 19 June 1998 Exhibit 2 included a statement ``Exchange by Friday 26 June '98 at this price or price changes to list price'' and a letter from the defendant's solicitors to the plaintiffs' agents of 22 June 1998 Exhibit 3 stated ``We are instructed that contracts for sale must be exchanged by Friday 26 June 1998 failing which the purchase price of $420,000 shall revert to the higher list price.'' The second plaintiff Ms Lazzaro produced in evidence two price lists which were provided to the plaintiffs by sales representatives of the defendant in 1998; one dated 20 May 1998 showed the list price of Unit 106 at $420,000 and the other dated 18 August 1998 after the sale shows its list price as $490,000. There is no evidence that up to the time of exchange of contracts any other price list or list price for Apartment 106 ever existed. Cross-examination of Mr Heap showed that his reasons for the view that the sale to the plaintiffs was under list price related to consideration of the value of the unit, and of its value in relation to other units, after the change in control. Transcript t.5, l.20 apparently recording a concession by Ms Lazzaro the second plaintiff that the sale was at a discount is not accurate; the witness did not make that concession. The indications to the plaintiffs, in Exhibits 2 and 3 and otherwise, that the sale price was less than the list price have not been borne out by evidence of any price list which then existed, and the probability is that the suggestion that there was some discount was made to the plaintiffs as part of some puffing activity in support of effecting the sale.

31. Other matters on which ANZ Bank required to be satisfied, as set out in the bank's Terms Sheet, and not mentioned by Mr Heap among the issues which he considered, were not adverse to the plaintiffs' contract either; they were Australian residents, and they were not multiple buyers. They also had a right of rescission under clause 4.2 but there is no practical prospect of rescission by them.

32. It should be said, by the bye, that the matters listed by Mr Heap, and by Mr Byrnes who also dealt with this subject, or the requirements of a bank for finance in an arrangement made two years or so after entering into a contract of sale are not good grounds on which to decline to observe contractual arrangements, which are no less binding if they are not at arm's-length or are entered into with low deposits, or contain unusual special conditions, and so forth. It was plain from his evidence as a whole that Mr Byrne's view that the sale to the plaintiffs was under the market value [and] was based on his view of market values at the time when he addressed the question and not at the time of the contract more than two years earlier.

33. Mr Byrne's evidence showed that thedecision as to which of the pre-sale contracts were to be rescinded, and which were to be left to take effect was based on what he and others responsible for Satellite Pyrmont's affairs believed to be achievable prices at the time of decision in 2000 or 2001 and said ``Our motivation for rescinding that contract was that

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we felt we could achieve a higher price.'' Attempts in cross-examination to obtain estimates by Mr Byrnes of the times required for early stages in the development produced answers which did not deal with the subject in a concrete way.

34. I am satisfied that, although the conditions imposed by ANZ Bank and other financiers on the kinds of pre-sales which were acceptable to the financiers may well have influenced the decisions whether or not

to rescind some pre-sale contracts or to leave them into effect, the requirements of financiers had no real impact on the decision to rescind the contract with the plaintiffs, which had no significant unsatisfactory feature. Mr Byrnes conceded that the predominant factor was the price; that the basis of the decision was ``simply dollars''. If any other matter such as the amount of deposit, or the sale not being at arm's-length, or the sale being discounted or at less than list price was taken into account, it was unreasonable to take it into account as it had no basis in fact. The plaintiffs' contract was not rescinded under the influence of some necessity to comply with the requirements of a financier. The rescission was not a response to any difficulty in Satellite Pyrmont's dealings with the purchasers, either a difficulty which existed in substance and reality or a difficulty which existed in the vendor's concept of what made a pre-sale contract eligible for rescission because of the need to satisfy the vendor's financiers. Long before the vendor rescinded or had any apparent right to rescind the vendor had chosen its course and acted on it by entering into a second pre-sale contract at a higher price. The pursuit of the higher price was the only thing which in reality moved the vendor to rescind. If the rescission had been otherwise effective, the vendor acted unreasonably and the purchasers would have been entitled to be relieved in equity against the rescission.

35. I find that the defendant rescinded its contract with the plaintiffs for the purpose of selling the unit at a higher price, and not for the purpose of escaping from any dilemma or difficulty encountered in endeavours to conform to its contractual obligations.

36. It was suggested that the plaintiffs were guilty of delay or failure to take steps at an appropriate time to challenge the threatened rescission from April 2001 onwards. The plaintiffs sought to uphold their position in that Ms Lazzaro had several telephone conversations in February and March 2001 with Mr Geoffrey Davey, a consultant engaged in the defendant's affairs. Mr Davey, after speaking to Mr Widdup, told her that the defendant considered that the Apartment was underpriced and would resell at a higher price; Mr Davey made some expressions of sympathy. Mr Davey was unable to give evidence in the proceedings because he had suffered a stroke and he was disabled. Ms Lazzaro then sought her solicitor's advice, tried to have a meeting with the director of the defendant and got no significant response. She also spoke to a solicitor then acting for Satellite Pyrmont seeking a Deed of Variation. The plaintiffs' solicitors were active in challenging the purported rescission by correspondence, some months passed before any reply was received which engaged with their contentions, and it was appropriate to deal with the matter by correspondence and a caveat until litigation was precipitated by the Lapsing Notice. In my finding the plaintiffs did everything that could reasonably be expected of them. In any event the activity or inactivity of the plaintiffs had no effect on the course taken by the defendant, which had decided to sell to someone else and had agreed to do so the previous December.

37. **Orders:**

(1) Declare that the Contract for the Sale of Land between the Plaintiffs and the Defendant dated 26 June 1998 of the land referred to in the Schedule to this Order is valid and subsisting.
(2) Liberty to apply with respect to

(a) Caveat 8089401
(b) Specific Performance of the Contract.
(c) Damages.

(3) Order that the Defendant pay the Plaintiffs' costs of the proceedings.

Schedule

The land is apartment 106 and car parking space 120 in the draft strata plan attached to the Contract for Sale being the draft strata plan submission of development to be erected or being erected on the property formerly Lot 2 Deposited Plan 217537 being the whole of the land comprised in Folio Identifier 2/217537 and now being Lot 22 in Deposited Plan 882825 and which is known as 209-221 Harris Street, Pyrmont.

MITCHELL v PATTERN HOLDINGS PTY LIMITED

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(2002) LQCS ¶90-116

Court citation: [2002] NSWCA 212

New South Wales Supreme Court, Court of Appeal

Judgment delivered 15 July 2002

Conveyancing — Contract for purchase of strata unit ``off the plan'' — Vendor contracted to make all reasonable efforts to procure the registration of the Strata Plan — Whether strata plan ultimately registered substantially in accordance with draft strata plan — Whether vendor failed to use all reasonable efforts to secure registration of strata plan in accordance with draft strata plan — Whether vendor entitled to terminate the contract for sale.

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Pattern Holdings Pty Limited ("the respondent"), owned the property 6 Silva Street, Tamarama (NSW). There was a building on the property which the respondent planned to convert into four strata units. Council approval to the development was sought. Before approval had been given, the respondent began to develop the property and advertise the units for sale.

Mr Mitchell (``the appellant'') agreed to purchase Unit 2 from the respondent for $550,000. Contracts were exchanged on 26 July 1999. The contract contained a Special Condition under the heading ``Registration of Strata Plan'' that stated that ``completion of this contract is subject to and conditional on registration by the Registrar General of the Strata Plan''. ``The vendor must use all reasonable endeavours to procure the registration by the Registrar General of the Strata Plan'', and "if the strata plan is not registered within 12 months of the date of making this agreement either party may rescind".

On 20 September 2000, the Council consented to an application by the respondent for strata subdivision. This subdivision was based on a strata plan that was different from the strata plan annexed to the contract. The rooftop balcony, a feature of unit 4 on the plan, was reduced in depth from four metres to one and a half metres. The overall area of the balcony was reduced by approximately ten square metres from about 15.95 square metres to 5.98 square metres. The sequence of events that delayed the eventual grant of consent and resulted in the reduction in the size of the balcony is oulined below.

An application for development consent was first made on 23 December 1998 and was substantially in accordance with the strata plan annexed to the contract. In particular it included a rooftop balcony with a depth of four metres. After advising nearby residents of the application, the Council received 3 letters objecting to the application, all of which complained about the extension of the roof line of the building to incorporate the balcony.

On 21 July 1999, the Council's Development & Building Unit made a report on the development recommending a variation to the original conditions permitting a rooftop balcony of reduced depth. On 27 July 1999, the Council approved the request for variation with the limitation of the reduced balcony recommended by the Development & Building Unit. On 9 August 1999, the Council wrote to the respondent advising that Condition 5 was varied so as to read ``To reduce the impact on surrounding properties the roof balcony depth is to be reduced to a maximum of 1.8 metres''. The effect of this was to allow the other changes proposed to the roof area but to reduce the size of the balcony. Condition 8 was re- affirmed.

Trevor R Howse & Associates (``Howse''), an ``Accredited Certifier'', were engaged to deal with Condition of Consent No 10. They wrote to Council on 24 September 1999 seeking clarification on Condition 10. The Council responded on 25 October 1999 and on 2 November 1999. Howse issued a construction certificate that was dated 29 October 1999. The respondent continued to build a larger balcony in contravention of the condition of consent. The Council received a number of letters of complaint relating to this illegal building work. These complaints were referred to Howse who wrote to the respondent on 23 November 1999 requesting that the rooftop balcony be constructed in accordance with the Council's

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conditions and advising the company that failure to comply with the consent could result in orders being issued by the Council.

There were further complaints as the respondent continued to ignore the Council's condition. On 18 February 2000, Howse wrote to the respondent again advising that failure to comply could result in orders against the company and that Howse could not issue an occupation certificate on completion unless the building work complied with the Council's development consent. On 28 February 2000, the respondent applied to the Council for strata subdivision of the property. The Council's statutory planner then discovered that the plans used by Howse to support its construction certificate were incorrect in that dimensions of both the balcony and the rooftop room exceeded the conditions of consent. An undated internal note from the statutory planner stating ``[p]lease ensure a condition is placed on any consent (to application for strata subdivision) that requires an Occ. Cert. Being issued''. This note meant that the respondent could not obtain strata subdivision unless the development complied with the amended conditions of consent.

On 8 March 2000, the respondent wrote to Council objecting to Condition 5. This was not a formal application to modify consent and was not dealt with by Council as such. On 16 March 2000, the respondent lodged a part completed application to modify consent, dealing with Condition 5. On 21 March 2000, the Council's statutory planner called the respondent and informed them that there were four discrepancies in its application for strata subdivision in relation to the development consent: these included the incorrect balcony size. On 19 May 2000, the Council's statutory planner met with the respondent and informed them that the

strata plan lodged needed modification, particularly with respect to the size of the balcony and modification of illegal work carried out.

On 6 June 2000, the respondent made a formal application to modify consent on a number of minor issues and the rooftop balcony. After again writing to residents of the area and receiving a number of complaints about the roof line, Council agreed to modify consent in respect of the minor ancillary works but not in respect of the balcony. The Council required rectification of the unauthorised work within 21 days. This decision was reached on 4 September 2000. On 20 September 2000, Council consented to the strata subdivision application, after the respondent had complied with the Condition of Consent No 5.

As the strata plan had not been registered within 12 months of the agreement, the respondent issued a notice of termination to the appellants on 11 August 2000. No point was taken that it was not a notice of rescission. The notice cited cl 2.4 of the contract in the covering letter which accompanied the Notice. The appellant sought an order for specific performance contending that the respondent was not entitled to issue the termination notice because it had not made all reasonable efforts to register the plan pursuant to cl 2.2 of the contract. The trial judge at first instance dismissed the proceedings and held that the respondent ``did make reasonable efforts to gain approval for its plan. Those efforts failed so that Condition 2 could not be fulfilled, thereby triggering the right to rescind''.

The grounds of this appeal are that the respondent breached its obligation to use all reasonable efforts to obtain the registration of the strata plan, substantially in accordance with the draft plans annexed to the contract and accordingly the respondent was not entitled to rely upon it notice of rescission under the contract

Held: appeal dismissed

Per Powell JA (Stein JA and Rolfe AJA agreeing)

1. The Court held that the strata plan that was ultimately registered was not one substantially in accordance with the draft strata plan as a ``strata plan is not limited to depicting the `envelope' of the building or buildings to which it relates but must depict the lots to be created by the registration of the strata plan'' such as the common property, floor plan, and location plan.

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2. ``In order that a party be held disentitled to exercise a right of rescission, it must appear that it was his default which brought about, or at least materially contributed to, the occurrence of the relevant event''. The Court agreed with the findings and decision of the trial judge that the respondent moved expeditiously to have the balcony issue (Condition 5) deleted from the Development Consent, and when the Council sought modifications, the respondent also sought to reach agreement on the modifications.

3. The Court held that the trial judge did not err in finding that the respondent made reasonable efforts to gain approval for the strata plan, and that the ``consent would never have been further modified even if Pattern [the respondent] had acted more expeditiously with its application.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

T G R Parker for the appellant (instructed by Blake Dawson Waldron).

B A J Coles QC, S J White and Ms N Obrant for the respondent (instructed by Freidman Reeves).

Before: Powell JA, Stein JA and Rolfe AJA.

Judgment in full below

Powell JA: This is an appeal from a Judgment delivered, and orders made, by Windeyer J on 26 March 2001, on which day his Honour dismissed with costs the proceedings which had been brought by the Appellant (``Mr. Mitchell'') against the Respondent (``Pattern'').

2. In those proceedings Mr. Mitchell had sought (*inter alia*) an order for specific performance of a contract made between himself as purchaser and Pattern as vendor for the sale of a strata unit to be created in a building at 6 Silva Street, Tamarama, which building was owned by Pattern and which building Pattern was then proposing to redevelop and to be made the subject of a strata subdivision.

3. Silva Street, Tamarama is a street which runs roughly from South to North. At a point along its length, Silva Street intersects Dellview Lane which runs roughly from West to East. The building known as No. 6 Silva Street was located on the North Eastern corner of Silva Street and Dellview Lane. The land upon which the building known as No. 6 Silva Street was erected falls from North to South on the frontage to Silva Street and from West to East along its depth.

4. In 1998, the relevance of which time will shortly appear, the building known as No. 6 Silva Street was a block of four two bedroom rental flats — two on each of what might be called the ground floor and first floor — and, in what might be described as a basement area two lock up garages, (see Combined AB 132-135) the building being described as ``of late 1920's vintage''(see Combined AB 103).

5. Although — since the building plans which are with the papers (Combined AB 132-135) appear to be incomplete — it is not possible to know with any certainty exactly what was involved in the planned

redevelopment of the building, it would seem that, in the basement area, behind one of the garages, a number of internal walls were intended to be removed so as to create a laundry and storage area as well as a shower room, that area, together with the garage in front of it, to become part of one of the units on the ground floor; that, on the ground floor, a number of internal walls were to be removed and, rearranged and, in addition, cantilevered balconies were to be provided at the Eastern end of each unit; that, on the first floor, internal walls were to be removed and the internal space altered in what was to become Unit 3; that similar works were to be carried out in the other flat on the first floor, that flat to form part of Unit 4, another part of which — to incorporate a second bathroom, a second bedroom and a balcony some 4 metres in depth — to be built into what had previously been the roof void, the final part of that lot to be a car space in the open to the East of the building at the basement level.

6. According to a report (Exhibit D — Combined AB 189) prepared in December 2000 by a Mr. Ryan, a town planner and real estate valuer, on 23 December 1998 there were lodged on behalf of Pattern with the Waverley Council Development and Construction Certificate applications. That report contained the following (*inter alia*) (Combined AB 194):

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> ``**DEVELOPMENT AND BUILDING WORKS**
>
> The development and building works for which approval was formally sought were:
>
> parking for three cars
> laundry and storage
> 4 x 2 bedroom apartments
> addition of cantilevered balconies, and
> addition of bedroom and bathroom within the roof area, with an area of 38.4m^2 (an increase of 7.96% on existing building area of 482.2m^2)
>
> The Description of Development in the Construction Certificate Application was `Rear balconies, roof attic conversion' and the Value of Work was stated as $65,000.00. The Value of Work is intended to reflect only the value of the work subject to the application — not the value of all renovation and fit-out works.
>
> …"

7. On 6 January 1999, the Council forwarded to residents in the vicinity of No. 6 Silva Street a letter advising of the lodgment of the application, of the availability at the Council for inspection and of the opportunity to make submissions in relation to them. That letter provoked three letters of objection from residents, the common ground of objection being the extension from the roof line, the roof top balcony and the consequential impact on privacy and views (Combined AB 195).

8. An assessment by Stephen Grubits & Associates, made with a view to assessing the application in terms of fire safety, which was provided to the Council in late February 1999, identified 17 matters in which insufficient detail was provided in the application for an assessment to be made, and in which compliance was required and 3 matters of non- compliance which were stated to be mostly as ``... a result of insufficient detail in the provided drawing", and detailed solutions to some at least of the matters which it had identified (Combined AB 195).

9. In his report (Combined AB 195), Mr. Ryan noted that the Council's records contained a Council's record of site inspection dated 29 March 1999 ``noting `... that illegal works have been carried out on the building before consent' detailing those works (as demolition of internal walls, new concrete floors, replacement of ceilings, new internal plumbing) & detailing incorrect plans compared to works carried out".

10. At its meeting on 8 May 1999, Council dealt with Pattern's Development Application and resolved that consent be granted to it subject to conditions. For present purposes, it is sufficient to note the following conditions to which that consent was made subject (Combined AB 237-238):

``1. Compliance in all respects with Plan No. A01 tables and documentation prepared by Glenn Gilsenan and Associates dated November 1998, submitted 23 December 1998 except where amended by the following conditions of consent.

…

4. To reduce the potential for noise generation and the loss of beach views from adjoining properties, the four balconies extending from the living areas shall be reduced in depth from 2100mm to 1200mm. Details shall be submitted prior to issue of the construction certificate.

5. To reduce impact on surrounding properties, the proposed changes to the roof including the installation of a room and balcony to be deleted from the application.

6. The third carspace allocated at the rear of the property shall be deleted as it impedes the manoeuvring area.

…

8. Pursuant to Section 94 of the Environmental Planning and Assessment Act, 1979 and having regard to Council's Housing policy and a result of the likely loss of rental housing for low to moderate income groups by the proposed development, the applicant/owner to contribute the sum of $56,064 to Council's Housing Trust Fund. This contribution to be paid prior to the issue of the Construction Certificate.

…

10. Inadequate details have been provided to allow proper assessment with regard to fire and life safety. In accordance with the report prepared by S. Grubits and Associates (ref 98/385-R1- dated Feb. 1998), engineering solutions are to be submitted together with amendments required by development

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consent conditions prior to the issue of the construction certificate.

…

14. The building work must not be commenced until:

(a) a Construction Certificate has been obtained from Council or an Accredited Certifier in accordance with Section 81A(2) of the Environmental Planning & Assessment Act, 1979; and
(b) a Principal Certifying Authority has been appointed and Council has been notified of the appointment in accordance with Section 81A(2)(b) of the Environmental Planning & Assessment Act, 1979 and Form 7 of the Schedule 1 of the Regulations; and
(c) Council is given at least two days notice in writing of intention to commence the building works.

The owner/applicant may make application to Council or an Accredited Certifier for the issue of a Construction Certificate and to be the Principal Certifying Authority. Should Council be appointed the Principal Certifying Authority, the applicant/owner is to pay an inspection fee of $237.50 in accordance with Council's Pricing Policy prior to the commencement of any works."

11. Notification of that determination (Combined AB 236-240) appears to have been forwarded to Pattern on 19 May 1999.

12. On 11 June 1999, Pattern wrote to the General Manager of the Council, a letter which, so far as is relevant, was as follows (Combined AB 241):

``We are writing to Council to request a review of Councils (sic) consent LD.486/98 dated 19th May 1999, items No. 5 and No. 8.

Item No. 5

`To reduce impact on surrounding properties'. The proposed changes to the roof including the installation of a roof and balcony to be deleted from the application. Council officers have considered

this under Merit Assessment DEP NO. 1 — Multi Unit Housing that, `the additional floor space is considered satisfactory in this regards' and Part (ii). The likely environmental, social or economic impacts of that development states that, `The development is unlikely to have a detrimental impact with regard to Environmental Impacts'.

The additional area within the roof has no effect upon the bulk or height of the building or physical effect upon the surrounding area. Council's planners considered that this was acceptable, with the addition of obscure glass to the window, which the applicant concedes.

…

The applicant therefore asks Council to consider these two items as the development will not have noticeable impact on surrounding properties from an environmental or social position."

13. It seems (Combined AB 42) to have been at about this time when, having seen, on the Internet, an advertisement (Combined AB 66) for the sale ``off the plan'' of proposed units in the property, Mr. Mitchell inspected the property in company with a Mr. Freund, an Associate Director of Elders Real Estate, Double Bay, which had been retained by Pattern as its agent. Following that inspection, and a later inspection with Mr. Freund and with a Mr. Hughes, a Director of Pattern, Mr. Mitchell negotiated to purchase the proposed Unit No. 2 — a price of $550,000.00 was then agreed upon.

14. On 21 July 1999, the Council's Development and Building Unit considered Pattern's request for a review of Conditions 5 and 8 of the Development Approval. The report which it made (Combined AB 244) contained the following (inter alia):

``PUBLIC SUBMISSIONS

The S82 application to review the determination was notified to previous objectors from June 21 — July 5. One submission was received objecting to the proposal from No. 1/45 Fletcher Street owner/ occupier. The concerns raised are in relation to a loss of privacy and potential for noise generation from the roof top balcony.

The existing roofline acts as a privacy screen for a depth of approximately 1.3 m. Beyond this, the deck extends a further 2.5m which is not screened. The reduction of the balcony by 1.5 m in depth would ensure privacy is retained and noise generation

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minimised. Otherwise the new room and balcony is considered satisfactory with regard to DCP No. 1 — Multi Unit Housing.

DBU Assessment

The DBU examined the applicant's request and make the following comments:

Condition 5 — DBU were previously of the view that the proposed rooms within the roof space would not result in excess impacts on surrounding properties, particularly having regard to the rooms being generally contained wholly within the confines of the existing roof space. It is considered appropriate that the proposed balcony be reduced in size so as to reduce privacy concerns for surrounding properties. In this regard, a balcony depth of 1.5 m is considered appropriate.

…"

15. On 26 July 1999, contracts for the sale and purchase of Unit 2 were exchanged and a deposit of $82,500.00, being 15% of the agreed purchase price, paid. In the contract, the property was described as ``2/6 Silva Street, Tamarama''. In addition to the standard conditions contained in the 1996 edition of the contract for the sale of land, the contract contained the following (inter alia) Additional Conditions (Combined AB 153-154):

``1.1 Definitions

In these Additional Conditions, unless a contrary intention appears:

…

`Property' means the property described in this contract.

`Strata Plan' means the strata plan substantially in accordance with the draft strata plan (a copy of which is annexed hereto).

…

2. Registration of Strata Plan

2. Completion of this contract is subject to and conditional on registration by the Registrar General of the Strata Plan.

2.2 The vendor must use all reasonable endeavours to procure the registration by the Registrar General of the Strata Plan.

2.3 The purchaser acknowledges that:

> 2.3.1. The Strata Plan is provisional and subject to final approval by the vendor and any Authority;
> 2.3.2. The vendor reserves the right in its reasonable discretion and without reference to the purchaser to vary or amend the Strata Plan.
> 2.3.3. The vendor must not make any variations or amendments to the Strata Plan which substantially and detrimentally directly affect the property to an extent which is other than minor unless the variation or amendment is required or made by an Authority or the Registrar General.
> 2.3.4. If on registration of the Strata Plan there are any variations or amendments which substantially and detrimentally affect the property to an extent is (sic) other than minor, the purchaser may rescind this contract by written notice to the vendor whereupon the provisions of clause 19 shall apply. In this additional condition 2.3.4 a `minor' variation or amendment includes a variation of the area of the properly (sic) or the common property by not more than 10%.
> 2.3.5. The right of rescission under additional condition 2.3.4 must, to be effective, be exercised by the purchaser within 14 days after the purchaser receives written notice from the vendor that the Strata Plan has been registered.
> 2.3.6. If the purchaser does not exercise his right of rescission under additional condition 2.3.4 within the time required under additional condition 1.3.5(sic) the right of rescission conferred on the purchaser under additional condition 2.3.4 shall lapse and this contract shall remain binding in all respects.

2.4 If the Strata Plan is not registered within 12 months of the date of making this contract either party may rescind this contract in which event the provisions of Clause 19 shall apply.

…"

(The draft Strata Plan referred to is to be found at Combined AB 169 -170.)

16. On 27 July 1999 (Combined AB 197), Council resolved to adopt the recommendation of its Development and Building Unit to the

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extent to which it proposed the variation of Condition 5.

17. Thereafter, on 9 August 1999, the Council's Building Services Manager wrote to Pattern a letter which, so far as is relevant, was as follows (Combined AB 243):

``…

> I have to advise you that after considering your submission, Council has resolved as follows:
> 1. That condition No. 5 of Council's development consent determined on 8 May 1999, be deleted and the following condition be imposed:

`To reduce the impact on surrounding properties, the roof balcony depth is to be reduced to a maximum of 1.5 m.'
2. That Condition No. 8 of Council's Development Consent determined on 8 May 1999 be reaffirmed."

18. Mr. Ryan's report records the following matters which he ascertained upon an inspection of the Council's records (Combined AB 197):

(a) on 26 September 1999 Council received a letter dated September 24, 1999 from Trevor Howse & Associates Pty. Limited:

(i) advising of its engagement to assess the ``Construction Certificate Application'' (i.e. notifying of its appointment of ``Accredited Certifier'' — a status created by legislation to facilitate assessment of such applications by a building expert as an alternative to a Council officer) and
(ii) requesting clarification of Council's position on Condition of Consent No. 10, about fire safety;

(b) on October 25, 1999, Council wrote to Trevor Howse & Associates Pty. Ltd. clarifying its position on Condition of Consent No. 10, stating that information available on fire safety is acceptable;
(c) on October 26, 1999, payment was made to the Council by Pattern of s 94 levy, long service leave levy and damage deposit;
(d) on November 2, 1999, Council received Construction Certificate dated October 29, 1999 issued by Trevor R. Howse & Associates Pty. Ltd. as Accredited Certifier.

19. Meantime, so it would seem, Council had received from a neighbour a complaint that the roof top balcony was being built contrary to the conditions of consent which complaint appears then to have been referred to Trevor R. Howse & Associates Pty. Ltd (Combined AB 198).

20. On 17 November 1999, Trevor R. Howse & Associates Pty. Ltd. wrote to Pattern a letter (Combined AB 245) which letter, omitting formal parts, was as follows:

``RE: 6 SILVA STREET, TUMARAMA (SIC)

CONSTRUCTION CERTIFICATE

It has been brought to the attention of this office that the construction works are proceeding not in accordance with the plans approved by Waverley Council's Development Consent 486/98 determined on 8 May 1999.

The works relate to the balcony of Unit 4, which is larger than that approved by Council. Accordingly, you are requested to construct building works in accordance with the approved plans.

You are advised that failure to comply with Development Consent may result in orders being issued by Council under the provisions of the Environmental Planning and Assessment Act.

Should you wish to discuss any of the above, please do not hesitate to contact the undersigned or the representative of Waverley Council."

21. Notwithstanding the terms of that letter, further complaints were received by Council from neighbours concerning unauthorised works. Among those complaints was one dated February 14, 2000, from a Mr. and Mrs. Gasser who appear to have been the complainants living in 45 Fletcher Street referred to in the Development and Building Unit Report of July 1999 to which I have earlier (para. 14 (above)) referred. A note by a council officer appearing on that complaint (Combined AB 246) was in the following terms:

``Spoke to neighbour regarding the alleged work. At present there is no balustrading around the roof deck. Therefore we are unable to determine whether the applicant has carried out unauthorised work contrary to conditions. When a final is given or by insp. we take action."

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22. These further complaints appear to have been referred to Trevor R. Howse & Associates Pty. Ltd. which, on 18 February 2000, wrote to Pattern a further letter (Combined AB 247) which, omitting formal parts, was as follows:

``RE: 6 SILVA STREET, TUMARAMA (SIC)

NOTICE TO COMPLY WITH DEVELOPMENT CONSENT

Further to our correspondence in November 1999, it has been brought to the attention of this office that the construction works are not proceeding in accordance with the plans approved by Waverley Council's Development Consent 486/98 determined on 8 May 1999.

The works relate to the balcony of Unit 4, which is larger than that approved by Council.

Take Notice that under Sections 109L and 121H of the Environmental Planning and Assessment Act, that failure to comply with the Development Consent may result in orders being issued by Council.

It is the responsibility of this office to not issue an occupation certificate at completion unless the building work complies with the approval of Council. Should you wish to discuss any aspect of the above, please do not hesitate to contact the undersigned or the representative of Waverley Council."

23. Mr. Ryan's report (Combined AB 198-199) records that, on February 28, 2000, Pattern applied (DA 120 /00) to Council for strata subdivision, at which time the Council's Statutory Planner discovered that the plans used by Trevor R. Howse & Associates Pty. Ltd. to support its issue of a Construction Certificate on October 29, 1999, were incorrect, in that they showed:

(a) roof top balcony exceeded depth and area permitted by Conditions of Consent dated May 8, 1999;
(b) floor plan area of room in roof top exceeded conditions of consent;
(c) wall shape in roof top was different to (sic) that shown in previously submitted plans; and
(d) roof top void was in the wrong location to (sic) that shown in the previously submitted plans.

Council's Statutory Planner then apparently made a note:

``Please ensure a condition is placed on any consent (to application for strata subdivision) that requires an Occ. Cert. being issued."

Mr. Ryan noted in respect of the note by Council's Statutory Planner:

``This is a reminder of the need to:

1. not issue an unconditional approval to the strata subdivision application, and

2. to make any approval conditional upon prior completion of building works consistent with the Conditions of Development Consent to justify issue of an Occupation Certificate."

24. The letter from Trevor R. Howse & Associates Pty. Ltd. of 18 February 2000 (para. 22 (above)) appears to have provoked the letter (Combined AB 248-249) written by Mr. Hughes on behalf of Pattern to the Council dated 8 March 2000, which letter was as follows:

``RE: SECTION 96(1) OBJECTION

6 SILVA STREET, TAMARAMA

LD486/98 MR:BF

CONDITION NO. 5 OF COUNCILS (SIC) CONSENT

I refer to your letter dated 6 August 1999 stating that condition number 5 states `To reduce the impact on surrounding properties, the roof balcony depth is to be reduced to a maximum of 1.5 m'.

We wish to object to this condition as we believe that it will not deliver a realistic outcome as a useable balcony and that the condition is related to an objection by only one of many adjoining neighbours.

The condition requires the depth of the balcony be reduced to 1.5 m. This would give a railing height of 1.4m which would not allow an outlook from the bedroom and would create a confined atmosphere to the bedroom.

The objectors D & H Gasser has stated that there (sic) living area will be directly overlooked and that the balcony will create a high level of ambient noise which will both (sic) contribute to a low (sic) of the value of their unit.

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Firstly, the living room that they refer to in their letter is really an enclosed balcony which as far as records reveal was never formally approved and seems to be used as an office rather than a living room.

Prior to any redevelopment of No. 6 Silva Street, there were already balconies in the ajoining (sic) building no. 4 Silva Street, that are closer to the objectors and pose more of a concern.

The upper level balcony is completely open which would create less noise transmission than enclosed one (sic) which would create should reverberation through the roof (sic).

The upper level balcony can be seen from the street and for the following reasons is better open ie

(a) Sound building construction for the drainage of the balcony.
(b) The view from the balcony is in the complete opposite direction from the objectors (sic) unit.
(c) The open balcony will enhance the outlook from the upper level towards the south east and away from the objectors.

We therefore ask council to reconsider this condition and for the original design of fully open balcony to be approved.''

25. The letter from Pattern to the Council was not formalised as an ``Application to Modify a Consent'' and was not dealt with by the Council as such. However, it would appear that a partly completed Application to Modify a Consent seeking to modify the conditions in respect of the roof top balcony was lodged on 16 March 2000 (Combined AB 199).

26. A note made by the Council's Statutory Planner for the purposes of the Council's file relating to the application for strata subdivision and dated 19 May 2000 is as follows (Combined AB 250):

``Meeting with applicant and architect Glen Gilsenan. Indicated changes required to strata plans, Unit 2 size and balcony reduction. Also indicated that illegal work performed to Unit 4 would require a section 96 modification to be submitted and assessed by Council.''

27. That conference appears to have provoked the lodging of a formal Application to Modify Consent, which application appears to have been received by Council on 8 June 2000 (Combined AB 251).

28. In a report by the Council's Development and Building Unit dated 14 August 2000, the application was described as follows (Combined AB 251):

``The application is for a Section 96 modification requesting Council approval for internal alterations to the approved upper unit area including an increase to the bathroom size, relocation of void area plus modifications to size of balcony area to residential flat building currently undergoing alterations at 6 Silva Street, Tamarama.''

29. The application was notified to adjoining owners and occupiers, following which objections were received from the Body Corporate for the building known as 4 Silva Street, Tamarama, from one of the occupiers of Unit 4 in that building, from the Body Corporate for the building known as 45 Fletcher Street, Tamarama and from the occupiers of two of the units in that building, those occupiers including Mr. and Mrs. Gasser. In each case, the objection which was received related to the request for modification of Condition 5 in the Development Consent so as to increase the size of the proposed balcony area (Combined AB 255).

30. However, before the report by the Council's Development and Building Unit had been prepared, Pattern's solicitors, on 11 August 2000, wrote to Mr. Mitchell's solicitors, a letter in the following terms (Combined AB 67-68):

``RE: PATTERN HOLDINGS PTY. LIMITED SALE TO MITCHELL

PPTY: 2/6 SILVA STREET, TAMARAMA

We refer to your letter of 15 June 2000 and advise that this firm has now been instructed to act for Pattern Holdings Pty. Limited in relation to the above matter.

We note that the contract for sale was dated on 26 July 1999 and Clause 2.4 of the contract states;

`If the strata plan is not registered within 12 months of the date of making this agreement either party may rescind this contract in which event the provisions of Clause 19 shall apply.'

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We note that the 12 months expired on 26 July 2000 and the Strata Plan is still not registered.

Contrary to your clients assertions as set out in your correspondence to C.P. Lucas & Co we are instructed that our client has diligently pursued strata approval with Waverley Council but has encountered enormous problems and is now faced with the prospect that the strata plan may not issue.

In this regard our client is now forced to look at alternatives, including company title.

Having regard to the above we are instructed to give a Notice of Termination of the contract dated 26 July 1999.

Our client will authorise the selling agent, Elders Double Bay, to refund the deposit plus all of the accrued interest and our client will refund the $4,000.00 paid by your client to our clients (sic) electrician for special lighting."

(A formal Notice of Termination (Combined AB 69) was enclosed with that letter.)

31. The Summary and Recommendation contained in the report of the Council's Development and Building Unit to which I have earlier referred (para. 28 (above)) were in the following terms (Combined AB 256):

``SUMMARY

The application has been assessed against the relevant provisions of Sections 79C and 96 of the Environmental Planning & Assessment Act 1979 (as amended); Council Codes and Policies had [sic] taken into account the submissions received. It is generally not considered that the proposed internal alterations will create any loss of amenities for adjoining residents. Located within the existing roof area, the proposed modifications are considered `hidden' and generally minor in nature.

The proposed increase in size to the balcony area is not considered acceptable. An increased length is considered will impact (sic) upon residential dwellings primarily to the north east of the site via increased overlooking and noise concerns. The retention of a 1.5m depth for the balcony from the bedroom wall is not considered unacceptable for users noting a 1.2m height allowed to its edge with the roof falling, allowing to view retention, solar access and ventilation.

The proposed modifications are therefore considered acceptable subject to the retention of the existing 1.5m balcony depth.

RECOMMENDATION

That Council as the consent authority grant Development Consent for the proposed modifications under Section 96 of the Environmental Planning and Assessment Act 1979 (as amended) for Development Application at 6 Silva Street, Tamarama subject to the following.

Condition 1 to be amended to read as follows:

1. The proposed development being carried out in accordance with the Development Application approved 8th May, 1999 review of conditions approved 9th August, 1999 and to conform with amended Plan Drawing No. A 01, dated November, 1998, prepared by Glen Gilsenan and Associates, received by Council on 6th June 2000.

That Condition No. 5 of Counsel's Development Consent (determined following a request for review of conditions, dated 9th August, 1999) be reaffirmed.

All other conditions of Development Consent 486/98 dated 8th May 2000 (sic) and REVIEW dated 9th August, 1999 are reaffirmed."

32. On 4 September 2000 Mr. Mitchell's solicitors forwarded to Pattern's solicitors by facsimile a letter (Combined AB 70) reading as follows:

``MITHCELL (sic) PURCHASE FROM PATTERN HOLDINGS PTY. LIMITED

PROPERTY: 2/6 SILVA STREET, TAMARAMA NSW.

We refer to your letter 11 August 2000.

We are instructed to advise that our client disputes that your client has diligently pursued approval of the Strata Plan of Sub- division under the Contract and we again confirm our clients (sic) advice and belief that your client has not used all reasonable endeavours to have the draft plan of sub - division under the Contract registered within 12 months of the date of making the Contract.

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It is on the above basis that our client disputes the validity of the Notice of Termination dated 11 August 2000.

We put both you and your client on notice that our client intends to pursue its (sic) claim and interest under the Contract and will take all necessary legal action to enforce its (sic) interest under this Contract."

33. On the same day, the Council's Manager Statutory Planning wrote to Pattern a letter (Combined AB 260) which was in the following terms:

``MODIFICATION OF DEVELOPMENT CONSENT LD 486/98

6 SILVA STREET, TAMARAMA

I refer to your application to Council for modification of Development Consent (LD 486/98 dated May 8, 1999) granted for the above property.

After considering all relevant issues, your application has been approved, subject to the following:

AMEND CONDITION NO. 1

At the end of this condition add... `No approval is expressed or implied to the proposed amendment to the roof balcony in terms of its depth of 2.5m when measured from the outer wall face of the bedroom 1'.

ADVISORY NOTE:

That the unauthorised work to the roof balcony, contrary to Condition C No. 5, resulting from a Review by Council is to be rectified to meet the intent of said condition No. 5 to within twenty-one (21) days from the date of the Notice of Determination.

ALL OTHER CONDITIONS FOR DEVELOPMENT CONSENT LD 486/98, DATED MAY 8, 1999 ARE REAFFIRMED.

Should you have any inquiries please do not hesitate to contact me on telephone 9369 8044."

34. A facsimile transmission, apparently sent on 13 September 2000 from Trevor R. Howse & Associates Pty. Ltd. to Mr. Hughes (Combined AB 261) was as follows:

``COMMENTS:

Reference is made to the telephone conversation today with John Hughes.

I have discussed the matter of he [sic] reduction of the balcony with Michael Buckley of Waverley Council with particular reference the installation of a planter box and the impacts of such in relation to the release of any strata plan.

Mr. Buckley advised that the proposal for the installation of the planter box to the (sic) considered during his recent discussions with yourselves and was subsequently put to the Councillor's (sic), however, it was not supported.

It is considered that a reasonable interpretation of the wording of the condition gives scope for the installation of a planter box, as the condition only calls for the reduction of the balcony and does not state the method of achieving such (e.g. the retention of the roof area). Mr. Buckley agrees that the wording of the condition does allow for scope in it's (sic) interpretation, however, Council is adamant that the roof must be reinstated. Whilst it may be possible to issue an Occupation Certificate for the building with a `planter box' reduction, Council remains responsible for the issue of the strata plan and accordingly, may refuse to do so. Therefore, the options that remain are for you to continue attempting to convince Council otherwise or comply with their requirements. It is considered that the latter is more likely to result in the expeditious release of the strata plan."

35. Subsequent events would indicate that that advice was accepted by Pattern.

36. On 20 September 2000, Council determined Pattern's application for strata subdivision. Insofar as is relevant, the Notice of Determination, was as follows (Combined AB 262-263):

``Your Development Application to strata subdivision of residential flat building containing 4 Units currently completed alterations and additions at 6 Silva Street, Tamarama has been determined by consent being granted subject to conditions itemised in Attachment 1.

…

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CONDITIONS OF CONSENT

1. Compliance in all respects with Plan Surveyors Reference No. 5288B, Sheets 1 and 2, prepared by Christopher C. Robertson printed 22 February, 2000 and submitted with LD 120/00 received by Council on 13th September 2000.

2. A linen plan and six copies are to be submitted to Council's Planning and Environmental Services Department.

3. Prior to the registration of the linen plans a Subdivision Certificate must be obtained from Council or an accredited certifier in accordance with Section 109c(d)(sic) of the Environmental Planning and Assessment Act 1979."

(The plan referred to in condition 1 is to be found at Combined AB 130-131.)

37. Mr. Ryan's report records (Combined AB 200):

> (a) that on September 26, 2000 Pattern submitted building plans for final inspection and stamping;
> (b) that on 26 October 2000 Council issued ``linen plans'', which plans were collected by Pattern on October 30, 2000.

38. Meantime, the proceedings with which Windeyer J was concerned to deal [with] were commenced by a Statement of Claim filed on 11 October 2000 (RAB 1 -6).

39. Since the Council sealed the linen plans and issued them to Pattern, one can but assume that the linen plans were in the form of the plan which had been prepared by Mr. Robertson in February 2000 but amended so as to reduce the depth of the balcony adjoining ``bedroom 1'' to 1.5m. If this be so, then the differences between the draft strata plan included in the contract and the plan which, so one assumes, has since been registered, are as follows (Combined AB 208);

> a. the Level 4 floor plan area is fundamentally different in configuration and plan area and the depth of the roof top balcony has been significantly reduced;
> b. the Level 4 ``void'' is now shown on the opposite side of the structure from its original position in the contract plan;
> c. the Level 3 common wall position at the Eastern end is reversed from that shown in the contract plan changing the Level 3 floor plan of both lots 3 and 4 by 10%;

d. the Level 1 store reveals a significantly larger plan area from that in the contract plan.

Of these differences, the only one which related to Lot 2 was that related to the Level 1 store which, together with Garage 2, was part of Lot 2.

40. The Strata Plan was registered as SP64230 on 6 November 2000 (Combined AB 185-186).

41. In the course of his cross-examination at trial, Mr. Ryan gave the following evidence (Combined AB 17-19):

``Q. Are you aware whether the plans lodged with the Council in respect of the roof top balcony provided for an area of 15.96 square metres?

A. I am not aware of the specific area that was provided in the original plans.

Q. I want you to assume that's what the building plans originally provided for; alright?

A. Yes.

Q. And if you assume that the review by the Council, limiting the depth of the top floor balcony to 1.5 metres resulted in an area of 5.98 square metres?

A. Right.

Q. That results in a loss of balcony area of 10 square metres?

A. sure.

Q. And that would in your experience as a town planner and no doubt having inspected many properties and indeed you were a valuer at one stage; were you not?

A. Yes.

Q. Would result in a substantial change of use in respect of that balcony?

A. In planning and valuation parlance, not a substantial change of use, a change of use. It is one part of the whole.

Q. I am directing your mind to this balcony at the moment?

A. Right.

Q. You have a balcony which was originally 15.96 square metres and it is now 5.98 square metres. Now, that would result in a

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substantial change in the use of that balcony; would it not?

A. It remains a balcony. I don't know that, except for a change in the area of the balcony.

…

Q. That balcony of 4 metres in depth you would agree with me would have been a significant selling point in relation to that unit?

A. Yes I have.

Q. You could expect, could you not, that if the balcony in respect of that penthouse unit was reduced in size of the kind we have been talking about, would have an adverse impact in the selling price of that unit?

A. I would suggest that it would effect (sic) marketability, ease of sale, quickness of sale, more than it would measurable affect the price one could achieve.

Q. Are you suggesting that a balcony on the top floor of this building which is reduced in size from 15.96 square metres to 5.98 metres wouldn't materially adversely affect the selling price of that unit?

A. I didn't say it wouldn't materially affect it. I said it would affect marketability rather than being able to measure the exact amount in 10,000 or 5,000 or $50,000 terms.

Q. Leaving aside trying to work out the precise figures, it would have a material adverse effect on the selling price?

A. It would have a materially adverse effect, yes."

42. In the Statement of Claim which was filed on his behalf, Mr. Mitchell alleged (inter alia):

``4. On 26 July 1999, the defendant and the plaintiff made a contract (`the Contract') for the sale by the defendant to the plaintiff of unit number two in the Plan (`the Unit'), at a price of $550,000.00.

5. The following were terms of the Contract:

…

5.2 The defendant must use all reasonable endeavours to procure the registration by the Registrar General of a strata plan substantially in accordance with the Plan (`Special Condition 2.2').

5.3 If a strata plan substantially in accordance with the Plan was not registered within 12 months of the date of the Contract (that is, 27 July 2000) either party might rescind the Contract in which event the provisions of clause 19 of the printed form contained in the Contract would apply (`Special Condition 2.4').

5.4. The vendor could only rescind the Contract pursuant to Special Condition 2.4 if it had complied with its obligations under Special Condition 2.2.

…

7. On or about 11 August 2000 a notice purporting to terminate the Contract pursuant to section 2.4 of the Special Conditions (`the Notice') was sent by the defendant's solicitor to the then solicitor for the plaintiff.

8. As at the date of issue of the Notice, the defendant had not used all reasonable endeavours to procure the registration by the Registrar General of a strata plan substantially in accordance with the Plan.

9. By reason of the defendant's breach of its obligations under the Contract, the Notice was invalid.

10. Further, at all material times from July 1999 onwards, the defendant led the plaintiff to expect that:

(a) the Unit belonged to him; and
(b) the defendant would not rely upon Special Condition 2.4 to rescind the Contract.

11. In reliance on that expectation, the Plaintiff decorated and arranged for certain improvements to the Unit.

…

12. At all material times the defendant encouraged, or was aware of and did not prevent, the plaintiff from altering, taking delivery of or organising the installation of the decoration and the carrying out of those improvements.

13. By reason of the matters set out in paragraphs 10, 11 and 12 above, the defendant is estopped from treating the Notice as valid and effective to rescind the Contract.

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14. Further, the issue by the defendant was the Notice was:

(a) not bona fide;
(b) not in accordance with the terms of the Contract;
(c) not reasonable; and
(d) reckless,

and accordingly the defendant is not entitled to rely upon the Notice."

43. Save that in paragraph 2(b) of the Defence which was filed on its behalf, Pattern did not admit sub-paragraph 5.4 of the Statement of Claim, it is not necessary otherwise to record the terms of the Defence.

However, the following passage (Combined AB 5) in the course of discussion which took place at the commencement of the hearing before Windeyer J should be noted:

``WHITE: …

In relation to the four points that my friend raised, can I deal with them very quickly in this way? In relation to the implied term, he submitted should be incorporated into this contract. We do not dispute that such an implied term would be so imputed, indeed, the express term in the contract is to that effect.

HIS HONOUR: To make it quite clear, the term claimed in paragraph 5.4 of the statement of claim which was subject to a non-admission in the defence is now admitted; is that correct?

WHITE: Yes.

HIS HONOUR: It can be noted then that paragraph 5.4 of the statement of claim is now admitted."

Nor is it necessary to refer to the terms of the Cross-Claim which was filed on Pattern's behalf in January 2001 as, on the hearing before Windeyer J (Combined AB 4), his Honour, on Pattern's application, ordered that the Cross- Claim be dismissed and that Pattern pay Mr. Mitchell's costs of the Cross-Claim.

44. In the course of his Judgment, Windeyer J wrote (RAB 25):

``Issues

21. It is admitted that the vendor could only rescind pursuant to Special Condition 2.4 if it had complied with its obligation under Special Condition 2.2. The principal question is whether it had done so. The second issue was whether or not the defendant should be estopped from relying on Special Condition 2.4 because it had represented to the plaintiff the unit belonged to him and it would not do so and thereby it caused the plaintiff to assume the condition would not be relied upon so that in reliance on this he expended money on the improvements to the unit. The third claim of the plaintiff is that the issue of the Notice was not bone [sic] fide nor in accordance with the contract, nor reasonable, and was reckless so as to preclude the defendant from relying upon it.

The evidence

22. No affidavits were read by the defendant but certain documentary evidence was tendered by it. The main evidence of the plaintiff consisted of his affidavit sworn on 10 October 2000 and an expert's report of Mr. Ryan, a well qualified property consultant, experienced in Local Council planning and previously a valuer. The evidence of the plaintiff was directed toward his conversations with Mr. Adam Hughes and the part he took in planing the upgrading of Unit 2 and the moneys expended by him on the project. The report of Mr. Ryan was directed to the questions of delay in obtaining registration of the strata plan. It may be for this reason that the real defence to the plaintiff's claim was not apparent at least to me until Mr. Ryan was cross - examined. It then became apparent that the real question to be determined was whether or not the strata plan which was ultimately approved was one `substantially in accordance with the draft strata plan' annexed to the contract. I assume that while has caused me some surprise (sic) it did not surprise counsel for the plaintiff as no opportunity was sought to lead further evidence on this subject."

45. Later, under a heading ``The Strata Plan'' Windeyer J, after referring to the passage in Mr. Ryan's evidence which I have set out above (para 41(above)) wrote (RAB 26-29):

``26. It is clear from the material included in Mr. Ryan's report that the defendant expended a great deal of time an [sic] energy trying to build the large balcony, even to the point of carrying out illegal and

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unauthorised work. It is clear that, from the defendant's perspective, there was a substantial difference between the two balconies. This is important because while the Council's original conditions of consent prohibited any work on the rooftop bedroom and balcony, from the date of the amended consent, 27 July 1999, the smaller balcony was approved. Once Trevor R. Howse & Associates were engaged, the fire safety requirements met and levies paid, the defendant was in a position to finish the development and obtain approval for its strata plan. This all happened by October 1999. I accept it would have

been unreasonable delay for the defendant not to have the strata plan registered in time unless it was entitled to pursue the large balcony. It was this pursuit that delayed the registration of the strata plan and took it beyond the contract period. If the defendant was in a position to register a strata plan within that period substantially in accordance with the draft, albeit with the smaller balcony, then it would be unreasonable of it to delay that registration. The question is whether a strata plan with the smaller balcony would be substantially in accordance with the draft strata plan. Mr. Ryan agreed that the defendant could not have convinced Council to consent to the larger balcony — that I think is clear.

27. I have come to the conclusion that the strata plan as approved is not substantially in accordance with that attached to the contract. Unit 4 is the most expensive unit in the development. I consider it reasonably obvious that a further 10 square metres of balcony with ocean views would substantially enhance its value. It was not unreasonable for the vendors (sic) to pursue this. The developer/vendor is entitled to rely on the draft strata plan in each of its sales and if that plan cannot be registered after proper efforts to obtain consent then it is not at fault. I have considered whether the absence of evidence from the defendant should bear on this so that without it I should conclude that there was no substantial difference. The question is one of objective fact: there is no evidence available other than inspection of the plan to show from the plaintiff's point of view the approved plan was substantially in accordance with the draft. The evidence of Mr. Ryan and that inspection leads me to determine this issue in favour of the defendant.

28. Mr. Ryan highlighted in his report a number of delays in the process of trying to modify the consent of Council. The fact is, however, that the consent was never modified and on the evidence never would be. If the Council's consent to subdivision on 20 September 2000 was consent to a large balcony and it could be shown that by hurrying its application process the defendant could have got that consent by July — which has not been shown — then the plaintiff would have had a strong case. But the 20 September consent was not to the draft plan annexed to the contract but to a plan that I have decided is not substantially in accordance with that plan. On this main issue the plaintiff fails.

29. This conclusion in some ways seem (sic) hard on the plaintiff, because so far as the unit he was purchasing is concerned, the plan as registered accords with the plan annexed to the contract. As against that, however, it is to be borne in mind that contract provisions are negotiated for the benefit of both vendor and purchaser. The vendor was entitled to look at the development as a whole. The terminating of the contract on its terms, presumably on the expectation of obtaining a higher price from another purchaser which might make up for a lower price than expected on the top unit, should not necessarily be looked upon askance."

46. Later, Windeyer J wrote (RAB 30-32):

``Paragraph 14 of the statement of claim

33. This paragraph claims the issue of the termination notice was not bona fide, not in accordance with the contract, not reasonable and reckless. The basis on which it was said not to be bona fide was that an agent has been asked to give an estimate of the value of Unit 2 prior to the date upon which termination was available. The evidence of the agent, which I accept, was that she had been asked to value Units 1 and 4 and while there [sic] was shown through Unit 2 and 3 and asked to give an estimate of their value, which she did. She said she had tried to obtain a sole agency agreement for these as

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a `try on' although she had been told they were not available. The defendant did not take any steps to sell Unit 2 prior to termination. The claim the issue of the notice was not bona fide presumably being for the improper purpose of enabling the defendant to proceed with some negotiations already in train, was not made out.

34. I have already found that the issue of notice was authorised by the contract and nothing further needs to be said on that. No particular argument was put forward on lack of reasonableness. If the plaintiff had an entitlement under the contract to rescind and did so pursuant to that entitlement, no question of reasonableness arises. The fact that so far as Unit 2 is concerned, this may enable the

vendor to obtain a higher price does not mean it was not reasonable to issue the notice assuming for the moment that lack of reasonableness could be considered. Finally, recklessness could, as I understand it, go only for some recklessness in a vendor in seeking to include a clause which it knew it could not comply with. The clause in question is not of that sort. Had Council allowed the balcony sought, the time limits could have been complied with. None of these matters raised is established and none prevents the vendor from relying on the notice. In making his submissions on these matters counsel for the plaintiff relied upon the decision of Bryson J in *Hawes v Cuzeno Pty Ltd* (unreported 14 December 1999). His Honour said:

> `A vendor acting recklessly may lose a right to rescind: *Woodcock* v *Parlby Investments Pty Ltd* (1989) NSW ConvR ¶ 55-454. In that case there does not seem to have been any contractual provision corresponding with Printed clA6 or any express contractual condition for rescission. At 58,297 Young J noted ``... there is no promise by the vendor to build a building within a certain time in accordance with the particular standard of construction.'' When dealing with cl8 Young J cited earlier authorities which established, in case where there is no condition like Printed Condition A6, that there are limits on the availability of the right of rescission. The limits appear from passages in *Gardiner* v *Orchard* (1910) 10 CLR 722 there cited and from the judgment of Gibbs J in *Pierce Bell Sales Pty Ltd* v *Frazer & Anor* (1974) 130 CLR 575 at 590. Disabling circumstances referred to include the necessity for bona fides, that the cancellation must be reasonable, and that the vendor must not be guilty of recklessness in entering into the contract. The plaintiff's case does not rest on this principle, but on the terms of their contracts.'

35. The High Court cases referred to dealt with the right to rescind under the contract for sale of land where a vendor unable or unwilling to comply with a requisition on title could give notice to the purchaser accordingly and if the requisition were not waived could rescind. As was pointed out by Young J in *Woodcock* v *Parlby Investments Pty. Ltd* (1989) NSW ConvR ¶55-454 at 58,295-58,298 those circumstances are quite removed from the situation under consideration here. Finally, Mr. Parker argued that the defendant was in default because it could have tried harder earlier to get what it did not get even if these efforts would have produced no results. I consider the vendor did make reasonable efforts to gain approval for its plan. Those efforts failed so that Condition 2 could not be fulfilled, thereby triggering the right to rescind.''

47. In the result, therefore, as I have earlier recorded, Windeyer J dismissed the proceedings with costs. In addition, his Honour ordered that Mr. Mitchell withdraw the Caveat which appears to have been lodged on Mr. Mitchell's behalf.

48. Although, in the Notice of Appeal (RAB 33-35) which was filed on Mr. Mitchell's behalf, further grounds of appeal were taken, the only grounds which, on the hearing of the appeal, were relied upon (T.3) were the following:

> ``2. Further, his Honour ought to have held that the respondent had breached its obligation to use all reasonable endeavours to procure registration of a strata plan, substantially in accordance with the draft plans annexed to the contract and accordingly the respondent was disentitled from relying upon its notice of recision (sic) under the contract.
>
> [140299]
>
> [140299]
>
> 3. Further, his Honour ought to have held that the issue by the respondent of its notice of recision (sic) was a breach of the respondent's obligation to act reasonably and accordingly the respondent was disentitled under the contract from relying on the notice of recision (sic).
>
> 4. Further, his Honour ought to have held that the respondent had been reckless in entering into the contract and was thereby disentitled from relying on the notice of recision (sic).''

49. When the appeal was called on for hearing, Mr. T.G.R. Parker appeared for Mr. Mitchell, while Mr. B.A.J. Coles QC appeared with Mr. S. T. White and Ms. N. Obrant for Pattern.

50. Despite the facts — which were admitted (T.7-8) — that the Statement of Claim did not allege that the Strata Plan which was registered was substantially in accordance with the draft strata plan and that no

evidence directed to that question was led on behalf of Mr. Mitchell at trial, Mr. Parker submitted that ground 2 in the Notice of Appeal had two aspects to it they being

> (a) that, upon the proper construction of clause 1.1 of the Special Conditions in the contract, the strata plan which was ultimately registered was a strata plan which was substantially in accordance with the draft strata plan annexed to the contract; and
> (b) that even if it not be so, the term of the contract which was pleaded in clause 5.4 of the Statement of Claim and which was admitted at trial, was a condition precedent to the exercise by Pattern of the right to rescind and, in the circumstances, as, so it was submitted, Pattern had failed to use all reasonable endeavours to procure the registration of a strata plan substantially in accordance with the draft strata plan annexed to the contract, it was not open to Pattern to exercise the right of rescission otherwise conferred on it by clause 2.4 of the contract.

51. In developing this ground, Mr. Parker submitted:

> (a) that upon its proper construction, clause 1.1 — and, thus, the obligation imposed upon Pattern by clause 2.2 — of the contract was concerned only with ``the envelope'' of the building, or alternatively, with ``the form and function'' of the various units within the proposed development. In this respect, so Mr. Parker submitted, ``the envelope'' of the building remained substantially the same, or, if the ``form and function'' of the various units in the development was what was required to be considered, Unit 4 remained a unit, the elements of which were to be found on three levels, but on the upper level of which was to be found a bedroom with attached bathroom and a verandah leading off the bedroom;
> (b) even if this be not so, it was not open to Pattern, in reliance on the provisions of clause 2.4 of the Special Conditions, to rescind the contract since the effect of the implied term in the contract — which was said to have been admitted — was that, unless — which it was submitted had not occurred — Pattern had used all reasonable endeavours to procure the registration of a strata plan substantially in accordance with the draft strata plan, the condition precedent to the exercise by Pattern of the right of rescission contained in clause 2.4 of the Special Conditions, would not have been fulfilled.

52. Even if, in the circumstances, the submission be open to him to argue, I am unable to accept Mr. Parker's submission that the strata plan which was ultimately registered was one substantially in accordance with the draft strata plan. In the first place, a strata plan is not limited to depicting the ``envelope'' of the building or buildings to which it relates but must depict the lots to be created by the registration of the strata plan, the common property, if any, and the like Strata Titles Act 1973 s 5(1) ``floor plan'', ``location plan'', ``lot'', s 8, Schedule 1A. Further, except to the extent to which a strata plan depicts lots and common property, a strata plan is not concerned with ``form and function''. Although both at trial and on the hearing of the appeal, most attention was directed toward the Council's rejection of the 4 metre deep balcony leading off the bedroom on the upper level of Lot 4 — reducing it in area by some 62.5% — there were other alterations required by the Council. Thus, the external car space — 13.75m^2 in area — which on the draft strata plan was to form part of Lot 4 was rejected, and the second garage in the basement which had been intended to form part of Lot 3 became part of

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Lot 4. Further, the balconies leading off the living rooms of each of Lots 1-3 and the lower level of Lot 4 at the Eastern end of the building were required to be reduced in depth from 2100mm to 1200mm. In addition, there were the other differences which Mr. Ryan recorded in his report (see para. 38 (above)).

53. Although apparently accepting that, in the absence of a condition of the contract, the terms pleaded in para. 5.4 of the Statement of Claim and admitted by Pattern, it would have been incumbent on Mr. Mitchell to establish, first, that Pattern had failed to use all reasonable endeavours to procure the registration of a strata plan substantially in accordance with the draft strata plan, and, second, that it was Pattern's failure to use all reasonable endeavours so to do which led to the failure to have such a plan registered within 12 months of the date of the contract, Mr. Parker submitted that, given that the condition pleaded in para. 5.4 of the Statement of Claim was accepted as having been a condition in the contract, it was necessary for Mr. Mitchell to do no more than establish that Pattern had failed to use all reasonable endeavours to secure the

registration of such a plan within 12 months from the date of the contract. For this submission, Mr. Parker relied upon the decision of Bryson J in *Hawes* v *Cuzeno Pty Limited* (1999) 10 BPR 97821.

54. *Hawes v Cuzeno Pty Limited* (*supra*) involved claims for specific performance by purchasers of home units in a development, the purchasers having agreed to buy those units ``off the plan'' before construction of the building began. So far as is relevant, Bryson J, in the course of his Judgment, said:

> ``4. The agreement was made conditional on registration of the strata plan by special condition 24 as follows:
>
> > `24. This Agreement and completion thereof is subject to and conditional upon the registration by the Registrar General of a Strata Plan pursuant to the Strata Titles Act, as amended, not less than twenty-four (24) months from the date hereof and in the event of such registration not being effected before or on the date than [sic] either party hereto shall have that right to rescind this Agreement by notice in writing to the other.'
>
> 5. Special condition 25 deals at length with the process of registering the strata plan and problems which may arise out of variations. Its provisions include: `The vendor will, as soon as possible, take steps to have the plan registered by the Land Titles Office.
>
> 6. These conditions operated with printed condition A6 which contains cll A6.1 and A6.2:
>
> A6 Unregistered plan
>
> If any of the properties described as a lot in an unregistered plan —
>
> > A6.1 The vendor must do everything reasonably necessary to have the plan registered within the plan registration time, with or without any minor alteration to the plan or any document to be lodged with the plan validly required or made by a statutory authority or the Registrar General.
> > A6.2 Normally, either party can rescind if the plan is not so registered.
>
> 7. The definitions in printed Cl1 include: `rescind' rescind this contract from the beginning.
>
> 8. The particulars on the first printed page say:`The plan registration time is 24 months after the date of this contract.'
>
> 9. In clA6.2 `normally' refers to what the vendor may do if the vendor complies with A6.1; the normal course is that contractual obligations are complied with. The right to rescind is conferred by printed condition A6. The reference in special condition 24 to `that right to rescind' is a cross reference to the right to rescind in printed condition A6. If the contract meant that that [sic] the vendor could commit a breach of cl A6.1 and then rescind there would be an absurdity because there would be no remedy for breach of A6.1. In the plain and ordinary meaning of these provisions, the right to rescind can only be exercised by the vendor in normal circumstances where the vendor has complied with cl A6.1.
>
> 10. If this result is not reached by the processes of construction or implication it is reached by the application of a principle of law referred to in *Suttor* v *Gundowda Pty Ltd* (1950) 81 CLR 418 at

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> 441; see to *Alghussein Establishment* v *Eton College* [1988] 1 WLR 587.
>
> 11. The same result is reached by considering whether the terms of the contract impliedly make compliance by the vendor with printed condition A6.1 a condition of exercise of the right of rescission. If the tests for implication of a term referred to in *Codelfa Construction Pty Ltd* v *State Rail Authority (NSW)* (1982) 149 CLR 337 at 351-2, 404; 41 ALR 367 are applied this implication should be made, as the contract would lack business efficacy if the vendor could escape from it by delaying.
>
> 12. In my view printed cl A6 has both the character which appears from its express terms of a promise the breach of which would give rise to a liability for damages and also the character of a condition for the exercise of the vendor's right of rescission; breach of the promise is also failure of the condition in which the vendor can rescind.

13. The plaintiffs' counsel referred me to observations of McLelland CJ in Eq in *Plumor Pty Ltd* v *Handley* (1996) 41 NSWLR 30 at 34C-E; 7 BPR 14735. The operation of printed cl A6 as a condition made it inapplicable to the present case his Honour's observations which relate to the need to show a causal relationship. In any event there is in this case a causal relationship."

55. I must say that I have difficulty in accepting as correct the approach taken by Bryson J in *Hawes v Cuzeno Pty Ltd* (*supra*) both as to the construction accorded by his Honour to condition A6 and as to the appropriateness of implying into the contract thereunder consideration a term making compliance by the then vendor with condition A6.1, a condition of exercise of the right of rescission. In this regard, it is appropriate to note that both the decision of the High Court in *Suttor v Gundowda Pty Ltd* (*supra*) and the decision of the House of Lords in *Alghussein Establishment v Eton College* (*supra*) to which his Honour referred in paragraph 10 of his Judgment, involved the application, in each case, to the agreement then under consideration of what has been described as ``a rule of construction'' based upon a broad proposition that a party is not entitled to take advantage of his own default or wrong. In each of the cases to which his Honour referred reliance was placed upon the decision of the House of Lords in *New Zealand Shipping Co Ltd* v *Societe des Ateiliers et Chantiers de France* [1919] AC 1. Thus, in the speech of Lord Jauncey of Tullichettle, with whom Lord Bridge of Harwich, Lord Elwyn-Jones, Lord Ackner and Lord Goff of Chieveley agreed, in *Alghussein Establishment v Eton College* (*supra*) at 592-595 the following passages may be found:

> ``In the *New Zealand Shipping* case in the Court of Appeal [1917] 2 KB 717, Viscount Reading CJ said, at pp 723-724:
>
> > `Unless the language of the contract constrains the court to hold otherwise, the law of England never permits a party to take advantage of his own fault or wrong. In *Malins v Freeman* (1838) 4 Bing. N.C. 395, 399 Coltman J said: ``It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such purpose.'' That appears to me to be the true underlying principle of the cases in which the word ``void'' has been construed as if it mean voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default.'
>
> And Scrutton LJ said, at p 724:
>
> > `... I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong and therefore is estopped from alleging invalidity of which his own breach of contract is the cause.'
>
> On appeal to this House, Lord Findlay LC said [1919] AC 1, 8:
>
> > `Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid the lease, and the expression generally employed has been
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> > that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about.'
>
> The speech of Lord Atkinson contained the following passage, at p 9:
>
> > `It is undoubtedly common for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard... But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either

would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a round about way, but in either way putting an end to the contract....'

…

... Finally in *Cheall* v *Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, Lord Diplock referring to the *New Zealand Shipping* case said, at pp 188-189:

`In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed in broad language as ``A man cannot be permitted to take advantage of his own wrong".'

…

It only remains to refer to the respondent's argument that there is an absolute rule of law and morality which prevents a party taking advantage of his own wrong whatever the terms of the contract. My Lords I do not find it necessary to deal with this. For my part I have no doubt that the weight of authority favours the view that in general the principle is embodied in a rule of construction rather than in an absolute rule of law..."

56. Two things, as it seems to me, flow from the approach reflected in the Judgments to which Bryson J referred, they being:

(a) that, given that approach, there is no need for the implication of a term such as his Honour suggested; and
(b) that, in order that a party be held disentitled to exercise a right of rescission, it must appear that it was his default which brought about, or at least materially contributed to, the occurrence of the relevant event.

57. Support for the latter of these two propositions may be found in the Judgment of this Court in *Nina's Bar Bistro Pty Ltd (formerly Mytcoona Pty Ltd)* v *MBE Corporation (Sydney) Pty Ltd* [1984] 3 NSWLR 613 — a case involving a claim by a party, which was held to have failed to comply with a covenant to use its best endeavours to obtain the consent of a lessor to the assignment to it of a lease — in which it was held that, if non- compliance with a contractual obligation is to take away the defaulting party's right to terminate, there must be a direct causal relationship between the compliance and the failure to complete, the onus of proving which lies on the non-defaulting party, and there must be an absence of repudiation by the defaulting party prior to that time.

58. However, in the light of the admission by Pattern of the term pleaded in para. 5.4 of the Statement of Claim, it does not appear to be

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open to me to give effect to the views which I have set out above.

59. This notwithstanding, it remained incumbent upon Mr. Mitchell to establish that Pattern had in fact failed to comply with the obligation cast on it by additional condition 2.2 of the contract. The question thus is, whether it can properly be said that Pattern had failed to use all reasonable endeavours to procure the registration of a strata plan substantially in accordance with the draft strata plan, a question which is not concluded by the mere fact that no such plan was approved by the Council or registered by the Registrar General.

60. It is clear that, notwithstanding that, when it gave its original consent to the development application, Council required the deletion of the room in the roof void and the balcony, Pattern moved expeditiously to

seek to have condition 5 deleted from that Development Consent. It is equally clear that, as the result of that action, Council, after the contract between Mr. Mitchell and Pattern had been entered into, acceded to modify the original condition 5. It is also clear that, albeit somewhat belatedly, Pattern then sought to have Council modify the substituted condition 5 with a view to increasing the size of the proposed balcony area, that further application not having been dealt with at the time when the Notice of Termination was forwarded to Mr. Mitchell's solicitors. It is equally clear, as Windeyer J found (para. 28 of his Judgment — see para. 45 (above)) that the consent would never have been further modified even if Pattern had acted more expeditiously with its application. This being so, it seems to me that Windeyer J did not fall into error when he held (para. 35 of his Judgment — see para. 46 (above)) that Pattern did make reasonable efforts to gain approval for its plan.

61. As Mr. Parker, on the hearing of the appeal, observed (T. 3), grounds of appeal 3 and 4 ``really go together''. That that is so is readily demonstrated by a reference to the speech of Viscount Radcliffe, when delivering the advice of the Judicial Committee in *Selkirk* v *Romar Investments Limited* [1963] 1 WLR 1415, 1422 -1424 a case which — in common with the decisions of the High Court in *Godfrey Constructions Pty Limited* v *Kanangra Park Pty Limited* (1972) 128 CLR 529 and *Pierce Bell Sales Pty Limited* v *Fraser* (1972-1973) 130 CLR 575 to which Mr. Parker also made reference in the course of his submissions — involved a purported rescission by a vendor of land in reliance upon a condition in the contract allowing the vendor to give notice of intention to rescind if ``unable or unwilling to satisfy or comply with'' a requisition. In the passage to which I have referred, his Lordship said:

> ``Now, on what can the appellant rest his claim to set aside the respondent's notice of rescission? It is plain enough that, so far as the terms of the contract go, the respondent is within its rights. Clause 3(3) is as much part of the various undertakings and stipulations that make up the total nexus of the parties' agreement as any other of its clauses, and it is in fact a stipulation that was included in the draft put forward by a purchaser. If a vendor, having stipulated for or been conceded such a right, is to be precluded from asserting it in any particular context, it must be by virtue of some equitable principle which enures for the protection of the purchaser; and it is not in dispute that courts of equity have on numerous occasions intervened to restrain or control the exercise of such a right of rescission in contracts for the sale of land, despite what, on the face of the contract, its terms seem to secure for the vendor.
>
> It does not appear to their Lordships, any more than it did to the judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale `brevi manu' since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of `recklessness' in entering into
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> his contract, a term frequently resorted to in discussions of the legal principle and which their Lordships understand connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission: see *In re Jackson and Haden's Contracts* ([1906] 1 Ch 412) *Baines v Tweddle* ([1959] Ch 679).
>
> …
>
> Authorities or propositions of law which bear upon such situations have therefore no immediate relevance to what is now an issue, which is simply the question whether the respondent is to be held

guilty of `recklessness' in the legal sense, in not warning the appellant before the contract was signed that there were certain evidential gaps in the proof of its title that it was unlikely to be able to fill up.

Their Lordships are satisfied that recklessness is not to be attributed to the respondent for this omission. While there have indeed been instances in which a vendor has been deprived of the right of rescission for entering into his contract in circumstances in which he had no reasonable assurance that he could convey the whole title for which he was contracting, his disqualification arises out of his carelessness or lack of prudence in the particular circumstances and not out of a mere failure to disclose the defect in title, much less the defect in the evidence of title, which rendered the title that he had to offer less than complete. Had the law been otherwise, the decision in *Duddell v Simpson* (1886) 2 Ch App 102) and *In re Deighton and Harris' Contract* ([1898] 1 Ch 458) could never have gone as they did, in favour of the vendor."

62. Even if — which, in the circumstances, I am prepared to do — one accepts that the principle described by Viscount Radcliffe is applicable to a case such as this, I am unable to accept Mr. Parker's submissions that, in entering into the contract with Mr. Mitchell, Pattern was guilty of ``recklessness'' and that, by reason of that fact, it was not entitled to rely upon the provisions contained in Additional Condition 2.4 of the contract. Although, at the time when the contract between Mr. Mitchell and Pattern was entered into, the Council, when granting consent to Pattern's Development Application, had imposed the original condition 5, the letter of 11 June 1999 requesting a review of (inter alia) that condition (see para. 12 (above)) would indicate that Council officers, when considering the merits of the original Development Application, had expressed a favourable view of it. Further, the application for review had by the time the contract was entered into been made and remained unresolved. Further still, as appears from what I have earlier recorded (paras. 16-17(above)), the application for review did lead to a variation to condition 5.

63. In seeking to support the submission that, in giving the Notice of Termination, Pattern had acted unreasonably and in bad faith, Mr. Parker sought to rely upon the Judgment of Gibbs J (as he then was) in *Pierce Bell Sales Pty Limited v Fraser* (*supra*) at 590 in which his Honour had prayed in aid the speech of Viscount Radcliffe in *Selkirk v Romar Investments Ltd* (*supra*) and also upon the Judgment of this Court in *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 and, in particular, on the Judgment of Sheller JA in the latter case where his Honour said (*supra*) at 368:

``If a contract confers power on a contracting party in terms wider than necessary for the protection of the legitimate interests of that party, the courts may interpret the power as not extending to the action proposed by the party in whom the power is vested or, alternatively, that the powers are being exercised in a capricious or arbitrary manner or for an extraneous purpose, which is another was (sic) of saying the same thing. Thus a vendor may not be allowed to exercise a contractual power where it would be unconscionable in the circumstances to do so: *Pierce Bell Sales Pty Limited v Fraser* (1973) 130 CLR 575 at 587."

and later *supra* at 369:

``The decisions in *Renard Constructions* and *Hughes Brothers* mean that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract. There is no

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reason why such a duty should not be implied as part of this lease. But it remains to decide whether the implication of that duty has any consequence in the resolution of the dispute the subject of this appeal."

64. Even assuming — as, in the circumstances, I am prepared to do — that there was to be implied in the contract a term to the effect of that suggested by Sheller JA, it seems to me that the implication of such a duty had no consequence in the present case. I say this since, as Windeyer J recorded in para. 33 of his Judgment (see para. 46 (above)), the basis upon which, at trial, it was sought to demonstrate that the giving of the Notice of Termination was not bona fide was that an agent had been asked to give an estimate of the value of Unit 2 prior to the date upon which termination was available, an assertion which his Honour did not accept.

65. It follows, in my view, for the reasons which I have set out above, that the grounds of appeal sought to be advanced by Mr. Mitchell have not been made out.

66. This being so, I propose that the appeal should be dismissed with costs.

67. **Stein JA:** I agree with Powell JA.

68. **Rolfe AJA:** I agree with Powell JA.

OWNERS — STRATA PLAN NO 51487 v BROADSAND PTY LTD

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(2002) LQCS ¶90-117

Court citation: [2002] NSWSC 770

New South Wales Supreme Court

Judgment delivered 29 August 2002

Contract — General contractual principles — Illegal and void contracts — Whether contracts illegal by statute — Nature of statutory prohibition — Whether entry into contract prohibited — Strata titles — Management and control — Managing agent must be licensed — Whether agreement appointed ``managing agent'' — Property Stock and Business Agents Act 1941 (NSW), sec 20(3); Strata Titles Act 1973 (NSW), sec 66(1), 68(1), 78(1) and (1AA).

These proceedings concerned a ``Management and Letting Services Agreement'' (``the agreement'' dated 11 January 1996 made between the Owners — Strata Plan No 51487 (``the plaintiff'') and Victoria Tower Management Pty Limited (``Victoria Tower''). The benefit of the agreement was assigned by Victoria Tower to an intermediate assignee which on 13 May 1998 by deed (``the deed of assignment'') assigned the agreement to Broadsand Pty Ltd (``the defendant'') pursuant to provisions contained in clause 11 of the agreement.

Strata Plan No 51487 was registered on 30 November 1995. The inaugural extraordinary general meeting was held on 4 December 1995. At that meeting the plaintiff appointed BCS Strata Management Pty Limited as ``managing agent of the body corporate in accordance with section 78'' of the Strata Titles Act 1973 (``the ST Act''), and delegated to it all of ``the powers, authorities, duties and functions of the body corporate'' but limited that appointment to end on the date of the first annual general meeting. It also resolved that the plaintiff enter into and execute the agreement, but without there being any limitation in either the resolution or the agreement of the time during which the agreement was to operate. There was no doubt that at that time Victoria Security did not hold a strata managing agent's licence under the Property, Stock and Business Agents Act 1941 (``the Agents Act'').

The minutes of the same meeting recorded the passing of a special resolution that repealed by-laws 12-29 and enacted special by-laws 1-28 (see para 11 of judgment for text of special by-law 28 — Restrictions on Management & Letting Activities).

The repeal of by-laws 12-29 and the enactment of special by-laws 1-28 was duly registered. There was no issue that the relevant resolution was, in the terms of sec 66(1)(d) of the ST Act, passed during the initial period and before the first annual general meeting which was held on 26 January 1996.

The deed of assignment was executed on 13 May 1998 pursuant to a resolution of an extraordinary general meeting of the plaintiff held on 6 May 1998. There was executed on the same day a tripartite deed among the plaintiff, the defendant and the Commonwealth Bank

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of Australia, whereby the plaintiff gave its consent to a mortgage over the benefit of the agreement to secure moneys borrowed by the defendant for the purchase of the agreement.

At an annual general meeting of the plaintiff on 21 March 2001, a resolution for the repeal of special by-law 28 was carried as a special resolution and subsequently registered.

The principal burden of the claim in these proceedings was that the agreement appointed Victoria Tower as a managing agent and was consequently beyond the power of the plaintiff or illegal as a contravention of sec 78(1AA) or sec 66(1)(d) of the ST Act or sec 20(3) of the Agents Act. The defendant argued that the plaintiff was estopped from denying the validity of the Agreement or had waived any objection to the validity of the Agreement. In addition, the defendant sought to have the resolution of the plaintiff repealing special by-law 28 declared invalid.

Held: management agreement void for illegality. By-law enacted during initial period conferring right of exclusive occupation on holder of unit invalid.

Was the agreement an agreement which fell within the terms of sec 78(1AA) of the Strata Titles Act?

1. The Court found that the agreement constituted an appointment of Victoria Tower as a ``managing agent and [the] delegation to it of at least some of... the powers, authorities, duties and functions of the plaintiff''. The agreement, on its proper construction, effected the appointment of Victoria Tower as a managing agent pursuant to sec 78(1AA) of the ST Act.

Was the agreement rendered void for illegality by reason of being entered into in breach of sec 78(1AA) or sec 66(1) of the Strata Titles Act?

2. For the same reasons that the Court found that the agreement was void for illegality because the entry into it was in contravention of sec 78(1AA), the agreement was also proscribed by sec 66(1)(a) of the ST Act and therefore void for contravention of that section.

Was the agreement rendered void for illegality by reason of its performance being in breach of sec 20(3) of the Agents Act?

3. Because neither Victoria Tower nor the defendant held the requisite licence under the Agents Act at the inception of the agreement, the performance of many of the functions provided for by the agreement by these parties would amount to a contravention of sec 20(3) of the Agents Act, and subsequently render the agreement void.

If the agreement was rendered void in any of the above ways is the plaintiff estopped from asserting that the contract is void for illegality?

4. Because the entry into the agreement contravened sec 78(1) of the ST Act and was void for illegality, ``this case is in a class where an estoppel cannot be availed of in the face of the statute. This is not a case where the rule contravened is one prescribed solely for the benefit of the person who claims to have the contract struck down for the illegality. In my view, the purpose of the provision is to provide a protection for the public or a section of the public''.

Was special by-law 28 validly repealed?

5. Special by-law 28 conferred, in substance, an exclusive right of use on the proprietor of Lot 252, while restricting the rights of all other proprietors in respect of this Lot. ``It is the substance which should be looked to rather than the form in determining whether a right is conferred within the meaning of sec 66(1)(a): Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297 at 305-306.

6. Special by-law 28 was a contract the entry into which was proscribed by sec 66(1)(a) of the ST Act. It therefore contravened sec 66(1)(a) and was wholly invalid. ``As the by-law was not valid, it matters not whether or not the conditions for its repeal were met. It should not be restored to the registered by-laws.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

R C McDougall QC and M D Young for the plaintiff (instructed by David Le Page).

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F C Corsaro SC and S Prince for the defendant (instructed by Andreones Lawyers).

Before: Hamilton J.

Judgment in full below

Hamilton J: These proceedings concern a ``Management and Letting Services Agreement'' dated 11 January 1996 made between the plaintiff and Victoria Tower Management Pty Limited (``Victoria Tower'') (``the agreement''). The benefit of the agreement was assigned by Victoria Tower to an intermediate assignee which on 13 May 1998 by deed (``the deed of assignment'') assigned the agreement to the defendant pursuant to provisions contained in clause 11 of the agreement. The principal burden of the claim in these proceedings is that the agreement appointed Victoria Tower as a managing agent and was consequently beyond the power of the plaintiff or illegal as contravening s 78(1AA) or s 66(1)(d) of the *Strata Titles Act 1973* (``the STA'') or s 20(3) of the *Property Stock and Business Agents Act 1941* (formerly the *Auctioneers and Agents Act 1941*) (``the Agents' Act''). The defendant, in addition to controverting those propositions, contends that the plaintiff is estopped from relying on them and also seeks to have declared invalid a resolution of the plaintiff repealing a special by- law as a result of which the defendant has been enjoying exclusive use of certain common property.

The agreement

2. The agreement, which was undoubtedly for reward, contained the following recitals:

``B The Body Corporate is responsible for the control, management and maintenance of the Common Property in the Strata Scheme under the Act.

...

D The Body Corporate has resolved to appoint the Management Company to perform duties and provide services on behalf of the Body Corporate for the control, administration, management and maintenance of the Strata Scheme.''

``Strata Scheme'' is defined in clause 1.1 as meaning ``the rights and obligations created by or under the subdivision of land by the Strata Plan and the Act''.

3. The agreement contained the following relevant operative provisions:

``2 APPOINTMENT & TERM

2.1 The Body Corporate appoints the Management Company to perform the duties and provide the services comprised in the Scheduled Works, the Non Scheduled Works, the Proprietors Services and the Letting Services for the Term.
2.2 The Management Company accepts the appointment.

3 DUTIES & POWERS OF MANAGEMENT COMPANY

3.1 The Management Company must by its employees, agents or subcontractors take all reasonable steps to: —

(a) perform the Scheduled Works;
...

3.3 Subject to the limitations contained in this Agreement, the Management Company may, either in its own right or as agent for the Body Corporate enter into agreements with other persons for the provision of services or materials for the proper performance of the Management Company's duties and powers.

3.4 Nothing in this Agreement imposes any obligation or confers any right on the Management Company to: —

(a) enforce the Special By-Laws or take any action in relation to Common Property by making applications or submissions to the Strata Titles or Commissioner or the Strata Titles Board or by instituting any proceedings in any court of competent jurisdiction;
(b) perform any power of a licensed managing agent;
(c) perform any duty or power of a technical or. [sic] specialist nature outside the scope of the Management Company's skill and expertise; or
(d) itself perform any of the services or provide any materials that are to be arranged or procured by the Management Company under the Scheduled Works, the Non-Scheduled Works, the Proprietors Services and/or the Letting Services."

4. The scheduled works are set out in Schedule 1 to the agreement as follows:

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``1 Manage, supervise and arrange for the maintenance, cleaning, repair [sic] the Common Property so as to ensure that it is kept in good order and repair and to do all things necessary to protect the interests of the Body Corporate in respect to its property.

2 Report promptly to the Body Corporate on all things on Common Property that require repair, replacement or renewal with quotations and all matters creating a hazard or danger and to arrange for remedial action where practicable.

...

4 Establish and supervise a cleaning programme to regularly and properly clean and keep clean the paths, driveways, entrance lobbies, stairs, hallways, doors and windows (other than internal doors and windows of lots in the Strata Plan), facilities, car parking areas, amenities and other areas of the Common Property within, upon and around the apartment building forming part of the Strata Scheme.

...

6 Organise and supervise a maintenance programme and to ensure, subject to Body Corporate approval, the proper maintaining at all times of the apartment building forming part of the Strata Scheme, its appurtenances and surrounds and all piant [sic] and equipment used in connection with the building and the Common Property.

7 Arrange for the maintenance of plant and equipment being Common Property.

...

10 Advise the Body Corporate from time to time as to its recommendations for the management, maintenance and care of the apartment building forming part of the Strata Scheme.

...

15 Supervise control and regulate the parking of motor vehicles on Common Property.

...

17 Arrange for and supervise such licensed security guards as the Body Corporate may wish to employ and to act as coordinator of those security guards.

18 Arrange for and supervise such concierges as the Body Corporate may wish to employ and to act as coordinator of those concierges.

...

21 Comply with and carry out all reasonable and lawful directions by the Body Corporate to the Management Company in respect to the performance by the Management Company of its duties.

...

25 As far as the Management Company is reasonably able and lawfully capable, to keep order on the Common Property and take such precautions as it sees fit to safeguard Common Property against lawful entry or accident or damage."

5. The agreement also provides for the provision by the management company, at the request of a unit holder, of letting services: see clause 5 and Schedule 3.

The legislation

6. The STA was in force at the time the agreement was entered into. Later in 1996 it was repealed and replaced by the *Strata Schemes Management Act 1996* (``the SSMA''). By s 78, so far as material, the STA provided:

``78(1) Subject to subsection (1A), a body corporate may, in general meeting and by instrument in writing, appoint a managing agent and may, in like manner, delegate to him:

(a) all of its powers, authorities, duties and functions;
(b) any one or more of its powers, authorities, duties and functions specified in the instrument; or
(c) all of its powers, authorities, duties and functions except those specified in the instrument,

and may, in like manner, revoke the appointment and delegation or revoke in part the delegation.

(1AA) A body corporate shall not appoint a person as managing agent unless the person is the holder of a strata managing agent's licence issued pursuant to the *Auctioneers and Agents Act 1941*.

(1A) A body corporate may not, under subsection (1), delegate to a managing agent its power to make:

(a) a delegation under that subsection;
(b) a decision on a restricted matter within the meaning of section 75; or
(c) a determination under section 68(1)(j) or (k)(including such a determination

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made pursuant to section 68(4A)), or to levy contributions under section 68(1)(p).

(2) A power, authority, duty or function the exercise or performance of which has been delegated under subsection (1) may, while the delegation remains unrevoked, be exercised from time to time in accordance with the delegation.

(3) A delegation under subsection (1) may be made subject to such conditions or such limitations as to the exercise or performance of all or any of the powers, authorities, duties or functions, or as to time or circumstances, as may be specified in the instrument of delegation.

(4) Notwithstanding any delegation made under subsection (1), the body corporate may continue to exercise or perform all or any of the powers, authorities, duties or functions delegated.

(5) Any act or thing done or suffered by a managing agent while acting in the exercise of a delegation under subsection (1) has the same force and effect as if it had been done or suffered by the body corporate and shall be deemed to have been done or suffered by the body corporate.

...

(9) A managing agent who exercises or performs a power, authority, duty or function pursuant to a delegation by a body corporate under subsection (1) shall, forthwith after its exercise or performance:

> (a) make a written record specifying the power, authority, duty or function and the manner of its exercise or performance; and
> (b) serve the record on the body corporate."

7. By s 54(3) the STA provided that the body corporate should have the control, management and administration of the common property and by s 68 it provided, so far as material:

``68(1) A body corporate shall, for the purposes of the strata scheme concerned, but subject to the provisions of any strata development contract affecting common property and to the operation of this Act in relation to the strata development contract:

> (a) control, manage and administer the common property for the benefit of the proprietors;
> (b) properly maintain and keep in a state of good and serviceable repair:
>
> > (i) the common property; and
> > (ii) any personal property vested in the body corporate..."

8. The STA also contained the following provisions:

``66(1) Notwithstanding any other provision of this Act except subsection (3), a body corporate shall not, during the initial period:

> (a) amend, add to or repeal the by-laws in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, proprietors or in respect of one or more, but not all, lots;
> ...
> (d) appoint a managing agent to hold office as such for a period extending beyond the holding of the first annual general meeting of the body corporate..."

Section 66(2), ``without affecting any other remedy available against the original proprietor'', gave to the body corporate and individual unit holders a right to recover from the body corporate any loss suffered as a result of a contravention of sub s (1). The SSMA by ss 51 and 52 now provides, as to the repeal of by-laws, that a by-law conferring on the owner of a lot ``a right of exclusive use or enjoyment of'' or ``special privileges in respect of'' any part of the common property may be repealed only with the written consent of the owner of the lot and in accordance with a special resolution of the owners corporation.

9. The *Agents' Act*, before the enactment of the SSMA, in s 4(1) defined ``strata managing agent'' as follows:

``Strata managing agent'' means a person (whether or not such person carries on any other business) who, for reward (whether monetary or otherwise), exercises or performs any function of a body corporate within the meaning of the Strata Titles Act 1973..., not being:

> (a) a person who:
>
> > (i) is the proprietor of a lot to which the strata scheme for which the body corporate is constituted relates,...
>
> [140310]
>
> [140310]
>
> > (ii) is the secretary or treasurer of the council of the body corporate, and
> > (iii) exercises or performs only functions of the body corporate required, by the by-laws in force in respect of the strata scheme... for which the body corporate is constituted, to be exercised or performed by the secretary or treasurer of that council or of the body corporate, or
>
> (b) a person who maintains or repairs any property for the maintenance or repair of which the body corporate is responsible."

By s 20(3) the *Agents' Act* provided:

``(3) A corporation shall not act as or carry on or advertise, notify or state that it acts as or carries on or is willing to act as or carry on the business of a real estate agent, a stock and station agent, a business agent, a strata managing agent, a community managing agent or an on-site residential property manager, as the case may be, unless the corporation has taken out a corporation licence and employs as the person in charge of its sole or principal place of business a person who holds a licence or licences of such one or more of the classes referred to in section 22 as may be appropriate."

The facts

10. Strata Plan 51487 was registered on 30 November 1995. The inaugural extraordinary general meeting was held on 4 December 1995. At that meeting the plaintiff appointed BCS Strata Management Pty Limited as ``managing agent of the body corporate in accordance with section 78" of the STA and delegated to it all of ``the powers, authorities, duties and functions of the body corporate" but limited that appointment to end on the date of the first annual general meeting. It also resolved that the plaintiff enter into and execute the agreement, but without there being any limitation in either the resolution or the agreement of the time during which the agreement was to operate. There is no doubt that at the time Victoria Security did not hold a strata managing agent's licence under the *Agents' Act*.

11. The minutes of the same meeting record the passing of a special resolution in the following terms:

``RESOLVED that the proprietors of Strata Plan 51487 under Section 58(2) of the Act to amend the by-laws contained in Schedule 1 of the Act in the following manner:

(a) RESOLVED that By-Laws 12-29 of Schedule 1 of the *Strata Titles Act* be repealed.
SPECIAL BY-LAW NO. 1"

There follows the body of special by-law 1 and 27 other special by-laws, ending with special by-law 28, which was in terms following:

``**SPECIAL BY-LAW NO. 28**

Restrictions on Management & Letting Activities

The proprietor or occupier of every lot except Lot 252 must not on any lot or the common property, except with the written consent of the proprietor of Lot 252, conduct or participate in the conduct of:

(a) the business of a letting agent; or
(b) the business of a pooled rent agency; or
(c) the business of on site residential manager; or
(d) any other business activity that is either:—

(i) an activity identical or substantially identical with any of the services relating to the management, control and administration of the parcel referred to in Special By-Law No 28 and/or any Agreement; and/or
(ii) an activity identical or substantially identical with any of the services provided to proprietors and occupiers of lots referred to in Special By-Law No 25 and/or any Agreement; and/or
(iii) an activity identical or substantially identical with any of the services relating to the letting of lots referred to in Special By-Law No 25 and/or any Agreement."

The repeal of by-laws 12 — 29 and the enactment of special by-laws 1 — 28 was duly registered. There is no issue that the relevant resolution was, in the terms of s 66(1)(d) of the STA, passed during the initial period and before the first annual general meeting, which was called for 19 January and held on 26 January 1996, after adjournments.

[140311]

[140311]

12. The deed of assignment was executed on 13 May 1998 pursuant to a resolution of an extraordinary general meeting of the plaintiff held on 6 May 1998. There was executed on the same day a tripartite deed among the plaintiff, the defendant and the Commonwealth Bank of Australia, whereby the plaintiff gave its

consent to a mortgage over the benefit of the agreement to secure moneys borrowed by the defendant for the purchase of the agreement. There had been some resistance by the plaintiff to the assignment of the agreement by the original assignee to the defendant. Wendy Cull, the solicitor for the original assignee, at the extraordinary general meeting threatened litigation against the plaintiff, as recorded in the minutes, if the resolution were not passed.

13. Mr Dudek, a unit holder, gave evidence on behalf of the plaintiff. His affidavit annexed a circular letter to unit holders written on behalf [of] the proposed assignor and dated 29 April 1998, which he stated he had received before the meeting. That letter contained assertions that it ``appears that the chairman of the Owners Corporation, Mr J Daveney... is using our request for assignment of the business as an opportunity to mount an unprovoked attack on that Agreement.'' Having sought advice ``a long time ago'' about another matter ``Mr Daveney received advice from that solicitor raising the issue of the validity of the agreement itself.'' Mr Dudek admitted that he had read those assertions in that letter but denied he had had any conversation with Mr Daveney concerning the subject matter before the meeting. He further denied that he was aware before late 1999 of the illegality argued for in these proceedings. The letter of 29 April 1998 was argumentative in tone. The letter of advice said to have been received by Mr Daveney was not in evidence and no evidence was led, by plaintiff or defendant, as to the content of the advice. There is no reason not to accept Mr Dudek's denial of knowledge before 1999 and his evidence generally according to its tenor, and I do so.

14. The resolution for the repeal of by-law 28 was carried as a special resolution at the annual general meeting of the plaintiff on 21 March 2001 and subsequently registered.

The issues for determination

15. It appears to me that the issues requiring determination for the disposal of these proceedings are as follows:

> (1) Was the agreement an agreement which fell within the terms of s 78(1AA) of the STA?
> (2) Was it rendered void for illegality by reason of being entered into in breach of s 78(1AA) or s 66(1)?
> (3) Was it rendered void for illegality by reason of its performance being in breach of s 20(3) of the *Agents' Act*?
> (4) If the agreement was rendered void in any of the above ways is the plaintiff estopped from asserting that the contract is void for illegality or has it waived its right to make that assertion?
> (5) Was special by-law 28 validly repealed and, if so, ought it be reinstated?

The Law: s 78 of the STA and s 20 of the Agents' Act

16. The Court of Appeal considered the incidence of s 78 of the STA and s 20 of the *Agents' Act* in *Gillett* v *Halwood Corporation Ltd* (2000) NSW Titles Cases ¶80-055. It is important to note that in that case the resolution to enter into the agreement was a resolution not of the body corporate in general meeting but of the council of the body corporate.

17. In delivering the principal judgment Priestley JA said (at 60, 527 — 60,529):

``*Appointment of ``Managing Agent'' under s 78(1)*

Although the STA does not define `managing agent', consideration of the various provisions in the STA in which the term `managing agent' appears seems to me to support the view that a Pt IV Division 3 managing agent is a person or entity to whom a body corporate, pursuant to s 78(1) has delegated any one or more of its powers, authorities, duties and functions.

Section 78(1) states what at first sight seems to be a two step procedure whereby a body corporate may (i)`appoint a managing agent' and (ii)`delegate to him... any one or more of its powers, authorities, duties and functions'. `Managing agent' is not a term which, simply by itself, carries a precise, recognised meaning. Undefined, it may apply to a wide variety of contractual relationships. For this reason, I doubt whether, if a body corporate, in general meeting and by instrument in writing, appointed a managing agent without any delegation of any power, authority, duty or function, the

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appointment would have any content. Definite content would require the delegation to the appointee, in like manner to the appointment of the managing agent, of at least one of the corporate body's powers, authorities, duties and functions. Thus, it seems to me that for the purposes of Pt IV Division 3 it is the delegation of some power, authority, duty or function which constitutes the delegate a managing agent. On this view `managing agent' in s 78 is a convenient name for someone who has been delegated one or more of the relevant powers, authorities, etc.

...

Relationship between s 78(1) and by-law 2

The contrast between the key verbs in s 78(1) and by-law 2, `appoint... delegate' in the former and `employ' in the latter, in my opinion points clearly to the intended different functions of the two powers; the former is directed to the appointment of an agent in the nature of an independent contractor, over whom the body corporate will not have the power of control that an employer has over an employee; the latter is directed to the creation of an employment relationship, in the course of which the council will have the power of an employer to control directly the way in which its employed agent or servant carries out the employment `in connection with the exercise and performance' by the body corporate `of the powers (etc)... of the body corporate'. In a s 78(1) case, the managing agent will exercise one or more delegated powers etc of the body corporate, for the body corporate. In a by-law 2 case the body corporate will itself be exercising powers etc by the direct controlled employment of an agent or servant.

The body corporate in a s 78(1) case still has ultimate control of its managing agent delegate, either through the revocation power, or by use of its own continuing powers etc as spelt out in s 78(4), but it does not have the immediate and direct control that an employer has over an employee.

When the provisions of the STA and the *Agents' Act* are read together, they show in my opinion a legislative intention that when a person or entity had been delegated one or more of the powers, authorities, duties and functions of a body corporate and would not in the ordinary course be subject to the immediate control or supervision of the body corporate, then the body corporate was to have the protection following from the requirement that such an agent be licensed under the *Agents' Act*. When the body corporate through its council had the more direct control which in the ordinary course it would have over agents and servants employed pursuant to by-law 2, then a lesser degree of protection was necessary and it is understandable that it was not thought necessary that such persons should be brought within the scope of the *Agents' Act*.

Although the distinction I have sought to describe is sometimes difficult to apply, and no doubt there could be cases in which it would be difficult to decide whether a particular engagement should be seen as a contract involving an attempted delegation which could only be effected under s 78(1) or as effecting a relationship subject to the greater control implied by by-law 2, in the present case what Management is authorised and required to do under the Management Agreement and the degree of authority it is given, seem to me to fall quite clearly within the scope of s 78(1), so that the appointment of Management should not be properly categorised as the employment of agents or servants pursuant to by-law 2."

(At 60,533 — 60,534)

``*Estoppel*

Three considerations appeared as possibly adverse to the estoppel claim of Management and Developments. These were (a) the length of time that had passed between the appellant's becoming aware of the matters subsequently raised in her proceedings and the commencement of those proceedings; (b) application of the legal proposition that an estoppel could not be raised against a statute; and (c), so the appellant contended, the fact that the estoppel now relied on had never been pleaded below.

...

As to (b), arguably also the rules preventing estoppels succeeding in overcoming statutory provisions might be applicable. The ease law on this matter is not however in a very definitive state: for differing examples

of what can happen when the point is raised see *Kok Hoong* v *Leong Cheng Kweng Mines Ltd* [1964] AC 993; *Pratten* v *Warringah Shire Council* (1969) 90 WN (Pt 1) (NSW) 134, and *Wongala Holdings Pty Ltd* v *Mulinglebar Pty Ltd* (1994) 6 BPR 13,527, at 13,534-5."

18. Handley JA said (at 60,537):

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``It follows in my opinion that the management agreement never came into force so as to bind the body corporate.

Fernbank did not, at any material time, hold a licence as a strata managing agent under the *Auctioneers and Agents Act* (the Agents' Act). Section 78(1AA) of the *Strata Titles Act* provides that a body corporate shall not appoint a person as managing agent unless that person is the holder of a strata managing agent's licence issued under the *Agents' Act*. The *Strata Titles Act* does not contain any definition of a managing agent, but this is defined in s 3 1) [sic] of the *Agents' Act* as meaning a person who, for reward, exercises or performs any function of a body corporate under the *Strata Titles Act* and this definition is implicit in s 78(1) of the *Strata Titles Act*.

Section 20(2B) of the *Agents' Act* prohibits a person from acting as a strata managing agent or carrying on the business of such an agent unless he is the holder of the relevant licence. The meaning of `carry on business' in this context is defined by s 3(3A)(a). Section 36 requires a strata managing agent to maintain a trust account with a bank into which all monies received for, or on behalf of, any person are to be paid until paid or disbursed at the direction of that person, and s 42 prohibits such an agent from bringing proceedings in any court to recover remuneration for services performed in that capacity unless he was the holder of the relevant licence when the services were performed.

If the general meeting had ratified the management agreement, or it had been re- executed after 15 June 1989, the making of that agreement by Fernbank when it did not hold the relevant licence would have contravened s 20(2B) of the *Agents' Act* and arguably the agreement would have been illegal and void. The question of illegality does not strictly arise because the Court has held the agreement was never validly executed or ratified, and it is not necessary to say anything further on this topic."

Handley JA said that he agreed with the reasons of Priestley JA and Priestley JA that he agreed with the additional reasons of Handley JA. Powell JA agreed with the judgments of both the other Judges. In that case the Court of Appeal found that the agreement entered into did indeed appoint a managing agent and was invalid as having been effected by the council and not by the body corporate in general meeting contrary to the provisions of s 78(1). There was an argument as to whether or not the agreement could be given effect to by estoppel and this was remitted to the Court below for decision. The proceedings were settled before that further trial took place.

The Law: Illegality and estoppel in the face of a statute

19. A convenient starting point in respect of this aspect of the law of illegality of contracts is the well known passage from the advice of the Privy Council in *Kok Hoong* v *Leong Cheong Kweng Mines Limited* [1964] AC 993 where their Lordships, having referred at 1015 to the ``principle... that a party cannot set up an estoppel in the face of a statute", said at 1016 — 1017:

``It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or `on grounds of general public policy'... But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the Court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise....

General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of persons enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as for instance the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar policy of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the Court to give its sanction to departures from any law that reflect such a policy, even though

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the party concerned has himself behaved in such a way as would otherwise tie his hands.''

20. The decision in *Kok Hoong* was considered and applied by the Full Court of this Court in *Barilla* v *James* (1964) 81 WN (Pt 1) (NSW) 457. In that case, the Full Court (by majority — Walsh and Wallace JJ, Asprey J dissenting) held that if the estoppel asserted were made out — and in the view of the majority it was not — then the policy of the *Landlord and Tenant (Amendment) Act 1948* would not permit a party to be estopped from relying on rights under it. Walsh J concluded at 464, having referred to the *Kok Hoong* test:

``In my opinion these categories of exclusion, whether brought into being by means of the definition of `prescribed premises' or by the introduction of section 5A, must be treated as fixed exclusively by the Act, irrespective of any divergence from them which the parties have sought to bring about, whether by express agreement or by conduct. Subject only to the exceptions which the Legislature has defined, effect must be given to the `general social policy' of the Act.''

21. In *Pratten* v *Warringah Shire Council* (1969) 90 WN (Pt 1) 134 at 143-144 Street J approved the following statement of principle in Spencer Bower & Turner on Estoppel by Representation (see 3rd ed, 1977 at [141]) as follows:

``A contract ultra vires a statute (for example) cannot be validated by an application of an estoppel....''

22. The conclusion that a disobedience of s 78(1AA) rendered a contract void for illegality was reached by Brownie J in *Thomas* v *Regal West Pty Ltd* (1991) NSW Titles Cases ¶ 80-010.

The Law: Principles relevant to the construction of the agreement

23. One of the problems that arises in relation to the construction of the agreement is the potential conflict or tension between the apparently general terms of the scheduled works which the management company is by clause 2.2 appointed to perform and the limitation sought to be imposed by clause 3.4(d). The principles to be applied in the construction of an agreement were compendiously stated by Gibbs J in *Australian Broadcasting Commission* v *Australian Performing Right Association Limited* (1973) 129 CLR 99 at 109-110 as follows:

``It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, `even though the construction adopted is not the most obvious, or the most grammatically accurate' to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, at p 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch D 681, at p 686. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, at p 514, that the court should construe commercial

contracts `fairly and broadly, without being too astute or subtle in finding defects' should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf *Upper Hunter County District Council* v *Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, at p 437)."

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And see *State Lotteries Office v Burgin* NSWCA, 13 May 1993 unreported per Kirby P (as his Honour then was). Gibbs J's dictum that a construction should be preferred which avoids ``capricious, unreasonable, inconvenient or unjust'' consequences has been cited in the Court of Appeal by Hope JA in *TCN Channel 9* v *Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 149 and by single Judges, eg, by Rolfe J in *Wilkinson* v *Feldworth Financial Services Pty Ltd* (1998) 29 ACSR 642 at 741. And see Lewison on The Interpretation of Contracts (2nd ed, 1997) 6.13.

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24. There is also a well established legal doctrine that, where a relationship of a particular sort is established by the ambit of the rights conveyed or duties imposed by an agreement between parties, then a declaration in the agreement that the relationship is not to have that legal characterisation will be ineffective: the characterisation of the transaction will be governed by the substance of the agreement and not by the parties' declaration in such cases. A well known example which has been cited is the decision of the High Court of *Radaich* v *Smith* (1959) 101 CLR 209 relating to leases. If one party gives another exclusive occupation of premises for a term, this being of the very nature of a lease, then a stipulation that the arrangement is one of licence and not of lease will be ineffective. As Windeyer J said at 222, if the rights that the instrument creates... be the rights of a tenant, it does not avail either party to say that a tenancy was not intended." And see *The Wik Peoples* v *The State of Queensland* (1996) 187 CLR 1 per Toohey J at 110 — 111 and Gaudron J at 152; *Lewis* v *Bell* (1985) 1 NSWLR 731; *KJRR Pty Ltd* v *Commissioner of State Revenue* [1999] 2 VR 174. The principle had been earlier discussed in the English Court of Appeal in *Weiner v Harris* [1910] 1 KB 224 where Cozens-Hardy MR said at 290:

``It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say `It is hereby declared there is no partnership between us.' The Court pays no regard to that. The Court looks at the transaction and says `Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is.' So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. You must look at the thing as a whole and see whether that is the real meaning and effect of it."

The contentions

25. The plaintiff contends, so far as the question of whether the agreement falls within s 78(1) is concerned, that the case is substantially indistinguishable from *Gillett* (*supra*). The defendant has carried out an analysis of the differences between the contract dealt with by the Court of Appeal in *Gillett* (a full copy of which has by agreement of the parties been furnished to the Court) and the agreement in this case. The defendant asserts that, whereas the contract in *Gillett* committed the management of the property to the agent, the agreement in this case rather requires the performance by the agent of specified services. It contends that this case can be distinguished because the agreement by item 21 of Schedule 1 reserves to the body corporate the right to give directions to the management company with respect to the performance of its duties during the currency of the agreement; this is an agreement under which the defendant is in effect an employee. It also relies heavily on clause 3.4(b). The defendant says that ``managing agent'' in that clause equates or includes ``strata managing agent'' in s 78 and that the effect of the clause is to read down the powers conferred by the agreement so as to exclude the conferral of any that would lead to contravention of s 78.

26. In *Gillett*, the matter was concluded by the characterisation of the contract as within s 78, because the appointment was made by the council, not the general meeting. Here, the appointment was by the general meeting, so the question arises, if the contract be within s 78, whether it is void for illegality. The plaintiff contends that it is: being a contract the entry into which is specifically forbidden by the statute, it is plainly illegal and void. The plaintiff also contends that, if the agreement is caught by s 78, the effect of s

66(1)(d) is that it is either rendered totally void or cannot operate after the date of the first annual general meeting, which is long past. The defendant says that even if there were a contravention of statute ``that part of the Scheduled Works which confers a delegation could be severed without altering the practical duties undertaken by the defendant."

27. The defendant says that the statutory prohibition was for the benefit of the plaintiff

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only. If the agreement did contravene s 78, then the plaintiff was prevented by the doctrines of estoppel or waiver from complaining about any illegality. The plaintiff replies that the provisions were for the benefit of a wider class, so that there can be no estoppel in the face of the statute. The factual basis on which the estoppel (or waiver) is said to arise was conveniently summarised in the defendant's contentions document as follows:

``27 In the alternative, the Plaintiff is estopped from denying the validity of the Agreement or has waived any objection to the validity of the Agreement.

28 As at 6 May 1998, the Plaintiff was aware of the matters upon which it now relies to advance its submission that the Agreement is void by reason of illegality. Nevertheless, by its conduct, the Plaintiff:

(1) Represented that they would not seek to rely upon the asserted illegality which representation was relied upon by the Defendant in entering into the Agreement and the Deed; and

(2) Waived its rights to rely upon such assertion.

29 The Plaintiff is estopped from relying upon the assertion that the Agreement is void for illegality by reason of its conduct.

30 Public policy considerations do not preclude the Defendant from relying upon estoppel or waiver in the present case."

The plaintiff says that, even if it is not correct that the doctrine of estoppel has no operation, no factual basis for an estoppel or waiver has been established.

28. So far as special by-law 28 is concerned, the defendant says that it was duly enacted and, in the absence of the defendant's written consent, its purported repeal was invalid. Alternatively, its repeal was an abuse of power. The plaintiff says that the by-law was never enacted: the relevant portion of the minutes of the meeting (which mirror those of the notice) simply do not contain words of resolution relating to the 28 special by-laws. Furthermore, it does not confer an exclusive right on the proprietor of one lot within the meaning of s 51 of the SSMA, so that the defendant's consent to its repeal was not necessary. However, if these submissions be wrong, the by-law was enacted during the initial period and was caught by s 66(1)(a). The resolution enacting it was either void or could not operate past the date of the first annual general meeting, so that the by-law is not in force and its repeal was otiose.

Conclusions

29. **Was the agreement entered into in breach of s 78(1AA) of the STA?** Although its construction is not without difficulty, I have come to the conclusion that the agreement effected the appointment of Victoria Tower as a managing agent within the meaning of the subsection. The primary proposition of Mr McDougall, of Queen's Counsel for the plaintiff, was that the agreement ``constituted an appointment of the company... as managing agent and delegation to it of at least some of... the powers, authorities, duties and functions of the plaintiff." By reason of the authority of *Gillett*, he said, this meant that there was an appointment within the subsection. In the end, I have accepted that the propositions in the quoted words are a correct statement of the effect of the agreement on its proper construction. Also, in my view, the agreement on its proper construction creates a relationship within which the agent is to perform the agreement on its part as a contractor acting independently, perhaps with some small and specific limitations, and not as an employee subject to the degree of supervision and direction inherent in the employment relationship. Bearing in mind the decision in *Gillett*, it follows from these conclusions that the appointment contravenes the subsection.

30. The basis of my conclusions is as follows. I am of the view that the appointment is effected by clause 2.1 of the agreement, which expressly uses the word ``appoints'' in relation to the performance of duties and the provision of services. The delegation is effected by clause 3.1, which imposes an obligation on the agent to perform, *inter alia*, the Scheduled Works. Schedule 1 is somewhat of a mishmash of generality and particularity, but opens in the most general terms with a first item which imposes a requirement to manage, supervise and arrange for the maintenance, cleaning and repair of the common property in terms which closely echo those specifying the duties of wide and general ambit imposed on the body corporate by s 68(1) (a) and (b) of the STA. It was submitted by the defendant that the duty imposed by the agreement was not to manage (as in the case of the *Gillett* contract), but only to provide services to the body corporate for the

[140317]

purposes of its management of the common property. However, although that may be the purport of the language of recital D, it is not the language by which clause 3.1 imposes the obligation to do the work specified in Schedule 1, including item 1. Subsequent items in the Schedule cast in particular terms may be thought to fall within the obligation in item 1, but the effect is not in my view to read down the generality of item 1. Equally, I do think the slightly strange requirement in item 2 to submit quotations in respect of part only of the subject matter of that item (and not repeated elsewhere in Schedule 1) is indicative that the agent generally cannot act without the prior approval of the body corporate or otherwise of employee status. (The juxtaposition of items 1 and 2 suggests strongly that ``things'' in item 2 refers to chattels.) Equally, the power to give directions in item 21 does not in my view indicate employee status; indeed the fact that it is included in the agreement suggests the contrary: directions could be given to an employee (as opposed to a contractor) without special stipulation. And the agent may in its own right engage persons for the provision of services for the performance of its duties: clause 3.3. The Court of Appeal has already pointed out in *Gillett* that the fact that a body corporate can retake complete control by termination of the contract in appropriate cases or by itself performing acts which fall within the scope of the contract under statutory power does not mean that the relationship is not one in which the wide discretion inherent in the role of an independent contractor is destroyed. The precautionary reservation in the agreement of a right to act does not have any different effect. In coming to the above conclusions I have taken into account all the terms of the agreement.

31. Perhaps the defendant's most significant argument is that based upon clause 3.4(b), which is to the effect that the agreement imposes no obligation and confers no right on the management company to ``perform (sic) any power of a licensed managing agent''. It is said in the defendant's written submissions that this provision ``materially affects the relationship''. But the argument faces considerable difficulties. The meaning of the paragraph is far from clear. Is ``managing agent'' in the paragraph intended to be coterminous with ``managing agent'' in s 78(1)? What are the powers of a licensed managing agent intended to be referred to? Why are powers referred to and not, say, duties? And how are the parties to determine whether in doing some act the agent is or is not ``performing''(itself a curious use of language) any such power, so that it may be known whether it is acting within or without the terms of the agreement? May the reference be to the agent's functions in relation to letting units contained in Schedule 3? It seems to me that the paragraph is virtually devoid of any meaning that can be ascertained. In these circumstances, I am of the view that Mr McDougall's submission is correct that it cannot have the operation contended for by Mr Corsaro, of Senior Counsel for the defendant. On the one hand, a contract should be construed so as to avoid invalidity if possible: Lewison op cit 6.09, 6.12. On the other it should be construed so as to make commercial sense (see the *Australian Broadcasting Commission case*, (*supra*)). It does not seem to me that the paragraph has sufficient clarity to preclude the result that the agreement, on its proper construction effected a delegation.

32. If the intended effect of clause 3.4(b) is to declare the agent appointed by the agreement not a managing agent or the agreement not an agreement within s 78(1), then it cannot be efficacious for that purpose if the substance be otherwise: see *Radaich v Smith* and the discussion in [24] above. On the one hand, Mr Corsaro has submitted that clause 3.4(b) ``materially affects the relationship'', whereas the corresponding provision in *Gillett* was a ``deeming'' provision. On the other hand, he said in oral argument that there is no infringement of the statute ``because we recognise that we are not strata managing agents. '' In any event, no characterisation by the parties of the legal nature of the relationship can prevail over its substance.

33. **Was the agreement void for illegality for contravention of s 78(1AA) or s 66(1)(d)?** It is therefore my view that the agreement falls within s 78(1) of the STA. Whilst the defendant argued vigorously that the agreement should not be so characterised, in the event of it being so characterised it argued but faintly that it did not contravene s 78(1AA). It relied heavily upon the defence of estoppel to which I shall in due course turn. I share the view expressed by Brownie J in the *Regal* case (*supra*) that an agreement entered into in defiance of the

[140318]

[140318]

statutory proscription effected by s 78(1AA) is void for illegality. Accordingly, I hold that the agreement in this case is void for illegality because the entry into it was in contravention of s 78(1AA). In my view, for the same reason, the contract is proscribed by s 66(1)(a) and void for contravention of that provision. In my view there can be no question of severance. It is not easy to tell what would need to be severed to cure the illegality and the defendant put no proposal more precise than that quoted in [26] above. In any event, any exercise of severance to remove the delegation which I have found was made would alter the nature rather than the extent of the contract: see *McFarlane v Daniell* (1938) 38 SR (NSW) 337 per Jordan CJ at 345; *Thomas Brown and Sons Limited* v *Fazal Deen* (1962) 108 CLR 391 *per curiam* at 411; *Humphries* v *The Proprietors ``Surfers Palms North'' Group Titles Plan 1955* (1994) 179 CLR 597; *Bristar Pty Ltd* v *The Proprietors ``Ocean Breeze'' Building Units Plan 1955* [1997] 1 QdR 117.

34. **Was the agreement void for illegality for contravention of s 20(3) of the Agents' Act?** The situation as to whether the agreement is void for illegality because its performance would contravene s 20(3) of the *Agents' Act* is perhaps not so clear. However, in my view, the carrying out of many of the central functions which it provides shall be carried out by the agent would contravene that section if performed by a party which did not hold the requisite licence, as Victoria Tower did not at the inception of the contract and as the defendant apparently still does not. In my view the agreement is also void for contravention of s 20(3) of the *Agents' Act*, although it is not necessary so to find for the decision of this case in view of the clear conclusions I have come to as set out in [33].

35. **Is the plaintiff estopped from asserting that the agreement is void for illegality?** So far as estoppel is concerned, I do not find that the case for an estoppel is here made out on the facts. As has been pointed out in recent decisions, the principle now to be regarded as underlying the various concepts of estoppel known to the law and to equity is unconscionability. Here the unconscionability relied on is agreeing to the assignment of the agreement to the defendant knowing of the illegality subsequently complained of, or at least of the facts from which that illegality arises. It should be borne in mind that the onus of establishing an estoppel lies upon the party asserting it. What must be established in the case of, for instance, an estoppel arising from a verbal representation is that the representation was clear and unambiguous: see Spencer Bower and Turner op cit [83]; *Discount & Finance Ltd v Gehrig's NSW Wines Ltd* (1940) 40 SR (NSW) 598 per Jordan CJ at 603. Equally, in relation to representations made by conduct, ``the same principles are applicable to equivocal acts or conduct'': Spencer Bower and Turner op cit [86]. Here, as is plain from the manner in which the defendant casts its case, the necessary unconscionability must be made out by establishing that the plaintiff knew of the illegality now relied on or, at least, of the facts and matters constituting it at the time of its participation in the assignment of the agreement. In my view, the plaintiff's submissions that this is not established on the material available are correct. Mr Dudek did not know of the illegality when he voted. The letter of 29 April 1998 did not tell him with any clarity the content of the letter Mr Daveney received, nor does the evidence show any more of what Mr Daveney knew. There is no basis for finding a representation that the plaintiff would not rely on a defect of which it knew, or any basis on which it could be found there was a common assumption to that effect. I find that the estoppel alleged is not established, even if the doctrine of estoppel could operate in the circumstances. Equally, no factual basis is made out for a waiver: apart from anything else, there was no discovery on the plaintiff's part of a state of affairs which put it to an election as to which of alternative courses it would follow.

36. In any event, it is my view that, by virtue of the proscription created by s 78(1AA), this case is in a class where an estoppel cannot be availed of in the face of the statute. This is not a case where the rule contravened is one prescribed solely for the benefit of the person who claims to have the contract struck down for the illegality. In my view, the purpose of the provision is to provide a protection for the public or

a section of the public. That section of the public is the persons who become or may become at any time within the operation of the contract the holder of an interest in a lot in a strata scheme. That includes both prospective purchasers, prospective mortgagees and, indeed, the prospective holders of any interests.

[140319]

[140319]

In light of the fact that such persons may be committed to a long term relationship with someone who was related to the original developer or promoter of the strata scheme and, in any event, without having had any opportunity to participate in the selection of the manager or the terms on which the manager is engaged some protection should be given to those people by the manager being a person required to hold a statutory licence and subject at the time of the grant of the licence and on an ongoing basis to the supervision of a public authority in relation to certain matters as to their knowledge, skill and integrity. In my view, therefore, estoppel will not run in the face of this statute. As was said long ago by Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121:

``The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so."

In those circumstances reliance upon estoppel cannot avail the defendant. Equally, the defendant cannot rely on waiver.

37. **Was special by-law 28 validly repealed?** In my view, a resolution purporting to propound by-law 28 was passed. Despite the lack of words of enactment, in my view the resolution should be construed to effect the adoption of the 28 special by-laws as well as the repeal of by-laws 12 — 29. It seems to me that the new by-laws were encompassed and incorporated in the resolution effected by the word ``RESOLVED". Despite the lack of express words of enactment or adoption the intention is plain. I hold that the by-law does fall within s 66(1)(a). Although it does in terms confer a right on the proprietor of lot 252, it restricts the rights of all other proprietors in respect of the lot so as confer in substance an exclusive right of use on that proprietor. It is the substance which should be looked to rather than the form in determining whether a right is conferred within the meaning of s 66(1)(a): see *Georgiadis* v *Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 *per curiam* at 305-306. If this were not so, the section could be easily circumvented by the use of negative language. However, I am of the view that the by-law was not validly enacted in the first instance. It is not in contest that it was during the initial period that the resolution adding it was passed. It contravenes s 66(1)(a). It was a contract the entry into which was proscribed by that provision. In my view it is wholly invalid. I do not accept the submission that the only remedy for contravention of s 66(1) is recovery proceedings against the original proprietor. I do not think there can be derived from the provision or extension of rights of compensation against the original proprietor by s 66(2) the removal or any limitation of a right to have the by-law declared invalid. If my conclusion that it is wholly invalid be not correct, the by-law could not operate beyond the initial period. It is not necessary to deal with the submission that its enactment was an abuse of power. As the by-law was not valid, it matters not whether or not the conditions for its repeal were met. It should not be restored to the registered by-laws.

38. An appointment will be made for short minutes to be brought in to give effect to my conclusions. Costs may be dealt with at that time.

CASTLE CONSTRUCTIONS PTY LTD v THE OWNERS STRATA PLAN 53342 and ORS

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(1999) LQCS ¶90-102

NSWSC citation: Castle Constructions Pty Ltd v The Owners Strata Plan 53342 and Ors [1999] NSWSC 1107.

Supreme Court of New South Wales

Judgment delivered 17 November 1999

Strata schemes — Affairs of owners corporation controlled by original owner — Application by lot owners for appointment of strata managing agent — Appointment by Strata Schemes Board without hearing original owner concerning choice of agent — Whether denial of natural justice — Whether same solicitor should represent owners corporation and applicant lot owners — Strata Schemes Management Act 1996 (NSW), sec 162, 200; Justices Act 1902 (NSW), sec 107.

Castle was the builder, developer and original owner of a strata scheme in respect of a five-storey commercial and residential development. Over half the lots were sold and Castle retained ownership of about 40% of the unit entitlement. With the help of a few other lot owners who supported Castle, it was able to retain control of the affairs of the owners corporation.

Fifteen lot owners applied to the Strata Schemes Board for the appointment of a strata managing agent pursuant to sec 162 of the Strata Schemes Management Act 1996 (NSW), complaining that the management of the strata scheme was not working satisfactorily primarily because of the dysfunctional relationship between Castle and its associates and the majority of the other lot owners. The Board found that the complaint was established and appointed an agent to exercise all of the functions of the owners corporation, chairperson, secretary, treasurer and executive committee of the strata scheme. It made a number of adverse findings against Castle and its principal, including wrongful expropriation of some common property.

Castle sought an order from the Supreme Court of New South Wales that the decision of the Board be set aside. It argued that there was an automatic stay of execution pending the determination of the appeal (by virtue of sec 200 of the Strata Schemes Management Act and sec 107 of the Justices Act 1902 (NSW)) or, alternatively, that the Court should grant a stay of execution. It relied on an alleged denial of natural justice arguing that the Board had said at the conclusion of the hearing that, if it thought that an agent should be appointed, the parties would be written to and given the opportunity to nominate proposed appointees. This did not happen and the Board made its orders without hearing Castle, which forced it to apply for variation and placed it in a position of disadvantage.

Castle also argued that the owners corporation and the 15 lot owners who sought to uphold the Board's decision should not be represented by the same solicitor. It contended that the owners corporation was bound to act in the interests of the lot owners as a whole and that, in the present case, there was a marked division of opinion as to such interests among the owners.

Held: order appointing agent quashed; question of who should be strata managing agent referred back to Strata Schemes Board.

1. When an issue is raised and the Board states that it is going to take a particular course if it decides that a strata managing agent should be appointed, it should follow that course. If it changes its mind, it should advise the parties and give them an adequate opportunity to deal with the issue having regard to the changes made. It was incorrect to make the orders first and then hear the parties on the particular issue.

2. Given the Board's findings, it could not reasonably be disputed that an agent should be appointed. The only question was who should be appointed. Essentially, the rules of procedural fairness must be followed. Castle had to nominate other qualified strata managing agents who were willing and competent and establish substantial reasons why the agent appointed by the Board was unsatisfactory. These were questions of fact for the Board member.

[140121]

[140121]

3. The interests of the owners corporation and of the 15 lot owners were not identical and the same solicitor should not have acted for these parties. The owners corporation had to protect the interests of the lot owners as a whole and its focus and approach would necessarily be different. While it was entitled to uphold the Board's orders it had to do so from the perspective of the best interests of the lot owners as a whole. It was not sufficient to say that both the 15 lot owners and the owners corporation wanted the appeal dismissed.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

RR Harper (instructed by Kitamura & Associates) appeared for the plaintiff.

MD Young (instructed by David Le Page) appeared for the defendants.

Before: Smart AJ.

Full text of judgment below

Smart AJ: Castle Constructions Pty. Limited (``Castle'') seeks an order that the decisions and orders of 16 August 1999 of Mr. G. Cochrane sitting as the Strata Schemes Board be set aside and that the application of some 15 owners of strata lots that a strata managing agent be appointed pursuant to s. 162 of the Strata

Schemes Management Act 1996 to exercise all of the functions of the owners corporation, chairperson, secretary, treasurer and executive committee of Strata Scheme No. SP53342 be dismissed.

2. By s. 200 of the Act an appeal lies to the Supreme Court against an order made by the Board under Chapter 5 in the same cases and in the same way as it would lie under Part 5 of the Justices Act 1902 if the order were a determination that a Justice or Justices made, at the time the order took effect, in the exercise of summary jurisdiction on an information or complaint. Section 104(1) of the Justices Act permits a defendant against whom an order has been made to appeal on any of the following grounds

> (a) a ground that involves a question of law alone,
> (b) a ground that involves a question of mixed law and fact, but only with the leave of the Supreme Court,
> (c) the ground that the... order... cannot be supported having regard to the evidence.

3. Castle's statement of grounds raises a large number of complaints, some of which seem to involve alleged errors of fact. There is a complaint of a denial of natural justice in the way in which Mr. Alan John Donald was appointed as the Strata Managing Agent.

4. At the hearing before the Strata Board on 19 and 20 April 1999, the 2nd to 16th defendants (the 15 lot owners) sought to establish that the management of the strata scheme was not working satisfactorily primarily because of the dysfunctional relationship between Castle and its associates and the majority of other lot owners in the strata scheme. In its detailed and lengthy reasons the Board found that this complaint was established and made the appointment mentioned.

5. The builder, developer and original owner of the strata scheme in respect of premises at 134-145 Sailors Bay Road, Northbridge, being a five storey commercial and residential development with above basement parking was Castle, whose principal is Mr. V. Lahoud. Over half of the lots were sold. Castle retained the ownership of about fifteen lots which held about 40% of the unit entitlement. The Board found that with the help of a few other lot owners who supported Castle, it and Mr. Lahoud were able to retain control of the affairs of the owners corporation.

6. The Board made a series of rather strong adverse findings against Castle and Mr. Lahoud including a wrongful expropriation of some common property. Mr. Lahoud was not regarded as a witness of truth in important respects. Some of his explanations for what appeared to be dubious or wrongful conduct were not accepted. The Board did not regard Mr. Hunt, Castle's leading opponent as without fault and wholly reliable but it held that he was more reliable than Mr. Lahoud. It noted that Mr. Lahoud was anxious to control the affairs of the owners corporation. The Board's findings were that he acted accordingly and wrongfully. Castle and Mr. Lahoud were in a difficult position. There were complaints about defective work involving the common property and about Castle and Mr. Lahoud advancing their own interests rather than the interests of the owners corporation as a whole.

[140122]

[140122]

7. According to the documents issued by the Board on 16 August 1999 incorporating its orders and reasons the applicants were some 15 named persons (being lot owners) and the respondent was The Owners, Strata Plan No. 53342. At the start of the hearing on 19 April 1999, counsel (Mr. Harper) announced that he appeared for Castle. A study of the transcript reveals a contest between the 15 applicants and Castle with the applicant relying on the evidence of Mr. Hunt and documentary materials and Castle relying on the evidence of Mr. Lahoud and documentary materials. Various witness statements were tendered. The owners corporation appeared to take no part, and certainly no active part in the proceedings before the Board.

8. In this Court the appellant is Castle. The owners corporation has filed an appearance and it has sought to uphold the Orders made by the Board. The owners corporation is the 1st defendant, the fifteen lot owners being the 2nd to 16th defendants have filed an appearance stating ``For so long as the First Defendant opposes the appeal [they] appear and submit to such orders as the Court may make, save as to costs.'' Both the 17th defendant (Mr. Donald) and the 18th defendant [the Board] have filed submitting appearances (save as to costs). The same solicitor entered appearances for the owners corporation and the 15 lot owners. The 17th and 18th defendants were separately represented. Mr. Donald, who exercises the powers of the owners

corporation instructed Mr. Le Page, to enter the appearance (which was in effect a disputing appearance) on its behalf. Mr. Le Page acted for the 2nd to 16th defendants before the Board and in this Court.

9. Castle has challenged the right of Mr. Le Page to act for both the owners corporation and the 15 lot owners. It has submitted that Mr. Le Page should not act for the owners corporation. There is the further question of a stay of execution of the Board's orders. I will deal with the latter point first.

10. Castle submitted that by virtue of s. 200 of the Strata Schemes Management Act 1996 and s. 107 of the Justices Act 1902 there was an automatic stay of execution pending the determination of the appeal. Alternatively, Castle contended that a stay of execution should be granted by this Court. The owners corporation submitted that there was no automatic stay and alternatively, if there were, it should be discharged. In support of its contentions Castle relied on an alleged denial of natural justice.

11. At the end of the hearing on 20 April 1999 Castle contended that if, contrary to its submissions, the Board concluded that a strata managing agent should be appointed, Mr. Donald should not be so appointed as Castle had substantial objections to him. Castle stated that it could not live with him and that it would wish to call evidence on that point. After some further discussion the Board member stated that if the Board thought that a strata managing agent should be appointed the parties would be written to. In response the parties were ``to nominate nominees for appointment''.

12. By and under cover of letters of Castle's solicitors of 31 May 1999, 16 July 1999 and 21 July 1999 the solicitors made complaints about Mr. Donald's administration of the strata scheme. Objection was taken by the solicitor for the 15 lot owners on the basis that the evidence had closed.

13. By Amended Notice of Hearing of 27 July 1999 the Board advised that it would give its decision on 16 August 1999 and that at the time of the decision being delivered so much of that material which was admissible and/or relevant may be addressed. The Board directed that a copy of the material be sent to Mr. Donald and advised that the Board anticipated that Mr. Donald would attend before it on 30 July 1999.

14. On 16 August 1999 the Board member delivered his reasons orally. The Board member concluded that it was the ``crossover of interests in which Castle is involved that is the primary cause of the problem''. Castle had been the builder and developer as well as the holder of 40% of the unit entitlements. The repair of defective work in the common property areas was a major bone of contention. Castle also attempted to appropriate some of the common property. The Board found, in effect, that Castle had the owners corporation do its bidding. The Board member stated that he did not accept that the appointment of an agent with full powers was punitive, that he was providing the scheme with 12 months time out to settle down and that during that time Mr. Donald was to do all he could to ensure that the owners corporation was ready and able to resume its duties and functions at the expiration of the appointment. The Board member said:

[140123]

[140123]

> ``The orders are:
>
> 1. Orders 3 to 5 inclusive made on 30 November are revoked. That revocation takes effect on 16 August.
>
> 2. Mr. Alan John Donald of Strata Partners, being a managing agent licensed, is hereby appointed for a period of 12 months commencing on 16 August. Mr. Donald is to have and may exercise all the functions of the Owners Corporation, chairperson, secretary, treasurer and executive committee and is to be remunerated in accordance with the management fee of $5,000 per annum. This fee covers three meetings. Additional meetings are $85 per hour plus disbursements as set out in the order.
>
> That is the end of that. Anything flowing from that?''

The formal orders in writing notified on 30 August 1999 were to the same effect but set out a little differently.

15. Counsel for Castle then said:

> ``The note that we received about listing this for hearing also says that at the time of the decision being delivered so much of the material that had been received which is admissible or relevant may be

addressed by the parties. We wish to make some submissions about the appropriateness of Donald continuing in the event, if the Board were disposed to make an order under section 162."

Counsel for Castle raised the further point that the application had not been referred to mediation and for that reason should be dismissed. This submission was rejected.

16. Counsel for Castle stated that it had no confidence in Mr. Donald and that that factor alone made it appropriate to appoint someone else. Castle submitted that Mr. Donald had a very unsatisfactory track record. In response to counsel's submission that Mr. Donald had not consented in writing, the Board member replied that Mr. Donald had given his consent on the previous Friday and pointed out that orders appointing a strata managing agent were usually made by an adjudicator without a hearing. He doubted if an adjudicator had power to hold an inquiry into the fitness of a nominee. He also pointed out that on the previous occasion (November 1998) Mr. Donald was the only eligible agent on the panel, within a reasonable distance from the property, to consent to act as the strata managing agent.

17. Counsel for Castle submitted that anyone but Mr. Donald would be preferable, even if the person was quite unknown. Castle applied to the Board to vary the order which it had just made to appoint someone else as the strata managing agent. Castle conceded that it did not have any particular nominee in mind. Castle contended that the problem arose because the 15 lot owners had not proposed a nominee. The Board member replied that there were many applications for the appointment of a strata managing agent where the applicants did not propose a nominee.

18. The 15 lot owners submitted that Mr. Donald had been doing a perfectly satisfactory job and that there was the advantage of familiarity and continuity with no need to change the books and financial records to another agent.

19. Castle then took the Board to the letters of Castle's solicitors of 31 May 1999 and 16 July 1999 and the complaints therein made against Mr. Donald.

20. The Board member was correct when he held that he would require some substantial material to appoint another strata managing agent when Mr. Donald had been acting for 81/2 months. It was not a sufficient reason that Castle did not want him or that it made allegations. Castle and Mr. Lahoud obviously did not appreciate losing control of the owners corporation and part of Mr. Donald's task may well involve denying Castle's requests or urgings.

21. The Board held that it was not satisfied that it had jurisdiction to entertain Castle's request. However, even if it did, there was nothing in what had been put to vary the order. The request failed.

22. Castle's real complaint was that the Board said at the conclusion of the hearing on 20 April 1999 that if it thought that a strata managing agent should be appointed the parties would be written to and given the opportunity to nominate proposed appointees but that this did not happen. Instead, the Amended Notice of Hearing of 27 July 1999 was in the terms summarised earlier. Castle complained that the Board made its orders without hearing it and that it was then forced to apply for a variation.

[140124]

[140124]

Castle contended that it was placed in a position of disadvantage.

23. An adjudicator and the Board are not bound by the rules of evidence and have wide investigative powers. They also proceed informally and often without oral evidence. Matters are often dealt with on the papers without a hearing. The system established is designed to deal with matters quickly and cheaply.

24. However, when an issue is raised and the Board states that it is going to take a particular course if it decides that a strata managing agent should be appointed it should follow that course. If it changes its mind, it should advise the parties and give them an adequate opportunity to deal with the issue having regard to the changes made. It was incorrect to make the orders first and then hear the parties on the particular issue. This is particularly so where there are doubts about the jurisdiction to vary orders so made upon the request of the party affected.

25. During argument I indicated that the question of the grant and refusal of a stay would be much influenced by there having been a breach of the rules of natural justice and of fairness. While the 15 lot owners did not

concede that there had been such a breach, they acceded to the view that if the Court took this view and was therefore going to refuse a stay or discharge any stay which existed it would be better for the order appointing Mr. Donald to be set aside so that the matter of which strata managing agent should be appointed could be resolved quickly.

26. Given the Board's findings it could not reasonably be disputed that a strata managing agent should be appointed. The only question is who should be appointed. I do not preclude the appointment of Mr. Donald. There are substantial practical reasons to continue that appointment. Essentially, the rules of procedural fairness must be followed. In practical terms Castle will have to nominate other qualified strata managing agents who are willing and competent and establish substantial reasons why Mr. Donald is unsatisfactory. These are questions of fact for the Board member. He may well appoint Mr. Donald. Costs of this point are reserved. If Mr. Donald is re-appointed the exercise may prove to have been a barren one.

27. Apart from this point I would not have regarded a stay as appropriate. It is necessary in view of the Board's findings to have a strata managing agent running the affairs of the owners corporation and discharging the other functions.

28. I turn now to the representation point. Can Mr. Le Page represent the owners corporation as well as the 15 lot owners? Castle objects to the 15 lot owners not having a direct personal liability for costs and the owners corporation's liability for costs possibly resulting in lot owners other than the 15 lot owners sharing the costs burden.

29. SCR Part 66, Rule 2 provides:

> ``2. Where a solicitor or a partner of the solicitor acts as solicitor for any party to any proceedings... that solicitor shall not, without the leave of the Court, act for any other party to the proceedings not in the same interest.''

30. Castle contended correctly that the owners corporation was bound to act in the interests of the lot owners as a whole. In the present case there was a marked division of opinion as to such interests amongst the lot owners. Mr. Donald's task, inter alia, is to try to keep the various interests in balance and to act in the interests of the owners corporation as a whole. Under the Board's order Mr. Donald exercises all of the functions of the owners corporation and it is obliged to remunerate him as specified in the Board's orders. The owners corporation has a direct interest in the Board's orders and the appeal or application for leave to appeal. So do the 15 lot owners who do not want Castle and Mr. Lahoud controlling the affairs of the owners corporation having regard to their previous conduct.

31. Counsel for the owners corporation submitted that both the 15 lot owners and the owners corporation wished to uphold the orders made by the Board and that accordingly they were in the same interest. If any dispute arose as to costs then, at that stage, the owners corporation and the 15 lot owners could be separately represented. I was referred to s. 229 of the Act which enables the court to make special orders as to costs and levies and s. 230 which provides that an owners corporation cannot in respect of its costs and expenses in proceedings brought under Chapter 5 levy a contribution on another party who is successful in the proceedings.

[140125]

[140125]

32. In *Nangus Pty. Ltd & Anor* v. *Charles Donovan Pty. Ltd* [1969] VR 184 Young CJ said at 185:

> ``The general rule undoubtedly is that counsel ought not to appear for two clients whose interests may conflict.''

and at 186:

> ``Every case must depend on its own circumstances but it is important to notice... that the court is concerned that it shall have the assistance of independent counsel for parties whose interests are not identical in the case before it...''

33. I was also referred to in the decision of *Oceanic Life Ltd* v. *HIH Casualty & General Insurance Ltd* [1999] NSWSC 292 (1 April 1999) where Austin J undertook an extensive review of the cases and an analysis of the

relevant legal principles. That was a commercial case of some complexity and a very different one from the present. It concerned amongst other things, information which had been gathered previously while acting for another client.

34. The grounds of appeal in the present case, apart from raising what appear to be some questions of fact involve canvassing the question whether the 15 lot owners other than R.J. Hunt did not support the application and were not in conflict with Castle and the adverse findings against Castle and Mr. Lahoud. The 15 lot owners have their own interests to advance. They are not identical with those of the owners corporation which has to protect the interest of the lot owners as a whole. Its focus and approach will necessarily be different. While it is entitled to uphold the orders made by the Board it must do so from the perspective of the best interests of the lot owners as a whole. It is not sufficient to say that both the 15 owners and the owners corporation want the appeal dismissed.

35. In the circumstances of the present case the interests of the 15 lot owners and those of the owners corporation are not identical. The same solicitor should not act for these parties. Mr. Le Page having previously acted for the 15 lot owners before the Board should not act for the owners corporation in this Court. This does not mean that the 2nd to 16th defendants need change their submitting appearance nor that the owners corporation should cease to uphold the Board's orders. I uphold the challenge to Mr. Le Page continuing to act as the solicitor for the owners corporation in this Court or before the Board. I reserve the question of costs.

36. I make the following orders:

1. The Order of 16 August 1999 naming Alan John Donald is quashed, such quashing to take effect seven (7) days from today.
2. The question of who should be the strata managing agent is referred back to the Board for consideration and appointment in accordance with these reasons.
3. All questions of costs reserved to the final hearing.

Subject to any later ruling of this Court there should be no stay of execution.

ANDERSON STUART & ORS v TRELEAVEN & ORS

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(2000) LQCS ¶90-103

NSWSC citation: [2000] NSWSC 283 revised 8/5/2000

New South Wales Supreme Court

Judgment delivered 14 April 2000

Strata schemes — Allocation of unit entitlements — Order of Strata Titles Board reallocating unit entitlements in waterfront block — Appeal to Supreme Court — Whether Board erred in law — Meaning of ``having regard to respective values of the lots'' — Whether Board erred by placing excessive importance on comparative areas of lots — Whether Board erred by not determining the value of each lot before calculating revised unit entitlements — Whether Board erred by rejecting comparative sales evidence — Proper approach to valuation — Whether Board erred in taking two valuations which it considered unsatisfactory and taking mean — Whether Board was functus when it expressed a provisional view and invited submissions — Whether breach of natural justice when submissions disregarded — Whether application should be dismissed where valuation evidence insufficient — Strata Titles Act 1973 (NSW), sec 119.

The Strata Plan was first registered in 1975 and consisted of three lots, each of equal unit entitlement. In December 1983 a strata plan of subdivision was registered in respect of Lot 3 and part of the common property; Lot 3 ceased to exist and a new Lot 4 was shown with an area of 280 sq m. The floor areas of Lots 1 and 2 were 124 sq m and 149 sq m respectively. The schedule of unit entitlements remained identical. The owners of Lot 4 (the first defendants) sought a reallocation of unit entitlements under former sec 119 of the Strata Titles Act 1973 (now sec 183 of the Strata Schemes Management Act 1996) in order to reflect recommendations made by a valuer. The application was opposed by the owners of Lots 1 and 2 (the plaintiffs).

In May 1998 the Strata Titles Board published a ``Provisional View'' on the application for reallocation, inviting the parties to make further written submissions. In the Provisional View the Board stated that the proper approach to valuation was to arrive at ``what a prospective willing but astute or cautious buyer, neutral as to number of bedrooms and bathrooms required, who wanted to buy one or all of the units in this particular block would pay for each of them against the other two, in the state that the common property was in in 1983''. The Board considered that neither of the parties' valuations were ``completely satisfactorily performed'' but used those valuations in the calculation of the unit entitlements derived from floor area and the mean of the unit entitlements from the two valuations.

Both parties made submissions in respect of the matters specified in the Provisional View but the Board stated that it had not invited submissions as to the correctness of its earlier determinations and that there had been final judicial determinations in respect of which the Board considered itself functus. In July 1998 the Board made an order (formalised in August 1998) that the allocation of unit entitlements among lots was, in December 1983, unreasonably made having regard to the respective values of the lots at that time and allocated unit entitlements among the lots as follows: Lot 1 — 21; Lot 2 — 28; and Lot 4 — 51.

The plaintiffs applied to the Supreme Court of NSW for a declaration that the determination of the Board was erroneous in law for a number of reasons, including its interpretation of former sec 119(2) of the Strata Titles Act (now sec 183(2) and (3), Strata Schemes Management Act), its method of valuing the units and its refusal to consider submissions following the invitation contained in its Provisional View.

Former sec 119(2) provided that an order reallocating unit entitlements could be made only if ``the Board considers, after having regard to the respective values of the lots and (if a strata development contract is in force in relation to the strata scheme) to such other matters as the Board considers relevant, that the allocation of unit entitlements among the lots: (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered''.

Held: matter remitted for redetermination by the Board.

Determination of values of lots

1. The Board erred in law by determining that ``respective values'' of the lots (in sec 119(2)) meant their value ``relative to each other''.

2. The Board erred in law by placing extraordinary and excessive importance on the comparative floor areas of the lots in determining their respective values when there was no evidence that the values of the lots could be determined on this basis.

3. The Board erred in law by not interpreting sec 119 as requiring it firstly to determine and have regard to the value of each lot before moving on to calculate revised unit entitlements. The Board did not ``have regard to the respective values of the lots''. After rejecting the valuation evidence of each of the parties' valuers, no regard was had to the value of the lots but rather to factors which, while going to value, did not constitute value.

4. The Board did not err in law merely by dismissing the comparable sales method of ascertaining value. However, it did err by rejecting this approach on the basis that sale price

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differentials may reflect internal refurbishment in one lot and not another, when there was no evidence of such internal refurbishment.

5. The Board's test of value (explained in the Provisional View) was erroneous for two reasons. Firstly, it expressly disavowed the requirement in sec 119(2) that the relevant values of the lots are the ``respective'' values of the lots. Secondly, it strayed from the meaning of ``value'' as espoused by the High Court in Spencer v Cth (1907) 5 CLR 418 (ie, the ``hypothetical prudent purchaser'' test as formulated by Isaacs J). The caveat by the Board that a prospective buyer be ``neutral as to the number of bedrooms and bathrooms required'' takes the hypothetical buyer outside that described by Isaacs J as one being ``cognisant of all circumstances which might affect [the land's] value''.

6. The Board erred in law by basing its conclusions as to the proper unit entitlements on the mean between the unit entitlements calculated by each valuer where there was no evidence that averaging resulted in a reasonable ``valuation'' of the lots.

7. After having rejected the valuation evidence before it and in the absence of further and better valuation evidence, the Board erred in law by not declining the application for the review of unit entitlements. The Board could not proceed under sec 119(1) before it had had regard to the values of the lots.

Denial of procedural fairness

8. At the time of its Provisional View of May 1998 the Board was not functus of its determinations as to the construction of sec 119. It had not made any orders even of an interim type to that effect nor had it handed down judgment. Further, the Board expressed itself open to further submissions on its factual findings and conclusions as to unit entitlements.

9. The Board denied procedural fairness to the plaintiffs by creating in the parties a legitimate expectation that their submissions as to the construction of sec 119 in the Provisional View would be countenanced by the Board before making its final orders.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

MD Young (instructed by Blessington Judd) appeared for the plaintiffs.

A Bouris, solicitor (Mallesons Stephen Jaques) appeared for the defendants.

Before: Santow J.

Full text of judgment below

Santow J:

Introduction

1. This is an appeal on a question of law to this Court pursuant to s 130 of the *Strata Titles Act* 1973 (NSW) (``the Act'') by Stated Case under s 101 of the *Justices Act* 1902 (NSW) from the Strata Titles Board (``the Board''). The Plaintiffs seek a review of the decision of the Board in relation to the re-allocation of unit entitlements of the property at 1A Wiston Gardens, Double Bay, being a waterfront block of three units. This is on the basis that this decision is erroneous in law, on a number of stated grounds. The Defendants' threshold position was that insofar as the Stated Case required this Court to determine questions of fact or to consider additional evidence, it lacked jurisdiction to do so. To the extent the Court has jurisdiction, the Defendants' contention is that the Court should as a matter of discretion decline to exercise it by upsetting the Board's determination. Thus the Defendants' ultimate submission is that on the material properly before the Court on the Case Stated, including any such further material if admitted, no discernible error of law on the part of the Board has been shown.

2. What in practical terms is at stake is not just contribution to outgoings but each parties' desire to maximise its respective voting entitlement. That in turn depends on the respective values of the lots and the corresponding unit entitlements which are the subject of the re-allocation.

Salient facts

3. The parties to these proceedings were originally named as ``The Proprietors of Strata Plan No. 10294'' as the Plaintiffs and Ian G and Andrea M Treleavan as the Defendants. That description followed that in the proceedings of

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the Board from which this is an appeal. At the outset of these proceedings before me I gave leave for the Plaintiffs to file an Amended Summons dated 15 February 2000 naming ``Peter Primrose Anderson Stuart and Colina Ann Anderson Stuart (being the owners of Lot 2) and Anderson Stuart Estates Pty Limited (being the owner of Lot 1)'' as the Plaintiffs, ``Ian G & Andrea M Treleaven'' as the First Defendants and ``The Proprietors — Strata Plan No. 10294'' as Second Defendants.

4. Strata Plan 10294 was first registered in 1975 and consisted of three lots, each of equal unit entitlement. The lots were of the following respective areas:

Lot 1 124 sq m
Lot 2 149 sq m
Lot 3 205 sq m

5. Lot 1 was on the first and second floors of the building, Lot 2 on its third floor and Lot 3 on its fourth floor.

6. On 16 December 1983 strata plan of subdivision No 20536 was registered in respect of Lot 3 and part of the common property. Lot 3 ceased to exist and the area of the new Lot 4 was shown as 280 sq m, consisting of 37 sq m on the third floor, 205 sq m on the fourth floor and 38 sq m on the fifth floor. The schedule of unit entitlements remained identical.

7. The Defendants sought a re-allocation of unit entitlements under s 119 of the Act in order to reflect recommendations made by a valuer.

8. On 7 July and 15 and 16 December 1997 and 23 March 1998 Ms Lillian Horler a senior magistrate acting as the Board heard an application brought by the Treleavens (Defendants in the present matter) pursuant to s 119 of the *Strata Titles Act* 1973. Their application was for an order that the unit entitlements of the three lots comprising the strata plan SP 10294 following the registration of the subdivision SP 20536 of Lot 3 and some common property into Lot 4 on 16 December 1983 should be reallocated in accordance with the certificate of Higgins Valuers Pty Limited.

9. The application was opposed by the Proprietors of Strata Plan 10294 (the Applicants in the present matter). The Applicants are the proprietors of two lots in the property, the Second Defendants being the proprietor of the third lot.

10. At the hearing the Defendants in the present proceedings tendered a valuation signed by Mr Harrigan of Higgins Valuers Pty Limited and called oral evidence in respect of it by Mr Higgins. That valuation assigned the following values and proposed the following unit entitlements in respect of the lots:

Unit	Value	Old Unit Entitlement	Proposed Unit Entitlement
Unit 1 Lot 1 SP 10294	$120,000	1	17
Unit 2 Lot 2 SP 10294	$180,000	1	25
Unit 3 Lot 4 SP 20536	$420,000	1	58
		TOTAL	100

11. The Plaintiffs in this matter tendered a competing valuation report of Gray Mulroney and called oral evidence from Mr A Gray who assigned the following differing values and unit entitlements:

Unit	Value	Old Unit Entitlement	Proposed Unit Entitlement
Unit 1 Lot 1 SP 10294	$185,000	1	224
Unit 2 Lot 2 SP 10294	$275,000	1	333
Unit 3 Lot 4 SP 20536	$365,000	1	443
		TOTAL	1000

12. On 23 May 1998 the Board published reasons and a number of determinations (the ``Provisional View''). In that Provisional View of 23 May 1998, the Board referred to the lack of guidance provided by the Act and the Regulations as to the method of determining unit entitlements. Then it was said that (Provisional View, 23 May 1998, p. 1):

> ``the Board may decline to make a reallocation order if it finds itself with insufficient evidence of respective values to do so, even if it has sufficient evidence to enable it to conclude that the existing ratios of entitlements are unreasonable having regard to respective values."

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13. On 29 July 1998 the Board made an Order, formalised on 3 August 1998 that:

> ``Accordingly, pursuant to section 119(1) being of the view that the allocation of unit entitlements among the lots the subject of SP10294 and SP20536 was at 16 December 1983 unreasonably made, having regard to the respective values of the lots at that time, I now make an order allocating unit entitlements among the lots as follows:
>
> Lot 1 21
> Lot 2 28
> Lot 4 51"

The Board's Grounds of Determination

14. Section 119(2) of the Act states:

> ``119(2) An order may be made only if the Board considers, after **having regard to the respective values of the lots** and (if a strata development contract is in force in relation to the strata scheme) to such other matters as the Board considers relevant, that the allocation of a unit entitlements among the lots:
>
> (a) was unreasonable when the strata plan was registered or when a strata plan of subdivision was registered;..."

15. The Board in its Provisional View of 23 May 1998 said, as to s 119:

> ``• Its focus is on the respective values of the lots in the plan under consideration: that is their value **relative to each other**
>
> • Although **value** must mean `market value', sale price of units in the subject parcel or of comparable lots in other strata plans would not ordinarily alone determine market value, since sale price differentials may reflect, inter alia, internal refurbishment in one lot and not another.
>
> • Comparative **areas**, although also not necessarily exclusively determinative of relative market values, must, since the exercise is to determine the relative value of lots in the one parcel, play a significant role in the valuation exercise.
>
> • Although a valuation certificate must accompany the s 119 application (s 119(2)) the Board is clearly not bound by the valuation of unit entitlements expressed in any such certificate."

Provisional View 23 May 1998, p. 2

16. In reaching its Provisional View of 23 May 1998, the Board determined that the focus of s 119 of the Act was on the respective values of the lots in that plan under consideration. The Board determined that the term ``respective values'' meant the values of the lots ``relative to each other''.

17. The Board further determined that although the term ``value'' in s 119 must mean ``market value'', the sales price of units in the subject parcel or of comparable lots in other strata plans would not ordinarily alone determine market value, since sale price differentials may reflect, *inter alia*, internal refurbishment in one lot and not another. The Board determined therefore that comparative areas must ``play a significant role in the valuation exercise''. The board did acknowledge that comparative areas are not necessarily determinative

of relative market values. However, since the Board had already determined that the exercise was ``to determine the relative value of lots in the one parcel'', the use of lot area was deemed to be appropriate.

18. The Board further determined that although s 119(2) required that the valuation certificate must accompany a s 119(1) application, the Board was not bound by the valuation of unit entitlements expressed in any such certificate.

19. With respect to the valuations, the Board found that the method of neither valuer satisfactorily performed the exercise or achieved the result called for by s 119. Instead the Board made a calculation on the basis of floor area using the total areas of the various lots (see Provisional View, 23 May 1998, p. 5). The resulting unit entitlements (namely Lot 1: 22; Lot 2: 27; Lot 3: 51) were then averaged as against the mean unit entitlements of the valuers. The conclusion reached on 23 May 1998, then, was as follows:

> ``In my view, there is sufficient evidence before me... for me to take the view that the following would be an appropriate reallocation of unit entitlements as at 16 December 1983:
>
> Lot 1 21
> Lot 2 28
> Lot 3 51
>
> ...
>
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> [140130]
>
> This represents my provisional view of the state of the evidence before me and the conclusions I would draw from it, provided for the assistance of the parties. Unless I receive further submissions in writing from the parties within 28 days, I shall make orders specifying a reallocation in terms of the provisional conclusion on that date.''

20. After the Board had made these determinations, both parties made further written submissions in respect of those matters. However, on 29 July 1998 the Board stated that it had not invited submissions as to the correctness of its earlier determinations and that they had been final judicial determinations in respect of which the Board considered itself *functus*. It must have been difficult for the parties to understand how, invited by the Clerk of the Board on 26 May 1998 to make submissions, their submissions were then disregarded as trenching upon ``final judicial determinations'' when these were included in a document entitled ``Provisional View''. I return to the implications of that at paras 159 and following.

21. It was asserted by the Plaintiffs that the Board had made errors in law in its interpretation of s 119(2).

Legal issues under consideration

22. The applicant in the present proceedings seeks a declaration that the determination of the Board was erroneous in law upon a number of grounds as contained in the Stated Case. These grounds form the principal questions to be answered in the present proceedings. It was submitted on behalf of the respondent that the Stated Case before the court contained no discernible error of law on the part of the Board.

23. While the original Stated Case was amended by consent to ask the Court to determine whether the determination of the Board was erroneous in point of law (T, 1), it remains to be answered whether such an error was made.

24. Before the specific questions relating to the determinations of the Board are dealt with, there are a number of threshold issues that must be addressed. First, it was submitted by the Defendants that the Stated Case and the contentions of the Plaintiffs required this Court to make determinations of fact and that, accordingly it is not appropriate for this Court to engage in such determinations. Second it was argued that this Court could not consider additional evidence for the purpose of determining whether the Board had come to a determination where there was no evidence suggesting that it could or should reach such a conclusion.

25. After those threshold questions are addressed, I will deal with each of the Plaintiffs' contentions in turn as contained in the Stated Case.

Questions of law and questions of fact

26. It was submitted by the Defendants that the contentions of the Plaintiffs suffered from the flaw identified by the High Court in *R v Rigby* (1956) 100 CLR 146 at 149:

> ``The so-called case stated also comprises a statement of some contentions made on each side, which, subject to an exception to be mentioned, concern matters, which in our opinion are simply questions of fact... The case stated goes on to state certain conclusions reached by that court extracted from the judgment which really turn on matters of evidence and afford no basis for any matter of law."

27. The Defendants assert that the matters brought to this Court by the Plaintiffs are merely matters of fact and degree of weight and outside the competence of this Court: see s 130 of the Act, *R v Rigby* (supra) at 150-1. Section 106 of the *Justices Act* 1902 (NSW) (now replaced by an appeal procedure), being the governing section applicable to these proceedings allows this Court to ``hear and determine the question or questions of law arising" on the stated case.

28. The Defendants contend that paras 4.1 to 4.5 of the Stated Case in general amount to an attempt by the Plaintiffs to argue that the Board misconstrued the evidence and should have otherwise construed it. The Defendants assert that the Plaintiffs seek to say that the approach of the Board was wrong on the evidence rather than pointing to an error of law. The jurisdiction of this Court to deal with each of these contentions is dealt with separately below.

29. Furthermore, the Defendants submit that even the wrongful admission or rejection evidence is not a ``determining fact" for purposes of a case stated unless the effect of reception or rejection of the evidence (as the case may be), would have been that the decision

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would have gone the other way. They rely on *Humphryis* v *Spence* [1920] VLR 407 at 410.

30. *Humphryis v Spence* (supra) was an appeal from the Court of Petty Sessions to the Supreme Court of Victoria on conviction under the *Police Offences Act* 1915 (Vic). It appears that the passage relied upon by the Defendants in the present case is the following:

> ``... the wrongful admission or rejection of evidence may not be a `determining fact' under section 147 of the *Justices Act* 1915 [Vic.] unless the Court of General Sessions can say that if the evidence had not been received or rejected, as the case may be, the decision would have been the other way."
>
> (at p. 410)

31. The relevance of the Defendants' authority in the present case is questionable. In particular s 147 of the *Justices Act* 1915 (Vic) is not comparable to s 106 of the NSW legislation, as the former requires that the lower court ``states the facts specially for the determination of the Supreme Court thereon". Nevertheless, while it is not the task of this court to reconsider the factual questions before the board, there are some questions of law (such as whether a conclusion of fact was made in the absence of evidence that could have supported that conclusion) that involve this court looking at the factual material before the Board.

32. Whether each contention, taken on its own, constitutes a question of fact or a question of law is dealt with below.

Admissibility of evidence on an appeal by Stated Case

33. A considerable amount of time was spent before me in argument over the admissibility of a bundle of exhibits to the affidavit of FL Andreone of 19 January 2000, sought to be tendered by the Plaintiffs. The exhibits included the transcript of proceedings before the Board, the valuation evidence before the Board, the submissions of the parties to the Board and their further submissions. Exhibits FLA 1-16 constituted the factual evidence before the Board. The balance of the exhibits constituted submissions and were admitted without objection.

34. On the second day of the hearing I ruled that:

``FLA 1-16 are admitted only in relation to paragraphs 1(a), 1(b), and 2(a) of the Plaintiffs' facsimile of 9 February 2000.''

35. The relevant paragraphs of the Plaintiffs' facsimile read as follows:

``1. In respect of grounds of determinations 3.4, 3.11, 3.13, 3.16 and 3.19 and to the Board's adoption of the gross floor areas (inclusive of storage and balconies) of the three lots as a basis for determining the value of the lots and appropriate unit entitlements:

(a) there was no evidence before the Board that it was appropriate to value the lots on the basis of their gross floor area inclusive of storage and balcony areas;
(b) there was no evidence that balcony or storage areas within the lots had the same value per sq m as internal habitable rooms.

2. In respect of ground of determination 3.3:

(a) there was no evidence expert or otherwise before the Board that sales prices of units in the subject parcel or of comparable lots in other strata planes were unreliable because sale price differentials might reflect internal refurbishment in one lot and not another.''

36. By so admitting the evidence for that limited purpose only and in support of those propositions of ``no evidence'', I am satisfied for the reasons below that I would be dealing with a question of law, namely that the Board had no evidence before it to make the relevant finding of fact. A ``no evidence'' contention, where not merely colourable, is a question of law; see *The Australian Gas Light Co* v *The Valuer General* (1940) 40 SR (NSW) 126 and also *Comcare Australia* v *Lees* (1997) 151 ALR 647 (Federal Court of Australia, Finkelstein J).

37. By ``not colourable'' is meant that evidence in support of a ``no evidence'' argument should only be allowed to be adduced in cases such as this where the ``no evidence'' point is not merely colourable but where it enjoys a real possibility of success. In *Lombardo* v *FC of T* 79 ATC 4542 at 4545-4546; (1979) 28 ALR 574 at 578, Bowen CJ concludes:

``A question of law is involved in a decision where there was no evidence upon which the Board could have reached its decisions, the implication being that the Board must have misdirected itself as to the correct legal interpretation of the statute or made perverse

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finding. A submission of `no evidence', however, involves the difficulty that unless some restrictions are applied, an appeal is open to any aggrieved appellant who chooses to make such a submission...

Without attempting an exhaustive summary, it may be said that a `question of law' will be involved in a decision in the following circumstances:

1. If it was expressly raised and the Board made a ruling on it as a relevant factor in its decision;
2. If it is obvious from the decision or transcript of the case that the Board in arriving at its decision has misunderstood the law in some relevant particular;
3. Technical words had necessarily to be construed before the statute could be applied;
4. Where a particular set of facts had of necessity to be within or without the statute;
5. Where, in a submission of `no evidence' there is a real possibility of success.''

38. The Plaintiffs' case before this Court was that the Board had erred in law on several occasions by reaching a determination where there was no evidence upon which the Board could have reached that conclusion.

39. The Plaintiffs also requested to have the evidence allowed for the purpose of proving that there was positive expert evidence before the Board that it was not appropriate to value the lots on the basis of their area and that there was expert evidence before the Board that storage and balconies were not of equivalent value to habitable room space. In support of that argument, in a further written submission of 16 February 2000, the Plaintiffs cited *Misfud* v *Campbell* (1991) 21 NSWLR 725 at 728 per Samuels JA. The further

written submissions were made pursuant to an invitation said to be implicit in my words at T, 55.33-36 and I have taken those into account. In the case referred to, Samuels JA referred to a failure to refer to evidence critical to an issue in a case as something that worked a miscarriage of justice and an error of law.

40. It was submitted by the Plaintiffs that not only was there no evidence of the critical findings 1(a), (b), and 2(a) in the facsimile as quoted above, such findings being necessary to render supportable the Board's ultimate findings as a piece of reasoning, but critical evidence to the opposite of those findings was not referred to.

41. That being said, the case of *Misfud v Campbell* (supra) does not stand for any universal proposition that this Court can or should rule on whether, given the factual evidence before the Board below, that Board should have reached the opposite conclusion. All that the case stands for is this. Where the Board has ignored evidence before it in the assertions of fact of one party, where it is so critical that to ignore it would work a miscarriage of justice, will have erred in law. Having already succeeded in adducing the evidence above in support of its ``no evidence'' argument, the Plaintiffs suffer a miscarriage of justice from the Board's failure to give any weight to the ``positive expert evidence''. The evidence contained in FLA 1-16 is, therefore, admitted and will be referred to for the purposes of adjudicating the ``no evidence'' points raised by the Plaintiffs.

The Plaintiffs' contentions by reference to para 4 of Stated Case

42. Having dealt with the preliminary questions, I will now deal with each of the Plaintiffs' contentions in turn; the reference to 4.1 and following corresponds to the paragraphs of the Stated Case.

4.1 Does ``respective'' mean ``relative''?

43. It was contended on the part of the Plaintiffs that the Board had erred in law by determining that ``respective values'' of the lots meant their value ``relative to each other''. Paragraph 4.1 of the Stated Case says:

> ``The Appellants contend that my determination was erroneous in law upon the following grounds:
>
> > 4.1 In respect of grounds for determination 3.1, 3.2, 3.7, 3.9, 3.10 and 3.11. I erred in law in interpreting `respective' in section 119(2) of the *Strata Titles Act* as equating to `relative' in meaning so as to focus initial enquiry on the values of the three lots relative to each other.''

44. The process contemplated by s 119(2) of the Act, it is submitted by the Plaintiffs, is that the Board must determine the value of each of the lots individually before using those valuations to calculate unit entitlements. The

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Defendants have raised several arguments to dispute the Plaintiffs' assertion that the Board erred in law by misinterpreting the term ``respective''.

The meaning of a word in a legislative provision

45. The Defendants first put that the question of the meaning of the word ``respective'' was a question of fact and therefore outside the concern of this court. In support of that assertion, the Defendants cited Davidson J in *The Australian Gas Light Co v The Valuer General* (supra) at 137:

> ``In cases in which an appellate tribunal has jurisdiction to determine only questions of law, the following rules appear to be established by the authorities:
>
> > (1) **The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law**: *Girls' Public Day School Trust* v *Ereaut* [1931] AC 12 at 25, 28; *Life Insurance Co. of Australia Limited* v *Phillips* 36 CLR 60 at 78; *McQuaker* v *Goddard* [1940] 1 All ER 471. This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence: *Camden* v *Inland Revenue Commissioners* [1914] 1 KB 641; *In re*

Ripon (Highfield) Housing Confirmation Order, 1938. *White and Collins* v *Minister of Health* [1939] 2 KB 838 at 852; although evidence is receivable as to the meaning of technical terms: *Caledonian Railway* v *Glenboig Union Fireclay Co. (6)*; *Attorney- General for the Isle of Man* v *Moore* [1938] 2 All ER 263 at 267; and the meaning of a technical legal term is a question of law: *Commissioners for Special Purposes of Income Tax* v *Pemsel* [1891] AC 531 at 580.

(2) The question whether a particular set of facts comes within the description of such a word or phrase is one of fact: *Girls' Public Day School Trust v Ereaut* [op cit.]; *Attorney-General for the Isle of Man v Moore* [op cit.].

(3) A finding of fact by a tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its finding, and there is evidence capable of supporting its inferences: *Farmer* v *Cotton's Trustees* [1915] AC 922 at 931; *Currie* v *Inland Revenue Commissioners* [1921] 2 KB 332 at 338-341; *Inland Revenue Commissioners* v *Lysaght* [1928] AC 234 at 246-7, 249-251.

(4) Such a finding can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences: *In Re Ripon (Highfield) Housing Confirmation Order*, 1938. *White & Collins* v *Minister of Health* [1939] 2 KB 838, or (c) if it has misdirected itself in law: *Farmer* v *Cotton's Trustees* [1915] AC 922 at 930-1; *Colonial Mutual Life Assurance*."

46. At 146, Davidson J concludes, after reviewing the various authorities on the matter:

> ``On these decisions I would with great diffidence conclude: (1) that the construction of a statute or any other instrument is always a question of law; (2) That the first question for decision as a matter of construction is whether words in the instrument were intended to be used in their strictly legal sense or with their ordinary meaning; (3) If it is determined as a matter of law that the strictly legal sense or the ordinary sense as the case may be was intended that sense must be applied by the Judge or Court; (4) If it be determined that the legal or ordinary sense may not have been intended there is then a further question of law to be decided, namely whether there are particular circumstances requiring a determination of fact, firstly as to the nature of such circumstances and secondly as to the meaning which would be applied to particular words or phrases in the vernacular of people concerned in the occupation, trade, calling or circumstances dealt with by the statute; (5) With the aid of findings on those points the statute must be construed as a question of law."

47. There are no ``particular circumstances'' in the present case requiring this court to determine a question of fact before attributing to the word ``respective'' a precise meaning. The Defendants, however, also cited in support of its contention that the statutory interpretation

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of the meaning of the word ``relative'' is a question of fact, relying upon *Lombardo v Federal Commissioner of Taxation* (supra). At 578, Bowen CJ approves of the words of Jordan CJ in *Australian Gas Light* at 126 of that judgment. Bowen CJ adds:

> ``In the above situations where an application of the statute is clearly a question of fact, a question of law will only arise if there was no evidence to support the conclusion of fact or it is obvious from the transcript of the case that the Board has misunderstood the law in some relevant particular: *Edwards (Insp of Taxes)* v *Abairstow* [1956] AC 14 at 33 per Lord Radcliffe.
>
> On the other hand a question of law will be involved where technical legal words must be construed before the statute can be applied to the found facts. Also, as stated previously, where the facts must fall clearly within or without the statute.''

48. It is clear that the construction of a statute is a question of law. Furthermore, the meaning of ``respective'' only arises in interpreting the statute in which the word appears.

49. Words in a statute, when their meaning is clear and admits no ambiguity, must be given their plain and natural meaning (see Gifford on ``Statutory Interpretation'' at pp 3-10). In *Hope* v *Bathurst City Council* 80

ATC 4386 at 4389; (1980) 144 CLR 1 at 7-8, Mason J quotes Kitto J in *New South Wales Associated Blue Metal Quarries Limited* v *Federal Commissioner of Taxation* (1956) 94 CLR 509 at 511:

> ``The judgment of Kitto J in *N.S.W. Associated Blue-Metal Quarries Limited. v Federal Commissioner of Taxation* is illuminating. Kitto J observed that the question whether certain operations answered the description `mining operations upon a mining property' within the meaning of s 122 of the *Income Tax Assessment Act* 1936 as amended, was a mixed question of law and fact. He went on to explain why this was so: `First it is necessary to decide as a matter of law whether the Act uses the expressions ``mining operations'' and ``mining property'' in any other sense than that which they have in ordinary speech'".

50. Therefore, whether the word ``respective'' is to have a meaning other than its meaning in ordinary speech is in any event a question of law and one which this Court is competent to determine on an appeal from the Board. I do not consider that the meaning of the word ``respective'' in its statutory context gives rise to any real ambiguity. It is my determination, itself a matter of law, that the Act uses the expression ``respective'' (to quote Kitto J) in the ``sense... which [it has] in ordinary speech'', viz.:

> ``pertaining individually or severally to each of a number of persons, things, etc.; particular'': *Macquarie Dictionary*

The meaning of ``respective'': Did the Board err in law?

51. That this be the natural and plain meaning of the word ``respective'' applicable in the present context is supported by the words of section 119(4) which reads:

> ``(4) An application for an order must be accompanied by a certificate specifying the valuation, at the relevant time of registration (or immediately after the change in the permitted land use of **each of the lots** to which the application relates''
>
> [my emphasis]

52. It is clear in this case that the Board did not interpret the words ``after having regard to the respective values of the lots'' in their ordinary and grammatical sense of ``after having regard to the particular or individual values of the lots'' or ``after having regard to the values of each of the lots severally''.

53. The Defendants argue, however, that the Board's finding that the word ``respective'' meant ``relative'' was a determination not ``in globo'', but rather ``respective'' had that meaning in the circumstances of the present case. In support of this assertion, the Defendants quote the Stated Case at paragraph 3.2: ``It determined that its focus was on the respective values of the lots **in that plan under consideration** that is, their values **relative to each other**'' [emphasis is the Defendants'].

54. The Defendants argue that the Board's determination of the meaning of the word ``respective'' was based on a number of contended factual determinations by the Board, especially, it seems, the Board's rejection of the valuation evidence before it. But that is to put the cart before the horse; the starting point is to determine what s 119 requires.

55. I am satisfied that to interpret the ``word'' respective in a manner other than its

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ordinary meaning in the present context is to misinterpret the statutory task of the Board as set by s 119, and is thus an error of law.

56. I will deal later with the Defendants' argument that it is an erroneous argument on the part of the Plaintiffs to say that the comparable sales approach is the exclusive test to be employed by the Board in determining unit entitlements.

Would the Board have reached the same conclusion?

57. Then the Defendants suggest that, even if the Plaintiffs' contended meaning of ``respective'' were adopted, the Board would have come to the same conclusion as it did in its Provisional View of 29 May 1998. Given that the Board had rejected the comparative sales approach of the valuer for the Plaintiffs, it is

asserted that the Board would have taken into account the same factors (such as area, access, aspect, light and air) and would have reached the same conclusion.

58. I do not need at this point to decide here whether, but for that one error, the Board would have come to a different conclusion. Such an inquiry need only be made when considering whether the matter should be returned to the Board after all of the Plaintiffs' other contentions have been dealt with.

The ``initial enquiry'' argument

59. The contention in paragraph 4.1 of the stated case identifies the error of law of the Board as ``interpreting respective... as equating to `relative' in meaning so as to focus initial enquiry on the comparative areas of the lots.'' The Defendants argue that the use of the words ``initial enquiry'' betrays the nature of the contention as one going to the merits of the Board's decision and reasoning process and thus outside this Court's jurisdiction. However, given the circumstances of the case, it is clear that the word ``initial enquiry'' refer to the fact that the Board only initially considered the value of the lots. Subsequently, the board considered a host of other factors, such as living area. The words ``initial enquiry'' do not, therefore, have any bearing on the matter of the Board's interpretation of its task under s 119.

4.2 Did the Board place ``extraordinary and excessive importance on the comparative areas of the lots''?

60. The Plaintiffs argue that the Board's alleged erroneous interpretation of the word ``respective'' in s 119(2) led the board to make further errors of law. The first of these is said to be that the Board placed extraordinary and excessive importance on the comparative areas of the lots.

61. The Stated Case reads:

> ``The Appellants contend that my determination was erroneous in law upon the following grounds:
>
> > 4.2 In respect of grounds of determination 3.4, 3.11, 3.13 and 3.19, and as a consequence of the error of law in 3.1 and 3.2 (identified in 4.1 above), I erred in law in placing extraordinary and excessive importance on the comparative areas of the lots when:
> >
> > > (a) neither valuer gave evidence that the values of lots moved in direct relationship to or were to be determined on the basis of their physical areas;
> > > (b) That is was common ground on the evidence of the valuers that storage space and open balcony space were not as valuable per sq.m as habitable living area;
> > > (c) That in assessing the gross floor areas in 3.13 I overlooked the unchallenged evidence that:
> > >
> > > > (i) Lot 1's area, which I described as storage, was a mixture of a laundry and storage;
> > > > (ii) Lot 2's area included an open balcony;
> > > > (iii) Lot 4's area adopted by me as the area excluding storage included open balcony areas, part- height under roof storage cupboards, two internal staircases and a bedroom having its only access to bathroom/ toilet by going outside the unit.''

62. The Plaintiffs assert that the Board did not properly have regard to the value of the lots. This asserted error of law had two parts. Firstly, it is argued that there was no evidence before the board that values moved in tandem with the gross areas of the lots or that valuation could be calculated from a comparison of gross area. Secondly, it is asserted that there was no evidence that storage and balcony areas were of like value to inhabitable rooms. Thirdly it is asserted that the Board overlooked crucial

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evidence of various sorts; here the issue of jurisdiction again arises.

Question of fact or law?

63. The Defendants, in reply argue, first, that there is no area of law complained of in paragraph 4.2 of the Stated Case.

64. The contention in paragraph 4.2 of the Stated Case refers to ``extraordinary and excessive importance''. The Defendants submits that the complaint, therefore goes to a finding of fact rather than raising a point of law. The determinations complained of by the Plaintiffs are as follows:

> ``3.4 I further determined that comparative areas, although not necessarily exclusively determinative of relative market values, must, since the exercise is to determine the relative value of lots in the one parcel, play a significant role in the valuation exercise.
>
> ...
>
> 3.11 I found that first and foremost one would expect to pay a price for each commensurate with the livable are[a], actual and perhaps potential, relative to the other two.''

65. The other two determinations complained of were the Board's calculation of unit entitlements based on floor areas. The Board's final conclusions are quoted above in the factual background.

66. The Plaintiffs' contention is essentially that there was no evidence upon which the Board could make the determinations complained of. Here then, we are dealing with the question of ``whether there is any evidence of a particular fact'', being a question of law: see earlier and *McPhee* v *S Bennet Limited* (1935) 52 WN (NSW) 8 at 9. That here this court is asked to make a determination of law is made clear by applying the principles expounded by Glass JA in *Azzopardi* v *Tasman UEB Industries Limited* (1985) 4 NSWLR 139 at 155-6:

> ``... To say of a finding that it is perverse, that it is contrary to the overwhelming weight of the evidence, that it is against the evidence and the weight of the evidence, that it ignores the probative force of the evidence which is all one way or that no reasonable person could have made it, is to say the same thing in different ways. Upon proof that the finding of a jury is vitiated in this way, it will be set aside because it is wrong in fact. Since the Act does not allow this Court to correct errors of fact, any argument that the finding of a Worker's Compensation Commission judge is vitiated in the same way discloses no error of law and will not constitute a valid ground of appeal. It is also pointless to submit that the reasoning by which the court arrived at a finding of fact was demonstrably unsound as this would not amount to an error of law: *R* v *District Court of the Metropolitan District Holden at Sydney*; *ex parte White* (1966) 116 CLR 644 at 654.
>
> A finding of fact in the Commission may nevertheless reveal an error of law where it appears at that the trial judge has misdirected himself ie has defined otherwise than in accordance with law the question of fact which he has to answer. A possibility of this kind exists with ultimate findings of fact but not with respect to primary findings of fact such as whether the applicant suffered injury on a particular date. Further an ultimate finding of fact, even in the absence of a misdirection, may reveal error of law if the primary facts found are necessarily within or outside a statutory description and a contrary decision has been made, *Hope* v *Bathurst City Council* 80 ATC 4386 at 4390; (1980) 144 CLR 1 at 10; *Australian Gas Light Co* v *Valuer-General* (1940) 40 SR (NSW) 126 at 138; 57 WN 53 at 55...''

67. While *Azzopardi's* case involved a different legislative regime to the present case, the principles can be applied in the present circumstances since, as in *Azzopardi's* case, this court is, by legislative fiat, only permitted to review the decision of the Board on questions of law: s 130 *Strata Titles Act*, s 106 *Justices Act* 1902. Where the contention of the Plaintiffs is that the Board made a determination where there was no evidence to support the finding, that contention is a question of law. This is in line with the Court of Appeal in *Allen* v *Kerr* (1995) Aust Torts Reports ¶81-354:

> ``It was not open to [the Plaintiffs] to argue that the ultimate factual conclusions were wrong. He could do that only if an appeal lay on questions of fact, and it is clear that it did not. He was limited to errors of law, if any, which underlay the factual finding. Such errors may occur where, for instance, there is no evidence to support a finding,

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where a tribunal has misdirected itself on the legal principles applicable or where the primary facts found are necessarily within or outside a statutory description and a contrary finding has been made''

per Clarke JA at p. 1

68. However, the question merely of the weight to be given to evidence of a correlation between area and value could not, if such evidence exists, be the subject of review in this case since it would be a question of fact: see *Azzopardi's* case, and also *Kahler and Anor* v *Sabaco Pty Limited*, (NSWSC, Master Malpass, 6 February 1997, unreported). To the extent that the Plaintiffs' contention goes to anything more than a lack of evidence of facts decided by the board, this Court cannot enter into the argument. Therefore, that it was ``common ground on the evidence of the valuer that storage space and open balcony space were not as valuable per sq. m as habitable living area'' and that the Board may have made an error in calculating the gross floor areas of the lots, cannot be the subject of inquiry by this Court. The only error of law asserted in contention 4.2 is that the Board concluded as it did in the absence of any evidence that values of lots moved in direct relationship to or were to be determined on the basis of their physical areas.

Disregarding paragraphs 4.2(a), (b) & (c)

69. The Defendants submit that with respect to sub-paragraphs (a) to (c) of paragraph 4.2 of the Stated Case, they are not ``facts'' binding on the Court. Furthermore it is asserted that the material is contentious and argumentative and should not find any place in a Stated Case (the Defendants here referred to *Marshall* v *Whittaker's Building Supply Co* (1963) 109 CLR 210 at 216-217). While paragraphs (b) and (c) are matters of fact and involve this Court making findings of fact (which is not the task of this court), paragraph (a) is of a different ``no evidence'' type.

70. The Defendants did not take the Court to any evidence that could have supported the determinations referred to in contention 4.2. It is clear that there was no evidence before the Board, including from the various experts, that could have supported the Boards determinations. The Plaintiffs' contention is, therefore, made out in respect of the weight accorded to floor area where there was no evidence to support such an approach. The Board took into account extraneous factors.

71. The Defendants says that the valuer must have regard to all material relevant to value and to check the valuation by as many methods as may be available (including but not limited to a hypothetical sale). They cite in support the case of *Minister of State for the Navy* v *Rae* (1945) 70 CLR 339 at 344.

72. That case involved the acquisition of a ship by the Commonwealth; the dispute arising over the compensation paid by the Commonwealth to the owner of the vessel. The valuation in dispute, then, was the valuation carried out by the board in that case of the ship. The court confirms that the market value of the ship was the most appropriate test. Other factors are to be considered if there is no market for the chattel. The paragraph on which the Defendants, no doubt, relies, is readily distinguishable as being specific to the circumstances of that case. That paragraph reads:

> ``In reaching a conclusion as to compensation for the taking of a piece of property such as that now in question, it is necessary, or at all events wise, to pursue as many means of estimation as are open, to compare them, and then, as an exercise of judgment, to fix what, upon considerations this process suggests, appears to be a fair compensation.'': per Dixon J at 344

73. It is the next paragraph that contains the general principle, namely, that ``if there is a market for a ship that is the most satisfactory test of its value... But where there is no market, you must ask what is its value as a going concern to its owners at the time of acquisition.'': per Dixon J at 344. The case of *Minister of State for the Navy v Rae* (supra) does not assist the Defendants in the present case. The applicable principle is not that the ``valuer must have regard to all material relevant to value and to check the valuation by as many methods as may be available''. Rather, the principle for valuation is that based either on the ``hypothetical prudent purchaser'' as formulated by Isaacs J or on ``the willing but not anxious vendor and purchaser'', as enunciated by Griffiths CJ, in each case as laid down in *Spencer* v *The Commonwealth* (1907) 5 CLR 418. In *Boland* v *Yates Property Corporation Pty Limited* (1999) 167 ALR 575 Gleeson CJ (at para 79) adopts the willing but not anxious purchaser test as enunciated by Griffiths CJ. He rejects as a gloss on that test,

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the so-called ``head start'' theory of special value, so carrying a warning against other unwarranted glosses not compatible with fundamentals of the *Spencer* test. I return later to the principles of valuation; see paras 107 and following.

74. The Defendants' argument that the valuer must have regard to all material relevant to value does not meet the contention of the Plaintiffs that the Board paid excessive regard to floor area; they correctly in my view contend that there was no evidence in support of the Board's determinations in that regard. Even if the Board is able to look to indicators other than comparable sales, the Board may not choose to consult those alternative indicators of value without any evidentiary basis that suggests that such an approach is a valid method of determining (or at least estimating) the value of the relevant land.

75. While the Defendants also argue that the Board did not decide *purely* on the basis of area, that does not seem to me to be any answer. The Plaintiffs' assertion is rather as to excessive and improper weight being given to one factor, being floor area, does not depend on that being the only factor taken into account by the Board. The Plaintiffs' argument as to whether the Board needed, according to the terms of the Act, to ascertain a value for each of the units is a different argument and is dealt with below.

76. Furthermore, it is true that the final conclusions of the Board as to the proper unit entitlements did differ marginally from the entitlements calculated solely on the basis of area. While put forward by the Defendants as an answer to the Plaintiffs' contention in paragraph 4.2 of the Stated Case, given my conclusion above (namely that the Board did take into account area as a determinant of value without evidence suggesting that it was a valid approach), the fact that the final unit entitlements reached by the Board differ from those based solely on floor area is irrelevant. The issue is not whether living areas formed the sole determinant of the final unit entitlements. Rather the issue is whether, given that the board had no evidence on which to base its course of action, the weight given to floor area in the determination of the respective values of the lots was excessive. I have already answered that question in the affirmative.

4.3 Rejection of the comparative sales approach

77. Paragraph 4.3 of the stated case reads:

> ``In respect of grounds 3.1, 3.2, 3.3, 3.7 and 3.10:
>
> > (a) I erred in law in not interpreting Section 119 Strata Titles Act as requiring the Board to firstly determine and have regard to the value of each lot;
> > (b) I further erred in law in dismissing the comparable sales approach to valuing each of [the] lots, particularly having regard to the approach of both valuers as per 2.9 above;
> > (c) I further erred in law in dismissing the said comparable sales method on the particular ground set out in 3.3 when neither valuer dismissed the comparable sales method on that ground and there was no evidence of such suggested internal refurbishment.''

78. The grounds referred to in the contention state:

> ``3.1 In considering the question of a re- allocation of unit entitlements as envisaged by Section 119, I turn to the Act and Regulations to see what the legislation said with regard to how unit entitlements were to be determined in the first instance. Having regard to the importance of the unit entitlements ascribed to any lot vis a vis any other lot in establishing the lot proprietors' share of expenses, obligations, surpluses, resumption or insurance payouts, water and council rates, as well as voting power on a poll, I was surprised to find the Act and Regulations to be almost silent on the subject. I considered Section 8 (Registration of Plans) and regulation 17 (Schedule of Unite [*sic*] Entitlements), Section 10 and Section 11, and found that only in Section 119, when a re-allocation of entitlements is being sought, does the question of how unit entitlements were initially made on registration of a plan or subdivision plan arise, in the requirement in the Board to determine whether or not they were unreasonably made having regard to the respective values of the lots at the time.
>
> 3.2 In considering section 119 in my Reasons of 23 May 1998 I determined that its focus was on the respective values of the lots in that plan under consideration that is, their values **relative to each other**.

3.3 I further determined that although value in section 119 must mean `market value', sales price of units in the subject parcel or of comparable lots in other strata plans would not ordinarily alone determine market value, since sale price differentials may reflect, inter alia, internal refurbishment in one lot and not another.

3.7 Because of my findings in 3.1 and 3.2 I found that the method of neither valuer completely satisfactorily performed the exercise, or achieved the result, called for by Section 119.

3.10 I found that Mr Gray's empirical enquiry of comparison of each lot separately with `comparable' units in other waterfront buildings led to conclusions that failed to reanchor the enquiry as a question for the comparative values of each of the subjective lots relative to each other."

[emphasis supplied]

79. I will deal with each subparagraph in relation to para 4.3 in turn.

4.3(a) Does Section 119 require the Board to firstly determine and have regard to the value of each lot?

80. The Board did not, in its provisional view of 23 May 1998 nor in its final orders of 29 July 1998 make any findings about ``the respective values of the lots''. The Plaintiffs assert that it is a condition imposed by subsections 2 and 4 of s 119 of the *Strata Titles Act* that a valuation must be decided upon before any finding can be made that the existing unit entitlements were unreasonable.

81. The words of s 119(2) allow the Board to make an order under subsection 1 ``**only** if the Board considers, **after** having regard to the respective values of the lots'' that ``the allocation of unit entitlements among the lots'' was or became ``unreasonable'' as elaborated in sub-paras (a) and (b).

82. The use of the word ``after'' in s 119(2) clearly indicates that the Board is to ``have regard to'' the value of the lots **before** moving on to calculate revised unit entitlements. Exactly what that means in the present circumstances depends on the meaning of the phrase ``having regard to''.

The meaning of ``having regard to''

83. The Defendants argue that the phrase ``having regard to'' or variants thereof means, in respect of matters to which it refers, that those matters must be taken into account and given weight as fundamental elements in the relevant determination to be made, but not as an exclusive element. The primary authority cited by the Defendants was *R* v *Hunt*; *Ex parte Sean Investments Pty Limited (``Sean Investments'')* (1979) 180 CLR 322 at 329. The Plaintiffs, however, takes issue with the Defendants' application of that authority.

84. *Sean Investments* concerned s 40AA of the *National Health Act* 1953 (Cth) (as amended), which states at subsection 7:

``The Permanent Head shall, in determining the scale of fees in relation to a nursing home for the purposes of sub-paragraph (i) of paragraph (c) of the last preceding sub- section, have regard to costs necessarily incurred in providing nursing home care in the nursing home''

[my emphasis]

85. Of the words ``have regard to'', Mason J wrote, at 329:

``When sub-s. (7) directs the Permanent Head to `have regard to' the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination... However, the sub-section does not direct the Permanent Head to fix the scale of fees exclusively by reference to costs necessarily incurred and profit. The sub-section is so generally expressed that it is not possible to say that he is confined to these two considerations. The Permanent Head is entitled to have regard to other considerations which show or tend to show that a scale of fees arrived at by reference to costs necessarily incurred, with or without a profit factor, is excessive or unreasonable.''

86. Further, Murphy J writes:

``The requirement that the Permanent Head (and on review, the Minister) shall have regard to the costs necessarily incurred, tends in itself to show that his duty in respect of those costs is limited to having regard to them. He must take them into account and consider them and give due weight to them, but he has an ultimate discretion''

(at 334)

87. That case, then, stands for the proposition that the words ``have regard to the respective values of the lots'' require the Board to take those values into account as a fundamental

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element in the making of its decision. That requirement, however, cannot be so interpreted as to determine the outcome of the Board's decision. It remains within the Board's discretion, given its consideration of other relevant factors, to make or refuse an order under s 119(1).

88. The Defendants submit, then, that there is no statutory requirement that the Board determine the respective values of the lots as a precondition to the exercise of the Board's discretionary power. Rather, the Board is simply required to **have regard to** those values. One way for the Board to fulfil that requirement is by considering a certificate presented by a valuer. It is further submitted that the Board is not required to accept any valuers certificate.

89. There is no requirement in s 119(2) that the values of the lots determine the unit entitlement calculations of the Board. Furthermore, there is no requirement to adopt any particular valuer's report. Rather the Board is to have regard to the values of each of the lots. While that value may be obtained from a particular valuer's report, that is not to say that all valuers' reports must be accepted or that other evidence as to value cannot be accepted. In *Western Australian Trustees Limited* v *Poon* (1991) 6 WAR 72, the Court of Appeal of the Supreme Court of Western Australia considered a default provision of a lease providing for determination of ``current market rental value'' of premises. Clause 1.02 of the agreement in that case contained a definition of that term as meaning ``the best Annual Rent that can be reasonably obtained for the premises'' and sub- clause (d) continued: ``Having regard to current market values of comparable premises in the Perth Metropolitan area''. Malcolm CJ said at 80-81:

``The defined task of the valuer... was to determine the best annual rent that can be reasonably obtained for the premises on the assumptions set out in the definition, having regard to the current market rental values of comparable premises. The discretion so conferred cannot be regarded as unfettered, merely because the words `having regard to' do not mean `slavishly adhered to' and the decision whether or not particular premises are `comparable' involves a value judgment... The determination whether a given sale is comparable or particular premises are comparable involves the making of an expert judgment or the formation of a professional opinion in accordance with the accepted principles of valuation: See *Mason* v *Skilling* [1974] 1 WLR 1437; [1974] 3 All ER 977 and Halsbury's Laws of England (4th ed 1981); Vol 27, par 731, pp 585-586.

The valuer cannot disregard current market rental values of comparable premises. The weight given to other current market rental values will necessarily depend upon the degree of comparability. This is a matter for expert assessment and not for the exercise of an unfettered discretion. I am unable to accept that the valuer's discretion is `unfettered' in any relevant sense.''

90. Further at 82-83, Malcolm CJ said:

``It was also submitted on behalf of the respondent that the words `having regard to' in par (d) of the definition do not suggest that the valuer is bound to adhere to or comply with current market rental values of comparable premises. It was suggested that these words may mean no more than the valuer is not precluded form taking current market rental values of comparable premises into account, although he is not bound to take them into account... I am unable to accept this submission. In the *Police Complaints Board* case the Board was required to take the specified matter into account by reason of the words `shall have regard to'. The decisions in other cases are to the same effect. In the present context the best rental that can reasonably be obtained is to be determined on the basis of

the specified assumptions and by taking into account the current market rental values of comparable premises. The latter requirement simply expresses an accepted principle of valuation."

91. The reasoning and conclusions of Malcolm CJ mean that a decision of the Board which does not ascertain (nor even discuss) the market values of each of the lots so as to have regard to them does not *have regard* to those values and is erroneous in law. The error is that the statutory task set by s 119(2) has not been performed. Value must be taken into account by the Board.

92. The Board is not bound to apply the rules of evidence and may inform itself in such manner as it thinks fit (s 132(2) of the Act). The Defendants argue that s 132 supports the

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proposition that s 119 should not receive a construction that implies into the provision any requirement as to determinations of value, which are not strictly necessary for the ultimate task of establishing unit entitlements under s 119.

93. As demonstrated, the requirement that the board have regard to the value of the lots is not an implied requirement but one contained in the express terms of the statute. The words of s 132(2), then, cannot affect the construction of s 119(2) and the requirements therein.

94. In the circumstances of this case it is finally submitted by the Defendants that the Board was entitled to have such regard to the opinions of the valuers as it felt appropriate. It was entirely appropriate, then, on the submission of the Defendants that the Board used the valuers' opinions as it did, namely in part of the calculation of unit entitlements. It is submitted that the Board did consider the respective values assigned by the valuers and analysed their deficiencies. While the Board did then adjust the unit entitlements without making a finding as to respective monetary values in 1983, the board was not required to do so. In the absence of any one valuer's certificate being found satisfactory by the Board, the Board had to carry out its ultimate task of allocating the unit entitlements in the best way it could. In support of this proposition, the Defendants cited *Bingham* v *Cumberland County Council* (1954) 20 LGR (NSW) 1 at 18-19, saying the Board was ``doing the best it could on the materials before it''.

95. In reply, the Plaintiffs submit as follows:

> ``It simply is not a permissible reading of the PV to cobble together odd references to **features** of the property or lots contained within the paragraphs rejecting the two valuers and then airily to suggest this satisfied the statutory obligation to have regard to the market values of each of the lots.
>
> Nor is it helpful to talk of the board `doing the best it could'. This is to confuse the task that the Board had with those cases where valuers or specialist valuation tribunals or Courts are bound to arrive at a specific value for land resumed or injuriously affected under entirely different statutory regimes. In this sense the reference to *Bingham's* case is misleading. In this case the matter which the Board must first have regard to is specifically identified, and the Board is under no statutory compulsion to reorder unit entitlements."
>
> [Plaintiffs' submissions in reply]

96. As discussed above, *Bingham's* case does not assist the Defendants here. It does not have any bearing on the meaning of the phrase ``have regard to'' in s 119(2) of the Act. Rather, it can only be relevant to the test of valuation used to obtain a value to which the Board must then have regard.

97. Furthermore, the use of the competing valuation evidence in the final calculation of unit entitlements cannot, in the present case constitute ``having regard to'' the values of the lots. There was no justification given by the Board nor otherwise apparent for the averaging of the competing valuations to obtain a ``value'' to which the Board could have regard, more especially when the Board was not satisfied with either valuation. The mean of the valuers' opinions does not, without justification, result in a ``value''. Rather it merely results in a figure, the genesis of which is in some doubt, to which the Board then had regard.

98. Furthermore, even if there were evidence to support the proposition that the mean value actually constituted a valuation figure, this Court would not find that the degree of consideration of value met the standard of the test in *Western Australian Trustees Limited v Poon* (supra).

99. Finally, in respect of the phrase ``have regard to'' the Defendants submits that the *Spencer* test cannot compel a conclusion as to the proper construction of section 119. While the Defendants' submission is correct, that is, the *Spencer* test does not compel a conclusion as to the proper *construction* of s 119, it is clear from my reasons above that that is not the issue. What is involved is identifying, once that construction task is complete, what are ``the respective values of the lots'', value being determined by the *Spencer* test.

100. I am satisfied that the Board did not ``have regard to the respective values of the lots''. Rather, after rejecting the valuation evidence of each of the valuers, no regard is had to the value of the lots, but rather to other factors which, while going to value, did not constitute value. That the Board used the unit entitlements calculated by each of the valuers

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does not satisfy the requirement of s 119(2). Averaging the two valuations, neither judged satisfactory, without any evidence that such an average would result in an accurate valuation of each of the lots, could not be said to ``have regard to the respective values of the lots''.

4.3(b) Was the dismissal of the comparable sales approach an error of law?

101. The Board had, in its Provisional View of 29 May 1998, dismissed both of the expert valuers' evidence. In respect of Mr Gray's valuation, the Board decided that:

> ``With Mr Grey's (sic.) calculations, I found the difficulty, which I was unable to articulate clearly in discussion with Mr Young, that there were so many additions and subtractions, to allow for size differences, to allow for terraces and garages, vis a vis storage areas, to allow for 2-lot plans where one lot had no waterfrontage and/or no view, to pro rate total price over different types of lot (Castra Place), that it was difficult to see that anything could really be obtained, ultimately, from the calculations other than an average price per square metre for 1983 Eastern suburbs waterfrontage units. With his ultimate conclusion as to relative entitlements, based as it was on those calculations, I found that his empirical inquiry of comparison of each lot separately with `comparable' units in other waterfront buildings, led to conclusions that failed to reanchor the inquiry as a quest for the comparative values of each of the subjective lots relative to each other''
>
> [Provisional View page 5]

102. The approach taken by each of the valuers was contained in the Stated Case at paragraph 2.9. That paragraph states:

> “The Harrigan/Higgins report contained a definition of market value and stated:
>
> > `This valuation task needs to consider the sales of one bedroom units, two bedroom units and four bedroom units in a comparable location with waterfrontage, harbour and water views without garaging facilities and in order to interpret the then market we have considered numerous sales within the immediate vicinity of Double Bay and Darling Point. The annexure of extract of strata plans, cancelled certificates of title, dealings and photographs marked ``H'' and numbered 1 to 98, are a collection of some of the relevant sales information collected and used as a guide as to the market value of each of the subject stratum.'
>
> and the Gray report listed a number of comparable sales of which it said:
>
> > The only sales that could be considered comparable would have to be waterfrontage and then more weight must be given to smaller blocks.
> > Values of the subject units have to be discounted when drawing comparisons because of the poor pedestrian access, the number of stairs to be climbed and the absence of parking facilities of any kind.”

103. There are a number grounds upon which the Defendants asserts that the approach to valuation and the dismissal of the comparable sales approach by the Board is not an error of law.

A question of law?

104. First, the Defendants assert that to the extent that the contentions of the appellant depend on a suggestion that in departing from any expert, the Board erred in law, that position is unsustainable because it is not an error of law. The valuation task, it is said, is one of fact; *Woolf* v *City of Camberwell* [1931] VLR 162 at 168. It appears that the Defendants relies on the approval given in that case by Lowe J to the judgment of Lord Halsbury in the case of *Mersey Docks and Harbour Board* v *Birkenhead Assessment Committee* [1901] AC 175 at 180 which is quoted at 168 in *Woolf v City of Camberwell*:

> ``I am not aware of any rule of law or any statute which has limited [a valuer] as to the mode in which they shall arrive at [a valuation]. It is not a question of law at all — it is a question of fact."

105. Lowe J, however quotes extensively from Lord Halsbury and cites a number of other decisions before concluding, at 169:

> ``For the reasons which I have already indicated, it is only a matter of law when the Judge has shown that he has not applied the rule which the statute has laid down, or has
>
> [140143]
>
> [140143]
>
> misconceived what was involved in the term `valuation'."

106. The present case is, indeed, one in which the Plaintiffs assert that the Board misconceived what was involved in the term ``valuation.'' That is a question of law and one rightly addressed by this Court (also see *Woolf v City of Camberwell* where it was upheld that the meaning of ``valuation'' within the appropriate valuation was a question of law: at 171 per Mann J).

What is the proper approach to valuation?

107. Secondly, the Defendants argued that the dismissal of the comparable sales approach to valuation by the Board did not constitute an error of law. The Plaintiffs on the other hand, assert that value as a matter of law must be interpreted as market value according to the test in *Spencer v The Commonwealth* (supra). Having not strictly applied that test to the principles of valuation, the Board, on the Plaintiffs' view, is in error.

108. In *Spencer v The Commonwealth* at 440-1 Isaacs J described the ``value'' of land as:

> ``the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to [441] purchase it for the most advantageous purpose for which it was adapted.... To arrive at the value of the land... we have... to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the Plaintiffs and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason howsoever in the amount which one would otherwise be wiling to fix as the value of the property... Having mentally placed itself in the position of the bargaining parties... the question for the tribunal is, what is the point at which the parties would meet; what is the sum the one would be willing to give and the other to take?"

109. According to her grounds of determination, the Board determined that value in s 119 must mean ``market value''. This in itself is in line with the *Spencer's* test.

110. However, the Board then chose to reject the valuations provided by the expert valuers of each party. In respect of the valuation proposed by the Defendants in the present proceedings, the Board determined:

> ``Mr Higgins' conclusion is largely inscrutable, because his report does not disclose what steps he took in reaching it.'': Provisional View, 23 May 1998, p. 4

111. The Board was not satisfied as to the precise method of valuation by Mr Higgins. While the Board found Mr Gray's valuation method ``very transparent'', she added that ``that does not necessarily mean that it was any more acceptable, at least as a final solution''. Later, the Board said of Mr Gray's calculations:

``With his ultimate conclusion as to relative entitlements, based as it was on those calculations, I found that his empirical inquiry of comparison of each lot separately with `comparable' units in other waterfront buildings, led to conclusions that failed to re-anchor the inquiry as a quest for the comparative values of each of the subjective lots relative to each other'': Provisional View, 23 May 1998, p. 5.

112. The Board rejected the comparative sales approach saying:

``sales price of units in the subject parcel or of comparable lots in other strata plans would not ordinarily alone determine market value, since sale price differentials may reflect, inter alia, internal refurbishment in one lot and not another'': Amended Stated Case paragraph 3.3.

113. As to whether further valuation evidence should be obtained to supplement or replace the valuations of Mr Higgins and Mr Gray, the Board said:

``It is obvious, at the end of the day, having regard to the significant disparity between Mr Higgins' and Mr Grey's conclusions as to relative unit entitlements, both of them being eminent and expert in their field, that should further valuations be sought they are as likely to be equally divergent, or at least that a renewed exercise under s 119 with

[140144]

[140144]

other expert valuers is likely to be disproportionately expensive to the likelihood of certainty of result.'': Provisional View, 23 May 1998, p. 5

114. Since the Board had, therefore, determined that there were no comparable sales from which the respective values of the units could be estimated, the Defendants submit that the Board was entitled to ascertain the value ``doing the best it could on the materials before it'': See *Bingham v Cumberland County Council* (supra) at 18-19.

115. In *Bingham's* case, the claimant sought compensation for injurious affection under now-repealed provisions of the *Local Government Act* 1919, as amended. The part of that judgment referred to by the Defendants is concerned with the method of ascertainment of the value of land affected by the local development scheme. After referring to the proper test for valuation of land as laid out in *Spencer's* Case, and the comparative sales approach also adopted in *Raja Vyricherla Narayana Gajapatiraju* v *Revenue Divisional Officer, Visagapatam (``the Raja's Case'')* (1939) AC 302, Sugerman J said:

“Special difficulties may exist in the application of these principles to the ascertainment of market value in cases such as the present. The affected `market value' is referable to an actual market in the sense earlier stated. But only a limited amount of land in a given locality may be affected in the way which is in question. Sales which are sufficiently close in time, unaffected by changes of circumstances or other extraneous considerations, and of sufficiently comparable properties may, therefore, be few or non-existent. So far as they do exist they may be so inconsistent with each other as to preclude any reliable inference... The unaffected `market value' is, as I have said, referrable only to a suppositious and not to an actual market. It may however be possible to obtain guidance from evidence of the prices obtained on sale in a market not significantly different or differing only to an extent for which appropriate adjustments may readily be made...

In the absence of sufficient guidance to be had from sales, the valuer may find himself in a position resembling that to which Lord Romer referred in the *Raja's* Case in which he `will have no market value to guide him, and he will have to ascertain as best he may from the materials before him what a willing vendor might reasonably expect to obtain from a willing purchaser for the land.' In these cases that would not be because the land possessed, in terms of Lord Romer's judgment, `some unusual, and it may be unique, features as regards its position or its potentialities' but because it derived a certain uniqueness from the character of the provisions and restrictions affecting it and the consequences of the affection, which would take a sale of it outside the ordinary run of transactions in otherwise comparable lands and thus preclude direct comparison.”: at 18

116. While this may appear to assist the Defendants, it must be borne in mind that Sugerman J was discussing the ascertainment of an ``affected'' and ``unaffected'' value of a particular piece of land. The ``affected value'' of the land was the value of the land at the time the development scheme came into

operation. The ``unaffected value'' of the land was the value that land would have had if the scheme had never proceeded. Similar circumstances do not exist in the present case. First, in the present case, there was, before the board, Mr Gray's valuation based on the comparable sales value of the property (adjusted by a number of factors). That valuation was dismissed by the Board. Secondly, the scheme contained in s 119 does not place an obligation on the Board to make a new allocation of unit entitlements. Section 119(1) gives the Board a discretion so to make or refuse an order and certainly may decline to make an order if not furnished by the parties with the materials to perform the statutory task. Section 119(2) provides the conditions placed on the Board's discretion in subs 1. The Board is not, therefore, in the situation of ``having to do the best it can'' as was the case in *Bingham*. A similar distinction can be drawn between the present case and that of *Harris v Minister for Public Works* (1912) 12 SR (NW) 149.

117. The Defendants argue, however, that comparable sales method of valuation is a method only ``applicable in cases where sales evidence of other properties directly comparable with the subject one is available, *or* where reasoned, minor adjustments can be made when applying the evidence to take into

[140145]

account points of difference between the evidence and the subject property'': Fricke (ed), ``Compulsory Acquisition of Land in Australia'' (LBC, 1982) at 344-5. The material before the Court, it is argued, makes it clear that the Board found as a matter of fact that market comparison evidence was not of assistance, inter alia, because the adjustments required by Mr Gray's method were not minor. The question apparent from the contention is whether that dismissal was due to an error of law on the part of the Board. As explained above, an error of law in these circumstances can only arise where the Board misinterpreted its statutory duty. If the statute can be said to afford other meanings to the word ``value'' than ``market value obtained by the method of comparable sales'', then the Plaintiffs' contention is not made out. While the provisions of the Act do not make clear whether ``value'' is to be understood in a certain sense, we are preceded by *Spencer's* Case, which remains the authoritative statement as to the meaning of ``value''. Can it be said that the dismissal of the comparative sales approach by the Board runs foul of the principle in *Spencer's* case?

118. The facts of *Spencer's* case were that there was no way to determine the piece of land in question by reference to comparable sales. While the test referred to above holds the Board to the mental process therein described, it does not constitute a rule that the comparable sales method is the only valid method of ascertaining a ``value'': see, for an application of this principle, *Dixon* v *City of Glenorchy* (1978) 15 LGRA 407 (especially at 417).

119. The contention that the Board erred in law *merely* by dismissing the comparable sales approach is not, therefore, made out; but see under 4.3(c) below as to whether there was no evidence on which to dismiss comparable sales, itself leading to error of law.

Which sales are comparable?

120. Thirdly, the Defendants argue that the question of which sales are comparable and which are not is a matter of degree and a question for the expert and, therefore, a matter of fact.

121. While it can readily be accepted that whether a certain sale is comparable to the property in question is a question of fact, the contentions of the Plaintiffs do not require this Court to determine whether the sales were, indeed comparable, only that the method of comparable sales should not have been dismissed. That question, as explained above, is a question of law.

4.3(c) No evidence on which to dismiss comparable sales?

122. The Plaintiffs assert that the Board erred in law by dismissing the comparable sales method on the grounds that there was no evidence of refurbishment that might justify the Magistrate's finding in paragraph 3.3 of the Stated Case.

123. Paragraph 4.3(c) of the Stated Case contains the words ``when neither valuer dismissed the comparable sales method on that ground and there was no evidence of such suggested internal refurbishment''. The Defendants submit that this Court should not accept this paragraph as stating any ``ultimate fact'' determined by the Board but merely as an assertion on the part of the Plaintiffs.

124. In light of my decision above that points going to a ``no evidence'' argument on the part of the Plaintiffs are questions of law, the ``fact'' of whether the Board made a decision without the aid of any anterior finding of fact is one capable of determination by this Court. A proposition which is not merely colourable that there was no evidence by which a Board could have reached its decision or made a material finding does raise a question of law.

125. Was there evidence before the Board, then, upon which it could have made the determination that ``sales price differentials may reflect, *inter alia*, internal refurbishment in one lot and not another''? Since the evidence before the Board was admitted before me for the purpose of determining this question and since the Defendants did not identify any evidence contrary to the Plaintiffs' assertion that there was no evidence of internal refurbishment, I find that there was no evidence to support the determination of the Board in paragraph 3.3. The Board's determination in paragraph 3.3 of the Stated Case therefore constitutes an error of law.

4.4 Was the Board's test of value a valid one?

126. Paragraph 4.4 of the Stated Case reads:

> ``4.4 In respect of grounds of determination 3.9 and 3.10 (and of the criticisms of Mr Gray therein):
>
> (a) I erred in law in finding that the proper exercise for a valuer such as Mr
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> [140146]
>
> [140146]
>
> Gray was to arrive at what a prospective willing but astute or cautious buyer, neutral as to number of bedrooms and bathrooms required, who wanted to buy one or all of the units in this particular block would pay for each of them as against the other two, in the state the common property was in in 1983;
> (b) Likewise I erred in law in criticising Mr Gray's empirical approach comparing each lot separately with other `comparable' units in other waterfront buildings rather than searching for the comparative values of each of the subjective lots relative to each other.''

127. The rejection of the comparative sales approach and the adoption of a floor area approach is said to be erroneous. Instead, the Board substituted a value according to a test explained in the Provisional View of 23 May 1998 at paragraph 4.7:

> ``Ultimately, the exercise is not to arrive at what price buyers seeking respectively a large one bedroom, large two bedroom and large ¾ bedroom two and a half bathroom Eastern suburbs waterfront strata title would respectively have paid for units in 1A Wiston Gardens, compared with other Eastern suburbs waterfront apartment blocks... Rather it is to arrive at what a prospective willing but astute or cautious buyer, neutral as to number of bedrooms and bathrooms required, who wanted to buy one or all of the units in this particular block would pay for each of them as against the other two, in the state that the common property was in 1983.''

128. The determinations complained of in the Stated Case, then, read:

> ``3.9 I found that Mr Gray's method was more transparent but that did not mean it was any more acceptable at least as a final solution. I found that the proper exercise was to arrive at what a prospective willing but astute or cautious buyer, neutral as to number of bedrooms an bathrooms required, who wanted to buy one or all of the units in this particular block would pay for each of them as against the other two, in the state that the common property was in in 1983.
>
> 3.10 I found that Mr Gray's empirical enquiry of comparison of each lot separately with `comparable' units in other waterfront buildings led to conclusions that failed to reanchor the enquiry as a quest for the comparative values of each of the subjective lots relative to each other.''

129. At the outset it is necessary to point out that the contention at paragraph 4.4 is considerably different to the contention at paragraph 4.3(b). That paragraph concerned merely the dismissal of the comparative sales approach. Paragraph 4.4, on the other hand, deals with the test of valuation as enunciated by the Board.

130. There are two ``benchmarks'' to which the Board's test of value must comply. The first is the requirements of s 119(2). While s 119(2) does not contain a test for or definition of ``value'', it does indicate that the relevant values of the lots are the ``respective'' values of the lots. As determined above, the word ``respective'' in the context of s 119(2) means ``particular''. Any test, then, must be concerned with finding the particular value of each of the lots in the property. The Board's test of value expressly disavows this principle determined as it is by the statute. In this respect, the test suggested by the Board is erroneous in law.

131. The second benchmark is the benchmark of ``value.'' *Spencer's* Case as extracted above is the applicable principle for the valuation of land with *Boland* (supra) a recent warning against unnecessary glosses. The question, then, is whether the test for value applied by the Board complies with the *Spencer* test. The Board's reference to a ``prospective willing but astute or cautious buyer'' cannot be said to be erroneous. However the caveat that they be ``neutral as to number of bedrooms and bathrooms required'' takes the hypothetical buyer outside that described by the *Spencer* test, as one being ``cognisant of all circumstances which might affect [the land's] value...''.

132. The approach is, therefore, erroneous at law as it misconstrues the statutory requirements of s 119(2) of the *Strata Titles Act* and strays from the meaning of ``value'' as espoused by the High Court in *Spencer's* Case.

4.5 Was it an error of law to base an order on the mean between the opinions of two rejected valuations?

133. Paragraph 4.5 of the Stated Case reads:

> ``4.5 In respect of grounds of determination 3.15, 3.16, 3.17, 3.19 and 3.20 I erred in law in basing in part an order under s 119(1)
>
> *[140147]*
> *[140147]*
>
> *Strata Titles Act* on a mean between the opinions of two valuers when:
>
> (a) I had made findings 3.7 and 3.8;
> (b) I had made no finding that their valuations were equally wrong lot by lot.''

134. In the Provisional View of 23 May 1998, the Board considered that neither the parties' valuations were ``completely satisfactorily performed''. Having found that neither valuer's evidence was satisfactory, however, the Board did, in the final result use the valuations in the calculation of the unit entitlements derived from floor area and the mean of the unit entitlements from the two valuations.

135. This was, on the submission of the Plaintiffs, an error of law on the part of the Board. The Plaintiffs assert that since the Board found the two valuers unacceptable then logically it could not make or derive a unit entitlement which was a mean between the unacceptable. The Plaintiffs assert that this, in the absence of further findings that the unit entitlement also reflected an accurate value of the lots, amounted to an error of law.

136. The Defendants, on the other hand, maintain that the Board did not ``base in part an order under s 119(1) Act on a mean between the opinions of two valuers''. It is however self- evident that the Board did, in part base its final conclusion on a mean between the unit entitlements calculated by each of the valuers: see paragraphs 3.13-3.20 of the Stated Case.

137. Further the Defendants assert that, however the unit entitlements were reached, the calculation involves a question of fact and not of law. Once again, where there is no evidence before the Board on which to base the conclusion that the mean of the valuer's unit entitlements reflected the true **value** of the lots, that is a matter involving a question of law.

138. It being clear that there was no evidence on which to base the Board's determinations as referred to in the Plaintiffs' contention at paragraph 4.5 of the stated case and in the light of the Board's determinations at paragraphs 3.7 and 3.8 of the Stated Case, the Board has erred in law.

4.6 Should the Board first determine respective values?

139. Paragraph 4.6 of the Stated Case reads:

> ``4.6 In respect of grounds of determination 3.19 and 3.20 I erred in law in making an order pursuant to Section 119(1) without first determining the respective values of each lot under Section 119(2)''

140. It is asserted that without first determining the value of the units, the discretionary power under s 119(2) could never be enlivened.

A question of fact?

141. The Defendants first assert that paragraph 4.6 involves a question of fact and not law. This is clearly wrong. Whether s 119(2) requires the Board to carry out a calculation of value before making an order pursuant to s 119(1) is a question of statutory construction and is a question of law.

A precondition?

142. Secondly the Defendants argue that s 119 contains no principle that the board needs to calculate and make a determination as to the respective values of the lots **before** moving on to calculate unit entitlements.

143. This was dealt with above in relation to contention 4.3(a).

144. It is sufficient to point out here that it is clear that ``having regard to the respective values of the lots'' is a precondition of the exercise of the power in s 119(1). Thus it is true to say that the Board is first required to have regard to the respective value of the lots. Secondly, the Board is to consider whether the unit entitlements allocated at the date of registration of the strata plan or strata plan of subdivision were unreasonable or have become unreasonable. After those two matters have been considered, and only after those matters have been considered, does s 119(2) enliven the power in s 119(1) to change the allocation of unit entitlements.

The only requirement is that the request was not ``unreasonably made''

145. Third, and counter to the Plaintiffs' assertion that value needs to be determined as a precondition for the Board's exercise of power under s 119(1), the Defendants argue that if any precondition to the exercise of that power exists, it is the requirement to dismiss applications where the original unit allocations were not ``unreasonably made'': s 119(2). It is submitted that the use of the word ``unreasonable'' suggest that the section is not

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[140148]

concerned with absolute arithmetical accuracy as to values. The Defendants go on to submit that ``the section [ie s 119] leaves room for discretionary matters... and the Board is not bound, as a matter of principle to change an original allocation simply because the Board would have reached a slightly different allocation''.

146. That group of submissions does not meet the Plaintiffs' argument. The fact that there are requirements in addition to the requirement to ascertain value does not rule out the existence of the valuation requirement if it can otherwise be truly said to exist. Furthermore, it is not the Plaintiffs' submission that determined value binds the discretion of the Board to change the unit allocations. It is, rather, that the Board cannot exercise that discretion unless and until it has a determined valuation for each lot on which to base that discretion.

4.7, 4.8 & 4.9 Was the Board functus officio and should it have accepted further written submissions?

147. The Stated Case contains the following contentions:

> ``4.7 In respect of 3.20 I erred in law in holding in my Order of 29 July 1998 that following publication of my Reasons of 23 May 1998 I was functus officio in respect of the issue of the proper construction of Section 119 or any other issue.
>
> 4.8 In respect of 3.20 I erred in law in not accepting the written submissions of the parties concerning the proper construction of Section 119 and other matters as referred to in those submissions.

4.9 In respect of 3.20 I erred in law in that if I was intending by Reasons of 23 May 1998 to give the parties the choice of three alternative allocations I consider satisfactory and/or the opportunity to obtain and adduce further valuation evidence, I erred in law in communicating my Reasons of 23 May 1998 in its terms as set out in 3.19 and offering the parties only the opportunity to make further written submissions."

148. In the Provisional View of 23 May 1998, the Board concluded:

> ``This represents my provisional view of the state of the evidence before me and the conclusions I would draw from it, provided for the assistance of the parties. Unless I receive further submissions in writing from the parties within 28 days, I shall make orders specifying a reallocation in terms of the provisional conclusion on that date.": Provisional View 23 May 1998, p. 6

149. Furthermore, attached to the Stated Case, there was a facsimile sent from the Strata Titles Board, by the Clerk of the Board dated 26 May 1998 to the solicitors for the Plaintiffs in the present matter. That document contained the words:

> ``If you choose to make further written submissions, these will be required to be filed at this Office by 22 June 1998."

150. In a statement of orders on 29 July 1998, the Board said:

> ``I thank Messrs Young and Bouris respectfully for their further submissions, received by me on 30 June, a few days before I went on leave.
>
> It seems that my final paragraphs under the head CONCLUSION in my reasons dated 25 May 1998 in this matter have been misunderstood by both legal representatives, no doubt due to a lack of clarity in my choice of words. I was not inviting submissions as to the correctness or otherwise of my conclusions as to the proper construction of s 119. They were final judicial determinations, in respect of which I considered myself functus, and as such my determinations reviewable only by the Supreme Court.
>
> Rather, I was seeking to give the parties the choice of three alternative allocations I considered to be satisfactory; or the opportunity to obtain and adduce further valuation evidence on the basis of my construction of s 119.
>
> In the event it seems clear there will be no agreement or further evidence."

151. The Plaintiffs say that in so refusing to consider the further submissions, the Magistrate erred in two ways.

The Board was *functus*

152. First the Plaintiffs assert that the Board made an error of law in that it was not, as it decided, *functus* in respect of the provisional view of 23 May 1998.

153. In respect of whether the board truly was *functus* of the issues raised in the 23 May

[140149]

[140149]

1998 Provisional View, it is submitted on behalf of the Plaintiffs that since no order had been made under s 119 until the publication of the orders of 29 July 1998, according to common law principles, no court or tribunal could be *functus* as determined by the Board.

154. The Board, in its final orders of 29 July 1998, said, of the determinations contained in the Provisional View: ``They were final judicial determinations, in respect of which I considered myself *functus*, and as such my determinations reviewable only by the Supreme Court". It is clear that the Board considered itself *functus* according to the normal judicial application of the word.

155. A court does have power to alter its judgment prior to entry of that judgment: *Autodesk Inc.* v *Dyason (No. 2)* (1993) 176 CLR 300. Furthermore where no judgment in terms has been handed down, there is not even anything to alter, or to be the subject of *res judicata* or issue estoppel: compare in the context of an appeal to this Court from a Taxing Officer, *Wentworth* v *Wentworth* (Santow J, [1999] NSWSC 638, 29 June

1999, unreported) as to the status of a judgment entered or not yet entered and the scope for re-opening or varying such a judgment.

156. In the present circumstances, the Board could not at the time be said to be *functus* of its determinations as to the construction of s 119. It had not made any orders, even of an interim type to that effect. Nor had it handed down a judgment. There were no orders certified and served as such on the body corporate (see s 144 *Strata Titles Act* 1973). Furthermore, the Board in terms of the invitation it made, expressed itself open, at least, to further submissions on its factual findings and conclusions as to unit entitlements (see Orders of 29 July 1998). Given that the Board was not *functus* of those determinations, it could not be said that it was *functus* of its determinations as to the construction of s 119 when it had not made any orders in respect of those matters or issued what could in terms constitute a judgment or final determination.

157. In respect of paragraph 4.9 of the Stated Case, the Defendants argue that since there was no obligation on the Board to invite the parties to adduce further evidence, the words of Provisional View were enough to constitute the Board's judgment and orders. In respect of the matters of construction, being those matters which the Board as at 29 July 1998 considered itself *functus*, it is impossible to see those determinations as constituting a final judgment or determination, when headed ``Provisional View'' and accompanied by the invitation to make further submissions nor as constituting orders on those matters.

158. The Board was in error at law in deciding, in its orders of 29 July 1998, that it was *functus* in respect of the construction of s 119 in its Provisional View of 23 May 1998.

A denial of procedural fairness

159. Secondly, the Plaintiffs assert that this error resulted in a denial to the Plaintiffs of procedural fairness in that the Board had, in its Provisional View of 23 May 1998, represented that it would receive further submissions and then at 29 July 1998 refused to countenance such submissions. The Plaintiffs' claim that, misled by the terms of the Provisional View and the letter of 26 May 1998, they relied on their supplementary submissions and did not pursue the matters referred to in the Board's order of 29 July 1998. They were denied, they say, the chance to properly argue their case. The Plaintiffs maintain that even if the Board had not stated the view of 23 May 1998 to be a ``provisional'' view, ``so radically different was [the Board's] view of the nature of the Board's function under s 119(2) that [the Plaintiffs was] entitled to be heard'' [T, 64:45]. While the Board could have, it is argued, published its Provisional View as its final reasons and order, it did not do so.

160. In further support of this second argument, both the Plaintiffs and Defendants, acting reasonably, interpreted the Provisional View and the letter of 26 May 1998 as allowing further submissions on the issues covered in the Provisional View, including the construction of s 119 of the *Strata Titles Act* 1973 (see T, 74, where Mr Bouris conceded that the Provisional View misled both sides). Was the Board then required, by the insistence of natural justice, to observe the *audi alteram partem* rule?

161. The *audi alteram partem* rule, being an expression of the fair hearing principle, means that, for example an arbitration must allow each party to comment on and contradict the material offered by an opponent (unless the parties otherwise agree): *T A Miller Limited* v *Minister of Housing and Local Government* [1968] 2 All ER 633 (there the ``material'' was hearsay evidence).

[140150]

[140150]

162. Having erred in deciding that it was *functus* in respect of the construction of s 119, the Board was in truth capable of accepting further submissions as to the construction of s 119. That it did not, in the result, consider those submissions might be said to have disadvantaged each party equally, and in a way that was inherently possible under s 132(2) of the Act in any event. Thus s 132(2) of the Act allows the Board to inform itself ``with or without any hearing''. However, that cannot be determinative in these circumstances. The effect of representing that such further submissions would be considered does have the effect of creating a legitimate expectation in the minds of the parties that the Board would consider those submissions and represents an exercise of the power so to order its proceedings. The representation of the Board, as contained at paragraph 3.20 of the Stated Case, clearly had a bearing on the way in which the parties chose to argue their case (for example, see the further submissions of both parties attached to the Stated Case). To

subsequently dismiss those submissions and not give an opportunity to the parties to make further, amended submissions on the matters of fact considered by the Board (see Orders 29 July 1998), was to deny the legal representatives before the Board proper opportunity to argue the case to the best of their ability and in the interests of their clients in accordance with the legitimate expectations engendered. To represent, as the Board did, that it would countenance further submissions in such broad compass as indicated in the Provisional View of 23 May 1998 and then to refuse to consider those submissions or allow further submissions by the Order of 29 July 1998 was, *prima facie*, in breach of the rules of procedural fairness.

163. Before I decide finally on this matter, though, it is necessary to address the arguments raised by the Defendants in respect of this natural justice point.

164. The Defendants' first argument is that the denial of natural justice point was not taken by the Plaintiffs (see Defendants' Written Outline of Submissions 8 February 2000 paragraph 4.8), is clearly wrong. The issue is raised in the Plaintiffs' contention at paragraph 4.9 of the Stated Case. The Plaintiffs took the point at paragraph 29 and 30 of its ``Outline of Plaintiffs' Submissions.''

165. The Defendants further submit that whether or not the Board was *functus* of the issues in the Provisional View as of 2 July 1998, there has been no denial of procedural fairness. Firstly, it is argued that even if the Board had allowed the further submissions, the orders of the Board would have remained as they now stand. Secondly, it is asserted that while the words of the Provisional View of 23 May 1998 in respect of further submissions were not clear, in the absence of any requirement of law to give the parties an opportunity to submit further evidence and submissions, that the case of the parties had been concluded as of 23 May 1998 and there was no error of law in not giving countenance to those further submissions.

166. I have ruled above that the Board was not *functus* following publication of the Provisional View on 23 May 1998. It could not, therefore, be said that, as of that date, the case of the parties had been concluded.

167.

[140151]

In respect of the submission that the Board's decision would remain the same even if further valuation evidence had been obtained, it is impossible for this Court to determine either way that such evidence would have influenced the Board's conclusions. If the Board continued to labour under the misconstruction of its task as laid down in s 119 of the Act, it seems likely that the Board would have, even in the face of further valuation evidence from the Plaintiffs, reached at least a similar conclusion. However, this Court does not and cannot have before it the evidence necessary to make a determination on this matter. Furthermore, the suggestion that Courts should overlook breaches of natural justice where, in the absence of such breach, the outcome may have remained the same, has been widely criticised (see Aronson & Dyer Judicial Review of Administrative Action (LBC, 1996) at 486-489). The present circumstance is not a ``technical breach'' of procedural fairness (as was suggested in the case of *R* v *Chief Constable of the Thames Valley Police*; *Ex parte Cotton* [1979] 77 LGR 689 at 350-1). Nor is it a circumstance where the outcome is a foregone conclusion (such as in *Mobil Oil Canada Limited* v *Canada Newfoundland Offshore Petroleum Board* (1994) 11 DLR (4th) 1). Furthermore, this present case is diametrically opposite to the situation in *Stead* v *State Government Insurance Commission* ; (1986) 161 CLR 141, where the High Court said:

> ``By way of illustration, if all that happened at trial was that a party was denied the opportunity of making submissions on a question of law, when, in the opinion of the appellate court, the question of law must clearly be answered unfavourably to the aggrieved party, it would be futile to order a new trial'': at 145 (per Mason, Wilson, Brennan, Dean and Dawson JJ) as cited in Aronson & Hunter.

[140151]

168. In this case I have already decided that the approach at law of the Board was fundamentally flawed. That the Board might reach the same conclusions as it did even if it had proceeded according to the principles of procedural fairness can, therefore, have no bearing on whether the Plaintiffs' contention is made out nor on whether I should remit the matter for re-determination.

169. As to the argument that there was no requirement at law to give the parties an opportunity to submit further evidence and submissions, it is clear that while no such requirement does exist, a legitimate

expectation in the parties that further submissions would be considered did arise out of the Board's own representations. Even if not a right in itself, that legitimate expectation is an interest protected by the rules of procedural fairness. The Board's refusal to admit the further submissions of the parties and its indication that there would be no further evidence (see Orders 29 July 1998), therefore, constitutes a breach of procedural fairness and an error of law.

4.10 Did the Board err in law by not dismissing the claim on the basis that the valuation evidence was insufficient?

170. Paragraph 4.10 of the Stated Case reads:

> ``4.10 In respect of the whole of my grounds of determination I erred in law in not dismissing the application on the basis that the valuation evidence of the parties was insufficient to ground an order reallocating unit entitlements under Section 119 of the *Strata Titles Act* 1973."

171. The Plaintiffs' contention here relies on the earlier contention that it was necessary for the Board to determine the value of each of the apartments before proceeding to calculate the unit entitlements. The Plaintiffs' argument is that in the absence of any valuation evidence satisfying the *Spencer* test, the Board should dismiss an application under s 119 for re- allocation of unit entitlements. That is, when a party cannot lead evidence of value according to the *Spencer* test of value, that party must necessarily fail.

172. The Defendants point out that evidence given by the valuers going to value, including evidence as to access, aspect, light and air and livable and potentially livable area, were considered by the Board. The Defendants maintain that these were sufficient for the Board to reach a valid determination according to the requirements in *Bingham*.

173. As discussed above, *Bingham's* case was about the proper test for valuation. It does not stand as authority for the proposition that in certain circumstances value does not need to be calculated as long as factors going to value are considered. Furthermore, while valuation may have been difficult in that case, such difficulty did not excuse the relevant authority from calculating a value where the express words of the statute required it. *Bingham* does not assist the Defendants here.

174. The Defendants also adopt submissions made by it before the Board [FLA 19]. The adoption of paragraph 3 of FLA 19 seems to be an inference that the Defendants submit that in certain circumstances, courts have rejected valuations based on comparable sales.

175. First the Defendants cite *Leichhardt Municipal Council* v *Seatainer Terminals Pty Limited & Glebe Island Terminals Pty Limited* (1981) 48 LGRA 409 at 435 where Hope JA says:

> ``Whether the differences between land the sale of which is to be relied upon and the land to be valued are so great that the land the subject of the sale cannot be regarded as comparable is a question of fact and degree. The difference may be so great that a court may be constrained to hold that the land is in no sense comparable, and that the adjustments which have to be made are so great that the sale can provide no evidence of the value to be determined, and no basis upon which that value can be assessed."

176. Second, the Defendants cite *Crompton* v *Commissioner of Highways* (1973) 32 LGRA 8 at 23-4 per Wells J:

> ``Obviously, no two sales of land will be found to be the same, or even similar in all
>
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> respects. Those that bear a close similarity to the assumed sale of the subject land will be more reliable than those whose similarity is less proximate and in respect of which adjustments or allowances must be made before they can be safely introduced into the valuation process. At a particular point it ceases to be safe or sound to treat them as sufficiently similar to the assumed sale of the subject land, and they must henceforward be rejected."

177. These cases do not assist the Defendants. While they do bear upon the usefulness of comparable sales evidence in the valuation of a property, it has nothing to say as to whether, having on its own admission no

satisfactory valuation evidence to go on, the Board could order a re-allocation of unit entitlements under s 119(1).

178. Of the other paragraphs in the submissions in FLA 19 referred to in 4.10 of the Defendants' Submissions of 8 February 2000, the Defendants have not demonstrated their relevance to the present proceedings. The following words, however, do appear in paragraph 24 of FLA 19:

> ``It is submitted that only in very extreme circumstances, not applicable to this case, should the Board decline to make an order under section 119(2), given that other implications arise from a decision as to the proper valuation of lots, for example, the issue of land tax and other imposts. Whilst the Commissioner of Land Tax is empowered under section 65A of the *Land Tax Management Act 1956* to seek an order for reallocation of unit entitlements in a strata scheme and other bodies may apply under s 119(3)(c) (including local councils), if the Board has before it evidence that such an allocation is unreasonable, then the Board ought to seek to give effect to that evidence not only as between the parties but ultimately having regard to the fact that third parties do rely on proper valuations being in place and that such reliance ought to be reliance on a correct state of affairs, as a matter of public policy.''

179. I have decided above that the Board, before it can order a re-allocation of unit entitlements, must have before it a value to which it can have regard. While the valuation of the valuers may be disregarded for various reason (as a matter of fact), it is true that the Board cannot proceed under s 119(1) before it has had regard to the values of the lots. The words of the statute are clear on this point. It is also true that *Spencer's* Case is authority for the basis of a proper valuation of land. A ``value'' in the sense determined in *Spencer's* case must be before the Board. Valuations of the lots are an important matter, as pointed out by the Defendants in FLA 19. All the more reason why s 119 of the Act should be read according to its terms, to require the Board to have regard to the respective values of the lots before making orders to reallocate unit entitlements pursuant to s 119(1).

4.11 Did the Board err in law by failing to consider the estoppel argument raised by the applicants?

180. The provisional view and orders of the Board did not deal with any estoppel argument on the part of the Proprietors of Strata Plan 10294. The Plaintiffs in the present proceedings assert that it had made a submission based on estoppel and that it was an error of law on the part of the Board not to give reasons in respect of that submission.

181. The contention at paragraph 4.11 of the Stated Case reads:

> ``4.11 I erred in law in failing to consider or make findings or a determination in respect of the submission of the Respondents that the Appellants were estopped from seeking an alteration of the unit entitlements under Section 119 by the long existence of the existing entitlements, their acquisition of their lot with knowledge of those entitlements and their continuing to take advantage of those existing entitlements by only paying one third of levies to the detriment of the Respondents.''

To this the Defendants respond that there was no duty to give reasons, or at any rate reasons as to this particular contention.

Does the Board have a duty to give reasons?

182. The Plaintiffs argue that the Board, while an administrative body, is exercising a quasi-judicial function and therefore is required to give reasons for its decision. That requirement to give reasons is also said to arise from the existence of a right of appeal from the Board. In *Sun Alliance Insurance Limited* v *Massoud* [1989] VR 8 at 18, Gray J writes that ``that the law has developed in a way which obliges a court from which an appeal lies to

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state adequate reasons for its decision''. Furthermore, in *Xuereb* v *Viola* (1989) 18 NSWLR 453 at 469, Cole J writes that ``natural justice requires that a referee give reasons for his opinion... [The reason being] that it enables the parties and the disinterested observer to know that the opinion of the referee is not arbitrary,

or influenced by improper considerations but is the result of a process of logic and the application of a considered mind to factual circumstances."

183. Firstly, the Defendants maintain that the Strata Titles Board is not a body which comes under the duty at law to give reasons for its determination. The Defendants assert, citing *Public Service Board of New South Wales* v *Osmond* (1986) 159 CLR 656 at 662 (per Gibbs CJ with whom Wilson J and Brennan J agreed); at 675-676 (per Deane J), that as a statutory decision-maker, the Board does not need to give reasons for its apparent rejection of the estoppel argument. The Defendants further assert that since the board is not a judge or a magistrate and since there is nothing in the Act to give rise to a contrary conclusion, the Board is not under a duty to give reasons either generally or with respect to the estoppel argument. The Defendants also point to the informality of the procedures before the Board and the fact that many of the disputes before the Board are relatively minor neighbourhood disputes.

184. The Act contains no express statutory duty on the Board to give reasons for its orders. Indeed the Act is wholly silent on the matter. In the case of *Re Saunders* [1993] 2 Qd 335, Derrington J dealt with an argument in similar terms to the present. In that case the argument on one side was that the failure of the Queensland Strata Titles Board to give reasons was an error of law according to various authorities including *Pettitt* v *Dunkeley* [1971] 1 NSWLR 376 and *Sun Alliance Insurance Limited v Massoud* (supra),
19. In reply, ``the respondent referred to *Public Service Board of New South Wales v Osmond* (supra), in which it was held that general rules of common law or principles of natural justice required reasons to be given for administrative decisions, even those made in the exercise of a statutory discretion and liable adversely to affect the interests, or defeat the legitimate or reasonable expectation of others''; *Re Saunders* per Derrington J at 338. Derrington J in *Re Saunders* went on to distinguish *Osmond's* Case on the ground that ``that decision was directed to matters of natural justice, whereas the present issue is directed to a duty of a quasi-judicial tribunal to state reasons where there is a right of appeal from its decision''. That states the issue before this Court. While the Board may not be a ``quasi-judicial'' body, it is at least exercising a ``quasi-judicial function''. On that question, Derrington J decided as follows:

> ``... because there was evidence upon the point the Tribunal should also have stated its findings of fact and reasons for them. Technically, there should also have been an account of the reasoning in principle upon the issue... The difficulty on appeal resulting from this deficiency is obvious and explains the principle requiring the giving of reasons'': at 339.

185. Similarly, here, the Board, in light of the right of appeal, should have given reasons for its dismissal of the estoppel point, as it could have been determinative of the result, if decided in favour of the Plaintiffs.

186. Second, the Defendants argue that Pt 51B, r 9(b) of the Supreme Court Rules ``by inference, supports the proposition that just because there may be an appeal or case stated procedure, it does not follow that reasons must be given'' [Defendants Outline of Submissions 8 February 2000 paragraph 4.11]. That rule states:

``9 The Plaintiffs shall, unless the Court otherwise directs... file an affidavit exhibiting:

> (a) a copy of the transcript of the proceedings in the tribunal below unless a transcript cannot be obtained in respect of proceedings of that type; and
> (b) a copy of the **reasons for decision** in the tribunal below, **unless the tribunal below has not given, and does not intend to give, written reasons**.''

[my emphasis]

187. The Rules, therefore contemplate a situation of appeal from a tribunal where that tribunal has not made written reasons. The Rules, however, cannot be said to determine the question whether the Board in this case was required to give reasons. The requirement to give reasons rests in the Board itself, and cannot be said to be altered by some general statement about the requirements of a Plaintiffs before a Court of Appeal.

[140154]

[140154]

Should the estoppel argument be remitted to the Board?

188. The Defendants submit that the estoppel argument would be destined to fail and should not be remitted to the Board notwithstanding any finding as to whether the Board should have given reasons for its dismissal of the argument. The Defendants argue that the estoppel ``runs the wrong way''.

189. In the case, referred to above, of *Re Saunders*, Derrington J ruled that, while the failure to give reasons on the part of the board in that case did amount to an error of law, the defect was not fatal ``because the evidence is all one way and as there is no reason to doubt it, it would have been wrong in law to find to the contrary'': at 339.

190. The argued estoppel, as contained in paragraph 4.9, is based on the long existence of the existing entitlements, the Defendants' acquisition of their lot with knowledge of those entitlements and the Defendants'continuing to take advantage of those existing entitlements by only paying one third of levies to the detriment of the respondents. Framed in that way, the Plaintiffs'estoppel argument was asking the Board to estop the Defendants from moving from a position of advantage to a position of disadvantage and to the advantage of the Plaintiffs. Unstated, although also evident, is that the estoppel also sought to stop the Defendants from moving from a position of minority voting power to a position of greater or even majority voting power at the meetings of the Body Corporate.

191. Either way it is difficult to see how the Plaintiffs' estoppel argument could succeed. This is in the absence of any unconscionable behaviour on the part of the Defendants and when continuing in residence at the lot does not constitute a representation sufficient to raise an estoppel either in the sense of *Thompson* v *Palmer* (1933) 49 CLR 507 at 547 or in the promissory estoppel sense: see *Waltons Stores (Interstate) Limited* v *Maher* (1988) Q ConvR ¶ 54-284 at p 58,028; (1988) 164 CLR 387 at 417. There is also no right in the Plaintiffs to maintain the original unit entitlements. Indeed such a right could clearly not exist — s 119 of the Act refutes any such proposition.

192. I therefore conclude in a manner similar to that of Derrington J in *Re Saunders* that, even if the failure to give reasons for the dismissal of the Plaintiffs' argument in relation to estoppel did constitute an error of law, it is not of itself one which merits remitting to the Board for determination anew.

5. Was the Board's determination erroneous in point of law?

193. I am satisfied for the reasons set out earlier that the Board erred in law these respects:

1. the Board did err in law by interpreting ``respective'' in section 119(2) of the *Strata Titles Act* as equating to ``relative'';
2. the Board erred in law by placing extraordinary and excessive importance on the comparative areas of the lots when there was no evidence that the values of the lots could be determined on the basis of their floor area;
3. the Board erred in law by not interpreting section 119 of the *Strata Titles Act* as requiring the Board to firstly determine and have regard to the value of each lot before moving on to calculate revised unit entitlements;
4. the Board erred in law by rejecting the comparative sales evidence on the ground set out in paragraph 3.3 of the stated case when there was no evidence to support the determination that internal refurbishment made the comparative sale approach inappropriate;
5. the Board erred in law by substituting a test for ``respective value'' of each lot by a test that did not comply with the statutory requirements of section 119(2) nor the requirements of *Spencer's* Case;
6. the Board erred in law by basing its conclusions as to the proper unit entitlements on the mean between the unit entitlements calculated by each valuer where there was no evidence that averaging resulted in a reasonable ``valuation'' of the lots;
7. the Board erred in law by making an order under section 119(1) without first having regard to the respective values of the lots pursuant to section 119(2);
8. the Board erred in law by, in its Orders of 29 July 1998, finding that it was *functus officio* in respect of its construction of section 119 in its Provisional View of 23 May 1998;

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9. the Board erred in law by denying procedural fairness to the Plaintiffs by creating in the parties a legitimate expectation that their submissions as to the construction of section 119 in the Board's Provisional View of 23 May 1998, would be countenanced by the Board before the making of its final orders;
10. the Board did err in law by, after having rejected the valuation evidence before it and in the absence of further and better valuation evidence, not declining the application for a review of unit entitlements;
11. the Board did err in law for failing to give reasons for its implicit rejection of the Plaintiffs' estoppel argument raised before it.

194. The Defendants submit that, in the event that this court finds that the Board did err in law, the Court should still dismiss the Summons on the grounds that the ultimate outcome of the case was not affected by those errors. In support of this, the Defendants cite *Sangster* v *Henry* (1920) 37 WN (NSW) 135 and *Ex parte Sharah*; *Re Cox*; *Potato Marketing Board v Sharah* (1956) 73 WN (NSW) 283 at 290.

195. In *Sangster v Henry*, the court considered that the magistrate had made an error in law by applying the words ``without reasonable cause'' to the whole of the legislative provision where it was clear from the terms of the statute that it was meant only to apply to the first half of that provision. The words statutory provision in that case, however, meant that a similar standard to ``without reasonable cause'' would apply to the second half of the provision and, given, the facts before the magistrate, it was evident that the same result would be reached. The case was considered not one to be remitted to the magistrate.

196. The case of *Ex parte Sharah* involved an appeal from a Magistrate in respect of one conviction of an accused and the acquittal of his accomplices under the *Marketing of Primary Products Act* 1927-1940 for offences involving dealing in potatoes which were the property of the Potato Marketing Board. Brereton J determined that the terms of the *Justices Act* 1902 ss 101 and 106 (which are the provisions applicable in the present proceedings) ``make it plain that the appeal is against the determination; and if the magistrate's decision is justified on the evidence and not affected by an erroneous decision of law the case will not be remitted'': at 290.

197. In the present case, it cannot be said that these authorities assist the Defendants. It is not clear, in the present proceedings, that the Board's decision was justified on the evidence. It would be difficult for this Court to determine that question without hearing the case *ab initio*, which course is not available under s 130 of the Act, s 101(1) of the *Justices Act* 1902. The only remedy available, then, to the Plaintiffs' application is to remit the matter for re- determination by the Board.

Final conclusions

198. Much in this case has turned on whether the contentions of the Plaintiffs as contained in the Stated Case constitute questions of law or questions of fact. I have examined each contention carefully on its own terms to determine whether it is one properly dealt with by this court as a question of law.

199. The second aspect of this case was the admission of the exhibits to the affidavit of F L Andreone of 19 January 2000. Being relevant to the various ``no evidence'' points raised by the Plaintiffs' contentions and submissions, that evidence was admitted.

200. In respect of the contentions contained in the Amended Stated Case, I conclude that in respect of contentions 4.1, 4.2(a), 4.3(a), 4.3(c), 4.4, 4.5, 4.6, 4.7, 4.9 and 4.11 the Plaintiffs' claim that the determinations of the Board were erroneous in law has been made out. In respect of all of the mentioned contentions, I direct that the matter be remitted to the Board for a fresh determination of whether the Board should exercise its power under s 119(1) and re- allocate unit entitlements.

201. I find that the Board did not err in law in respect of contention 4.3(b) of the Plaintiffs' contentions as contained in the Stated Case. Furthermore, the Board did not err in law in respect of contention 4.8 of the Stated Case.

202. In respect of contention 4.11, I find that even were the Board to have erred in law by not giving reasons for its dismissal of the Plaintiffs' argument in relation to estoppel, nonetheless given that that argument would, on legal principles, fail, I do not see any reason to remit it for reconsideration by the Board.

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[140156]

Orders

203. I direct the parties to submit short minutes of order to give effect to the terms of this judgment, within fourteen days.

BANKS & ANOR v BODY CORPORATE FOR ``NOOSA ON THE BEACH'' COMMUNITY TITLES SCHEME 6417

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(2000) LQCS ¶90-104

QCA citation: [2000] QCA 146

Supreme Court of Queensland, Court of Appeal

Judgment delivered 28 April 2000

Community schemes — Retrospective order by primary judge concerning contribution schedule lot entitlements — Whether there was invalid resolution of body corporate to commence application for leave — Whether resolution ratified commenced proceedings — Whether order could be given retrospective effect — Body Corporate and Community Management Act 1997, sec 46; 256 — Body Corporate and Community Management (Standard Module) Regulation 1997, sec 44; 46.

On 19 March 1999 the body corporate of a community titles scheme (``the scheme'') applied to the District Court under sec 46 of the Body Corporate Management Act 1997 for adjustment of the contribution schedule lot entitlement. The return date was 7 April 1999 on which date neither party was ready to proceed. An amendment was made to the application to add a plea for further or other order as the court deemed fit, the application having initially sought only adjustment to an equal contribution. In the meantime, on 29 March the body corporate resolved upon a number of special levies on lot owners in proportion to their existing contribution schedule lot entitlement. Payment of some of these levies was due by the end of May.

When the matter came before the court again on 17 May 1999, the body corporate sought an adjournment on the basis that it had been unable to convene a body corporate meeting to determine the attitude of proprietors other than the respondents. The judge adjourned the application and restrained the body corporate, until further order, from levying the respondents to any greater extent than if their lot entitlement were equal to that of the other lot owners. In July 1999 the respondents filed an affidavit stating that a just and equitable adjustment required a contribution from the respondents of approximately twice that which would have been an equal contribution but less than half that for which they were liable under the existing scheme. An expert report received by the respondents in September agreed with this view. This was the adjustment ultimately made by the District Court in December 1999. The Court further ordered that the adjustment was to take effect on 7 April 1999 and that, until further adjustment, the body corporate refrain from levying any lot owner in the scheme other than in accordance with the contribution schedule lot entitlements contained in its order.

The body corporate applied for leave to appeal from this judgment. At that time there was no special resolution of the body corporate authorising the application but a special resolution to that effect (``the resolution'') was passed in March 2000, some three months later. The body corporate argued that this resolution ratified the proceedings already commenced without authority.

In the event that leave to appeal were granted, the Court agreed to treat the hearing as the hearing of the appeal. Three questions thus arose for determination: (i) the competency of the appeal and application for leave; (ii) whether leave to appeal should be granted; and (iii) the merits of the appeal.

Held: the application and appeal were competent; leave to appeal granted; appeal allowed.

Competency of application and appeal

1. A submission that the resolution was invalid because the general meeting had not been duly convened was rejected. The meeting was held more than 15 km from scheme land and the notice calling the meeting was given exactly 21days before the meeting was held. It did not follow that, as 21 days was the minimum period of notice required by sec 43 of the Standard Module, a reasonable opportunity under sec 44 to object to the proposed place of the meeting required a longer period.

2. While the resolution, in form, did not authorise the ratification of the proceeding already commenced, it did so in substance. That plainly must have been its intention.

Leave to appeal

3. There was an important question involved in the appeal which should be resolved by the Court of Appeal, namely whether an order made under sec 46 of the Act may be made so as to have retrospective effect.

Substantive points on appeal

4. The primary judge did not have power to make an order under sec 46 having retrospective effect. An order changing the lot entitlement could take effect only pursuant to the terms of the Act, that is, upon the recording by the registrar of the new community management statement.

5. The respondents were not entitled to an injunction as from 7 April 1999 restraining the recovery of any contribution levied. The Court could not be satisfied that, even assuming unconscionability on the part of the body corporate from September 1999 in failing to disclose and act on the report received by it, that unconscionability caused the respondents any detriment. They did not assert any detriment other than that which occurred by reason of their liability to pay the levies for which they became liable before the adjustment took effect. There was, therefore, no basis for an injunction from 7 April 1999 or from any later date.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

CJ Carrigan (instructed by Short Punch & Greatorix) appeared for the applicant/appellant.

DLK Atkinson (instructed by Kinneally Mahoney) appeared for the respondents.

Before: McMurdo P, Davies JA and Moynihan J.

Full text of judgment below

McMurdo P, Davies JA and Moynihan J:

The Court

1. This is an application for leave to appeal from a judgment of the District Court on 14 December 1999 that the contribution schedule lot entitlement for Noosa on the Beach Community Titles Scheme Number 6417 be adjusted in accordance with a specified schedule, that that judgment take effect from 7 April 1999 and that, until further adjustment of the contribution schedule lot entitlements pursuant to the provisions of the *Body Corporate and Community Management Act* 1997, the applicant refrain from levying any lot owner in the scheme other than in accordance with the contribution schedule lot entitlements contained in the order on and from 7 April 1999.

2. Before this Court the parties joined in asking the Court, in the event that it granted leave, to treat the hearing as the hearing of the appeal and the Court agreed to that course. Accordingly three questions arose for determination by this Court. They were:

1. the competency of the applicant's appeal and its application for leave;
2. whether leave should be granted; and
3. the merits of the appeal.

Competency

3. The respondents submitted that the appeal, and consequently the application, were incompetent because the proceedings had not been properly authorized. Section 259 of the *Body Corporate and Community Management Act* 1997 (``the Act'') provides in s 259(1) that a body corporate may start a proceeding only if the proceeding is authorised by special resolution of the body corporate. Some exceptions are provided for in s 259(2) but none

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of these is relevant to the present case.[1] It is common ground that at the time the present application was filed[2] there was no special resolution of the body corporate authorising it.

4. However the applicant relies on a special resolution of the body corporate of 24 March 2000, about three months after the present application was filed, by which it was resolved to authorise the commencement and conduct of this appeal and to incur any necessary legal expenses. Mr Carrigan, who appeared for the body corporate in this Court, submitted that that resolution ratified the proceeding already commenced without authority. To that, Mr Atkinson who appeared for the respondents, made two submissions. First he submitted that that was not a valid resolution because the general meeting for it had not been duly convened; and secondly he submitted that, in any event, the resolution did not purport to and did not ratify the proceeding already commenced.

5. The first of Mr Atkinson's submissions relies on s 43 and s 44 of the *Body Corporate and Community Management (Standard Module) Regulation* 1997 (``the Regulation''). Those sections are in the following terms:

> ``43. A general meeting must be held at least 21 days after notice of the meeting is given to lot owners.
>
> 44.(1) A general meeting must be held not more than 15 km (measured in a straight line on a horizontal plane) from scheme land.

(2) However, if the committee notifies the owners of its intention to hold the meeting at a stated place more than 15 km from scheme land, and allows them a reasonable opportunity to object in writing to the proposed place, the meeting may be held at the place unless written objections to the proposed place of meeting are given by or for owners of at least 25 % of the lots included in the scheme."

6. It was common ground between the parties that the general meeting was held more than 15 kilometres from scheme land and the notice calling the meeting was given exactly 21 days before the meeting was held. Mr Atkinson submitted on these facts that, as 21 days is the minimum period required by s 43, a reasonable opportunity under s 44(2) required longer than that. We do not think that necessarily follows. Moreover in the present case the only lot owners who stood to lose in consequence of success of this appeal appear to have been the respondents who were represented in person by the first respondent at the meeting. We would therefore reject the respondents' submission that the meeting at which the resolution was passed was not duly held.

7. The respondents' other submission on this point also lacks substance. It is correct that, in form, the resolution does not authorise the ratification of the proceeding already commenced, but if it were correct that it did not do so in substance the appropriate course for this Court to take would have been, in our view, to permit the applicant to withdraw its earlier application and permit it to file one on the day of hearing of this application, to extend time accordingly and to treat the material already filed in this application as filed in that. Mr Atkinson does not contend that his clients would suffer any detriment from that course. But we think, in any event, that the resolution in substance ratifies the proceeding already commenced; that plainly must have been its intention. We would therefore reject the submission that the application and appeal are incompetent.

Leave

8. There is no doubt that there is an important question involved in this appeal, namely whether an order made under s 46 of the Act may be made so as to have retrospective effect. The learned primary judge held that it may. However Mr Atkinson, whilst conceding the strength of a contrary view, submitted that the question did not necessarily arise if, as he submitted, in any event, the respondents were entitled to an injunction restraining the applicant from levying the respondents, other than in accordance with the adjusted amount, from 7 April 1999. One difficulty facing Mr Atkinson in making this submission is that that question itself may be an important question of law. But in any event it is important that the question whether a court can make an order under s 46 having retrospective effect should be resolved by this Court. Accordingly, we would grant leave to appeal.

The appeal points

9. The substantive points in the appeal then are whether the learned primary judge had power to make an order under s 46 having retrospective effect; and, if he did not, whether

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the respondents were nevertheless entitled to an injunction restraining the recovery of any contribution levied as from a date earlier than the date on which the adjustment would take effect.

10. Section 46 of the Act, pursuant to which the owner of a lot may apply to a District Court for an order for the adjustment of a lot entitlement schedule, provides in s 46(8) that, if a court orders an adjustment of a lot entitlement schedule, the body corporate must, as quickly as practicable, lodge with the registrar a request to record a new community management statement reflecting the adjustment ordered.[3] Sections 48, 49 and 50 then provide for the recording of a community management statement and s 53 provides that a community management statement takes effect only when it is recorded by the registrar as the community management statement for a community titles scheme. It can be seen from these provisions that it is the recording by the registrar of the community management statement, rather than the order of the judge, which causes it to take effect. If there remained any doubt that, consequently, the adjustment of lot entitlement took place only on the recording of the new community management statement, that is removed by s 44(7) which so provides specifically.

11. If by the orders already referred to the learned primary judge was purporting to change the lot entitlement retrospectively, his Honour was, in our opinion, wrong in thinking that any such order could have that effect for it could take effect only pursuant to the terms of the Act, that is, upon the recording by the registrar of the new community management statement.

12. Mr Atkinson, for the respondents, did not argue strongly to the contrary. His principal argument was that, assuming that an order under s 46 could not be given retrospective effect, the learned primary judge was nevertheless correct in enjoining the applicant from levying lot owners, after 7 April 1999, otherwise than in accordance with the contribution schedule lot entitlements contained in his order. This was, he submitted, because the applicant was estopped, on and from 7 April 1999, from asserting a right to recover from the respondents lot entitlement contributions greater than those which would be in accordance with the lot entitlement contribution schedule contained in the order. Such an estoppel, it was conceded, must be based on unconscionability of the applicant causing delay, from that date, in the adjustment of the lot entitlement which in turn caused detriment to the respondents, that detriment being liability for contributions to the extent that that liability would not have existed under the adjusted schedule.

13. The application for adjustment was filed in the District Court on 19 March 1999 with a return date of 7 April. On that date neither party was ready to proceed.[4] The present respondents did not then have evidence to support the adjustment for which they later contended and which the court made. Directions were sought and given as to amendment of the application, the filing and serving of documents including affidavits and the listing of the matter ``for final determination or further directions if necessary on May 17 1999''. The amendment sought and made was as to the form of relief, adding a plea for such further or other order as the court deemed fit, the application, as initially framed, having sought only adjustment to an equal contribution. This amendment was sought, presumably, because the respondents recognized by that date the possibility that the contributions ought not to be equal.

14. This is of some importance because of the submission made by Mr Atkinson that, on that date, the court could have and perhaps should have made an order for equality of contribution in reliance on the presumption contained in s 46(4) which provides that, for the contribution schedule, the respective lot entitlements should be equal except to the extent to which it is just or equitable in the circumstances for them not to be. It was submitted for the respondents in this Court, as it had been below, that such an order would have left it open to other lot owners to make a further application for adjustment. Given the fact that the respondents' application for adjustment was already before the court in circumstances in which the likelihood of an adjustment otherwise than on the basis of equality must have been foreseeable,[5] it was appropriate for the court to consider what that adjustment should be rather than to take the course urged by Mr Atkinson. Mr Atkinson was unable to point to any act or omission of the present applicant, at that time, which could be relied on to found an estoppel.

15. In the meantime on 29 March 1999 the applicant had resolved upon a number of

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special levies on lot owners in proportion to their existing contribution schedule lot entitlement.[6] Some of these were made payable in full by 31 May 1999, others by instalments the first of which was due on 31 August 1999.

16. When the matter came before the court again on 17 May 1999 the applicant sought an adjournment on the basis that it had been unable to convene a meeting of the body corporate to determine the attitude of the proprietors other than the respondents. The learned primary judge whilst noting that the time frame which he had imposed was quite tight, noted also the urgency from the respondents' perspective because payment under some of the levies was due at the end of that month. It was at this hearing that counsel for the respondents raised, for the first time, the possibility of any adjusting order ultimately made being antedated to the date on which the application was made. Mr Carrigan for the present applicant informed his Honour that he had no instructions to consent to such an order. His Honour nevertheless concluded that there were special circumstances which would justify an order, if favourable to the respondents' application, being antedated to the time when the application by them was made. His Honour did not identify those special circumstances. At that stage no evidence had been produced by either party as to what would be a

just and equitable adjustment. The learned primary judge accordingly adjourned the application, gave further directions as to the conduct of the matter and restrained the applicant, until further order, from levying the respondents to any greater extent than if their lot entitlement were equal to that of the other lot owners.

17. It could not seriously be contended that there was, on or before this date, any act or omission of the applicant which would found an estoppel. The suggestion for backdating was plainly not accepted by the applicant as a condition of the adjournment. In any event, even the respondents were not then ready to proceed except on the basis that, in accordance with the presumption in s 46(4), the lot entitlements should be equal.

18. By the time the matter came before another judge on 26 July 1999 the applicant had filed an affidavit of Bryce Hansen on 14 July. That affidavit is not before this Court but we were told that it stated that the contribution lot entitlement should be other than equal but did not say how it should be adjusted. It is unclear whether, by 26 July, Mr Hansen had told the applicant how he thought it should be adjusted. However on 26 July the respondents filed an affidavit by Howard William Alfred Stewart deposing to what was, in his opinion a just and equitable adjustment. This showed an adjustment requiring a contribution from the respondents of approximately twice that which would have been an equal contribution but less than half that for which they were liable under the existing scheme. This was the adjustment ultimately made by the court. On 26 July the matter was further adjourned to October, the applicant being given liberty to produce and serve an expert report, within one month, in reply to Mr Stewart's report. There was no further act or omission by the applicant on or prior to 26 July which would found an estoppel. By now, of course, the levies due on 31 May would have been payable but for the injunction referred to earlier which, though not referred to in the orders of 26 July, appears to have continued by force of the order of 17 May.

19. The time limit imposed on the applicant for producing and serving its expert's report was not complied with. It was not until 11 November 1999 that it disclosed to the respondents a further report of Mr Hansen which was, in effect, identical to that of Mr Stewart. Nevertheless it appears that it had in its possession a copy of that report in draft form in September 1999. It is also possible that the applicant knew of Mr Hansen's view at a date earlier than this but that is not clear. What is clear is that, at no time after it received Mr Hansen's further report did the applicant challenge Mr Stewart's report. On the ultimate hearing of the matter on 9 and 10 December 1999 the applicant did not contest Mr Stewart's report or itself file any valuation evidence and accordingly, on 14 December, the order under appeal was made adjusting the lot entitlement schedule in accordance with Mr Stewart's report.

20. The first date upon which there was any arguable unconscionability on the part of the applicant is some time in September 1999 when it received Mr Hansen's draft report presumably agreeing, in effect, with that of Mr Stewart. It is arguable that it ought then to have conceded the correctness of Mr Stewart's adjustment and agreed to an order in terms of it or called a meeting of the body corporate for the purpose

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of consenting to a new community management statement.[7]

21. But it is not at all clear that the taking of either of these courses would have, in any way, hastened the making of an adjustment. The adjustment order was made retrospective upon the submission of the respondents and there is no suggestion that, if either of those courses had been taken, the respondents would have resiled from that submission. The applicant was plainly entitled, as it did, to contend that no such retrospective order should be made; indeed, as already indicated, such a contention would have been correct.[8] So it seems likely that a contested hearing, presumably at about the time it ultimately occurred, was likely.

22. Consequently we cannot be satisfied that, even assuming unconscionability on the part of the applicant from, say, the end of September 1999, in failing to disclose and act on Mr Hansen's draft report, that unconscionability caused the respondents any detriment. They do not assert any detriment other than that which occurred by reason of their liability to pay the levies for which they became liable before the adjustment took effect. There was, therefore, no basis for an injunction from 7 April 1999 or from any later date.

23. We would accordingly grant the application, allow the appeal, set aside the judgment below and order that the contribution schedule lot entitlement for Noosa on the Beach Community Titles Scheme Number 6417 be adjusted in accordance with the Schedule contained in 1 of the judgment of 14 December 1999 and that the respondents pay the applicant's costs of and incidental to the hearing set down for two days commencing on 9 December 1999 and of this appeal.

24. In view of the fact that this appeal has succeeded on an error of law by the learned primary judge we would also order the respondents be granted an indemnity certificate in respect of this appeal.

Footnotes

1 See also *Body Corporate and Community Management Act* 1997 s 92(1) and s 92(2); *Body Corporate and Community Management (Standard Module) Regulation* 1997 s 26(e).

2 The application for leave to appeal and notice of appeal were filed on 24 December 1999.

3 The community management statement must include a contribution schedule: s 57(1)(c) of the Act.

4 That is, except on the basis contended for by Mr Atkinson, referred to in 14.

5 The facts in the report of Mr Stewart which was before this Court shows that it must have seemed an obvious possibility.

6 The Act s 113(2)(b); the Regulation s 95 and s 96.

7 Pursuant to s 55 of the Act.

8 And the same is true of a contention with respect to an injunction from 7 April 1999.

SATTEL & ORS v THE PROPRIETORS BE BEE'S TROPICAL APARTMENTS BUILDING UNITS PLAN NUMBER 71593

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(2000) LQCS ¶90-105

QSC citation: [2000] QSC 071

Supreme Court of Queensland

Judgment delivered 23 March 2000

Building Units and Group Titles — By-laws — Building unit plan for small tourist resort — Validity of caretaking agreement challenged — Severance of provisions — Ultra vires — Purported termination of agreement — Whether caretaking agreement valid and enforceable — Building Units and Group Titles Act 1980, sec 30(7AA); 37; 51.

Be Bee's Tropical Apartments was a small tourist resort in Cairns. The building unit plan (which was registered in 1994) consisted of ten lots, Lot 1 to be owned and used by the manager/caretaker and the remaining lots to be used as holiday apartments for short term rentals. The proprietor of Lot 1 had the exclusive right to certain common areas noted on the plan, including an area beside Lot 1 which was used for a restaurant and two smaller areas.

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In 1994 a five-year caretaking agreement was entered into between the body corporate and the then owners of Lot 1 (``the vendors''). The agreement, among other things: allowed the caretaker to operate a licensed restaurant and required its maintenance in a clean and tidy condition; required the caretaker to provide the body corporate with cleaning services and entitled it to remuneration from the body corporate for these services; required the caretaker to provide day and night PABX telephone answering services; and provided ``special privileges'' to the caretaker, including that the body corporate would ``not interfere with, hinder or compete with the caretaker'' in running its business or enter an agreement with another person to provide services required to be performed by the caretaker. The relevant by-law giving the body corporate power to enter into a caretaking agreement with the owner of Lot 1 was By-law 33.

In May 1995 the plaintiffs purchased the vendors' interest in the property and then conducted the business of caretaking the premises on behalf of the body corporate. After taking possession of Lot 1, the plaintiffs moved the reception area (which had previously been located in their lot) to an outside passageway which was part of the common area under the control of the body corporate.

Certain lot holders later took the view that there had been breaches of the letting agreements and that the caretaking agreement was invalid. At an extraordinary general meeting on 9 February 1996 it was resolved that, on the basis that the agreement was void, remuneration to the plaintiffs would not be paid and they would not be required to perform any services under the agreement. At a further extraordinary general meeting on 3 April 1997 it was resolved that the agreement be terminated by the body corporate pursuant to sec 50(9), which implied a term that, after three years of the first annual general meeting, the body corporate may, within 30 days, terminate the appointment.

The plaintiffs claimed that the body corporate wrongly repudiated the agreement and purported to accept that repudiation by a solicitors' letter dated 4 July 1997.

The body corporate challenged the validity of the caretaking agreement, arguing that certain terms were outside the power of the body corporate, including: provisions which it alleged required the body corporate to pay for the costs of cleaning and maintaining Lot 1 and exclusive use areas; the requirement to provide day PABX answering services; and the ``special privileges'' provisions. It further argued that these terms could not be severed without changing the nature of the agreement.

Held: declarations that the caretaking agreement was enforceable and that it was terminated as from 4 July 1997 by the plaintiff's acceptance of the body corporate's repudiation; action remitted to District Court for assessment of damages.

Enforceability of caretaking agreement

1. The caretaking agreement was enforceable.

2. The requirement in the agreement that the body corporate pay for cleaning services in the ``reception area'' did not offend the provisions of sec 37 and 51 of the Building Units and Group Titles Act 1980 requiring the body corporate to maintain the common areas and the lot owner to maintain his or her lot. The ``reception area'' referred to in the agreement and By-law 33(f) was part of the common area exclusive use of which was given to the plaintiffs and not the area in Lot 1 originally used as the reception area by the vendors.

3. The plaintiffs had the responsibility under sec 30(7AA) of the Act to perform at their expense the duties of the body corporate in respect of the common areas over which they had exclusive use. There was nothing in the agreement which, on its face, required the performance by the body corporate of services which were the plaintiffs' responsibility. Further, no remuneration had ever been sought from or paid by the body corporate in respect of the exclusive use areas.

4. The provision of the PABX service was part of the plaintiffs' business activities and was authorised by By-law 33(a)(xii), which allowed the caretaker to carry out any services or

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activities which were related to those listed. The answering service would be of particular importance to the letting business, to the business of providing service in respect of the lots and to the restaurant business.

5. The ``special privileges'' provisions were ultra vires the body corporate because, at the time the caretaking agreement was agreed between the body corporate and the plaintiffs by assignment from the vendors, there was no by-law authorising such provisions. However, the relevant clauses were clearly for the exclusive benefit of the plaintiffs and could be severed without making a perceptible change to the general nature of the agreement (Humphries & Anor v The Proprietors of ``Surfers Palms North'' Group Titles Plan 1955 (1922-4) 179 CLR 597, followed).

Termination

6. The caretaking agreement was validly terminated by the plaintiff's acceptance of the body corporate's conduct repudiating the agreement by their solicitor's letter to the body corporate dated 4 July 1997.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Before: Jones J.

Full text of judgment below

Jones J: At the relevant time *Be Bee's Tropical Apartments* was a small tourist resort located in suburban Cairns. The Building Unit Plan consisted of ten lots altogether. Lot 1 was designed to be owned and used by the manager/ caretaker, the other nine lots to be used as holiday apartments for short term rentals usually less than one week.

2. The proprietor of Lot 1 had the exclusive right to certain common areas noted on the plan. These included a large area beside Lot 1 which was used for a restaurant/dining area and two smaller areas, one used for a communal laundry and the other a passageway which was used initially as a storage area for visitors. Lot 1 was equipped with a commercial kitchen for the purpose of that business.

3. As at 8 May 1995 the second defendants (``the vendors'') held an interest in —

(i) Lot 1 of Building Unit Plan No. 71593 (``the BUP'');
(ii) A caretaking agreement dated 22 August 1994 between themselves and the body corporate of the said Plan (``the body corporate'').

4. On 8 May 1995 the plaintiffs agreed in partnership to purchase from the vendors their interest in the said property.

5. This case turns on the question whether the caretaking agreement is valid and enforceable against the body corporate. The body corporate contends that the caretaking agreement is not enforceable against it for the reason that when made its terms were ultra vires the body corporate with respect to five particular provisions. Further, the terms could not be severed without changing the nature of the agreement.

6. The BUP was registered in 1994 and the first meeting of the Body Corporate held on 7 March, 1994.

7. On 22 August 1994 the caretaking agreement was entered into between the Body Corporate and the vendors providing for —

(i) the better management, caretaking, administration and control of the Body Corporate's property; and
(ii) the better exercise and performance of some of the body corporate's powers and duties pursuant to the Act.

The Act referred to is the *Building Units and Group Titles Act 1980* which will hereinafter be referred to simply as ``the Act''.

8. The original caretaking agreement also included terms which permitted the resident caretaker to carry on the business of letting the lots comprised in the Plan. However this provision was deleted following the decision of *Humphries & Anor v The Proprietors of ``Surfers Palms North'' Group Titles Plan 1955*[1] . This alteration was made prior to the plaintiffs entering into the agreement here. On completion of the sale the plaintiffs also received an assignment of the letting rights agreement which the vendors had with the various owners of the lots other than Lot 1.

9. The by-laws which give power to the body corporate to enter into an agreement with the proprietor of Lot 1 for caretaking and management service is by-law 33, the relevant

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terms of which were agreed by special resolution on 16 May 1995.[2]

10. On 26 May, 1995 the plaintiffs completed the sale by paying the following amounts:—

For Lot 1	$105,000
For Management business	$ 30,000
For Plant and equipment	$ 40,000

Total	$175,000

11. After completion of the sale the plaintiffs' partnership then conducted the business of caretaking the premises on behalf of the body corporate and they carried on the business as letting agents to the proprietors of the various lots. The partnership members held the appropriate real estate agent licences for this purpose. On 26 July 1995 at the Annual General Meeting of the body corporate, Messrs. Sattel and Nicholson were appointed to the body corporate committee.

12. After taking possession of Lot 1 the plaintiffs re-configured a part of their lot which had previously been used as a reception area. This had the effect of moving the reception area to an outside passageway which was part of the common area under the control of the body corporate.

13. Also the partnership business had the obligation pursuant to the caretaking agreement of answering the PABX telephone system. By this system incoming calls to the occupiers of the various lots would be answered at the office and redirected to the relevant lot. The occupants of the lots could make outgoing calls directly by dialling 0. The provision of the answering service was not the subject of an express provision in the By-law pursuant to which the caretaking agreement was entered into. But it was a service which provided a source of income to the partnership.[3]

Issues

14. The validity of the caretaking agreement is challenged in five respects, particularised in paragraph 18 of the amended defence. Since these allege that the making of the agreement was ultra vires the power of the body corporate I will set out the relevant provisions of the by- law by which the body corporate was authorised to enter into the agreement.

15. The terms of the by-law include[4] :—

> ``33(a) The proprietor of Lot 1 in the Plan will be at liberty to carry on or cause to be carried on all or any of the following activities from that lot, subject to the terms of these by-laws, from any area over which the proprietor of Lot 1 has been granted rights of exclusive use (for profit or otherwise):
>
> (i) the hiring of television sets etc
> ...
> (v) cleaning and the provision of services to the occupants of the lots contained in the plan;
> ...
> (viii) the business of sales and/or letting agency for the sale and/or letting of the lots comprised in the plan;
> ...
> (ix) the business of providing service to partners in respect of the lots contained in the Plan;
> (x) the management and caretaking of the building and the common property;
> (xi) the business of the operation of a licensed restaurant;
> (xii) any other related service or activity,

the body corporate will enter into such agreement in writing with the proprietor of Lot 1 as may be reasonable and/or necessary to give effect to the rights of the proprietor of Lot 1 to carry on all or any of the activities referred to in this by-law.

...

(e) The proprietor or occupants for the time being of Lot 1 would be entitled to the exclusive use and enjoyment for himself and his licensees of the outdoor dining area hachured in black on Annexure `A' hereto.

...

(f) the proprietor occupier for the time being of Lot 1 will be entitled to the exclusive use and enjoyment for himself and his licensees of the area adjacent to Lots 2 and 3 and the area adjacent to Lots 7 and 8 and hachured in black in Annexure `B' hereto. Each proprietor or occupier to whom the exclusive use of this area is given may use such space for:—

(a) receiving the proprietors, occupiers or tenants of the lots and the licensee

...

on the proviso that he or his licensees will keep such area in a clean and tidy

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condition and not litter the same or use the same to create a nuisance or eyesore.

...

(g) other than the proprietor of lot 1, the owner or occupant of any other lot contained in the plan will not make use of that lot or cause that lot to be used for any of the purposes or activities referred to in by-law 33(a), 33(b) and/or 33(f)."

16. I shall deal then with the five allegations raised by the first defendants in turn:—

(a) By the First Schedule to the agreement (service (i)) the plaintiffs are required to provide services to clean and maintain Lot 1 in Building Units Plan 71593 at the expense of the first defendants

The particular service detailed in the First Schedule relates to a list of daily and weekly cleaning tasks to be performed in this reception area[5] . The first defendant argues that at the time the initial caretaking agreement was entered into and even when that agreement was assigned to the plaintiffs the reception area was located within the bounds of Lot 1. The requirement for the body corporate to pay for the services so performed offended the provisions of ss. 37 and 51 of the Act[6] . In simple terms the scheme of the Act is that the body corporate has the duty to maintain the common areas and the lot proprietor has the duty to maintain his or her lot. The body corporate may however enter into agreement with the lot proprietor for the provision of services to the lot. No such agreement was reached here.

17. The first defendant identified the ``reception area'' as that part of Lot 1 which was used as an office by the vendors and where guests would come to the register.

18. Mr Owen gave evidence on behalf of the plaintiffs that shortly after the plaintiffs went into occupation of Lot 1 the area where guests were received was moved to a common area outside the bounds of Lot 1. The office remained inside Lot 1[7] .

19. The plaintiffs' response was that the ``reception area'' referred to in schedule 1 of the caretaking agreement relates to the common area described in by-law 33(f) above and as such it is in accord with the statutory provisions binding on the body corporate.

20. Quite apart from the factual situation, it seems to me that in determining the validity of the caretaking agreement regard must be had to the terminology used in it compared with that in the by-law. The manner in which the vendors chose to use Lot 1 does not influence the correct construction of the documents. There is no delineation on the BUP described as ``reception area'' nor is the term anywhere defined. But there is a close correlation between the description of the common areas to which the proprietor of Lot 1 was given exclusive use and the areas in which the First Schedule services were to be provided. Following the physical

alterations made to Lot 1 by the plaintiffs the factual situation basically complied with what was intended by the two documents.

21. In my view the reception area referred to in the Schedule is the same as that referred to in by-law 33(f) and therefore it is part of the common area exclusive use of which is given to the plaintiffs. As a consequence there is no infringement of any of the provisions of the Act.

(b) By clause 11(3) of the agreement the plaintiffs are required to provide services to clean and maintain areas of common property of which the plaintiffs have exclusive use at the expense of the defendant

22. The by-laws by paras 33(e) and (f) referred to above grants to the proprietor of Lot 1 exclusive use over certain use on the proviso in each instance that ``he and his licensees shall keep such area in a clean and tidy condition and not litter the same or use the same as to create a nuisance or an eyesore''. In neither instance however is any reference made as to whether the expense of performing such obligations shall be borne by the body corporate or the proprietor of Lot 1.

23. Section 30(7A) of the Act states that a by-law of this kind should provide who is to be responsible to carry out the body corporate's duties with respect to the common property and at whose expense. If the by-law does not do this (and that is the case here) then sub-sec (7AA) provides that ``the proprietor or proprietors shall be responsible at his, her or their own expense''.

24. So the first defendant contends that part of the services detailed in the First Schedule were in fact the obligations of the plaintiffs and ought not to have been paid for by the body corporate. The first defendant further contends that as the cost to the body corporate for the

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performance of those services expressed as a lump sum the particular services performed in respect of the exclusive use area cannot simply be deleted without making a material change to the contractual arrangement. As a consequence on the application of the principle annunciated in *Humphries* case (supra) the caretaking agreement is void.[8]

25. The plaintiff contends that clause 11.3 of the caretaking agreement imposes on the plaintiffs the obligations consistent with that proviso in the by-law and that it is done as part of the plaintiffs' responsibility consistently with sub-section (7AA) of s 30. It is clear from clause 11 of the caretaking agreement that the responsibility and the expense of running the restaurant lies with the plaintiffs. Clause 11.1 provides —

> ``11.1 The resident caretaker may carry on in the building the business of a restaurant together with all associated services commonly rendered in connection with such a business (`a restaurant business')."

And then clause 11.3 provides —

> ``11.3 The resident caretaker shall at all times make sure that the restaurant and outdoor dining area are maintained in a clean and tidy condition clear of rubbish and vermin and shall ensure that such areas are regularly and thoroughly cleared."

26. These clauses should be read with clause 4 of the caretaking agreement which deals with the remuneration of the resident caretaker. Clause 4.1 makes it clear that the remuneration set out in the Third Schedule was for ``providing these services to the body corporate''. Clause 4.3 makes it clear that the remuneration ``shall be in addition to any income derived by the resident caretaker as a consequence of the operation of the resident caretaker's business''.

27. The relevant ``services'' listed in the First Schedule essentially detail a cleaning regime to be carried out physically by the caretaker. It has the character of an instruction one would give to an employee or contractor. It relates to the services which the body corporate itself determines are necessary to meet its obligation under s. 37(1)(c) of the Act.

28. Whether invalidity is shown turns on the construction of by-law 33 and the terms of the caretaking agreement within the statutory framework referred to above. It is clear that the plaintiffs have the responsibility pursuant to s 30(7AA) of the Act to perform at their expense the duties of the body corporate

in respect of the common areas over which they have exclusive use. That fact is particularly acknowledged by the plaintiffs and the body corporate quite expressly in relation to the restaurant business referred to in clause 11. In relation to the other businesses carried on by the plaintiffs the responsibility is not expressed in the agreement but nonetheless that responsibility does exist. The agreement in its general terms in clause 4 acknowledges that the resident caretaker is to provide service to the body corporate. There is nothing in the terms of clause 11(3) of the agreement which, on its face, requires the performance by the body corporate of the services which are the responsibility of the proprietor of Lot 1. Mr. Owen gave evidence that no remuneration had ever been sought from or paid by the body corporate in respect of the exclusive use areas.[9] No attempt was made on behalf of the defendants to identify any of the areas where it was alleged the body corporate incurred expense which was the responsibility of the proprietors of Lot 1.

29. Consequently I am not satisfied that clause 11(3) gives rise to any invalidity in the caretaking agreement.

> *(c) by the first schedule to the Agreement (service (x)) the Plaintiffs are required to provide day and night PABX answering services*

30. The requirement to provide day and night PABX answering is one of the daily duties of the resident caretaker listed in the First Schedule, see s. A(xi)[10] .

31. The defendant contends that this service is not authorised by any relevant power in the by-law and could not be given pursuant to s. 37(2)(a) of the Act. This subsection allows the provision of a service by the body corporate to a proprietor of a lot only if there is an agreement with the lot holder. The first defendant argues that this is a service provided to the individual lot holders and there are not any agreements with those lot holders.

32. The plaintiffs argue that this activity is a related service to the businesses conducted by the plaintiffs as envisaged by paragraph (xii) of by-law 33, see para 15 above.

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33. The view I take of this contest is that the provision of the PABX service is part of the business activities of the plaintiffs. In this way the agreement is authorised by by-law 33(a)(xii) which I construe as meaning an activity which is related only to the activities referred to in paragraph (a). The PABX answering service would be of particular importance to the letting business (sub para (viii)), to the business of providing service to the partners [sic] in respect of the lots contained in the plan (ix), and to the business of the restaurant (xi). This part of the agreement therefore seems to have a broader purpose than service to a particular lot of the kind envisaged in s 37(2)(a) of the Act. Further to that, the phone answering is an activity which provides some income for the plaintiffs as I have already found in para 13 hereof.

34. Once this is seen as the basis for the power set out in by-law 33 then the body corporate has the authority to enter into an agreement which provides this telephone service. I therefore reject the suggestion that this provision in the caretaker agreement gives rise to invalidity.

35. Even if I had come to the opposite view on this point, I should add that I would have held the provision of this service as severable in accordance with the principles discussed in paragraphs 42 and 43 hereof.

> *(d) by clause 9.2 of the Agreement the Plaintiffs are purportedly granted special privileges in respect of the common property of building units plan 71593*;
> *(e) by clause 9.5 of the Agreement the Plaintiffs are purportedly granted special privileges in respect of both the common property and each lot in the building units plan 71593*.

36. These grounds of alleged invalidity can be considered together.

37. Clause 9.2 of the caretaking agreement provides that the body corporate will ``not interfere with, hinder or compete with the caretaker'' in the running of the caretaker's business, will not ``grant to any other person'' a right to use the common property nor enter into an agreement for another person to provide the services required to be performed by the resident caretaker. Clause 9.5 extends that commitment by the body corporate to ``take all practical steps to bring about the termination'' of any such activities or service undertaken by such other person or persons.

38. These provisions would fit the description of ``special privileges'' as that term is used in s 30(7) of the Act.

39. It is common ground that at the time the caretaking agreement was agreed between the body corporate and the plaintiffs by the assignment from the vendors, there was no by- law authorising the body corporate to these special privileges. Such a power had been present in earlier versions of the by-law but had been removed from the by-law which was operative at the relevant time. The plaintiffs cannot avoid the consequence that these particular provisions are ultra vires the body corporate.

40. The question then to be determined is whether these two provisions can be severed. Mr Queen, giving evidence on behalf of the plaintiffs, regarded these privileges as of no moment. The letting of the lots other than Lot 1 was to tourists on short stay, typically let for a period less than one week. The likelihood of business competition in a resort of only nine units, to quote Mr Owen, was ``irrelevant'' and ``immaterial''[11] . Naturally, the privilege expressed in clause 9.5 was similarly regarded.

41. Clauses 9.2 and 9.5 appear to me to have little relevance to the situation that existed at these premises. In larger resorts such a clause may have some importance and for that reason has probably become a standard provision in agreements of this kind.

42. The test for severance from an agreement of terms found to be invalid is discussed by members of the High Court in *Humphries* case. At p. 618 McHugh J cited the general test laid down by Jordan CJ in *McFarlane v Daniell*[12] in the following terms:—

> ``When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature... If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable.''

43. McHugh J noted that these terms did not enunciate an exclusive test. At p. 620 he noted

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that ``the mere fact that a lump sum payment is provided in consideration of the performance of range of duties... is not of itself a bar to severance.'' Later in his judgment, His Honour referred to a passage from an opinion of the Privy Council in *Carney v Herbert*[13] as follows:—

> ``Subject to a caveat that it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties enter into a lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision.''

44. That passage applies particularly to the situation here. Clauses 9.2 and 9.5 are clearly for the exclusive benefit of the plaintiff. But the plaintiffs see no worth in either clause and none was expressly identified by the defendants. The severing of these clauses would make no perceptible change to the general nature of the agreement.

45. In conclusion, with clauses 9.2 and 9.5 deleted I have come to the view that the caretaking agreement is enforceable.

Termination

46. The purported termination of the agreement by the first defendant followed a course of conduct which commenced with the receipt by the plaintiffs of a letter from the solicitors indicating that certain lot holders took the view that there had been breaches of the letting agreements and that the caretaking agreement was invalid. An extraordinary meeting was requisitioned by the lot holders and this was held on 9 February 1996. It was their resolve that, on the basis that the agreement was void, that the remuneration to the plaintiffs

would not be paid and they would not be required to perform any services pursuant to the agreement. The partnership continued to be involved with the letting pool until October 1996.

47. A further extraordinary general meeting was held on 3 April, 1997 whereat it was resolved that the caretaking agreement be terminated by the body corporate pursuant to s 50(9) of the Act. This subsection implies a term into any agreement for the appointment of a body corporate manager that after the expiration of three years from the date of the first annual general meeting the body corporate may within 30 days terminate the body corporate manager's appointment. In this instance the first annual general meeting of the body corporate was held on 7 March, 1994 and so it was submitted that the body corporate was entitled to terminate 30 days after the third anniversary of that meeting. The caretaking agreement was for a term of five years.

48. The plaintiffs contend that the first defendant by its resolution on 9 February 1996 wrongly repudiated the agreement and that they accepted that repudiation and that is the basis of their claim for damages which I have indicated will be assessed in District Court proceedings in which the parties are already joined. Counsel, on behalf of the body corporate, submitted (presumably seeking a finding from me) that in any event the body corporate was entitled to terminate the agreement without penalty and without giving reasons 30 days after the third anniversary of the original meeting on 7 March, 1994. That is not a matter which was raised on the pleadings nor in the statement of issues which was presented to me by consent at the commencement of the trial. The factual question of whether this agreement was indeed one which came within the purview of s 50 was not canvassed in the evidence. In those circumstances it would not be appropriate for me to make a determination on that issue first raised in addresses. I do however note the consideration by the Court of Appeal of a similar argument in *Humphries v The Proprietors ``Surfers Palms North'' GPT 1955*[14] .

49. The circumstances leading to the body corporate resolution of 3 April, 1997 do not need to be considered in detail. It is clear enough that there was an intention on the part of the body corporate that it was not willing to perform the terms of the agreement. The associated actions of the lot holders, in respect of the letting agreements, the appointment of an auditor and the general level of disputation between the plaintiffs and the influential lot holders who were also the body corporate committee members, lead to this conclusion.

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50. I have come to the view that the contract was validly terminated by the plaintiffs' acceptance of the body corporate's conduct repudiating the agreement by their solicitors' letter to the body corporate dated 4 July, 1997.

51. I answer the questions raised in the statement of issues in the following way:—

Question 1:
The caretaking agreement dated 22 August, 1994 as varied with the exception of clauses 9.2 and 9.5 is valid and enforceable and I so declare.
Question 2:
The caretaking agreement has been validly terminated by the plaintiffs on 4 July, 1997.
It is not necessary for me to answer therefore questions 3 and 4.

52. My orders therefore are:—

1. It is declared that with the exception of clauses 9.2 and 9.5 that the caretaking agreement dated 22 August, 1994 as varied referred to in the pleadings and subsisting as between the plaintiffs and the first defendants is valid and enforceable.
2. It is further declared that the said agreement has been terminated as from 4 July, 1997 by the plaintiff's acceptance of the first defendants' repudiation of the said agreement.
3. It is further ordered that the action be remitted to the District Court at Cairns for the assessment of damages.
4. It is further ordered that the first defendant pay the plaintiff's costs of and incidental to this action to be taxed.
5. I make no order as to costs with respect to the second defendants.

Footnotes

1 (1992-4) 179 CLR 597.

2 Document 31 of Ex. 1. The acceptance of this document by all parties — Transcript p. 354.

3 Transcript 30/5.

4 See document 31 ex. 1.

5 Caretaking Agreement First Schedule A(ii) and B(i) — Ex.1 document 27.

6 Section 37(1) requires that a body corporate shall ``properly maintain etc the common property''. By sub sec (2) it ``permits the body corporate to enter into an agreement with the proprietor of a lot for the provision of services to that lot or to the proprietor thereof''. Section 51(2) requires the proprietor of a lot ``to maintain his or her lot ... and keep the same in a state of good repair''.

7 Transcript 29/10-30.

8 See particularly per Brennan and Toohey JJ at p. 606.

9 Transcript pp 24-7.

10 This is found at p. 14 doc. 27 Ex. 1.

11 Transcript 22/50.

12 (1938) 38 SR (NSW) 337.

13 (1985) AC 301/310.

14 CCH Unit and Group Titles Law and Practice (1993) 30-122.

REGIS TOWERS REAL ESTATE PTY LTD v KIN FUNG & ORS

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(2000) LQCS ¶90-106

NSWSC citation: [2000] NSWSC 438

Supreme Court of New South Wales

Judgment delivered 25 May 2000

Strata title — Special by-laws giving manager exclusive right to conduct real estate business on premises — Lease entered into by another owner in breach of by-laws — Lessee not notified of special by-laws by lessor as required — Application to restrain use under lease as real estate agency — Presumption of regularity in making of special by- laws — Whether Court should decline to exercise jurisdiction — Whether lot owner had a right to have dispute adjudicated under machinery in legislation — Whether exclusive right excessive — Whether any injunction should have effect only against lessee — Strata Schemes Management Act 1996, sec 44; 46; 157.

Regis Towers owned four lots in a large strata development (``the complex''), which it managed for the owners corporation. Special by-law 4 adopted in September 1999 gave it the exclusive right to conduct a real estate business in the complex. The owners of another lot in the complex (``the lessors'') were not aware of the special by-law and granted a lease, commencing in March 2000, to another company (``the lessee'') for use as a real estate agents office. The lessors did not provide the lessee with a copy of the by-laws as required by sec 46 of the Strata Schemes Management Act 1996 (``the Management Act'').

On 3 May 2000 Regis Towers brought proceedings to restrain the lessors from permitting their premises to be used for a real estate agents office and to restrain the lessee from operating the business. On 11 May the lessors applied under sec 157 of the Management Act for an order by a Strata Schemes Adjudicator that the special by-law 4 be repealed on the ground that the exclusive rights it gave were ``in excess of those intended by the Service Agreement''.

The lessors argued that the Supreme Court should decline to exercise jurisdiction and should leave the controversy to be determined under the disputes provisions of the Management Act.

Held: injunction granted; liberty reserved to apply to vary or dissolve injunction in the event that special by-law 4 altered by order of Adjudicator.

Requirements concerning by-laws

1. By virtue of sec 44 of the Management Act, the lessors were bound to observe and perform all the provisions of the by-laws, and the lessor was bound to comply with the by- laws, as by covenant to Regis Towers.

2. The lessors were in breach of sec 46(1) of the Management Act, requiring them to provide the lessee with a copy of the by-laws. By leasing the property without first finding out and telling the lessee what the by-laws provided at the time, they did not obey the law and they did not observe a reasonable standard of care in the interests of themselves, the lessee or other owners. The fact that they were unaware of what the by-laws provided for did not excuse them or improve their position.

3. The presumption of regularity of the by-laws was acted on in the absence of any evidence to the contrary.

Application for change of by-laws

4. The present case should be decided on the basis of the present state of the by-laws. The application under sec 157 was one for consideration by an Adjudicator, the Supreme Court having no power to act under that section (unless perhaps in an appeal after decision by an Adjudicator).

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Appropriate remedy

5. On the undisputed evidence it was clear that there was a threatened breach of special by-law 4. The covenants of the lessors and lessee were negative in nature and, subject to any discretionary considerations, an injunction to restrain breaches was the appropriate remedy.

Discretionary considerations

6. On the issue of whether any injunction should be made against the lessors, Regis Towers had a clear right to a remedy against the lessors and there was no substantial discretionary reason why the injunction should go only against the lessee or its director. It would not be difficult for the lessors to comply with an injunction even if they were required to bring the lease to an end to do so. Further, the lessee would have little difficulty in escaping from the lease — it was given a clear misrepresentation by the lessor about the operative controls of use of the premises; there was misleading or deceptive conduct under sec 52 of the Trade Practices Act 1974; and there was a fundamental mistake about the premises being available for use as a real estate agency.

7. It was in the interests of all concerned that the Court hear and determine the present litigation and establish the positions of the parties. The procedure under the Management Act is not well accommodated to commercial disputes and the urgency imposed by economic interests, and is primarily directed and suited to disputes relating to home units.

8. It was likely that, if an injunction were refused, the conduct which Regis Towers sought to restrain would occur and its business interests would be affected.

9. In assessing the weight of the opportunity to apply for alteration of special by-law 4 for a discretionary refusal of jurisdiction, it was significant that the application under sec 157 was made when the controversy was well advanced and with a strong air of contrivance, illustrated by the fact that Regis Towers was not told of it until the day before the hearing.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

M Broun QC with V Bedrossian (instructed by Broun Abrahams) for the plaintiff.

C Freeman (instructed by Raymond M Wong) for the first and second defendants.

Lin Tang & Co, solicitors, for the third and fifth defendants.

Blessington Judd, solicitors, for the fourth defendant.

Before: Bryson J.

Full text of judgment below

Bryson J: Lot 643 Strata Plan 61369 is a lot in 40-50 Campbell Street, Sydney, part of a large strata development known as the Regis Towers complex. Lot 643 has a street frontage and is suitable for use as an office or shop. It is not suitable for residential purposes. Its registered proprietors, subject to a mortgage, are the first and second defendants Mr Kin Fung and Mrs Margaret Mary Fung. As lessors they have granted a lease to Sunaust Group Pty Ltd which is the fifth defendant; both parties have executed the lease but it has not been registered. The lease grants a term of two years commencing on 22 March 2000, with an option to renew for three years, and incorporates provisions of Memorandum Y517839. The covenants incorporated include the following:

> ``IV. FURTHER COVENANTS BY THE LESSEE The lessee further covenants and agrees: (a) the lessee shall not without the consent in writing of the lessor use or occupy the premises otherwise than as nominated in Schedule Two of this Lease; such consent shall not unreasonably be refused AND PROVIDED THAT the lessee pay to the lessor for any such consent a premium of five hundred dollars ($500) in addition to a reasonable sum for any legal or other expenses incurred by the lessor.''

2. The lease has no Schedule Two but in its only annexure contains the following provisions:

USE OF PREMISES: Real Estate Agents office/mortgage originator

3. The first and second defendants control a company which owns the neighbouring Lot 644, where a printing business is conducted.

4. The plaintiff company owns Lots 149, 454, 488 and 650 in the strata plan. The plaintiff's

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business is to conduct management of the Regis Towers complex and also a real estate business; its business involves management of the leasing of many residential and commercial strata units on behalf of their respective owners and real estate sales agency, as well as management of the whole complex for the Owners Corporation in the interest of all owners. By a Deed dated 20 April 1999 the plaintiff agreed to purchase the management rights from the developer Merriton Apartments Pty Ltd, and by a Management Agreement dated 6 August 1999 the Owners Corporation appointed the plaintiff caretaker. Clause 4 of the Management Agreement authorises the plaintiff to provide some real estate agency services as agent for the owners of lots in the building; this permission is further regulated by cll 5 and 7, and cl 6 provides:

> ``6. The Owners Corporation must not permit the use of the common property or any of the Lots for the provision of these services, except according to the terms of this Agreement.''

5. The plaintiff's real estate agency business is wider than the area of protection of cl 6, and the plaintiff acts as selling agent whether or not properties are in the Regis Towers complex. Mr John Rose is the real estate licensee in charge of its business.

6. In addition to by-laws adopted on registration of the Strata Plan the Owners Corporation has adopted Special By-laws 1 to 6 inclusive. Special By-law 5 was adopted by a registered Change of By-laws executed on 1 September 1999 and registered soon after, and substituted new Special By-laws 1, 2, 3 and 4 for earlier Special By-laws and added Special By-law 6. Special By-laws 1 and 4 are in these terms:

``SPECIAL BY-LAW 1. — Empower Caretaker-Manager Agreement

(1) In addition to its powers under the Act, the Owners Corporation has the power to appoint and enter into an agreement with a Caretaker-Manager to provide management, leasing, security, cleaning and operational services for the strata scheme.

(2) The Caretaker-Manager's duties may include:

(a) Caretaking, supervising and servicing the common property to a standard consistent with use of lots in the scheme as high class residential apartments;
(b) Supervising the cleaning, repair, maintenance, renewal or replacement of common property and any personal property vested in the Owners Corporation;
(c) Providing services to the Owners Corporation owners and occupiers including, without limitation, the service of a handy person, room cleaning and servicing, food and non-alcoholic drink service;
(d) Providing a letting property management and sales service;
(e) Supervising Owners Corporation employees and contractors;
(f) Providing security services to the Owners Corporation;
(g) Providing cleaning, pool cleaning and gardening services to the Owners Corporation;
(h) Supervising the strata scheme generally; and
(i) Anything else that the Owners Corporation agrees is necessary for the operation and management of the strata scheme.

(3) The Caretaker-Manager must comply with instructions from the Owners Corporation about performing its duties, subject to the Caretaker-Manager Agreement.

(4) The Owners Corporation cannot, without the written consent of the Caretaker- Manager, enter into more than one agreement under this by-law at any one time, or revoke or amend this by-law without the written consent of the Caretaker- Manager or his lawful successors or assigns.

...

SPECIAL BY-LAW 4. — Non Competition

(1) The owner or occupier of a lot must not in his lot or on the common property, except with the written consent of the owners of Lots 149, 454, 488 and 650, conduct or participate in the conduct of a business which provides services in the nature of:—

(a) The business of a letting agent; or
(b) The business of a pooled rent agency; or

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(c) The business of on-site caretaker, security, cleaner; or
(d) any other business activity that is either:—

(i) An activity identical or substantially identical with any of the services relating to the management, control and administration of the parcel referred to in Special By-law 1 and/or the Caretaker-Manager Agreement; and/or
(ii) An activity identical or substantially identical with any of the services provided to owners and occupiers of lots referred to in Special By-law 1, and/or the Caretaker-Manager Agreement; and/or
(iii) Any activity identical or substantially identical with any of the services relating to the letting of lots referred to in Special By-law 1, and/ or the Caretaker-Manager Agreement."

7. Before they entered into the lease of Lot 643 Mr and Mrs Fung gave a disclosure statement in writing to the proposed lessee, who acknowledged this by signing a copy on 16 March 2000. The disclosure statement referred to the permitted use of the premises as ``retailing shop (subject to Council's approval)''. Mr Lai, the third defendant, is the director of Sunaust Group Pty Ltd who managed this part of its business and is the licensed real estate agent who actually conducts the operations of Sunaust Group. After Mr Lai had seen that the shop was vacant and telephoned a number shown in a notice on the front window, he told Pearl Wong, who said that she represented the landlord of Lot 643, that ``I am going to use it as a real estate agent'' to which she replied ``It should be O.K. The landlord will give consent.'' This appears to have happened on 15 March. The disclosure statement was sent on the following day. On 22 March 2000 neither of Mr and Mrs Fung was aware of the Special By-laws adopted on 1 September 1999, and they did not know there was a restraint to the effect of Special By-law 4. As a result Mr Lai was not made aware that there was a Special By-law relating to the conduct of a real estate business in the Regis Towers complex. He first learnt of the restriction when Mr John Rose told him by telephone on 5 April 2000 that Lot 643 was not able to be used by Sunaust Group as a real estate agent office. The real estate operations have been very restricted since these proceedings were commenced.

8. Sunaust Group made an application to Sydney City Council for development consent; the application was dated 11 April 2000 and the detailed description of the development was ``As an office of real estate agents & mortgage originator''. The application was made without the written consent of Mr and Mrs Fung. There is a signature at the space provided for the registered owners but that is in fact Mr Lai's signature, and he did not then have their authority to make the application. It was by implication the duty of Mr and Mrs Fung as lessors to give their consent to that application and, although they did not sign the document, they have not objected to it.

9. These proceedings were commenced by Summons on 20 April 2000. At that time the plaintiff did not know the identity of Sunaust Group as the proposed tenant, and the fifth defendant was added as a party by Amended Summons on 3 May 2000. The Owners Corporation was the fourth defendant to the Summons; the Owners Corporation took the position of a submitting defendant and the proceedings against it were dismissed on 3 May 2000. On 3 May 2000 Windeyer J made an appointment for the hearing to take place before me on 17 May.

10. The Amended Summons filed on 3 May claimed: (1) that the first and second defendants be restrained from permitting their premises to be used for a real estate agent's office, and specified a number of classes of services the provision of which was to be restrained; and (2) that Mr Lai and Sunaust Group be restrained from operating a real estate agent's office, again specifying services to be restrained.

11. In correspondence while the hearing was pending, solicitors for Mr and Mrs Fung contended that there was no basis for the relief sought against them, and the following assurance was given: ``If the fifth defendant vacates the property, our clients will not place any other tenant in the premises contrary to the by-laws or pending any change to the by-laws.''

12. Sunaust Group has not vacated the property. Mr Lai gave evidence stating the company's position plainly; until confronted with the litigation Sunaust Group intended to use the premises, in the terms stated in the

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Development Application, as an office of real estate agents and mortgage originator. Mr Lai's evidence included the following passage: ``5. We have so far refrained ourselves from conducting any real estate business in the leased premises notwithstanding this meant loss of our real estate business.'' He said that he has been assured on many occasions by Pearl Wong to the effect that he can use the premises as a real estate office ``but do not touch the three buildings managed by the Regis Towers Real Estate.'' His evidence also shows that he would agree to have the lease assigned to any other business provided that Sunaust Groups rental and fitting costs incurred so far were covered and he says, ``8. On behalf of my company and myself, I offer undertaking to the plaintiff that we will not seek to carry on business in breach of the by-laws.''

13. Mr Lai's evidence shows in effect that if use as a real estate agent is in breach, Sunaust Group would like to get out of the premises and they seek to be released or to assign the lease. In the meantime

Sunaust Group is, on the face of the lease, incurring liability for rent, and is incurring expense relating to its occupation, but has not been able to make the use of the premises which it contemplated and told Pearl Wong about from the first phone call onwards.

14. Part 5 of the Strata Schemes Management Act 1996 relates to by-laws and Div 2 is entitled ``How are the by-laws enforced?''. Section 44 is in these terms:

> ``44 Who is required to comply with the by- laws?
>
> (1) The by-laws for a strata scheme bind the owners corporation and the owners and any mortgagee or covenant chargee in possession (whether in person or not), or lessee or occupier, of a lot to the same extent as if the by-laws:
>
> (a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, lessee and occupier; and
> (b) contained mutual covenants to observe and perform all the provisions of the by-laws.
>
> (2) There is an implied covenant by the lessee in a lease of a lot or common property to comply with the by-laws for the strata scheme.
>
> (3) In this section, lessee means, in relation to a lot in a strata leasehold scheme, a sublessee of the lot.''

15. It was not disputed that the unregistered lease is a lease within the meaning of subs 44(2). It is a lease at law and not merely an equitable lease as it appears to comply with s 23D of the Conveyancing Act 1919, although it is not protected by s 42(1)(d) of the Real Property Act 1900; see also s 53. Mr and Mrs Fung, and also Sunaust Group, are bound as by covenant to the plaintiff to observe and perform all the provisions of the by-laws or (for Sunaust Group) to comply with the by-laws, and these statutory covenants are enforceable at the suit of the plaintiff.

16. Section 46 is entitled ``How does a lessee get information about the by-laws?'' Subsection (1) is in these terms:

> ``(1) If a lot or common property in a freehold strata scheme is leased, the lessor must provide the lessee with a copy of the by-laws, and any strata management statement affecting the lot or common property, within the time and in the manner required by this section.''

17. It is plain as a matter of fact that Mr and Mrs Fung, who did not know of the Special By- laws, did not provide Sunaust Group with a copy of the By-laws, and were in breach of s 46(1). By leasing the property without first finding out and telling the lessee what the by- laws provided at the time, they did not obey the law and they did not observe a reasonable standard of care, in the interest of themselves, the lessee or other owners, and the fact that they were unaware of what the by-laws provided for cannot excuse them in any way or improve their position. Their counsel contended that as they did not know of the by-laws it should not be assumed that the amendments to the by-laws are valid. The prima facie position is that the Special By-laws were made and registered in a regular manner, and I act on the presumption of regularity in the absence of any evidence that they were not.

18. On 11 May 2000 Mr and Mrs Fung filed a written application for an order by a Strata Schemes Adjudicator under the Strata Schemes Management Act seeking ``an order that the by- law be repealed (s 157) and/or an order declaring the by-law to be invalid (s 159)''. These reasons were given as:

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> ``Our complaint relates to the attached Change of By-Laws dated 1 September 1999 and in particular Special By-law (non- competition).
>
> Regis Towers Real Estates Pty Ltd (`The Company') is the owner of Lots 149, 454, 488 and 650 as referred to in paragraph 1 of the Special By-law 4. In proceedings instituted by it in the Supreme Court of New South Wales, that company seeks an injunction restraining us from leasing Lot 643 for use by our tenant as a real estate agency.

Also attached for your information is a copy of the Service Agreement between the company and the Owners Corporation of Strata Plan 56443 dated 6 August 1999. We believe that the Special By-law referred to above gives the company exclusive rights in excess of those intended by the Service Agreement and in such circumstances, the Special By-law should be repealed or otherwise declared invalid."

19. Notification of an application of this kind to interested persons is the responsibility of the Registrar of the Strata Schemes Board, who must consider to whom and how notice is to be given. Mr and Mrs Fung did not advise other parties to these proceedings of the application, or of evidence relating to it, until some time on the day before the hearing day.

20. Section 157 is entitled ``Order revoking amendment of by-law or reviving repealed by- law.'' Subsection 157(1) is in these terms:

``(1) An Adjudicator may make one of the following orders if the Adjudicator considers that, having regard to the interest of all owners in a strata scheme in the use and enjoyment of their lots or the common property, an amendment or repeal of a by- law or addition of a new by-law should not have been made or effected by the owners corporation:

(a) an order that the amendment be revoked,
(b) an order that the repealed by-law be revived,
(c) an order that the additional by-law be repealed.

(2) An order under this section, when recorded under section 209, has effect as if its terms were a by-law (but subject to any relevant order made by a superior court).''

21. There was some debate about whether an order by an Adjudicator can have retrospective effect, or whether a by-law would be effective until revoked. I will leave this question undecided; the power in subs 157(1)(a) to revoke an amendment may suggest that the order can be retrospective; the reference in subs (2) to the need to record the order may support the opposite view, and the explicit provisions of s 159 authorising a date for operation of an order earlier than the date on which the order is recorded, where the order is made on the limited ground referred to in s 159, suggest that orders made under other sections may not have retrospective effect.

22. The Supreme Court does not have power to act under s 157, unless perhaps in an appeal after decision by an Adjudicator. In my view the prospects of success in the application cannot be said to be strong. The stated ground is to the effect that Special By-law 4 gives the plaintiff exclusive rights in excess of those conferred on it by the Management Agreement. It seems to me that this ground is little to the point of the important question whether a Special By-law should not have been made, having regard to the interest of all owners of lots in the use and enjoyment of their lots for the common property. Most owners of lots own residential lots, and the use and enjoyment of their lots could not be affected by restrictions which apply to the relatively small number of lots the use of which Special By-law 5 could restrict. The restriction on use and enjoyment of the lots capable of commercial use is of a kind which s 49 does not forbid and subs 43(2) does not exclude. Plaintiff's counsel pointed out that having management conducted by a real estate agent with premises on the site can moderate the costs incurred for management services, and that there are advantages in inducing a real estate agent to take up the management task by offering exclusivity. This may be so; the contention is one for consideration by the Adjudicator. I am in no position to decide the application in advance and do not attempt to do so.

23. The application under s 157 was brought forward late in the controversy in circumstances which give it the air of contrivance, no order has been made on it, and this case should be decided on the present state of the by-laws.

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24. On the undisputed evidence it is clear and it was not disputed that there is a threatened breach of Special By-law 4. The covenants of the defendants are negative in nature and, subject to any discretionary considerations, an injunction to restrain breaches is the appropriate remedy. Counsel for Mr and Mrs Fung

put forward a number of discretionary considerations, going to the exercise of the Court's jurisdiction at all, and also to the choice of an injunction against his clients as the remedy.

25. On the discretionary question the plaintiff's counsel submitted that there clearly has been a breach of the Special By-law 4 and of the implied covenant, and the position should be established and Sunaust should have its position made clear as soon as is possible.

26. On the issue whether any injunction should be made against Mr and Mrs Fung the plaintiff's counsel submitted that the Court should take the view that it is clear that there had been a breach of the by-law and the covenant, and that it is within the power of Mr and Mrs Fung to release Sunaust Group from its apparent obligations or to ask or require Sunaust Group to leave the premises. Counsel submitted that it is not practically possible to enforce the lease or to claim rent because Sunaust Group has not been given what the Fungs contracted to give it, that is the opportunity to use the premises for a real estate agency among other things. It was contended that both parties to the lease are entitled to be released from it.

27. The evidence of Mr Lai shows that it would not be difficult for Mr and Mrs Fung to comply with any injunction even if they were required to bring the lease to an end to comply with the injunction. It is very improbable that there would be any difficulty in reaching some accommodation with Mr Lai. If performance of the lease by both of the parties to it were restrained by injunction there would be no prospect of performance of the lease being required by any equitable remedy, while the injunctive restraint would prevent either party restrained from showing any significant damage caused by any breach by the other. In any event Mr and Mrs Fung are responsible for the difficulty.

28. Mr Lai and Sunaust Group have not so far taken an aggressive stance. Mr Lai was given a clear misrepresentation about the operative controls of use of the premises by Pearl Wong on behalf of Mr and Mrs Fung; this may be a ground on which the lease may be rescinded. There are clearly remedies under the Trade Practices Act 1974 (Cth) s 52 as Ms Wong's conduct was misleading and deceptive, and there was a fundamental mistake about the premises being available to use as a real estate agency. In the presence of these facts Sunaust Group could have little difficulty in escaping from the lease.

29. Counsel for Mr and Mrs Fung contended that as a matter of discretion the Court should decline to exercise its jurisdiction, and should leave the controversy to be determined under the procedures provided for by the Strata Schemes Management Act 1996. Counsel pointed out that the powers under that Act extend to adjudication dealing with disputes, and to granting interim orders pending adjudication. He contended that Mr and Mrs Fung have a right to have their claim examined and adjudicated in accordance with the Act, and said that any injunction which prevented that happening would be a de facto removal of their statutory right to make that application. He pointed out that the claim is for a perpetual injunction. He accepted that the plaintiff's rights under the Management Agreement had been granted for valuable consideration, and that Mr and Mrs Fung could not and did not seek to interfere with those rights relating to caretaking duties and lots within the Regis Towers complex. Counsel referred to decisions in which this Court has declined to exercise jurisdiction and has left adjudication of disputes relating to strata schemes to decision by machinery provided for by earlier legislation, particularly the decisions of Kearney J in *MacLeod* v. *Proprietors of Strata Plan No. 6544* [1980] 2 NSWLR 691 and Rolfe J in *North Wind Pty Ltd* v. *The Proprietors — Strata Plan 3143* [1981] 2 NSWLR 809.

30. In *MacLeod's* case Kearney J said, at para 25, pp 695-696, referring to Pt V of the Strata Titles Act 1973:

> ``On this question of discretion I consider that the subject matter of the proceedings is such that it ought to be the subject of an application to the Commissioner rather than being prosecuted in this Court. While the matter may eventually reappear in the court on appeal from a decision of the board, nevertheless the Act clearly evinces the
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> intention that these matter should originate with the Commissioner under Pt V, and that the Court should entertain such proceedings only where special circumstances such as extreme urgency in effect necessitate the intervention of the Court. Further, any need to follow the above course arises from the plaintiffs' own neglect to prosecute their appeal from the Commissioner's decision.''

31. In referring to the intention evinced by the former Act, Kearney J referred to s 146 of the Strata Titles Act 1973 with which his Honour dealt at pp 693 and 694. Generally similar provision is now made by s 226 of the Strata Schemes Management Act 1996. Kearney J's decision was a discretionary decision, and it was given where the underlying controversy related to problems arising from water penetration through the roof. The plaintiffs sought an order that the Body Corporate repair part of the roof being common property in a proper and workmanlike manner so as to render it impervious to water penetration, and to repair the interior of the plaintiff's lot damaged by water coming through the roof. See pp 691-692. As much experience shows, building disputes and disputes in which supervision in detail of building work is required are not well suited for equitable remedies. In the present case the facts for practical purposes are not disputed and adjudication is required on the effect of conduct and the interpretation of documents, and there are no corresponding inconveniences for determination of the litigation by the Court.

32. In the North Wind case Rolfe J was of the view that the dispute, which also included the controversy relating to building work which it was contended should be done, and what in detail should be done, was one to which the procedure under the Strata Titles Act 1973 was particularly appropriate. See pp 815-816.

33. It is not uncommon for the Court to determine controversies which could be referred to adjudication under strata titles legislation, without declining jurisdiction on discretionary grounds. Examples are *Salerno* v. *Proprietors of Strata Plan 42724* (1997) 8 BPR 15,457 (Windeyer J), *Bapson Pty Ltd* v. *Puyeti Pty Ltd* (1990) NSW Titles Cases ¶80-002 (Waddell CJ in Eq) and *Sydney Diagnostic Services Pty Ltd* v. *Hamlena Pty Ltd* (1991) NSW Titles Cases ¶80-009 (Court of Appeal). See too *Proprietors of Strata Plan 1627* v. *Schultz* (1978) 2 BPR 9443. This court has exercised jurisdiction from time to time, the cases do not show any general reluctance, and the reported cases where jurisdiction has been declined relate to detailed disputes about building work.

34. In my opinion the procedure under the Strata Schemes Management Act is not well accommodated to commercial disputes and the urgency imposed by economic interests, and is primarily directed and suited to disputes relating to home units. In my view it is in the interests of all concerned that I should hear and determine the present litigation and establish the positions of the parties.

35. The present proceedings have aspects of urgency in that it is plain, and is not open to substantial dispute, that unless there is an injunction Special By-law 4 will not be complied with; the form of the defendants' own documents show that clearly enough. It is likely that if an injunction is refused the conduct which the plaintiff seeks to restrain would occur and its business interests would be affected thereby.

36. Counsel for Mr and Mrs Fung contended that it was for consideration on the discretion to decline jurisdiction that, as he put it, ``what is occurring by circumventing the Strata Schemes Management Act is to remove the opportunity for Mr and Mrs Fung from exercising their rights under that Act.'' It was contended that the defendants are significantly prejudiced in that they are unable to bring a cross-claim relying on s 157, and that the parties are forced to go to two different jurisdictions and unnecessarily to multiply proceedings. This observation was based on there being no opportunity in these proceedings to seek alteration of the by-laws in a cross-claim, as that power is not conferred on the Court. I do not regard this observation as to the point, as the right to seek to vary the by-laws can be pursued and a decision obtained on it in due time. That right is not injured or affected by a decision on the rights of the parties as they now stand in the unamended form of the by-laws. The application to the Adjudicator will have whatever merits it has whether or not parties have in the meantime been required to comply with their present obligations. The Court is asked to act in these proceedings on the right which the parties have now.

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37. If the by-law were to be altered in the future Mr and Mrs Fung would have the opportunity to ask the Court to dissolve or vary any injunction, even a perpetual injunction, and the possibility that there may be an alteration is adequately protected by reserving liberty to apply in that event, and in that way qualifying the perpetual nature of the injunction. These submissions appeared to make some complaint about the plaintiffs using remedies under the general law, but as those remedies are especially preserved by subs 226(1) of the Strata Schemes Management Act, this is not an appropriate subject for complaint. It was then said that

the application for relief is premature, but there is no substance in this contention, as the plaintiff has offered proofs which show that there already has been a breach, and that it is reasonable to fear continuing breach.

38. In assessing the weight of the opportunity to apply for alteration of Special By-law 4 for a discretionary refusal of jurisdiction it is significant and very adverse to the submission that the application under s 157 was made very recently, when the controversy was well advanced, and with a strong air of contrivance illustrated by the plaintiff's not having been told of it until the day before the hearing. It is unlikely that this event would have happened in a sincere application, which would have been pursued openly and would have been prefigured in the correspondence which passed while the proceedings were pending, in which possible outcomes were discussed.

39. It was also contended that there is no occasion to impose an injunction on Mr and Mrs Fung, and that the orders as framed are too wide. It was submitted that it would be sufficient to impose restraint on Sunaust Group. The defendants' counsel contended that these defendants have a prima facie enforceable lease which they entered into for valuable consideration, and that an injunction would cause them to act in breach of it. He contended, apparently on the basis that the previous submission justified the contention, that the injunction should be directed only against the tenant. These submissions were not well founded or readily comprehensible; if the plaintiff is entitled to relief, it should have relief against all involved in the threatened breaches of covenant. The statement in Mr and Mrs Fung's solicitors' letter of 12 May 2000 about what they would do if the fifth defendant vacated the property is not a reason in substance why they should not be restrained.

40. Counsel also observed that the by-laws do not extend to preventing the business of mortgage originator being carried on. As it was clearly contemplated and intended by the lessors and the lessee and Mr Lai that the business of real estate agent would be carried on, this observation had no force.

41. The fact that Mr and Mrs Fung might be placed in breach of their contract with Sunaust Group if restrained from breach of covenant by permitting activities by others, was put forward as a consideration of hardship against making an injunction. In my view it is a consideration of no weight, as it is a disadvantage which they imposed on themselves. When the plaintiff complains of a breach of an obligation to it, it is not a significant consideration adverse to granting the remedy that the first defendants have later entered into an inconsistent contractual obligation.

42. Submissions on behalf of Sunaust Group were generally to the effect that Sunaust Group was prepared to comply with its obligations as determined by the Court, but is in a difficult position now as it is in occupation and obliged to pay rent and other outgoings, but has been kept standing without carrying on a real estate agency until these proceedings are decided. As shown in Mr Lai's affidavit, Sunaust Group would be happy for someone else to take an assignment and would seek to be recompensed for its costs and expenses. The position of Sunaust Group and the impact on it of the delay in resolution of the dispute are considerations against declining to exercise jurisdiction and against leaving resolution to some future determination by an Adjudicator.

43. Plaintiff's counsel pointed out that all difficulties arise out of Mr and Mrs Fung not having complied with s 46, and not having found out and given notice of what is in the by- laws. It is very unlikely that there would have been a lease or that Sunaust Group would have taken any interest in the premises if Mr Lai had known of the by-laws, whether or not the by- laws are amended by some decision in the future.

44. Plaintiff's counsel contended that the substance of the dispute before me relates to costs and liabilities as among the defendants. As I observed during the argument I do not propose to establish in detail what is to happen

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among the defendants or to try to solve every problem which the facts apparently present. There is no cross-claim and I propose to hear and determine the plaintiff's claim.

45. The plaintiff has a clear right to a remedy against the first and second defendants and there is no substantial discretionary reason why the injunction should go only against the fifth defendant or only against the third and fifth defendants.

46. For these reasons I propose to order an injunction as claimed, while reserving liberty to apply to vary or dissolve the injunction in the event that Special By-law 4 is altered by order of the Adjudicator.

47. I have not yet considered questions of costs.

Order:

(1) Injunctions as claimed in claims 1 and 2 of Amended Summons filed on 3 May 2000.

(2) Reserve to each party liberty to apply to dissolve or vary the injunctions if there is an alteration in Special By-law 4 Strata Plan 61369.

(3) Costs reserved.

LAWROM NOMINEES PTY LTD v KINGSMEDE PTY LTD & ANOR

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(2001) LQCS ¶90-107

NSWSC citation: [2000] NSWSC 1048

Supreme Court of New South Wales

Judgment delivered 14 October 2000

Strata title — Lease — Lessor seeks registration of strata plan — Lessee of one floor of building applies for injunction to restrain registration — Whether registration of strata plan would breach the lease — Whether lessors and future assignees would be bound by lease — Whether breach justifies injunctive relief — Whether deed poll adequate to protect lessee's interest — Conveyancing Act 1919 (NSW), sec 117, 118; Strata Schemes (Freehold Development) Act 1973 (NSW), sec 5, 16, 18, 21, 25; Strata Schemes Management Act 1996 (NSW), sec 44, 55.

In March 2000, Kingsmede and Pamiers (``lessors'') purchased a building in Sydney subject to a registered lease over one floor of the building. In May 2000, the lessors requested the consent of Lawrom Nominees (``lessee'') for the registration of a strata plan for the building. The lessee did not consent, and lodged a caveat on the title on 30 May.

On 3 July, a notice to lapse the caveat was served on the lessee, and, on 17 July, the lessee received notice from the Registrar-General that it intended, pursuant to sec 196AA(2) of the Conveyancing Act 1919, to register the lessors' strata plan unless restrained by the Supreme Court.

In August, the lessee obtained an extension to the caveat, and, on 16 August, the lessee applied to the Supreme Court for an injunction restraining the lessors from pursuing registration of the strata plan on the basis that the registration would be in breach of the terms of the lease.

On 6 September, the lessors offered to the lessee that the owners corporation under the proposed plan would secure the passing of a by-law authorising it to enter a deed poll. The purported deed poll would prohibit variation and termination of the lease and would recognise the rights of the lessee under the terms of the lease.

Issues

The issues in this case were whether, by procuring registration of the strata plan, the lessors would breach the terms of the lease or give rise to the threat of breach, and, if so, whether the breach would be such as to justify the remedy of an injunction. Relevant to the second issue is the adequacy of the deed poll proposed by the lessors to protect the interests of the lessee.

Held: injunction refused on the basis that the defendants procure a deed poll and undertake contractual obligations in favour of the plaintiff.

1. The Strata Schemes (Freehold Development) Act 1973 does allow for the registration of strata plans without the consent of lessees: sec 16(2).

2. Registration of the strata plan would result in a ``technical breach of the lease in relation to floors, ceilings and external walls, and pipes and wires within them''. This breach would be immaterial and insufficient grounds for the remedy of an injunction.

3. An injunction would only be available to the lessee if the breach involved substantial interference with the rights of the lessee, or the threat of such interference.

4. The defendants and future assignees would be bound by the terms of the lease, despite the fact that the lessee's rights to access and to service such as lifts, air-conditioning, water and electricity are deemed common property and are owned by the owners corporation and not the lessor.

5. A deed poll, if authorised by a by-law, could validly require the owners corporation to provide access rights and services in accordance with the terms of the lease.

6. In addition to procuring a deed poll, the lessors should undertake a contractual obligation to the plaintiff to fulfil all the terms of the lease in the form of a charge over the proposed lot.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

A Meagher SC with D Raphael (instructed by Esplins) for the plaintiff.

S Robb SC (instructed by Middleton Moore & Bevins) for the defendants.

Before: Hodgson CJ.

Full text of judgment below

Hodgson CJ: The plaintiff Lawrom is the lessee, under a lease originally granted by Permanent Trustee Co. Limited, of the whole of Level 6 of 261 George Street, Sydney, for a term of six years expiring 31st May 2005. The defendants Kingsmede and Pamiers purchased the building 261 George Street under a contract of sale dated 14th March 2000, and they became registered proprietors of the property on 16th June 2000.

2. In May 2000, the defendants requested the consent of plaintiff to registration of a proposed strata plan for the building. The plaintiff did not consent, and on 30th May 2000 lodged a caveat on the title. Notice to lapse the caveat was served on the plaintiff on 3rd July 2000, and on 17th July 2000, the plaintiff received notice from the Registrar-General that the Registrar- General intended to register the defendants' strata plan unless restrained by the Supreme Court.

3. These proceedings were commenced on 20th July 2000, initially seeking an order extending the caveat.

4. Orders were made extending the caveat, and an Amended Summons filed on 16th August 2000 sought orders inter alia restraining the defendants from pursuing registration of the strata plan.

Outline of facts

5. The plaintiff's lease was registered on 17th December 1999.

6. The property leased is described as ``whole of Level 6, being part of 261 George Street Sydney Volume 15229 Folio 26'', but, according to the Reference Schedule to the Lease ``excluding Common Areas''. The lease incorporates, with amendments, a Memorandum No. W288827 filed in the Land Titles Office, and according to this Memorandum, the ``Demised Premises'' include ``the fixtures, fittings, furniture, plant, machinery and equipment (if any) of the Lessor... installed therein''.

7. Clause 4.4 of the Memorandum provides to the effect that the lessee should not, without the prior approval in writing of the lessor, display signs on the interior or exterior of the building. Clause 4.11 provides to the effect that the lessee should give to the lessor prompt notice of any defect in the services to the demised premises.

8. Clause 4.5 provides to the effect that the lessee should comply with the Rules and Regulations (set out in the Second Appendix), which could be altered by the lessor, provided that no amendment or variation was inconsistent with the lessee's rights under the lease. Clause 13 of the Rules and Regulations

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gives the lessee right of access to the demised premises 24 hours a day, seven days a week.

9. Clause 6.1 of the Memorandum provides to the effect that, where air conditioning or elevators are provided, the lessor is to endeavour to keep them working, and to effect repairs without undue interference to the lessee. Clause 7.3 provides to the effect that the lessee should not, without the prior consent of the lessor, make alterations to the demised premises.

10. Clause 12.1 of the Memorandum provides to the effect that the lessee should have quiet enjoyment of the demised premises; and cl. 12.2 provides to the effect that the lessee might, at the expiration of the lease, remove the lessee's fixtures. Clause 14.12 provides to the effect that in exercising its right to make alterations to the building the lessor should endeavour to cause as little inconvenience to the lessee as is practicable.

11. Clause 3 of the First Appendix to the Memorandum provides to the effect that the lessee should pay to the lessor a proportion (stated by the lease to be 9.57%) of all increases of rates and taxes in respect of the building or land, and of other outgoings in respect of the building paid or payable by the lessor.

12. The premises currently leased include partitioning, ducting, pipes, pumps and lighting.

13. The contract for sale to the defendants was expressed to be subject to the lease, and a copy of the lease was attached to it.

14. On 23rd March 2000, letters were sent to the lessees of various parts of the building, seeking their consent to the proposed strata plan, being a subdivision into ten lots and common property. Floor 6 (apart from access areas) comprised one lot.

15. By 4th May 2000, the defendants had received consents from all lessees, apart from the plaintiff; although they have not sought or obtained consent from a registered sub-lessee of part of the building, namely Pruside Willow Pty. Limited.

16. On 16th June 2000, the defendants lodged their proposed strata plan with the Registrar-General; and on 23rd May 2000, the defendants offered to waive the right to recover outgoings for the remainder of the lease. On 26th May 2000, the plaintiff suggested that the defendants should waive rent for the remainder of the lease; and this was rejected by the defendants on 29th May 2000.

17. During May 2000, the defendants entered into two contracts for the sale of strata lots, for $4.75 million and $1.6 million respectively, subject to registration of the strata plan by 31st December 2000. It was negotiating for other sales, but these negotiations were halted because of these proceedings.

18. On 30th June 2000, the defendants caused the Registrar-General to take action to serve lapsing notices under s. 74I of the *Real Property Act*.

19. On 10th July 2000, the Registrar-General sent a written notice to the plaintiff pursuant to s. 196AA(2) of the *Conveyancing Act*, stating that strata plan 62822 had been lodged for registration, and inviting submissions, but advising that, unless the Supreme Court restrained the Registrar-General, the Registrar-General intended to register the strata plan. These proceedings were commenced on 20th July 2000.

20. On 6th September 2000, the defendants, as the original proprietors of all lots in the strata plan, offered to the plaintiff to procure the owners corporation under the strata plan to pass a by-law authorising it to enter into a deed poll and prohibiting variation or termination thereof, and to procure execution by the owners corporation of that deed poll. The deed poll in question purported to recognise the rights of lessees under all leases of the building, including their right to exclusive possession of parts of the building which would become common property under the strata plan, and their rights to use other common property, and purported to provide that the lessees would not be bound by by-laws inconsistent with the terms of their leases, and included terms to ensure the provision of services to lessees and to ensure that they could remove tenants' fixtures.

Issues

21. The main issues in the case are whether, by procuring registration of the strata plan, the defendants would breach the terms of the lease to the plaintiff or give rise to a threat of breach thereof; and if so, whether the breach or threat would be such as would justify the remedy of an injunction. Relevant to the second question, involving the exercise of discretion, is the adequacy of the deed poll proposed by the

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defendants to protect the interests of the plaintiff; and also a question of possible adverse taxation consequences.

22. These issues involve consideration of the effect of ss. 117 and 118 of the *Conveyancing Act 1919* (NSW), and of various provisions of the *Strata Schemes Management Act 1996* (NSW) (the ``Management Act''), and the *Strata Schemes (Freehold Development) Act 1973* (NSW) (the ``Development Act'').

23. The rights and obligations of transferees of leases and of reversions expectant upon leases are dealt with by ss. 117 and 118 of the *Conveyancing Act 1919*, which are in the following terms:

> ``117(1) Rent reserved by a lease and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained shall be annexed and incident to, and shall go with the reversionary estate in the land or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part as the case may require of the land leased.
>
> This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
>
> (2) The benefit of every condition of re- entry or forfeiture for a breach of any covenant or condition contained in a lease shall be capable of being enforced and taken advantage of by the person from

time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry or forfeiture had become enforceable.

(3) This section shall not render enforceable any condition of re-entry or other condition waived or released before the person became entitled as aforesaid.

(4) This section applies to:

(a) leases made after the commencement of this Act, and
(b) leases made before the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, or provision contained in the lease.

118(1) The obligation of a covenant entered into by a lessor with reference to the subject- matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to, and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies to:

(a) leases made after the commencement of this Act, and
(b) leases made before the commencement of this Act so far only as relates to breaches of covenant committed after the commencement of this Act."

24. The subject is also dealt with in s. 40(3) and s. 51 of the *Real Property Act*; but it seems clear that those provisions do not affect the requirement that, for a covenant in a lease to bind the transferee of the lessor, it must be a covenant ``with reference to'' the land in question, as contemplated by ss. 117 and 118 of the *Conveyancing Act*.

25. The subdivision of land by way of strata schemes is dealt with by the *Development Act*.

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26. Section 5 of that Act contains definitions, including the following definitions of ``common property'', ``lot'', ``parcel'' and ``structural cubic space'':

```common property' means so much of a parcel as from time to time is not comprised in any lot.

`lot' means one or more cubic spaces forming part of the parcel to which a strata scheme relates, the base of each such cubic space being designated as one lot or part of one lot on the floor plan forming part of the strata plan, a strata plan of subdivision or a strata plan of consolidation to which that strata scheme relates, being in each case cubic space the base of whose vertical boundaries is as delineated on a sheet of that floor plan and which has horizontal boundaries as ascertained under subsection (2), but does not include any structural cubic space unless that structural cubic space has boundaries described as prescribed and is described in that floor plan as part of a lot.

`parcel' means:

(a) except as provided in paragraph (b), the land from time to time comprising the lots and common property the subject of a strata scheme, and
(b) in relation to a plan lodged for registration as a strata plan, the land comprised in that plan.

`Structural cubic space' means:

(a) cubic space occupied by a vertical structural member, not being a wall, of a building,
(b) any pipes, wires, cables or ducts that are not for the exclusive enjoyment of one lot and:
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(i) are in a building in relation to which a plan for registration as a strata plan was lodged with the Registrar-General before the day appointed and notified under section 2(3) of the *Strata Titles (Development Schemes) Amendment Act 198*5, or
(ii) in any other case — are in a building or in a part of a parcel that is not a building,

(c) any cubic space enclosed by a structure enclosing any such pipes, wires, cables or ducts."

27. Section 5(2) of the Act provides as follows:

``5(2) The boundaries of any cubic space referred to in paragraph (a) of the definition of `floor plan' in subsection (1):

(a) except as provided in paragraph (b):

(i) are, in the case of a vertical boundary, where the base of any wall corresponds substantially with any line referred to in paragraph (a) of that definition — the inner surface of that wall, and
(ii) are, in the case of a horizontal boundary, where any floor or ceiling joins a vertical boundary of that cubic space — the upper surface of that floor and the under surface of that ceiling, or

(b) are such boundaries as are described on a sheet of the floor plan relating to that cubic space (those boundaries being described in the prescribed manner by reference to a wall, floor or ceiling in a building to which that plan relates or to structural cubic space within that building)."

28. Section 7(2) of the Act provides as follows:

``7(2) Land including the whole of a building may be subdivided into lots, or into lots and common property, by the registration of a plan as a strata plan."

29. Section 16 deals with the signing of or consent to strata plans, as follows:

``16(1) The Registrar-General shall not register as a strata plan, a strata plan of subdivision, a strata plan of consolidation or a building alteration plan a plan lodged in the office of the Registrar-General unless the plan is signed:

(a) by the registered proprietor of the land comprised in the plan, and
(b) by every mortgagee, chargee or covenant chargee under a mortgage, charge or covenant charge recorded in the folio of the Register kept under the *Real Property Act 1900* relating to that land.

(2) Without limiting the effect of subsection (1), the Registrar-General may refuse to register a plan referred to in that subsection unless consents in writing to the registration

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of the plan signed by (or by an agent authorised by) such of the following persons as the Registrar-General may determine:

(a) the lessee under any lease, or the judgment creditor under any writ, recorded in the folio of the Register kept under the Real Property Act 1900 relating to the land comprised in the plan,
(b) the caveator under a caveat affecting any estate or interest in that land, are lodged in the office of the Registrar- General.

(3) In relation to any particular plan lodged for registration as referred to in subsection (1), the Registrar-General may, without giving notice to any person, dispense with the requirement for a person mentioned in that subsection to sign the plan."

30. Section 18 deals with the vesting of common property, as follows:

``18(1) Upon registration of a strata plan any common property in that plan vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(2) The Registrar-General shall, upon registration of a strata plan, create a folio of the Register for the estate or interest of the body corporate in any common property in that strata plan.

(3) Upon registration of a strata plan of subdivision creating common property, the common property so created vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that plan but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land immediately before registration of that plan.

(4) Upon registration of a notice of conversion, any lot thereby converted into common property vests in the body corporate for the estate or interest evidenced by the folio of the Register comprising the land the subject of that notice at the time when the notice is registered but freed and discharged from any mortgage, charge, covenant charge, lease, writ or caveat affecting that land before registration of that notice.

(5) Nothing in subsection (1), (3) or (4) affects any right or remedy that may be exercised otherwise than in relation to common property by a person who is a mortgagee, chargee, covenant chargee, lessee, judgment creditor or caveator, even though the person may have signed or consented to the registration of the plan or signed the notice creating the common property.

(6) In this section (other than this subsection), `lease' does not include a lease granted to the provider of an electricity, telephone or telecommunication service that is required by that provider for the provision of the service. In relation to land the subject of such a lease, the lessor is taken to be the body corporate and the land leased is taken to be common property on registration of the plan or notice."

31. Sections 21 and 25 provide in relation to dealing with common property, as follows:

``21. Common property shall not be capable of being dealt with except in accordance with the provisions of this Act.

25(1) A body corporate may, pursuant to a unanimous resolution, execute a transfer or lease of common property other than common property the subject of a lease accepted or acquired by the body corporate under section 19(2).

(1A) Subsection (1) does not authorise a transfer by the body corporate under a strata scheme that is part of a community scheme under the *Community Land Development Act 1989*.

(2) A body corporate, pursuant to a unanimous resolution, may, if not prevented by the terms of the lease, transfer a lease of common property accepted or acquired by the body corporate under section 19(2) or grant, by way of sub-lease, a lease of its estate or interest in common property the subject of a lease so accepted or acquired.

(3) A body corporate may, pursuant to a unanimous resolution, accept a surrender of a lease, or, if otherwise empowered so to do, re-enter under a lease, granted under subsection (1) or (2).

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(4) The Registrar-General shall register a dealing referred to in subsection (1), (2) or (3) by making in the Register such recordings with respect to the dealing as he considers appropriate.

(5) (Repealed)"

32. The *Management Act* provides for the management of strata schemes and the resolution of disputes in connection with them.

33. Sections 11, 12 and 13 provide for the establishment of an owners corporation and the exercise of its functions, as follows:

``11(1) The owners of the lots from time to time in a strata scheme constitute a body corporate under the name `The Owners — Strata Plan No X' (X being the registered number of the strata plan to which that strata scheme relates).

(2) The Corporations Law does not apply to or in respect of an owners corporation.

12. An owners corporation has the functions conferred or imposed on it by or under this or any other Act.

13(1) An owners corporation may employ such persons as it thinks fit to assist it in the exercise of any of its functions.

(2) An owners corporation must ensure that any person employed to assist it in the exercise of a function has the qualifications (if any) required by this Act for the exercise of that function.

Note:

> An owners corporation may employ such persons to assist it as, for example, caretakers and persons providing services to retirement villages. However, where a strata managing agent is appointed the appointment must be in accordance with Part 4. In addition, the Act requires certain functions to be performed by particular persons or persons having particular expertise. For example, section 24 places restrictions on the persons who can exercise functions relating to the finances and accounts of an owners corporation.

(3) An owners corporation may not delegate any of its functions to a person unless the delegation is specifically authorised by this Act."

34. Part 5 of the *Management Act* deals with by-laws. Sections 43, 44, 47, 49, 50, 51, 52, 53 and 55 are in the following terms:

``43(1) By-laws may be made in relation to any of the following:

> safety and security measures
> details of any common property of which the use is restricted
> the keeping of pets
> parking
> floor coverings
> garbage disposal
> behaviour
> architectural and landscaping guidelines to be observed by lot owners matters appropriate to the type of strata scheme concerned.

(2) This section does not limit the matters for which by-laws may be made.

(3) The regulations may prescribe model by- laws which may be adopted as the by-laws for a strata scheme.

44(1) The by-laws for a strata scheme bind the owners corporation and the owners and any mortgagee or covenant chargee in possession (whether in person or not), or lessee or occupier, of a lot to the same extent as if the by-laws:

> (a) had been signed and sealed by the owners corporation and each owner and each such mortgagee, covenant chargee, lessee and occupier, and
> (b) contained mutual covenants to observe and perform all the provisions of the by-laws.

(2) There is an implied covenant by the lessee in a lease of a lot or common property to comply with the by-laws for the strata scheme.

(3) In this section, `lessee' means, in relation to a lot in a strata leasehold scheme, a sublessee of the lot.

47. An owners corporation, in accordance with a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots or the lots and common property for the strata scheme, make by-laws adding to, amending or repealing the by-laws for the strata scheme.

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49(1) By-law cannot prevent dealing relating to lot.

No by-law is capable of operating to prohibit or restrict the devolution of a lot or a transfer, lease, mortgage, or other dealing relating to a lot.

(2) By-law resulting from order cannot be changed.

If an order made under Chapter 5 has effect as if its terms were a by-law, that by-law is not capable of being amended or repealed except by a by-law made in accordance with a unanimous resolution and, in the case of a strata leasehold scheme, with the consent of the lessor of the scheme.

(3) By-law cannot restrict children.

A by-law for a residential strata scheme has no force or effect to the extent to which it purports to prohibit or restrict persons under 18 years of age occupying a lot. This subsection does not apply to a by-law for a strata scheme for a retirement village or housing exclusively for aged persons.

(4) By-law cannot prevent keeping of guide dog.

A by-law has no force or effect to the extent to which it purports to prohibit or restrict the keeping on a lot of a dog used as a guide or hearing dog by an owner or occupier of the lot or the use of a dog as a guide or hearing dog on a lot or common property.

50(1) An owners corporation must not, during the initial period, make, amend or repeal a by-law in such a manner that a right is conferred or an obligation is imposed on one or more, but not all, owners or in respect of one or more, but not all, lots.

(2) An owners corporation may recover from the original owner, as damages for breach of statutory duty, any loss suffered by the owners corporation as a result of a contravention of this section.

(3) An owner may recover, as damages for breach of statutory duty, any loss that has been suffered by the owner as a result of a contravention of this section.

(4) It is a defence to an action under this section for damages if it is proved that the original owner:

(a) did not know of the contravention on which the action is based, or
(b) was not in a position to influence the conduct of the owners corporation in relation to the contravention, or
(c) used due diligence to prevent the contravention.

(5) A remedy available under this section does not affect any other remedy.

51(1) This Division applies to a by-law conferring on the owner of a lot specified in the by-law, or the owners of several lots so specified:

(a) a right of exclusive use and enjoyment of the whole or any specified part of the common property, or
(b) special privileges in respect of the whole or any specified part of the common property,

and to a by-law that amends or repeals such a by-law.

(2) This Division does not prevent an owners corporation making a by-law in accordance with section 54 of the *Community Land Management Act 1989*.

52(1) An owners corporation may make, amend or repeal a by-law to which this Division applies, but only:

(a) with the written consent of the owner or owners of the lot or lots concerned and, in the case of a strata leasehold scheme, the lessor of the scheme, and
(b) in accordance with a special resolution.

(2) A by-law to which this Division applies may be made even though the person on whom the right of exclusive use and enjoyment or the special privileges are to be conferred had that exclusive use or enjoyment or enjoyed those special privileges before the making of the by-law.

(3) After 2 years from the making, or purported making, of a by-law to which this Division applies, it is conclusively presumed that all conditions and preliminary steps precedent to the making of the by-law were complied with and performed.

53. A by-law to which this Division applies may confer rights or special privileges subject to such conditions as may be

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specified in the by-law (for example, a condition requiring the payment of money by the owner or owners of the lot or lots concerned, at specified times or as determined by the owners corporation).

55(1) A by-law to which this Division applies, while it remains in force, continues to operate for the benefit of, and is binding on, the owner or owners for the time being of the lot or lots specified in the by-law.

(2) If a person becomes owner of a lot at a time when, under a by-law or under this subsection, a former owner is liable to pay money to the owners corporation, the person who becomes owner is jointly and severally liable with the former owner to pay the money to the owners corporation.

(3) Any money payable by an owner to the owners corporation under a by-law to which this Division applies or under subsection (2) may be recovered, as a debt, by the owners corporation."

35. ``Initial period'' referred to in s. 50 is defined in the Dictionary as follows:

```initial period', in relation to an owners corporation, means the period commencing on the day on which that owners corporation is constituted and ending on the day on which there are owners of lots the subject of the strata scheme concerned (other than the original owner) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement."

36. Chapter 5 of the Act deals with disputes, Part 4 of that Chapter deals with orders of adjudicators, and Division 8 of that Part deals with orders relating to by-laws. Section 159(1) provides as follows:

``159(1) An Adjudicator may make an order declaring a by-law to be invalid if the Adjudicator considers that an owners corporation did not have the power to make the by-law."

37. Contracting out of the provisions of the Act is prohibited by s. 245, which is in the following terms:

``245(1) The provisions of this Act have effect despite any stipulation to the contrary in any agreement, contract or arrangement entered into after the commencement of this section.

(2) No agreement, contract or arrangement, whether oral or wholly or partly in writing, entered into after the commencement of this section operates to annul, vary or exclude any of the provisions of this Act."

**Submissions**

38. The parties have provided written submissions, which I will leave with the papers.

39. Mr. Meagher SC for the plaintiff submitted that the defendants acquired the building subject to the lease; and that there was no implied term in the lease requiring the lessee to consent to the registration of a strata plan. Those matters were in fact conceded by the defendants.

40. Next, Mr. Meagher submitted that registration would necessarily involve breaches of the lease, and threats of further breaches.

41. He submitted that the demised premises would cease to exist as such. The defendants, as owners of a strata lot in respect of Level 6, would own only the air space, whilst the walls, floors, ceilings and fixtures would become common property owned by the body corporate: see *Development Act*, ss. 5, 18(1). Accordingly, the defendants would be unable to lease the demised premises to the plaintiff.

42. Mr. Meagher referred to *Ashington Holdings Pty. Ltd.* v. *Wipema Services Pty. Limited (No.2)* (1998) 9 BPR 16,515 at 16,518-20. In that case, an agreement for lease arose from the lessee's exercise of an option, in relation to a floor in a commercial building. Subsequently, a strata plan was registered with the lessee's
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consent, and the owner offered a lease of the relevant strata lot. Young, J. refused specific performance, because what was offered was different from the agreed lease. Young, J's decision was reversed by the Court of Appeal, but only on the ground that the proposed lessee's consent to the strata plan gave rise to an estoppel by convention.

43. Next, Mr. Meagher submitted that what had previously been common property owned by the defendants as owners of the building would become common property owned by the body corporate, so that the defendants would no longer be in a position to comply with their covenants in the lease to provide access, lifts, air conditioning, water and electricity, and this in turn could lead to infringement of the plaintiff's right to quiet enjoyment. Mr. Meagher submitted that they may not even be

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bound to provide these services: the defendants were not the original lessor, with obligations arising from privity of contract, but were assignees whose obligations arose from privity of estate: see *Progressive Mailing House Pty. Limited* v. *Tabali* (1984-5) 157 CLR 17; *Auscott Limited* v. *Panizza* (1988) NSWConvR ¶ 55-395; *Kumar* v. *Dunning* (1989) QB 193-9.

44. The lessor's obligations in relation to services were not ``with reference to'' the air space of Level 6, within ss. 117 and 118 of the *Conveyancing Act*. Even if the obligation to provide those services bound the defendants, they would not bind assignees of the defendants; so that even if the availability of a claim for damages would be an incentive to the defendants to ensure that the services were provided, that claim would not lie against lessor assignees of the defendants.

45. Next, Mr. Meagher submitted that a number of the provisions of the lease would become unworkable: for example, the provision to the effect that the lessee could erect signs and make alterations with the consent of the lessor; and provisions providing for percentage increases in outgoings.

46. Next, Mr. Meagher submitted that the plaintiff would become bound by entirely new obligations, namely the by-laws for the strata scheme: see s. 44 of the *Management Act*. These could involve serious disadvantages, for example reduced access to the building, or access to the plaintiff's premises by workers authorised by the body corporate, without the protection given by cl. 14.12 of the Memorandum.

47. Mr. Meagher submitted that the plaintiff could become liable also to additional payments under clauses of the Memorandum providing for contributions to expenses, including cl. 3(c), (cc), (dd) and (ee) of the First Appendix.

48. In relation to the deed poll offered by the defendants, Mr. Meagher submitted first that cl. 2 thereof, purporting to provide for exclusive use and enjoyment by the lessee of common property previously within the demised premises, would be invalid, because the owners corporation does not have power to give lessees exclusive use and enjoyment of common property: at most, it could give a licence to owners, pursuant to ss. 51, 52 and 55 of the *Management Act*, which is not an interest in land. See *Victorian Professional Group Management Pty. Limited* v. *The Proprietors ``Surfers Aquarius'' Building Units Plan No. 3881* (1989) NSW Strata Title Cases ¶30-088 at 50,785-6; *Rugby Court Pty. Limited* v. *The Proprietors Strata Plan No. 7712* (1979) NSW Strata Title Cases ¶30-030 at 50,391-2.

49. Mr. Meagher submitted that cl. 4(b) of the proposed deed poll, purporting to authorise non-compliance with by-laws inconsistent with rights under the lease, would be invalid, because the owners corporation does not have power to authorise such non-compliance: see s. 44 of the *Management Act*. Furthermore, s. 47 of the *Management Act* meant that any purported attempt to prevent amendment would be invalid.

50. Next, Mr. Meagher submitted that s. 50 of the *Management Act* prevented by-laws, during a relevant ``initial period'', conferring rights on owners unless all owners were given the same rights: *Bapson Pty. Limited* v. *Puyeti Pty. Limited* (1990) NSW Strata Title Cases ¶ 80-002 at 60,057. Even though this deed poll purported to apply to all leases, leases had different obligations and expired at different times, so that the rights given to different owners by the deed poll would be different.

51. Mr. Meagher submitted that cl. 6 of the deed poll, purporting to permit lessees to take away fixtures, was invalid: ss. 21 and 25 of the *Development Act* meant that common property could be dealt with only by a unanimous resolution of lot holders at the time of the transfer of common property.

52. Mr. Meagher submitted that cl. 7, purporting to appoint lessors as agents of the owners corporation for the purpose of consents, was invalid: see ss. 12, 13(3) of the *Management Act*, and cl. 3.1 of the by-laws.

53. Finally, Mr. Meagher pointed out that cl. 12 of the deed poll, which purportedly required the owners corporation to carry out certain work, contained no obligation upon the lessor to give notification to the owners corporation or to fund the repair work.

54. Mr. Raphael, also for the plaintiff, submitted that there could be adverse tax consequences to the plaintiff. The registration of the strata plan would result in a release of rights by the plaintiff, possibly in return for the benefits of the deed poll, and that release of rights would be a supply on which GST was payable. If there were any lessening of the plaintiff's obligations to pay outgoings, that

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would constitute firstly, a one-off income or capital gain (see *Warner Music Australia Limited* v. *FCT* (1996) 96 ATC 5046 at 5,055-6) and would involve an ongoing loss of deductions.

55. Mr. Robb QC for the defendants submitted that the *Development Act* confirmed a right to achieve the benefits of strata title as an incident of property ownership, that all lessees but the plaintiff had consented, and that the defendants had indicated a willingness to take whatever steps were necessary to ensure that there would be no disadvantage to the plaintiff. Section 16(2) of the *Development Act* showed that a strata plan can be registered without a lessee's consent, so that the Court did have a discretion to permit registration, notwithstanding the lack of consent from the plaintiff.

56. Next, Mr. Robb submitted that a lessee is not entitled to an injunction against breaches of a lease unless substantial interference with its rights occurred or was threatened: *Martin's Camera Corner Pty. Limited* v. *Hotel Mayfair Limited* (1976) 2 NSWLR 15; *Kohua Pty. Limited* v. *Tai Ping Trading Pty. Limited* (1985) 3 BPR 9,705; *Todburn Pty. Limited* v. *Taormina International Pty. Limited* (1990) 5 BPR 11,173. Trivial interference was insufficient: *Lincolnshire Railway Co.* v. *Anderson* [1898] 2 Ch. 394 at 401, 404. Where the alleged breach was derogation from grant, it was necessary to show that the premises were rendered materially less fit for the intended purpose: *Vasile* v. *Perpetual Trustees WA Limited* (1987) NSW Conv.R. ¶55-345.

57. The deed poll was offered in order to ensure that the defendants as lessors could comply with the lessor's obligations, and that the owners corporation would not exercise its powers inconsistently with the rights of the lessee. It would complement the obligations of the owners corporation under Part 2 of Chapter 3 of the *Management Act*.

58. Mr. Robb submitted that the majority of the Court of Appeal in *Ashington* took the view that the change to strata title in that case was not material; and cf. *Gourmet Pizza Kitchen Pty. Limited* v. *Sikes* (1998) 8 BPR 15,971.

59. Mr. Robb submitted that although the defendants, as owners of a strata lot, would cease to have an interest in the fixtures, there would be no breach sufficient to grant an injunction. Similarly, the circumstance that the control of the building would pass to the owners corporation, the power of the owners corporation to make by-laws, and the need for concurrence of other lot owners for financial contributions, did not involve any breach or threat of breach sufficient to grant an injunction. The defendants' offer to waive the lessee's obligation to pay a percentage of increases in outgoings ensured that this would not involve a burden on the plaintiff.

60. Purchasers from the defendants of the strata lot would be bound by all the terms of the lease: see *Hurlfite Pty. Limited* v. *Coles Myer Limited* (1990) NSW Conv.R. ¶55-515.

61. Turning to the deed poll, Mr. Robb submitted that there was a wide power to make by-laws: see *Hamlena Pty. Limited* v. *Sydney Endoscopy Centre Pty. Limited* (1990) 5 BPR 11,432 and 11,436; *Salerno* v. *Proprietors of Strata Plan No. 42724* (1997) 8 BPR 15,457; *Humphries* v. *The Proprietors (Surfers Palms North) Group Titles Plan 1955* (1994) 179 CLR 597 at 616.

62. Mr. Robb submitted that cl. 2 impliedly confirmed the lot owner's rights to exclusive use and occupation of the relevant property; and in any event, cl. 2 could be amended so as expressly to give the right to the owner which would be passed on to the lessee under the lease. Mr. Robb submitted that, although amendment of

by-laws could not be prevented, the deed poll would contractually bind the body corporate not to amend: cf. *Craig Gordon* v. *Proprietors of Strata Plan No. 16* (1964-5) NSWR 1576. This was also consistent with company law principles, which according to *Hamlena* were relevant. In any event, the defendants were prepared to offer a covenant not to amend by-laws and a promise that it would cause all future owners of lots to enter into a similar covenant.

63. Mr. Robb submitted that in so far as the deed poll purported to give the lessees the right to take away tenants' fixtures, the deed poll itself would be an expression of a unanimous resolution of unit holders made at this time, which was sufficient.

Decision

64. In my opinion, as submitted by Mr. Robb, the *Development Act* does contemplate that subdivision into strata lots is an incident of ownership of property suitable for that subdivision, and also that strata plans may be

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registered without the consent of lessees. I also accept that the question is not just whether there would be breaches of the lease, but rather whether an injunction would be justified; and that this requires substantial interference with the rights of the plaintiff, or the threat of such interference, and also requires that damages would be an inadequate remedy. This is very different from the question considered in *Ashington*, of whether an agreement for lease of a floor of a building should be enforced by compelling an unwilling lessee to enter into a lease of a strata lot: in that case, the onus was squarely on the lessor to have the Court exercise a discretion in the lessor's favour.

65. I was initially persuaded by Mr. Meagher's submission that the registration of the strata plan would involve an actual breach of the lease, in taking away the plaintiff's right to exclusive possession of fixtures etc.; although I took the view that this would justify an injunction only if it was associated with a real threat of interference or some other actual burden or disadvantage. However, on further consideration I have concluded that all fixtures and internal walls within the cubic spaces of the lot (not including structural cubic spaces) are part of the lot. Paragraph (b) of the definition of ``structural cubic space'' makes it clear that the *Development Act* is not using the expression ``cubic space'' as excluding physical objects within the cubic space in question, but rather includes such objects if they are part of a ``parcel'', that is, land. This approach is confirmed by Ilkin, *Strata Schemes and Community Schemes Management and the Law* (3rd ed), p. 44. and *Burgchard* v. *Holyroyd Municipal Council* [1984] 2 NSWLR 164. In those circumstances, I see no reason why the provision in the lease for removal of tenant's fixtures would not remain efficacious. There would still in my view be a technical breach of the lease in relation to floors, ceilings and external walls, and pipes and wires within them; but that breach seems plainly immaterial.

66. In my opinion, the defendants, and also future assignees from the defendants, would be bound by the terms of the lease, notwithstanding the registration of the strata plan, even though the premises then owned by them and affected by the lease would be ``cubic spaces'' only. In my opinion, the lessee's rights to access and services such as lifts, air conditioning, water and electricity, and the lessor's corresponding obligations, are plainly ``with reference to'' the cubic spaces of the relevant lot, considered as being leased for use as commercial offices. In my opinion, the fact that the property required for the supply of these rights and services would be owned by the owners corporation, rather than the lessor, is in no way inconsistent with that.

67. I think this is supported by my decision in *Hurlfite*. In that case, I held that the lessor's obligation to maintain a car park in association with a leased shopping centre was ``with reference to'' the demised premises, notwithstanding that part of the car park was owned, not by the lessor but by the local Council. It could be argued that that decision is distinguishable, because the car park was treated as a whole, and it was partly owned by the lessor; and also because the lease itself recognised that the car park was partly owned by the Council. I think it is extremely unlikely that the decision could be distinguished on that ground. However, out of abundant caution it may be appropriate to require the defendants to undertake a contractual obligation to the plaintiff to fulfil all the terms of the lease, and also promise that the plaintiff will not be any worse off by reason of the registration of the strata plan, together with an obligation to ensure that the same

obligations are undertaken by any assignee of this strata lot from the defendants: this promise could be secured by a charge over the lot itself.

68. Turning to the question of tax, there would in my opinion be no supply by the plaintiff by reason of refusal of the injunction and registration of the strata plan: all it would mean would be that the plaintiff's existing rights were not such as to justify an injunction or to preclude the registration of the strata plan, and the plaintiff would retain contractual rights in relation to future breaches. In so far as outgoings are waived, this could conceivably be a one-off capital gain or income receipt, and it would involve an on-going loss of deductions, but there would be a net gain to the plaintiff.

69. Leaving aside any question of a deed poll or other agreement, there could be a basis for granting an injunction. First, there is the need to obtain consent from the owners corporation, rather than the lessor, for various operations in respect of the demised premises. Next, there is the reduced ability of the lessor to provide the access and the services to which I have referred.

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Next, there is the circumstance that by-laws passed by the owners corporation could be more onerous, and give less rights, than provided by the lease, for example in relation to access to the premises; and that these by-laws could be amended from time to time. Finally, unless increases in outgoings are waived, it is conceivable that outgoings could be increased.

70. There is force in Mr. Meagher's criticisms of the proposed deed poll. In my opinion, the deed poll could not validly authorise non-compliance with by-laws, nor could it prevent by-laws being varied, nor could it validly appoint lot owners as agents of the owners corporation for the purpose of giving consents. Although companies can validly make contracts, I do not think an owners corporation can contractually bind itself and future owners corporations not to amend by-laws: I can find no such power in either Act, and I do not think the analogy with companies is sufficient to imply such a power.

71. Such a deed poll, authorised by a by-law, could in my opinion validly require the owners corporation to provide access, lifts, air conditioning, etc., in accordance with the terms of leases, except to the extent that this was inconsistent with either the Act or the by-laws. I do not think the different terms of leases would mean that any of these provisions would be in breach of s. 50 of the *Management Act*.

72. This would meet some of the possible disadvantages to which I have referred. However, in addition to procuring such a deed poll, I think the defendants should undertake contractual obligations in favour of the plaintiff:

(a) to ensure that the plaintiff has all the rights purportedly granted by the lease;
(b) to ensure that the plaintiff would not be disadvantaged in relation to any term of the lease by reason of the registration of the strata plan;
(c) secured by charge over the strata lot (giving security for damages, and the right to lodge a caveat); and
(d) to ensure that any purchaser of the lot would undertake the same obligations, including this one.

I would not require waiver of increases in outgoings. It may be that the lease, on its true construction, will not require them; but in any event, I think a contractual undertaking in terms of (b) gives sufficient protection.

73. On the basis of the defendants procuring a deed poll covering the matters I have referred to, and undertaking the above contractual obligations, I would refuse relief to the plaintiff.

74. My tentative view on costs is that the plaintiff should pay one-half of the defendants' costs. The conditions I am imposing on the defendants are not exactly as offered, but the defendants were prepared to submit to any reasonable conditions and asked the plaintiff what it wanted. However, my tentative view is that the plaintiff was entitled to the interim protection it obtained, so should not be liable on its undertaking as to damages.

SATTELL & ORS v PROPRIETORS BE-BEES TROPICAL APARTMENTS (No 2)

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(2001) LQCS ¶90-108

QCA citation: [2000] QCA 496

Supreme Court of Queensland, Court of Appeal

Judgment delivered 29 November 2000

Building Units and Group Titles — Body corporate — Nature and powers — Special resolution not required to bring counterclaim, third-party proceeding or other proceeding, in a proceeding to which body corporate already had a party — Whether appellant body corporate required to pass special resolution to start appeal proceeding — Whether appeal a separate proceeding from action below — Body Corporate and Community Management Act 1997 (Qld), sec 259; Body Corporate and Community Management (Standard Module) Regulation 1997 (Qld), reg 26.

The respondents (``Sattell'') instituted an action in the Supreme Court in which they sought declarations relating to a caretaking agreement as well as damages for breach of contract and other relief. The appellant (``Be-Bees'') was sued as a body corporate constituted under the provisions of the Building Units and Group Titles Act 1980. The complaint Sattell made against Be-Bees was that it had wrongfully repudiated certain agreements said to have been made between the two parties.

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Jones J declared that one of the agreements mentioned in the pleadings was valid and enforceable and declared that it had been terminated by Sattell's acceptance of Be-Bees repudiation of the agreement. His Honour remitted the case to the District Court for assessment of damages, by which was meant assessment of any damages that might have been incurred by Sattell: (2000) LQCS ¶90-105.

Be-Bees purported to institute an appeal that the action be dismissed, set down for hearing on 29 November 2000. On 28 November, Sattell filed an order that the appeal be struck out or dismissed on the ground that Be-Bees had failed to obtain a special resolution from the body corporate to institute the appeal, thus failing to comply with sec 259 of the Body Corporate and Community Management Act 1997 (the ``Act''). Sec 259 reads as follows:

> ``(1) The body corporate for a community titles scheme may start a proceeding only if the proceeding is authorised by special resolution of the body corporate.
>
> (2) However, the body corporate does not need a special resolution to —
>
> (a) bring a proceeding for the recovery of a liquidated debt against the owner of a lot included in the scheme; or
> (b) bring a counterclaim, third-party proceeding or other proceeding, in a proceeding to which the body corporate is already a party; or
> (c) appeal against an adjudicator's order; or
> (d) start a proceeding for an offence under chapter 3, part 5, division 4."

Be-Bees argued that the appeal was a proceeding in the same proceeding as the judgment at first instance, the latter being one to which the body corporate was already a party.

Held: Appeal dismissed.

1. The wording of sec 259(2) of the Act, ``counterclaim, third-party proceeding or other proceeding, in a proceeding'', when the latter proceeding is an action at first instance, would not bring to mind an appeal against a judgment at first instance. Particularly an action of the present character which disposes finally of the only substantive issue before the Court for determination.

2. The exclusion in sec 259(2)(c) of an appeal against an adjudicator's order supports the assumption on which paragraph (c) is based: that such an appeal to a higher court, attacking the result of a judgment delivered at first instance, would not be within paragraph (b).

[Headnote by the CCH CONVEYANCING LAW EDITORS]

DA Savage with WA Cull (instructed by Attwood Marshall (Gold Coast)) for the appellant.

CJ Carrigan (instructed by Nicholsons) for the respondents.

Before: Pincus and Davies JJA, Douglas J.

Judgment, in full, below

Pincus and Davies JJ, Douglas J: The appellant purported to institute an appeal against a judgment of Jones J which appeal was, after outlines had been delivered, set down for hearing on 29 November 2000. On 28 November the respondents to the appeal filed an application for an order that the appeal be struck out or dismissed on the ground that, it was said, the appellant had failed to ``comply with s 259 of the *Body*

Corporate and Community Management Act 1997''. We granted that application, dismissing the appeal, and reserved our reasons.

2. The respondents, Messrs Sattell and others, instituted an action in the Supreme Court in which they sought declarations relating to a caretaking agreement as well as damages for breach of contract and other relief. The appellant was sued as a body corporate constituted under the provisions of the *Building Units and Group Titles Act* 1980. The complaint the respondents made against it was that it had wrongfully repudiated certain agreements said to have been made between the appellant and the respondents. During the hearing of that action the learned trial judge decided that, for reasons which need not be explained here, it would be convenient to deal with the action only in so far as certain declaratory relief was sought, leaving any

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question of damages to be determined in the District Court; the action then proceeded to judgment on that basis.

3. Jones J declared that, with certain exceptions, one of the agreements mentioned in the pleadings was valid and enforceable and declared that it had been terminated by the respondents' acceptance of the appellant's repudiation of the agreement. His Honour remitted the case to the District Court at Cairns for assessment of damages, by which was meant assessment of any damages that might have been suffered by the respondents.

4. By its notice of appeal the appellant sought an order that the action be dismissed. The point the respondents, for whom Mr Carrigan appeared, raised against the competency of the appellant's proceedings depends on the interpretation of s 259(1) of the *Body Corporate and Community Management Act* 1997. The appellant did not come into existence under that Act, but under its predecessor, the *Building Units and Group Titles Act* 1980. The 1997 Act contains provisions having the effect of bringing existing bodies corporate under that Act. The substantive provisions of the 1997 Act came into force on 13 July 1997. Sections 275 and 276, which we do not here quote, have the effect that on that date a ``community titles scheme'' being a ``basic scheme'' was established for the relevant plan, which was registered under the 1980 Act. The expression ``basic scheme'' is in effect defined by s 11(5) of the 1997 Act, but it is not necessary to explain its content. The critical provision is s 259 of the 1997 Act, which reads as follows:

> “(1) The body corporate for a community titles scheme may start a proceeding only if the proceeding is authorised by special resolution of the body corporate.
> (2) However, the body corporate does not need a special resolution to —
>
> > (a) bring a proceeding for the recovery of a liquidated debt against the owner of a lot included in the scheme; or
> > (b) bring a counterclaim, third-party proceeding or other proceeding, in a proceeding to which the body corporate is already a party; or
> > (c) appeal against an adjudicator's order; or
> > (d) start a proceeding for an offence under chapter 3, part 5, division 4”.

5. It is accepted that there was no relevant special resolution. Section 92 of the 1997 Act reads in part as follows:

> “(1) A decision of the committee is a decision of the body corporate.
> (2) Subsection (1) does not apply to a decision that, under the regulation module, is a decision on a restricted issue for the committee”.

The regulation module is a document entitled ``*Body Corporate and Community Management (Standard Module) Regulation* 1997''; see s 22(1) of the 1997 Act and reg 3(1) of the 1997 Regulation. Counsel for the appellant relied to some extent upon reg 26 of the 1997 Regulation which says, among other things, that:

> “A decision is a decision on a restricted issue for the committee if it is a decision —
>
> > ...
> > (e) to bring a proceeding in a court, other than —
> >
> > > (i) a proceeding to recover a liquidated debt against the owner of a lot; or

(ii) a counterclaim, third party proceeding or other proceeding in relation to a proceeding to which the body corporate is already a party...".

6. It will be noticed that reg 26 just quoted may not harmonise well with the terms of s 259(2) of the 1997 Act, in that the latter includes pars (c) and (d) which are not to be found in reg 26(e); although counsel for the appellant sought to gain some advantage from this lack of conformity, it does not appear to have much if any bearing on the central issue. That is whether the need for a special resolution did not arise, because the institution of the appeal falls within the description ``other proceeding, in a proceeding to which the body corporate is already a party'' in s 259(2)(b). It was argued for the appellant that the appeal against Jones J's judgment is a proceeding in the same proceeding as was before Jones J, the latter being one to which the body corporate was already a party.

7. In making this contention, counsel for the appellant conceded that the judgment of Jones J was final and not interlocutory; the point is not absolutely clear: *Hall* v *Busst* (1960) 104 CLR 206 and *Computer Edge Pty Ltd* v *Apple Computer Inc* (1984) 54 ALR 767. The judgment of Jones J was final at least in the

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sense that his Honour finally disposed of the case so far as the Supreme Court was concerned; further proceedings, if there were to be any, had to be taken in another court. It was argued for the appellant that if we upheld the respondents' objection, that would imply the necessity for obtaining a special resolution as authority to institute an appeal from any interlocutory order. That does not appear to be so; to hold that an appeal against an order finally determining the only issues falling for determination in this Court is not a proceeding ``in'' the proceeding before the primary judge does not commit one to holding that no appeals on procedural points arising in the trial may be instituted unless authorised by special resolution.

8. A rather similar point arose in *General Accident Fire and Life Assurance Corporation Ltd* v *Foster* [1972] 3 All ER 877, which was decided on the basis that an interlocutory appeal to the Court of Appeal was ``clearly a separate proceeding for the purpose of considering the effect of'' a certain statutory provision: see p 881e-f. The alternative view was that the appeal was merely part of the proceedings at first instance. Since the point went by concession, the authority is of no great weight here. More assistance is to be obtained by attention to the words of s 259(2) of the 1997 Act. The expression ``counterclaim, third party proceeding or other proceeding, in a proceeding'', when the latter proceeding is an action at first instance, would not bring to mind an appeal against a judgment in the action, particularly one of the present character which disposes finally (subject to the possibility of an appeal) of the only substantive issue before the Court for determination. The mention of a counterclaim and a third party proceeding is rather against the appellant's contention; and one would not describe an appeal to a higher court, attacking the result of a judgment delivered at first instance, as being one ``in'' the original proceeding. Also the exclusion by par (c) of an appeal against an adjudicator's order does not help the appellant; the assumption on which par (c) is based is that such an appeal would not be within par (b).

9. The Queensland Court of Appeal was, as was pointed out during the hearing, established as a division of the Supreme Court of Queensland: see s 16 of the *Supreme Court of Queensland Act* 1991. But the same Act treats the Court of Appeal as a distinct institution: see in particular Pt 3 of the Act. In our opinion the institution of the appeal was beyond the appellant's power.

10. It was suggested on behalf of the appellant that, if we took this view, the appeal should be adjourned so that, if so advised, the appellant could attempt to obtain a special resolution ratifying what was done. It appears to us that, where a party having no right to do so purports to begin an appeal in this Court, on the deficiency being brought to the Court's attention the appeal would ordinarily be dismissed or struck out. The circumstances of the present case, so far as they appear from the record, do not suggest that this is a case where justice requires that any other course be followed.

11. The foregoing are the reasons, which we undertook to give, for the order made dismissing the appeal. We reserved the question of costs. The respondents, had they considered the matter, must have known or believed that there was no special resolution authorising the appeal, for they are themselves the owners of a lot. It appears, however, that the appellant's difficulty did not occur to the respondents' legal advisers until very recently and the point was notified to this opponent only the day before the hearing. Had the matter

been drawn to the appellant's attention earlier, perhaps there could have been a considerable saving of time and effort in preparing outlines of argument and preparing for oral argument, on the substantive issues. On the other hand, it was the appellant which wrongly instituted the appeal.

12. In our view the appellant should have a partial order for costs. The appeal has, as we have mentioned already, been dismissed. We would order in addition that the appellant pay half of the respondents' costs of and incidental to the appeal, to be assessed.

REGIS TOWERS REAL ESTATE P/L v CSS HOLDINGS P/L & ORS (1611/01); REGIS TOWERS REAL ESTATE P/L v PETER KELLY FLOORING P/L & ORS (1612/01)

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(2001) LQCS ¶90-109

Court citation: [2001] NSWSC 139

New South Wales Supreme Court

Judgment delivered 2 March 2001

Strata title — By-laws purporting to give exclusivity to caretaker/manager — Whether by-laws extend to preclude owners from using selling agents other than plaintiff/ caretaker — Whether constraint upon owners would result in restriction of transfer — Strata Schemes Management Act 1996 (NSW), sec 49(1).

The plaintiff (``Regis Towers'') is a real estate agent that carries on its business in a city development in Sydney known as Regis Towers. Regis Towers owns the so-called management lots (lots 149, 454, 488 and 650) contained in Strata Plan No 56443.

The first defendant (``Peter Kelly Flooring'') is the owner of Lot 630 in the Regis Towers development. Peter Kelly Flooring chose to retain Kenneth Real Estate Pty Ltd (``Kenneth Real Estate'') as its agent when it wished to sell Lot 630.

Kenneth Real Estate advertised that the unit was for sale and arranged for the unit to be open for inspection. They also erected a-frame signs in front of the building. An incident occurred when representatives from Regis Towers asserted that Kenneth Real Estate had no right to act on the sale or erect signs without the consent of Regis Towers.

Regis Towers, claiming that the by-laws and building management agreement confer exclusive agency upon themselves, sought an injunction against Peter Kelly Flooring and Kenneth Real Estate continuing the agency. Peter Kelly Flooring and the other owners contended that the exclusivity contained in the by-laws and management agreement went no further than to preclude their direct participation in or conduct of the various specified services in their units or in the common property.

By-law 4 is in the following terms:

> ``1. The owner or occupier of any lot must not in his lot or on the common property, except with the written consent of the owners of Lots 149, 454, 488 and 650, conduct or participate in the conduct of a business which provides services in the nature of:—
>
> a. the business of a letting agent; or
> b. The business of a pooled rent agency; or
> c. The business of on-site caretaker, security, cleaner; or
> d. any other business activity that is either:—
>
> i....
> ii. An activity identical or substantially identical with any of the services provided to owners and occupiers of lots referred to in Special By-Law 1, and/or the Caretaker-Manager Agreement''.

Clause 4 of the Management Agreement to which the by-laws refer states:

> ``4. The Caretaker may provide the following services as agent for owners of lots in the building, at their request and subject to the settlement between the Caretaker and the owners of the terms on which the services are to be provided:
>
> 1. Buying, selling, leasing, assigning or otherwise disposing of lots within the strata scheme; and''

Held: summons dismissed.

1. The constraint in by-law 4 should be interpreted as merely precluding the owner from direct participation in, or conduct of, the relevant activities. The owner then remains free to appoint real estate agents for selling purposes, as long as they do not involve participation by

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the owner in the agent's business. Clearly, an owner who engages a real estate agent to sell his or her property is not conducting or participating in that business.

2. An all-encompassing selling exclusivity, as argued by Regis Towers, may result in such a constraint on the selling of units as to invoke sec 49 of the Strata Schemes Management Act 1996 (NSW). Under that provision, no by-law can operate to prohibit or restrict a transfer or other dealing relating to a lot. To grant the purported exclusivity that Regis Towers contended is contained in by-law 4 may result in a restriction on transfer or an unreasonable restraint of trade.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

1611/01

MD Broun QC (instructed by Broun Abrahams) for the plaintiff.

J Conomy (instructed by Pigott Stinson Ratner Thom) for the first defendant.

D Warren for the second defendant.

FL Andreone (instructed by Blessington Judd) for the third defendant.

1612/01

MD Broun QC (instructed by Broun Abrahams) for the plaintiff.

T Castle for the first defendant.

T Murray (instructed by Murray Stewart & Fogarty) for the second defendant.

FL Andreone (instructed by Blessington Judd) for the third defendant.

Before: Santow J.

Full text of judgment, as revised 9/3/2001, below

Santow J:

Introduction

1. This case is essentially about whether under Strata Title by-laws the Plaintiff could prevent a number of strata title owners bypassing the Plaintiff in order to appoint their own selling agent.

2. The Plaintiff is the Manager/Caretaker of the building and relies upon the by-laws and building management agreement for its claimed exclusivity. The owners say the exclusivity goes no further than to preclude their direct participation in or conduct of the various specified services in their units or in the common property. They say that this does not preclude them engaging third party real estate agents (or their counterparts in the other specified services), though they act for the owner by entering upon the premises with prospective purchasers, or by conducting an auction on site within the unit. The Plaintiff disputes that, contending that any such engagement would also breach the by-laws and building management agreement.

3. In the interests of a ``just, quick and cheap'' resolution of that dispute, all parties sensibly agreed to my answering the following question as a separate one. This was with the agreed result that, if answered against the Plaintiff, its claim to exclusivity under the Strata by-laws and management Agreement must fail. Accordingly, I made these following orders by consent.

> ``1. Pursuant to Pt 31 r 2 and 4 of SCR, the question below shall be decided separately from any other question, such to be the initial question for decision and if decided against the Plaintiff the agreed result is that the Plaintiff's summons in each of the above matters is dismissed.
>
> > `Whether pursuant to the special By-laws (PX1) or otherwise having regard to PX2, the Plaintiffs have the exclusive rights described in paragraph 3 of the Plaintiff's Summons in each of the above matters.'"

Agreed facts

4. Set out below is a summary outline of facts agreed between the parties.

> ``The Plaintiff company is a real estate agent. It carries on its business in a city development known as Regis Towers, which fronts Castlereagh Street, Campbell Street and Pitt Street. It owns the so-called management lots in Regis Towers (lots 149, 454, 488 and 650). The development is contained in Strata Plan No. 56443. The owners of the Strata Plan are joined as a Third Defendant to give them an opportunity
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>
> of being heard on the issues in these proceedings. They have appeared and made submissions, but without prejudice to the Plaintiff's challenge to the Third Defendant's retainer.
>
> The Plaintiff claims that a special by-law of the strata plan which is referred to later effectively excludes the retention of any other real estate agents but the Plaintiff by any of the owners of lots in the development.

The First Defendant, Peter Kelly Flooring Pty Limited, is the owner of Lot 630 in Regis Towers. The First Defendant chose to retain Kenneth Real Estate Pty Limited trading as Ray White City South, the Second Defendant as its agent when it wished to sell Lot 630. Neither the First nor Second Defendant sought the agreement or consent of the Plaintiff to this arrangement.

The Second Defendant advertised that the unit was for sale and arranged to have the unit open for inspection on Saturday, 24 February 2001. For that purpose, they erected A frame signs in front of Castlereagh Street tower and in front of the Campbell Street tower of Regis Towers. They were inviting prospective purchasers to enter Regis Towers for the purposes of inspecting Unit 630 and otherwise promoting the sale of the unit.

An incident occurred when representatives of the Plaintiff company asserted that the Second Defendant has no right to act on the sale without the Plaintiff's consent or to have their signs on the footpath, or to invite members of the public to inspect the unit.

Following that incident, solicitors on behalf of the First Defendant, Peter Kelly Flooring Pty Limited objected to the stand taken by the Plaintiffs. They requested an immediate assurance that the Plaintiffs would not interfere any further with the owner's chosen agent in the process of promoting the sale. The Plaintiffs commenced these proceedings seeking injunction against the owners and the agents continuing the agency."

Resolution of separate question

5. Special by-law 4 sets out the constraint primarily relied upon by the Plaintiff as precluding any owner from appointing a sales agent for the sale of that owner's strata lot who is not the Plaintiff. That constraint confers a degree of exclusivity upon the Plaintiff as ``the caretaker-manager'' of the building. This is in carrying out functions as caretaker-manager as elaborated in the management agreement (PX2). By-law 4 is in the following terms:

``1. The owner or occupier of any lot must not in his lot or on the common property, except with the written consent of the owners of Lots 149, 454, 488 and 650, conduct or participate in the conduct of a business which provides services in the nature of:—

a. the business of a letting agent; or
b. The business of a pooled rent agency; or
c. The business of on-site caretaker, security, cleaner; or
d. any other business activity that is either:—

i. An activity identical or substantially identical with any of the services relating to the management, control and administration of the parcel referred to in Special By-Law 1 and/ or the Caretaker-Manager Agreement; and/or
ii. An activity identical or substantially identical with any of the services provided to owners and occupiers of lots referred to in Special By-Law 1, and/or the Caretaker-Manager Agreement; and/ or
iii. Any activity identical or substantially identical with any of the services relating to the letting of lots referred to in Special By-Law 1, and/ or the Caretaker-Manager Agreement.

e. Any of the following businesses:—

1. Supply of linen;
2. Housekeeping and cleaning;
3. Catering, insofar as it consists in the delivery of foodstuffs and beverages to lots within the strata scheme;
4. Butler and valet;
5. Porterage;
6. Dry cleaning and laundry;
7. Vehicle, taxi and limousine hire;

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8. Entertainment, restaurant and tour reservations;
9. Purposes permitted by Special By- Law No. 1.

...."

[emphasis added]

6. The emphasised portion contains the preclusion invoked by the Plaintiff, though the rest of the clause bears upon its construction.

7. By-law 4 then refers to Special By-law 1. Para 2 d of by-law 1 provides that the Caretaker-Manager's duty ``may'' include... ``providing a letting property management and sales service...''. This the Plaintiff does.

8. The Management Agreement to which the by-laws refer is dated 6 August 1999. Clause 4 is relevant:

``4. The Caretaker may provide the following services as agent for owners of lots in the building, at their request and subject to the settlement between the Caretaker and the owners of the terms on which the services are to be provided:

1. Buying, selling, leasing, assigning or otherwise disposing of lots within the strata scheme; and
2. Collecting rents payable in respect of any lease of lots within the strata scheme.

The consideration for the Owners Corporation granting the Caretaker the right to conduct the services is the Caretaker conducting the activities associated and incidental to these services if the Caretaker elects to do so. In no circumstances shall the Owners Corporation be liable to pay the Caretaker remuneration for these services, or to reimburse for it any expenses incurred in providing these services.''

9. Clause 6 of the Management Agreement is also invoked by the Plaintiff as precluding real estate agents engaged by an owner going on to the premises to sell the owner's unit. It is in the following terms:

``6. The Owners Corporation must not permit the use of the common property or any of the other Lots for the provision of these services, except according to the terms of this Agreement.''

10. The Management Agreement is only for an initial term of 10 years. There are then three 5 year options to renew vested only in the Caretaker-Manager. Clause 18 makes clear that the services that Caretaker-Manager provides are not wholly exclusive because the Caretaker is free to provide them to other persons who are not owners. But there is no reciprocal provision to the effect that owners must use only the Caretaker-Manager in the Management Agreement. That is contrary to what one would expect, if the by-laws were to have the restrictive interpretation contended for by the Plaintiff. Moreover the by-laws are unlimited as to time, whereas the associated management agreement might cease after 10 years. That leaves the owner, on the Plaintiff's interpretation, precluded from taking a wide range of services by persons temporarily in the premises to provide them. This would include not only real estate agency services but also the numerous other services stipulated. That constraint would operate even in circumstances where there was no agreement providing for the Plaintiff to offer them or where only on offer on exorbitant terms. The Management Agreement makes no provision for the costs to be charged for the relevant estate agency and other services to be provided exclusively by the Caretaker- Manager. That is contrary to what one would expect if owners were bound to take those services exclusively from the Manager/Plaintiff when their provision brought the service provider on to the premises, albeit only in a transient sense.

11. Nonetheless, despite these onerous consequences, the Plaintiff contends that any owner who uses an outside agent rather than the Caretaker-Manager to sell his unit infringes special by-law 4, unless consent were first obtained. (There is no suggestion of consent being forthcoming in the present cases). This is said to be because the owner, either directly or through the agent, would in the words of the by- law thereby ``conduct or participate in the conduct of a business which provides services in the nature of'' the ``sales service'' provided to owners and occupiers of the relevant lots. The Plaintiff relies on the judgment of Bryson J in *Regis Towers Real Estate Pty Ltd* v *Kin Fung & Ors* (2000) NSW Titles Cases ¶80-056; [2000] NSWSC 438. But that case is directed to an actual underlease of a unit to a real estate agent. That is a wholly

different set of circumstances to the present, where none of the service provider comes on to the premises save in a transient sense, as for example to confer with the owner or bring in a potential purchaser.

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12. The anomalous and onerous consequences of such an interpretation point strongly against it. They include that the owner, though refused that specified service by the Caretaker or offered it on onerous terms or in circumstances where the agent had a conflict, would nonetheless be in breach of the prohibition if the owner used an outside agent. This the Plaintiff tried to answer by suggesting that the caretaker would then be precluded from withholding its consent to the owner using an outside agent. That is said to be an implied term attaching to the capacity to give or withhold consent.

13. But such a term would not be implied if the agreement, interpreted less restrictively, could have business efficacy without it. There is indeed an interpretation of the clause which avoids that anomaly arising in the first place. This is simply to construe the constraint in a less strained and expansive way; by interpreting the constraint as merely precluding the owner from direct participation in, or conduct of, the relevant activities. In that way the owner remains free to appoint agents, selling or otherwise, so long as they do not involve participation by the owner in the agent's business.

14. There is a further powerful argument against the Plaintiff's construction. An agreement having the onerous consequences that I have identified would operate as an unreasonable restraint of trade, offending the common law prohibition on such restraints. JD Heydon, QC (as he then was) writing in ``A Restraint of Trade Doctrine'' 2nd ed (Butterworths 1999) at 115 explains how the rules of construction applicable to restraints can often assist in holding covenants valid, by narrowing their scope:

> ``The rules of construction already discussed will often assist in holding covenants valid by narrowing their scope. Thus where an employee agreed that he would not, after leaving his employer's service, deal with `any of the customers who shall at any time be served by the employer... in the said business', the Court of Appeal held that these words referred only to the employer's business at the time of the agreement, and not to any business started elsewhere thereafter. As Lord Esher MR said, `It is an ordinary canon of construction that the meaning of words in an agreement which, taken by themselves, are quite general may be confined to a particular subject-matter with which the parties were dealing'. Here, I think the parties to the agreement were dealing with the business then carried on by the plaintiff in Whitechapel and St George's in the East, and the scope of this agreement must be limited by reference to that locality. *Dubowski & Sons* v *Goldstein* [1896] 1 QB 478 at 481; [1895-99] All ER Rep 1959 at 1961.''

15. The Plaintiff contended that use of the common property or any of the lots merely to permit prospective purchasers to come onto the premises was prohibited by clause 6 of the Management Agreement. That introduces yet further absurdity. It would mean that a frail owner who arranged for a limousine driver to enter the common property to assist him or her to the hire car would thereby invoke the prohibition in clause 6. Yet that is another of the numerous services the subject of constraint in by-law 4. An interpretation that avoids such absurdity is obviously to be preferred. Thus, consistently with the earlier preferred interpretation of by-law 4, one would read clause 6 as simply prohibiting the common property to be used for the provision of the relevant services where these were being offered from within the building. There would be no need to extend that constraint to preventing an owner, in transient fashion, using such a service when not so offered from within the building.

16. The Plaintiff's argument is that by-law 4 constrains the owner in two distinct ways. First, the owner may not directly conduct or participate in the conduct of the relevant business within the building. He or she would do so it is said even by permitting the agent on to the building with a prospective purchaser, or by conducting an auction of the owner's flat in the flat. But that is not the natural meaning of the words ``conduct or participate in''. If one comes as a client to a real estate agent, one does not conduct or participate in that business.

17. Moreover the relevant clause refers to the conduct of *a business* meaning the agent's business. Clearly enough the owner who engages a sales agent to sell his or her lot is not engaging in agency business. He

or she as owner does no more than co-operate in the selling process by making title available and receiving payment, having earlier permitted

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prospective purchasers on to the premises. To be engaged in the sales agent business, there must on the owner's part in any event be system and continuity in carrying out *that* business. It has been put in the comparable context of carrying on the business of a money lender by Dr Pannam in ``the Law of Money Lenders'' LBC 1965 at 36:

> ``The result of the preceding authorities would seem to be that in order for a person to come within the primary definition of money lender it must be shown that he has systematically or regularly lent money.[21] The precise volume of lending which must be proved in order to make that showing cannot be captured in a legal formula. It is a question that can only be decided by a court having regard to the facts of each particular case. As McCardie J said, in the passage set out above: `It is ever a question of degree.' The only legal proposition that can be stated with any certainty in determining the question is that a single loan,[22] or several isolated loans,[23] cannot constitute the carrying on of a `business' for the purpose of this part of the definition.''

18. A similar approach is to be found in the trade practices context, as mostly recently *Fasold* v *Roberts* (1997) 70 FCR 489 per Sackville J. But even were the owner himself or herself to be engaged in the business of trading in strata title units, he or she would not be engaged in the business of a ``sales service''. That is the provision of a service for others, not for oneself.

19. The second way in which the Plaintiff contends that by-law 4 constrains the owner is in precluding the owner carrying on the business of sales service through the agency of the estate agent. This is said to occur by referring the owner's business to the agent, who thereby acts on the owner's behalf. That presupposes that an estate agent is not in reality an independent contractor. But that supposition does not fully describe the owner's relationship with a real estate agent. While the agent acts for the owner in selling, it is more accurate to describe the relationship as usually one of client to independent contractor. One may equally say a solicitor acts on behalf of a client. But the solicitor is not an agent either. But even if the real estate agent is properly described as truly acting as an agent, the language does not compel the result that the Plaintiff contends for. The more natural meaning of the words used is that they preclude the owner actually conducting the business *through* an agent, as for example by permitting the agent to set up business in the owner's unit or on the common property. The fallacy in the Plaintiff's argument is to equate the owner's piece of business referred to the agent, with the agent's business overall, and then attribute that business to the owner. All that the agent, if a true agent, is doing on behalf of the owner is to sell that owner's lot.

20. The Plaintiff points to a number of advantages for the building from the Plaintiff's more expansive view of its exclusivity clause. However, those advantages are balanced by some severe disadvantages; for example in forcing owners to employ no agent, if the Plaintiff were unable to perform, or performed inadequately or at exorbitant cost. But in any event those advantages need not depend upon extending the constraint beyond its more reasonable ambit. That ambit still gives the Caretaker/Manager the advantage of exclusivity in being alone permanently on the premises conducting the relevant businesses and totally familiar with the building; this confers major convenience in attracting clients. If the Plaintiff thereby attracts the bulk of the business, those claimed commercial advantages for the building would follow. If it does not attract the bulk of the business it is because owners clearly value competing services more highly than having those advantages, or having them in full measure.

21. Finally, it is important to note that the Management Agreement will terminate after ten years unless extended by the Caretaker for up to a further fifteen years. If by-law 4 were to have the restrictive interpretation pressed by the Plaintiff, one would have the absurdity that the very mechanism for providing the sales service would no longer be available once the Agreement terminated unless the Caretaker chose to make it available. Yet the constraint would still preclude the use of outside services in the absence of consent. Moreover those services are not just selling, but also a wide range of other services, such as letting. And as I have said there are no price terms laid down in the Management Agreement for their provision. All

these factors reinforce the gross unreasonableness and intrusiveness of the exclusivity contended for by the Plaintiff and

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the absurdity of any interpretation which purported to impose such exclusivity. There is also much to be said for the view that such an all-encompassing selling exclusivity, with no requirement for availability and reasonable terms from the monopolist selling agent, if it did apply, would so constrain the selling of units as to enliven the statutory preclusion in s 49 of the *Strata Schemes Management Act* 1996 (NSW). It provides, relevantly, that ``No by- law is capable of operating to prohibit or restrict... a transfer, lease, mortgage or other dealing relating to a lot''. When the exercise or enjoyment of that right of sale is constrained to such a degree, it may amount to a restriction on transfer, though that will depend on the onerousness of the exclusivity in the overall context of no reciprocal obligation on the Caretaker/Manager. An interpretation which avoids that result and that of an unreasonable restraint of trade is open and clearly should be adopted as the more natural.

Conclusion and orders

22. The separate question should be answered ``No''. It follows that the Plaintiff fails altogether in accordance with the agreed result.

23. I order that the Plaintiff's summons be dismissed in each case.

24. Costs should follow the event and accordingly the Plaintiff should pay each of the three Defendants' costs in each action. This is subject in the case of the Third Defendant in each matter providing evidence to the Plaintiff in the first instance of their respective retainer, with leave to apply on the Plaintiff's part if there is to be any further challenge to that retainer.

Footnotes

21 ``I apprehend that to establish that a man is a money-lender the relevant evidence is evidence to prove that he has done such a succession of acts of such a character as that the judge ultimately says, Having ascertained all those facts as to the acts which he did, the times and dates when he did them, the terms which he imposed and so on, the result is that, looking at this Act of Parliament which defines what a money-lender is, I as a matter of law hold him to be a money-lender'': *Nash* v *Layton* [1911] 2 Ch 71, at p. 83, per Buckley LJ.

22 *Newman* v *Oughton* [1911] 1 KB 792. ``If a man lends money to a friend on one occasion, even at interest, he is not carrying on a `business' ...'': *Shaw* v *Benson* (1883) 11 QBD 563, at p. 570, per Brett MR. This proposition is also supported by all of the cases cited in the discussion of *ad hoc* money lenders, *infra*, pp. 49-51.

23 *Litchfield* v *Dreyfus* [1906] 1 KB 584, at pp. 589-590; *Newton* v *Pyke* (1908) 25 TLR 127; *Lapin* v *Heavener* (1992) 29 SR(NSW) 514, at p. 523, per Long Innes J, affd. 29 SR(NSW) 525 (Full Court), affd. (Isaacs J *dubitante*) (1930) 44 CLR 166 (High Court), affd. (1934) 51 CLR 58, at p. 74 (Privy Council).

INDEPENDENT FINANCE GROUP PTY LTD v MYTAN PTY LTD & ANOR

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(2001) LQCS ¶90-110

QCA citation: [2001] QCA 306

Supreme Court of Queensland, Court of Appeal

Judgment delivered 3 August 2001

Community schemes — By-laws of body corporate — Exclusive use of common property — Disputes — Power of adjudicator to make order to resolve dispute — Whether power of adjudicator to make order removed by sec 231 of the Body Corporate and Community Schemes Act 1997 — Whether adjudicator asked to resolve question about title to land — Body Corporate and Community Management Act 1997, sec 231, sec 233.

The dispute concerns a two-storey building consisting of eight flats, known as Welsby Place. The building was purchased by a developer, Steincorp Pty Ltd, which divided the property into eight strata-titled units. Four of the units were sold and the four remaining units were transferred to Mrs Steinfort (``Steinfort''). Steinfort made certain representations to the purchasers regarding exclusive use of courtyards and car-parking spaces. Each of the owners later approached Steinfort to have the exclusive-use problem resolved by a meeting of the body corporate.

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[140202]

Steinfort called the first Annual General Meeting on 16 October 1998 where the exclusive-use motion was to be presented. Steinfort would not consent to the motion and it was defeated. After the meeting, an application to resolve a dispute was lodged with the Commissioner for Body Corporate and Community Management (``the Commissioner''). The Commissioner, in dismissing the application, suggested that a new community- management statement be prepared and submitted again to a general meeting of the body corporate but that the motion covering the exclusive use of courtyards and car spaces should be separate from any motion dealing with excising any part of the common property.

On 4 June 1999, an extraordinary general meeting of the body corporate was held. Motion 3 related to the recording of a new community-management statement granting exclusive use of four existing courtyards to units 1, 2, 3 and 4. Motion 4 related to the recording of a new community-management statement granting exclusive use of four existing garages and four newly-surveyed car spaces. Steinfort endeavoured to have the meeting cancelled and voted against all motions. A further application to resolve a dispute was lodged with the Commissioner. This application was withdrawn due to a deficiency in the by-laws contained in the new community-management statement in that it did not include an exclusive-use by-law.

A further extraordinary general meeting was called on 12 August 1999 where a motion was again put to adopt new by-laws to grant exclusive use of the courtyards and car spaces. Steinfort again voted against and defeated the motion. The owners of units 1, 2 and 7 (``the respondents'') again applied to the Commissioner to resolve a dispute. On 25 November 1999, the Commissioner invited all owners to make written submissions on the matters raised in the application.

On 30 November 1999, Independent Finance Group Pty Ltd (``the applicant'') purchased Lot 6 from the mortgagors of Steinfort. The mortgagors had served Notices of Exercise of Power of Sale on Steinfort and had taken possession of the units (including Lot 6) on 19 July 1999. The applicant submitted to the Commissioner that the motion to record a new community-management statement must be passed without dissent, and that Steinfort's dissent was recorded and constituted a valid defeat of the motion.

Adjudicator's decision

On 6 July 2000, the adjudicator ordered that the exclusive-use motion from the 12 August 1999 meeting was deemed to have been passed without dissent. He further ordered that its consent be recorded on the new community-management statement, and that the statement be lodged for recording by the Registrar of Titles.

Appeal to the District Court

The applicants appealed to the District Court contending that the adjudicator acted beyond power in that his decision resolved a question of title to land in that to grant exclusive use of an area to a unit holder was to grant a lease which is an interest in land. His Honour held that the adjudicator's decision merely meant that the motion was deemed to have been passed without dissent.

Issues

The applicants appealed to the Court of Appeal on the following grounds:

1. The adjudicator did not make a decision which came within the ambit of sec 223(1) of the Body Corporate and Community Management Act 1997 (``the BCCM Act'').

2. The decision resolved a question about title to land and therefore was beyond the power of the adjudicator pursuant to sec 231 of the BCCM Act.

Held: application for leave to appeal granted, appeal dismissed with costs.

Whether adjudicator had jurisdiction under sec 223 of the BCCM Act?

Per Thomas JA

1. The dispute concerning the exclusive-use by-laws was a dispute to which sec 223(1) of the BCCM Act applied as it ``concerned the exercise of rights or powers under the Act, namely the exercise of the powers of the body corporate and its members to amend the community-management statement and in particular to allocate the exclusive use of areas of the common property to particular lot numbers."

Per Atkinson J

2. ``The powers of the adjudicator under sec 223(3)(u) arise where the adjudicator is satisfied that the resolution was not passed without dissent because the opposition was unreasonable in the circumstances. Prima facie, the decision was within the power given to the adjudicator pursuant to sec 223(1) and 223(3)(u) of the BCCM Act."

Resolution of question of title to land

Per Thomas JA

3. The District Court judge's decision was to give effect to the exclusive-use motion. ``As such the decision partakes more of managerial intervention than it does of the determination of a legal question concerning title to land. The adjudicator's order was a necessary link in causing property rights to be affected, but neither he nor his order resolved a question about title to land."

Per Atkinson J

4. ``An exclusive-use by-law is not a common-law interest in land but rather a statutory right. The statutory right is created under Part 5, div 2, of the BCCM Act which provides for the meaning, requirements, identification of the subject matter and regulation of exclusive- use by-laws."

5. The language of the BCCM Act supports the respondent's contention that the rights under an exclusive-use by-law do not constitute a lease. ``The exclusive-use by-law does not take effect by way of a grant or demise, it is not for a term, it does not create a reversion, it is not assignable as a separate proprietary interest, it is not subject to forfeiture, it is not capable of surrender and there is no rent reserved."

6. A registered community-management statement takes effect as a ``statutory contract between the body corporate, each member of the body corporate, each registered proprietor and each occupier of a lot or common property. While it affects rights inter partes, it cannot create a registered interest in the land."

[Headnote by the CCH CONVEYANCING LAW EDITORS]

L Boccabella for the applicant (instructed by Broadbent Radich Sampson).

D Jackson and K Downes for the respondent (instructed by Deacons).

Before: McMurdo P, Thomas JA and Atkinson J.

Judgment, in full, below

McMurdo P: I have read both the reasons for judgment of Atkinson J in which the relevant facts and issues are set out and those of Thomas JA.

2. It is unnecessary to decide here whether s 184 *Body Corporate and Community Management Act* 1997 (``*BCCM Act*") requires disputes of the type listed in s 183 *BCCM Act* to be determined under Ch 6 (ss 182-249) of that Act, giving the adjudicator exclusive jurisdiction. My preliminary view is that it would be surprising if, in the absence of the clearest words, the inherent jurisdiction of the Supreme Court was diminished by Ch 6, although I agree with Thomas JA that the court would generally be reluctant to grant relief restraining a party from exercising statutory rights before the appropriate specialised statutory tribunal.

3. I otherwise agree with Atkinson J's reasons for concluding that s 118(3) *District Court Act* 1967 provides for an appeal by leave to the Court of Appeal from a judgment of a District Court judge determining an appeal from

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the decision of an adjudicator under s 184(2)(b) *BCCM Act*. I wish only to add the following comments.

4. The respondents contend, *inter alia*, that an appeal from the District Court to the Court of Appeal by way of s 118(3) *District Court Act* 1967 is excluded by s 184(2) which provides that:

``The *only remedy* for the dispute is *an order of*—

...

(b) *a District Court* on appeal from an adjudicator on a question of law''

(my emphasis);

an order of the Court of Appeal cannot be an order of a District Court and so there can be no appeal by leave to the Court of Appeal from the District Court.

5. Rule 766(1) UCPR provides:

``The Court of Appeal—

(a) has all the powers and duties of the court that made the decision appealed from;''.

If leave to appeal were to be given in a case such as this and the Court of Appeal dismisses the appeal, the order of the District Court will stand; if the Court of Appeal allows the appeal it will vacate the District Court order and substitute or vary it. An appeal to the Court of Appeal from the District Court does not therefore negate the requirement in s 184(2) that the only remedy for the dispute is an order of a District Court. For these reasons, as well as for the reasons given by Atkinson J, the respondents have failed to demonstrate that a party who is dissatisfied with a judgment of a District Court on appeal from an adjudicator under s 184(2) *BCCM Act* has no right to apply for leave to appeal under s 118(3) *District Court Act* 1967.

6. I also agree with Atkinson J's reasons for concluding that the adjudicator had jurisdiction under s 223(3)(u) *BCCM Act* to determine the application as to whether the dissent to the motion considered by the extraordinary general meeting of the body corporate of Welsby Place on 12 August 1999 was in the circumstances unreasonable, even though the motion involved the approval of a community management statement which granted exclusive use rights and despite s 231 which prohibits the adjudicator from resolving a question about title to land.

7. The Commissioner for Body Corporate and Community Management, through the body corporate of Welsby Place, gave the owners of all units the opportunity to make submissions as to the respondent's application for an adjudicator to resolve the dispute under Ch 6 *BCCM Act*. Only the applicant, Independent Finance Group Ltd (``IFG''), the owner of Unit 6, made submissions opposing the application and supporting the stance taken by Mrs Steinfort at the extraordinary general meeting on 12 August 1999. Although the adjudicator wrongly assumed IFG was not the owner of Unit 6, he nevertheless considered its submissions because, again wrongly, he assumed that Mrs Steinfort had instructed IFG's solicitors on her own behalf. These errors did not affect the adjudicator's reasoning which considered only whether Mrs Steinfort's opposition to the motion at the extraordinary general meeting was unreasonable.

8. On appeal to the District Court, his Honour wrongly considered that Mrs Steinfort was a director of IFG, the appellant before him. But the sole argument considered by his Honour was whether the adjudicator acted beyond his power in resolving a question about exclusive use of areas in the light of s 231 *BCCM Act* which provides that the adjudicator ``... does not have power to resolve a question about title to land''.

9. The applicant IFG did not put forward any argument before the adjudicator or the learned District Court judge to suggest that its interests differed from those of Mrs Steinfort, or that its interests were affected by its status as subsequent purchaser.

10. The errors made by the adjudicator and by the learned District Court judge were irrelevant to the issues they were each asked to consider and did not render the decisions of either other than ``just and equitable''.[1]

11. Having had one appeal already which was limited to matters of law, I agree with Thomas JA that the applicant should not now be permitted to raise for the first time a claim that the learned District Court judge ``erred in not appreciating the position of the appellant as a bona fide purchaser for value without notice of any exclusive use provisions in relation to the courtyards attached to the ground floor units, a full and proper search of the title having been made prior to completion''.

[140205]

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12. This application raises matters of some importance as to the interpretation of provisions of the *BCCM Act* and leave to appeal should be granted although the appeal should, in my view, be dismissed. I agree with the orders proposed by Thomas JA and Atkinson J.

Thomas JA: The applicant (``IFG'') seeks leave to appeal against a decision of the District Court. IFG is presently the owner of Lot 6 which is a unit in a community titles scheme involving eight lots. The three respondents are individual owners of lots numbers 1, 2 and 7.

14. The circumstances surrounding this application are set out in the reasons of Atkinson J which I have had the advantage of reading.

15. The original proceedings in this matter were commenced by the respondents who were and are unit owners in an eight-unit community titles scheme. They sought to resolve a dispute involving other unit owners and brought the matter before an adjudicator under s 223(1) of the *Body Corporate and Community Management Act* 1997 (the ``*BCCM Act*''). The legislation clearly contemplates the use of this form of alternative dispute resolution for a very wide range of the problems and disputes that may arise in the context of a community titles scheme. The order which the adjudicator made had the effect of validating a resolution granting exclusive use to the owners of particular lots of specified areas which had hitherto been common areas.

16. The principal contention of IFG is that the proceedings before the adjudicator, and in turn before a District Court judge on appeal, reveal a misunderstanding of the applicant's position. It is true that the adjudicator's reasons show that he did not understand that IFG was the owner of Unit 6. However no objection on that score seems to have been made to his Honour on appeal. Indeed his Honour recorded that the sole argument put to him by counsel for the appellant was ``that the adjudicator acted beyond power in that his decision resolved a question of title to land''. It would seem then that no objection as to any misunderstanding of the applicant's position was raised either in the notice of appeal or in argument.

17. The material presented to this court suggests that the adjudicator had regarded IFG's appearance to be on behalf of a Mrs Steinfort. The adjudicator noted that Mrs Steinfort remained registered as the owner of Lot 6. In point of fact IFG had purchased Unit 6 from Mrs Steinfort's mortgagees in possession on 30 November 1999. Mrs Steinfort remained the registered proprietor of that unit until August 2000, which was after commencement of IFG's appeal to the District Court. The learned District Court judge seems to have made a somewhat similar error in concluding that Mrs Steinfort was a director of the appellant. However for reasons which I shall develop, I do not regard these errors as of themselves justifying the grant of leave to appeal or the allowance of the appeal. Quite simply the appellant, both before the adjudicator and the learned District Court judge chose not to attach any particular relevance to its status as a person independent of Mrs Steinfort. Indeed its submissions asserted reliance upon her refusal to vote in favour of the amendments to the plan and upon the alleged lack of power of the adjudicator to make an order of the kind that was made.

18. The evidence suggests that Mrs Steinfort, who had owned a number of units in the scheme sold them to persons including the respondents with express or implied representations that the units had the exclusive use of particular courtyards and carparking spaces. That apparently was not the case in relation to the courtyards which were common property under the control of the body corporate. Moreover, settlements occurred without ensuring that conditions relating to exclusive use of the carparking spaces were fulfilled. At that time Mrs Steinfort also owned other units. It was considered that all difficulties could be best rectified by passing a resolution which would ascribe separate courtyards to each of the units instead of having such areas as common property and also to deal with the question of allocation of car parks to individual units. Accordingly instead of bringing legal proceedings, arrangements were made for the holding of a meeting and the passing of the necessary resolutions, to be followed by the lodging of a new community management statement which would give legal effect to the proposed changes.

19. Despite initial agreement to this course, Mrs Steinfort frustrated its achievement by a series of manoeuvres that might reasonably be regarded as obstructive tactics. On the third occasion when a body corporate meeting was called to achieve the desired solution, Mrs

[140206]

Steinfort (and she alone) voted against the proposal. The proposal, described as motion number 2 at the meeting of 12 August 1999 would have granted exclusive use of the four existing courtyards to Units 1, 2, 3 and 4, and also would have designated exclusive use of existing garages and newly surveyed carparking spaces in respect of all eight units. Mrs Steinfort's change of heart was perceived by the respondents as unreasonable. They therefore initiated proceedings to have Mrs Steinfort's opposition held unreasonable and for an order giving effect to the motion as if it had been carried without dissent. Subject to the question whether such an order resolves ``a question about title'' and is therefore prohibited by s 231, s 223(3)(u) purports to give an adjudicator the power to provide such a solution.

20. At the time of the meeting Mrs Steinfort was the owner of Lots 3, 4 and 6. She had defaulted under mortgages over those lots, and there is evidence suggesting that the mortgagees had entered into possession. However neither she nor the mortgagees advised the body corporate of this before the meeting, as they were obliged to do by s 140 of the *Body Corporate and Community Management* (*Standard Module*) *Regulation* 1997. The purpose of that provision is to enable any new owner to give notice to the body corporate so that they may be placed on the roll and therefore be notified of meetings and entitled to vote. In turn, IFG expressly accepted and relied upon Mrs Steinfort's attendance at the meeting and her casting of a negative vote by reason of her right as owner. I do not think it can at this stage be permitted to depart from that position.

21. On 13 September 1999, the respondents filed their application with the commissioner for Body Corporate and Community Management (``the Commissioner''). This was the application which was in due course determined by the adjudicator after the Commissioner had taken the necessary procedural steps to ensure that other interested parties might present their submissions on the matter. On 1 December 1999 IFG purchased Lot 6 from the mortgagees in possession although, as earlier noted, no transfer was registered until the following August. IFG obviously received notice of the pending application, as on 13 December 1999 its solicitors (Broadbent Radich Sampson) sent written submissions on behalf of IFG to the commissioner which were in due course placed before the adjudicator. Paragraphs 1 to 9 of the submissions make comments about the various statements of fact contained in the respondent's application, accompanied by submissions that such matters do not fall within the meaning of ``dispute'' under s 182, and other similar legal arguments. The final three paragraphs of the submission are in the following terms:

> ``10. Mrs Steinfort's dissent was recorded and the motion regarding the exclusive use of courtyards and garages was validly defeated.
>
> 11. It is improper for the applicants to seek an order of the Commissioner to overrule a motion, which was defeated at general meeting pursuant to Section 55 of the Act.
>
> 12. In summary, this is a matter between a vendor and purchaser and should be dealt with through other legal avenues. It is not a matter within the ambit of Chapter 6.''

22. The submissions assert reliance upon Mrs Steinfort's dissent. There is not a hint of reliance upon the existence of third party rights differing from those of Mrs Steinfort. The essential submissions were that it was ``a vendor and purchaser matter'' and that it should be dealt with by ``other legal avenues''.

23. As noted above, a similar line was taken when IFG appealed to the District Court. On that occasion the sole argument of IFG's counsel was that the decision was beyond power because it resolved a question of title to land, and that s 231 expressly prohibits this.

24. Now, upon application for leave to appeal to this court, a new issue is sought to be introduced. Ground 6 of the notice of appeal alleges:

> ``The learned Senior Judge further erred in not appreciating the position of the appellant as a bona fide purchaser for value without notice of any exclusive use provisions in relation to the courtyards attached to the ground floor units, a full and proper search of the title having been made prior to completion.''

25. In my view it is now far too late to seek to litigate such an issue. It is raised against a background which shows that the sole director and shareholder of IFG is the wife of Mr Radich, who was at all material times the solicitor for Mrs Steinfort's mortgagees and who acted in the sale of Unit 6. The reasons of

Atkinson J reveal that this rather complex conundrum has now been solved and completed to the extent that a new community management statement and accompanying exclusive use by-law has been signed, and lodged for inclusion on the Queensland Land Registry under the *Land Title Act* 1994 and the *Land Act* 1994.

26. I appreciate that an error of fact is disclosed in his Honour's statement that Mrs Steinfort was a director of IFG. But in the absence of the raising of issues such as those which are now sought to be raised it was not an error that falsifies the decision in any material way.

27. I can see no error in the conclusion of the learned District Court judge that the adjudicator's finding of unreasonableness against Mrs Steinfort was reasonably open and consider that no error of law had been shown.

28. The only issues that remain are whether the adjudicator has jurisdiction to make the orders in question, and whether the *BCCM Act* precludes any further appeal beyond that to the District Court under s 184 of that Act.

Jurisdiction under s 223 of the *BCCM Act*

29. Section 223 gives an adjudicator power to make ``an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about... the exercise of rights or powers, or the performance of duties, under this Act or the community management statement''. Certain other general types of dispute are designated in s 223(1), but it is unnecessary to refer to these. In my view the dispute that arose concerned the exercise of rights or powers under the Act, namely the exercise of the powers of the body corporate and its members to amend the community management statement and in particular to allocate the exclusive use of areas of the common property to particular lot numbers. On the face of it, it was a dispute to which s 223(1) could apply.

30. Section 223(3), without limiting subsection 1, mentions many examples of orders that the adjudicator may make. Sub- paragraph (u) provides that the adjudicator may:

> ``if satisfied that a motion (other than a motion for reinstatement, termination or amalgamation) considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable — make an order giving effect to the motion as proposed, or a variation of the motion as proposed; or''

31. Chapter 6 of the Act (ss 182-249) in which the provisions concerning the adjudicator's powers are contained, is concerned with dispute resolution. The primary object of the Act is declared to be ``to provide for flexible and contemporary communally based arrangements for the use of freehold land having regard to the secondary objects''. One of the primary objects is the operation and management of community titles schemes. The secondary objects include flexible administrative and management arrangements for community titles schemes, and ``to provide an efficient and effective dispute resolution process''. In this context it is not surprising to find a provision such as 223(3)(u) which permits a virtually direct managerial solution to defeat a certain type of unreasonable conduct that might otherwise frustrate an objective that could otherwise only be attained by a resolution without dissent. Such a power may seem surprising to those used to the independent management of companies, but there seems little doubt that the legislature has here deliberately established a mechanism for the resolution of community titles scheme disputes in this way. The difficulty of obtaining remedies such as specific performance in the context of disputes which required some action to be taken by the body corporate, and the sometimes unsatisfactory nature of legal remedies in such a context must have been apparent[2] . That is not to say that recourse may not be had to the courts or that legal remedies are unavailable. There remains of course a concurrent jurisdiction, and the ultimate power of the Supreme Court to restrain concurrent proceedings[3] , although experience suggests that the court is generally reluctant to grant injunctions to restrain a party from exercising rights in a tribunal entrusted with a particular task and possessed of a particular expertise[4] .

32. I have no doubt that this dispute fell within the ambit of s 223.

Question about title to land

33. The only possible jurisdictional answer to the adjudicator's power to resolve the dispute is in s 231. It states:

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[140208]

``The adjudicator does not have power to resolve a question about title to land.''

34. I think that the learned District Court judge's answer to this point was correct. Whether or not the new community management statement created a lease, it did so lawfully under the Act as an action of the body corporate, not the adjudicator. The body corporate had power to grant exclusive rights over common property if the resolution was unanimous. In the events that happened in this case, the body corporate's resolution could only be made unanimous by the decision of the adjudicator. Even so, his decision was ``to give effect to the motion''. As such the decision partakes more of managerial intervention than it does of the determination of a legal question concerning title to land. The adjudicator's order was a necessary link in causing property rights to be affected, but neither he nor his order resolved a question about title to land.

35. The point is however a fine one on which different minds might reach different conclusions. If my primary conclusion is incorrect, I would agree with the analysis presented by Atkinson J which concludes that in the circumstances of this particular case the adjudicator did not resolve the question of title to land in contravention of s 231 of the *BCCM Act*. On either view, his Honour was correct in dismissing the appeal.

Jurisdiction to appeal to this court

36. This involves the proper construction of s 184 of the *BCCM Act* and of s 118 of the *District Court Act* 1967. The applicant's submission is that s 184 of the *BCCM Act* has a privative effect, impliedly overruling the further appeal that s 118(3) of the *District Court Act* would otherwise permit from a decision in the District Court's appellate jurisdiction. In my view s 184 is distinguishable from the legislation considered in *Stinson v The Pharmacy Board of Queensland*[5] where a privative effect was accorded to a section of the *Pharmacy Act* 1976. I agree generally with the reasons which Atkinson J has given for concluding that a further appeal, by leave, remains open to this court under s 118(3) of the *District Court Act*.

Conclusions

37. The proper construction of ss 223 and 231 of the *BCCM Act* is a matter of sufficient importance to justify leave being granted, and I do not understand the respondents to have submitted otherwise. I would therefore grant leave. However the appeal should be dismissed because the adjudicator had jurisdiction to make the necessary order and did not err in law. Although it is unnecessary for the disposition of either of the appeals, I am prepared to say that it was reasonably open to him to decide as he did. In turn the learned District Court judge was correct in dismissing the appeal. To the extent to which the applicant has attempted to introduce additional issues not raised by below, such issues should not be entertained.

Order

38. Application for leave to appeal granted. Appeal dismissed with costs, including cost of the application for leave to appeal, to be assessed.

Atkinson J: This is an application pursuant to s 118(3) of the *District Court Act* 1967 for leave to appeal a judgment of the District Court given on 7 March 2001 on appeal from an order made by the adjudicator under s 223 of the *Body Corporate and Community Management Act* 1997 (``*BCCM Act*''). The applicant has also sought an extension of time pursuant to r 748 of the *Uniform Civil Procedure Rules* in which to lodge its Notice of Appeal. The parties were content to have the application treated as the appeal, if leave were granted.

Factual background

40. The factual background to the matter is found in the details given of the dispute between the parties to the adjudicator. The dispute concerns a block of units, being lots 1 to 8 of BUP 106287, known as Welsby Place at 41 Welsby Street, New Farm. Welsby Place is a two-storey building consisting of eight flats. It was

purchased by a developer, Steincorp Pty Ltd, which divided the property into eight strata titled units. Fences were built which fenced off courtyards to the ground floor units 1, 2 and 3. Unit 4 already had a covered verandah constructed. Four of the units were sold and the four remaining units were transferred from Steincorp Pty Ltd to Deidre Steinfort. Certain representations were made by Mrs Steinfort to the purchasers about exclusive use of courtyards and car parking spaces. In fact, the contracts for sale of units 1 and 2 included a condition specifying exclusive use of a garage but not the courtyards. The contract for the sale of unit 3 included a condition specifying

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exclusive use of an allocated parking space. Each of the owners approached Mrs Steinfort to have the exclusive use problem resolved by a meeting of the body corporate to provide for exclusive use of the courtyards and car parking spaces.

41. Mrs Steinfort called the first Annual General Meeting on 16 October 1998 at which a motion was to be presented to grant the exclusive use areas. However, the resolution which Mrs Steinfort prepared and presented to the meeting incorporated approval for the subdivision of an area of land representing 20 percent of the total area for $1 consideration to be transferred to Mrs Steinfort's son, Alexander Steinfort. The piece of land proposed for subdivision was valued at approximately $100,000. Mrs Steinfort said that she would not consent to the exclusive use areas unless all owners of the units agreed to the subdivision. The motion was defeated.

42. After the meeting on 16 October 1998, an application to resolve a dispute was lodged with the Commissioner for Body Corporate and Community Management (``the Commissioner''). The Commissioner dismissed the application pointing out that the unit owners seeking the order to require the Body Corporate managers to prepare and lodge a new community management statement granting certain exclusive use areas, had themselves voted against the motion. The Commissioner suggested that a new community management statement be prepared and submitted again to a general meeting of the body corporate but that the motion covering the exclusive use of courtyards and garages should be separate from any motion dealing with excising any part of the common property.

43. On 28 April 1999, a plan showing the proposed exclusive use of common property was prepared by a licensed surveyor. An extraordinary general meeting of the body corporate was held on 4 June 1999. Motion 3 related to the recording of a new community management statement granting exclusive use of four existing courtyards to units 1, 2 3 and 4. Motion 4 related to the recording of a new community management statement granting exclusive use of four existing garages and four newly surveyed car parking spaces. The meeting was attended by Mytan Pty Ltd (the owner of lot 1), Catherine Arndt (the owner of lot 2), Greg Fee (the owner of lot 7) and Mrs Steinfort (the owner of lots 3, 4 and 6). Mrs Steinfort was said to be unfinancial and consequently could not vote on ordinary or special resolutions. She endeavoured to have the meeting cancelled and voted against all motions. Subsequently a further application to resolve a dispute was lodged with the Commissioner. However, due to a deficiency in the by-laws contained in the new community management statement submitted to the meeting, in that it did not include an exclusive use by-law, the application was withdrawn.

44. Meanwhile on 10 June 1999, the mortgagees of lot 4 (N.F. Casey and J.M. Close) and lot 6 (G.S. and L. White and N.D. and J.E. Fairlie) served Form 7, Notices of Exercise of Power of Sale, on Mrs Steinfort, who was the mortgagor, pursuant to the mortgages over those properties. The solicitor acting for the mortgagees was Nicholas Radich. On 19 July 1999, the mortgagees took possession of units 3, 4 and 6.[6] As such, they were considered ``owners'' of those lots for the purposes of the *BCCM Act*,[7] wherein the ``owner'' of a lot included in a community titles scheme is defined to mean:

> ``the person who is, or is entitled to be, the registered owner of the lot, and includes—
>
> (a) a mortgagee in possession of the lot; and
> (b) if, under the *Land Title Act* 1994, 2 or more persons are the registered owners, or are entitled to be the registered owners, of the lot — each of the persons.''

45. A further extraordinary general meeting was called for 12 August 1999. The unit owners in attendance were Karen Ross from Mytan Pty Ltd (unit 1), Ralph Kooymans as proxy for Mr Fee (unit 7) and Mrs Steinfort. Ms Ross also held a proxy for Ms Arndt (unit 2). It does not appear from the record whether notice was given to the mortgagees in possession. A motion (Motion 2) was put that related to the recording of the new community management statement to adopt new by-laws which included an exclusive use by - law to grant exclusive use of the four existing courtyards to units 1, 2 3 and 4 and to grant exclusive use of four existing garages and four newly surveyed car parking spaces. Votes in favour of the resolution were recorded by the three unit owners voting at the meeting apart from Mrs Steinfort who voted against the motion.

[140210]

[140210]

46. On 30 August 1999, Mr Kooymans sent a memorandum to Nicholas Radich saying:

> ``With regard to the notice of the meeting I sent to you on Friday 27 August, 1999 it will be necessary for the mortgage (sic) to advise the body corporate of the fact that he has entered into possession of the units as per Section 140 of the (Standard Module) regulations 1997.
>
> The definition of an owner includes a mortgagee in possession as set out in Schedule 4 of the Regulations.
>
> Also Section 49 of the Regulations identifies a `voter' as a mortgagee in possession who claims the right to vote by written notice to the secretary.
>
> Could you please discuss these issues with your client and forward the necessary notices.
>
> The notices can be sent to the secretary C/- RF Kooymans & Co, PO Box 1142, Milton Centre, Queensland, 4064 or to my fax number, 07 3368 2460."

Section 140 of the *Body Corporate and Community Management* (*Standard Module*) *Regulation* 1997 (the ``*Standard Module Regulation*") provides that a new owner must give notice to the body corporate so that they can be placed on the roll and therefore be notified of meetings and be entitled to vote.

47. On 1 September 1999, Broadbent Radich Lawyers replied to that memorandum with two letters. The first informed Mr Kooymans, as secretary of Welsby Place, that Mrs Steinfort had committed several defaults and that their clients had taken possession of units 3, 4 and 6 and gave notice that, as their clients were mortgagees in possession, they were intending to enforce their mortgages and assert all the rights which arose thereby pursuant to the *BCCM Act*. The second letter to the Body Corporate Manager advised that the properties were going to auction on 18 September 1999 and requested Disclosure Statements for each of units 3, 4 and 6.

48. On 13 September 1999, Ms Arndt, Mr Fee and Mytan Pty Ltd, as owners of units 1, 2 and 7, made an application to the Commissioner to resolve a dispute. They named Mrs Steinfort of unit 6 as the other party to the dispute. The owners of units 1, 2 and 7 sought an order requiring the body corporate manager to prepare and lodge a new community management statement and a plan of survey of exclusive use of common courtyards, garages, and parking spaces to allocate them to the owners of the units. They set out the history which has already been referred to in these reasons. In their application the three unit owners said:

> ``It is felt that Mrs Steinfort continues to act in a disruptive manner and that she acted unreasonably in withholding her consent to the granting of exclusive use of the courtyards, garages and car parking spaces, particularly where she has acted in a manner when the units were being purchased that indicated the unit has exclusive use of the courtyards and the contract in the case of units 1 and 2 included the exclusive use of garages and in the case of the contract for unit 7, included the exclusive use of a car parking space."

49. On 15 September 1999, Broadbent Radich Lawyers wrote to the Body Corporate Manager care of Mr Kooymans, in relation to the body corporate meeting scheduled for Friday, 17 September 1999. Broadbent Radich Lawyers advised that one of the mortgagees refused to become involved in the issues to be raised at the meeting and asked for the meeting to be adjourned for at least a week to see what happened following the auctioning of the properties. They advised that it was most unlikely that Mrs Steinfort would, prior to the

auction, be able to re-finance the loans and accordingly it was unlikely that they would have to deal with her again.

50. On 16 September 1999, Broadbent Radich Lawyers wrote to the Body Corporate Manager with regard to the meeting to be held on the following day, setting out the attitudes for each of the mortgagees for lots 3, 4 and 6 to the motions. Mr and Mrs White, who were two of the mortgagees of unit 6 had instructed Broadbent Radich Lawyers to act as their proxy and instructed them to vote against the new community statement because by-law 18 would grant certain exclusive use of areas, being courtyards, verandahs, garages and car parking bays as set out in that by-law. A handwritten note showed their strenuous objection to this proposal. The evidence does not disclose whether a meeting was held on 17 September 1999.

[140211]

[140211]

51. On 11 October 1999, the mortgagees of lot 4, Ms Casey and Ms Close, agreed to sell that lot to another of Mrs Steinfort's sons, Brendan Steinfort. On 10 November 1999, that transfer was registered. Mr Steinfort remains the registered owner.

52. On 25 November 1999, the Commissioner sent a copy of the application to resolve the dispute to the secretary of the body corporate. The Commissioner invited all owners to make written submissions on the matters raised in the application. The notice informed the secretary that she was required to ensure that all owners received a copy of the notice and the application. The submissions were required to reach the office of the Commissioner by 17 December 1999.

53. On 30 November 1999, the applicant, Independent Finance Group Pty Ltd as purchaser, entered into a mortgage with Mr and Mrs Fairlie and Mr and Mrs White as mortgagees of lot 6. On 1 December 1999, Broadbent Radich Sampson Lawyers[8] sent a letter to Mrs Steinfort saying that it enclosed a notice of completion of sale with regard to lot 6. The notice of completion of sale referring, presumably by mistake, to lot 4, says the lot was sold by private contract to Independent Finance Group Pty Ltd. Ms Sternbeck, a paralegal at Broadbent Radich Sampson Lawyers, says that the sale to Independent Finance Group was settled on that day.

54. On 1 December 1999, Independent Finance Group Pty Ltd instructed Broadbent Radich Sampson Lawyers to act on its behalf in lodging a submission to the application lodged with the Commissioner.

55. On 8 December 1999, Mr and Mrs White executed a transfer of lot 6 to Independent Finance Group Pty Ltd. On 7 February 2000, a transfer was executed by Mr and Mrs Fairlie. The transfer of lot 6 from Mrs Steinfort to Independent Finance Group Pty Ltd was not lodged for registration until 28 August 2000. However the entitlement to registration arose upon settlement on 1 December 1999. The applicant was therefore entitled to be considered as the owner of the lot pursuant to the definition in schedule 4 of the *BCCM Act*.

56. On 13 December 1999, Broadbent Radich Sampson Lawyers sent a letter to the Commissioner enclosing the submission by the applicant. The covering letter said that the lawyers acted for Independent Finance Group Pty Ltd, the owners of Lot 6 BUP 106287, and enclosed its submission opposing the application. They submitted that pursuant to s 55 of the *BCCM Act*, a resolution to record a new community management statement must be passed without dissent unless the resolution changed a by-law which was not an exclusive use by-law. Mrs Steinfort's dissent was recorded and therefore the motion regarding the exclusive use of the courtyards and garages was validly defeated. They further submitted that the argument was between vendor and purchaser and was therefore not within the ambit of the dispute resolution procedures of the *BCCM Act*.

The adjudicator's decision

57. On 6 July 2000, the adjudicator made the following orders under part 10 of Ch 6 of the *BCCM Act*:

> ``I hereby order that motion 2 considered by the Body Corporate at the extraordinary general meeting held on 12 August 1999 shall be deemed to have been carried by resolution without dissent.

I further order that the Body Corporate shall, within one month of the date of this order, endorse its consent on the new community management statement.

I further order that the Body Corporate shall, within three months after the date on which its consent is endorsed on the new community management statement, lodge the new community management statement for recording by the Registrar of Titles."

58. Detailed reasons were given for these orders. After reciting the factual history the decision says:

``One submission was received from a firm of solicitors purporting to act on behalf of the owner of lot 6, Independent Finance Group Pty Ltd. The owner of lot 6 is in fact Deidre Una Steinfort, who has owned the lot since 12 June 1998. However, the body of the solicitors' submission refers to Mrs Steinfort, and I take it, therefore, that Mrs Steinfort did in fact instruct the solicitors to act on her behalf, even if they incorrectly stated the ownership of the lot."

The adjudicator was apparently unaware that mortgagees had been in possession of lot 6 since 19 July 1999 and that the sale of the lot to Independent Finance Group Pty Ltd had been

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[140212]

settled on 1 December 1999. He incorrectly refused to accept that the applicant's solicitors acted on the behalf of Independent Finance Group Pty Ltd and not on behalf of Mrs Steinfort. The adjudicator therefore failed to take account of the interests of Independent Finance Group Pty Ltd.

59. The reasons of the adjudicator also say that the exclusive use areas depicted on the plan had not been registered in the Titles Office and were therefore of no force or effect. The decision continued:

``It is for this reason, of course, that the applicants have been attempting to remedy the situation by taking the steps outlined in the application."

60. The adjudicator went on to consider whether or not to make an order under s 223 of the *BCCM Act*. Section 223(1) provides that:

``223(1) An adjudicator to whom the application for an order of an adjudicator is referred may make an order that is just and equitable in the circumstances (including a declaratory order) to resolve a dispute, in the context of a community titles scheme, about—

(a) claimed or anticipated contravention of this Act or the community management statement; or
(b) the exercise of rights or powers, or the performance of duties, under this Act or the community management statement; or
(c) a claimed or anticipated contravention of the terms of, or the termination of, or the exercise of rights or powers under the terms of, or the performance of duties under the terms of—

(i) the engagement of a person as a body corporate manager or service contractor for a community titles scheme; or
(ii) the authorisation of a person as a letting agent for a community titles scheme."

Subsection 223(3)(u) provides that without limiting subsections (1) and (2), the adjudicator may:

``if satisfied that a motion (other than a motion for reinstatement, termination or amalgamation) considered by a general meeting of the body corporate and requiring a resolution without dissent was not passed because of opposition that in the circumstances is unreasonable — make an order giving effect to the motion so proposed, or a variation of the motion as proposed."

61. In determining whether or not Mrs Steinfort's opposition to the motion was unreasonable, the Commissioner considered that Broadbent Radich Sampson Lawyers, whom he wrongly thought were Mrs Steinfort's solicitors, did not deny on her behalf the allegations in the application as to the representations made by her to two of the applicants in respect of the courtyards and the car parking spaces and garages. He considered whether or not the motion would be of benefit to Mrs Steinfort and her previous voting behaviour. He considered in the circumstances that her opposition to the motion at the extraordinary general

meeting held on 12 August 1999 was unreasonable. He rejected the applicant's submissions that the dispute was not within the ambit of the dispute resolution procedures of the *BCCM Act*.

62. Broadbent Radich Sampson Lawyers received notice of this decision on 10 July 2000. On 24 July 2000, a new community management statement was signed. It included by-law 18 which provided as follows:

> ``*Exclusive Use Areas*
>
> The proprietors of Lots identified in Schedule E, with their licencees, invitees and occupiers, are entitled to the exclusive use areas allocated therein and as identified on the sketch plans marked `A' and `B' attached hereto for the purposes of a courtyard or verandah as applicable and car parking only.
>
> The proprietor gaining exclusive use under this by-law shall be responsible for this property as if it were Part of his or her Lot.''

63. On 21 July 2000, the body corporate manager informed Broadbent Radich Sampson Lawyers that there would be a general meeting to ratify the endorsement of the community management statement on 27 September 2000. On 11 August 2000, a request for lodgement of the new community management statement was executed and this was lodged on 17 August 2000 for inclusion on the Queensland Land

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Registry under the *Land Title Act* 1994 and the *Land Act* 1994.

Appeal to the District Court

64. On 17 August 2000, Independent Finance Group Pty Ltd filed a notice of appeal in the District Court under s 237 of the *BCCM Act*. Subsection 237(2) of the *BCCM Act* provides that such appeals are restricted to questions of law only.

65. On 7 March 2001, after a hearing on 27 February, 2001, Senior Judge Skoien of the District Court dismissed the appeal from the adjudicator. In the course of his reasons for decision, His Honour referred to Mrs Steinfort as being a director of the developer who was the appellant before him. The appellant was in fact Independent Finance Group Pty Ltd, of which Mrs Steinfort is not a director or shareholder.

66. His Honour said that the sole argument put to him was that the adjudicator acted beyond power in that his decision resolved a question of title to land in that to grant exclusive use of an area to a unit holder was to grant a lease which is an interest in land. Section 231 of the *BCCM Act* provides that:

> ``The adjudicator does not have power to resolve a question about title to land.''

His Honour held that to grant the right to exclusive possession of land creates a lease. He did not determine whether or not a lease had been created in this instance because he was concerned with what had been decided by the adjudicator which was to resolve a dispute about the conduct of the meeting of the body corporate. His Honour concluded that the adjudicator's decision merely meant that the motion was deemed to be passed without dissent. If the motion, by adopting a new community management statement, created a lease it did so lawfully under the *BCCM Act* as an action of the body corporate, not the adjudicator.

Application for Leave to Appeal to the Court of Appeal

67. The applicant submitted that there are three reasons that leave to appeal from that decision should be granted. The first is that as the adjudicator and the judge failed to understand who the parties were before them, the decision was not ``just and equitable'' as it was required to be by s 223(1) of the *BCCM Act*. Secondly, the adjudicator did not make a decision which came within the ambit of s 223(1). Thirdly, the decision resolved a question about title to land and therefore was beyond the power of the adjudicator pursuant to s 231 of the *BCCM Act*.

68. The respondents opposed the grant of leave on the ground that there was no capacity to appeal to this court from the decision of the District Court. In any event, they opposed leave being granted on the grounds of appeal that were the first ground argued in this court (or grounds 5, 6 and 7 of the grounds of appeal in the notice of appeal). Further they submitted that any appeal should be dismissed.

69. It is convenient to consider whether or not this court has jurisdiction to hear an appeal before considering whether or not leave to appeal should be granted.

Jurisdiction

70. The respondents submit that the applicant cannot appeal to the Court of Appeal from a decision of the adjudicator made under the *BCCM Act*. In this, they rely on s 184 of the *BCCM Act* which relevantly provides:

``*Exclusivity of dispute resolution provisions*

184(1) Subsection (2) applies to a dispute if an adjudicator may, under this chapter, make an order to resolve it.

(2) The only remedy for the dispute is an order of—

(a) an adjudicator; or
(b) a District Court on appeal from an adjudicator on a question of law."

71. Section 5(h) of the *BCCM Act* provides that one of the objects of the Act is ``to provide an efficient and effective dispute resolution process". This is done by ensuring that disputes must go to the adjudicator if there is a dispute which is within his or her jurisdiction. This reduces the possibility of sterile jurisdictional questions of the type recently referred to by Young J in *Mulwala & District Services Club Ltd v The Owners — Strata Plan 37724*.[9] The adjudicator has exclusive jurisdiction to deal with disputes under Chapter 6.[10]

72. There is then a statutory right of appeal from that decision to the District Court. No right of appeal is given by the *BCCM Act* to the Court of Appeal, but that is not necessary. In such a case, appeals from a District Court to the Court of Appeal are governed by s 118 of the *District Court Act* 1967 which provides:

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``118(1) This section—

(a) does not apply to an appeal from a judgment of the District Court in the exercise of its criminal jurisdiction under part 4;[11] but
(b) does apply to an appeal from other judgments of the District Court in the exercise of its criminal jurisdiction, including on an appeal brought before the court under the *Justices Act* 1886, section 222.[12]

(2) A party who is dissatisfied with a final judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—

(a) is given—

(i) for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
(ii) in relation to a matter at issue with a value equal to or more than the Magistrates Courts jurisdictional limited; or

(b) involves directly or indirectly any claim, demand or question in relation to any property or right with a value equal to or more than the Magistrates Courts jurisdictional limit.

(3) A party who is dissatisfied with any other judgment of a District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court.

(4) In deciding whether there is a right of appeal under this section, the Court of Appeal may—

(a) inform itself in any way it considers appropriate, including by reference to the appeal record; and
(b) decide the question summarily without hearing evidence.

(5) if it reasonably arguable that a right of appeal under this section exists, the Court of Appeal may treat that circumstance as a ground for granting leave to appeal.

(6) If the Court of Appeal grants leave under subsection (3), it may grant it on the conditions it considers appropriate.

(7) A single judge of the Court of Appeal may—

(a) grant (with or without condition) or refuse leave mentioned in subsection (3); or
(b) make the decision mentioned in subsection (4)(b).

(8) The *Supreme Court Act 1995*, section 254,[13] does not apply to an order of a single judge of the Court of Appeal under this section.

(9) An appeal from a District Court in its original jurisdiction is by way of rehearing.

(10) In this section—

``**final judgment"**, of a District Court, includes a judgment that grants leave to enter a judgment mentioned in subsection (2).
``**Magistrates Courts jurisdictional limit"** means the amount of the jurisdictional limit of Magistrates Courts for personal actions stated in the *Magistrates Courts Act 1921*, section 4(a)."[14]

73. The respondents submit that a right to appeal to the Court of Appeal would contradict the express terms of the *BCCM Act*. It is argued that the specific provision of s 184(2) of the *BCMM Act* excludes the general provision of s 118(3) of the *District Court Act*, as s 184(2) provides that the only remedy for a dispute is an order of an adjudicator or a District Court on appeal from an adjudicator on a question of law.

74. However, s 184 of the *BCCM Act* does not explicitly exclude s 118 of the *District Court Act*. The respondent relied upon the decision of the Full Court in *Nickelseekers Limited v Vance*,[15] but the decision is not helpful in resolving this question since counsel in that case disclaimed reliance on the section of the Act which was the equivalent of s 118(3).[16] In *Stinson v The Pharmacy Board of Queensland*,[17] the Court of Appeal referred extensively to authority in holding that a section of the *Pharmacy Act* 1976 which provided that an appeal from the Pharmacy Board could be made to a Judge of the District Court whose decision would be final, precluded an appeal to the Court of Appeal. Such a provision excludes the ordinary incidents of the procedure of the District Court which include ``any general right of appeal from its decisions".[18]

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75. In this case, however, s 184 is concerned with the manner in which matters in dispute under part 6 of the *BCCM Act* are resolved. If the matter is within the jurisdiction of the adjudicator, then the only remedy is to apply to the adjudicator for an order. Section 184(2)(b) of the *BCCM Act* then gives a right of appeal from the arbitrator's order to the District Court. Section 118(3) of the *District Court Act* then provides for an appeal with leave to the Court of Appeal.

Identity of parties

76. As to the first ground of appeal, the submission by the applicant to the adjudicator disclosed that it was the owner of lot 6 and it was submitted that the District Court judge was told the same from the bar table. Neither the adjudicator nor the judge on appeal, however, understood that Mrs Steinfort, whose behaviour was under consideration, had no apparent connection with the applicant. It is true that the applicant's interests were not separately considered by the adjudicator but the applicant did not present any argument to distinguish its interests from that of Mrs Steinfort until its submissions in this Court. For the reasons given by McMurdo P and Thomas JA, the applicant should not be able to raise this argument for the first time in this Court. Furthermore the error of fact does not appear to have infected the decisions in any relevant way.

Did the adjudicator have jurisdiction under s 223 of the *BCCM Act*?

77. The second ground of appeal was that the adjudicator's decision did not come within his jurisdiction under s 223 of the *BCCM Act*. The applicant submitted that the adjudicator did not identify which, if any, of the subject areas, about which he had jurisdiction, he was considering. What is significant, however, is not whether he explicitly identified the subject area but rather whether he was considering a matter over which s 223(1) gave him jurisdiction. In this case, the adjudicator was considering the exercise of rights or powers

under the *BCCM Act* or the community management statement. The original community management statement did not provide for a right to exclusive use to any part of the common area. The proposed by-law granting exclusive use of certain parts of the common area to individual lot owners therefore affected the exercise of rights under the community management statement.

78. The adjudicator is given further power under s 223(3). In this case, the relevant provision is s 223(3)(u) which gives the adjudicator specific power to make an order giving effect to a motion which is required to be passed without dissent, but was not.

79. The power of the adjudicator under s 223(3)(u) arises where the adjudicator is satisfied that the resolution was not passed without dissent because the opposition was unreasonable in the circumstances. Prima facie, the decision was within the power given to the adjudicator pursuant to s 223(1) and s 223(3)(u) of the *BCCM Act*. This ground of appeal would not be successful.

Resolution of a question of title to land

80. The third ground on which the applicant seeks leave to appeal is that the adjudicator's jurisdiction to make the decision he made was removed by s 231 of the *BCCM Act* which prohibits the adjudicator from resolving a question about title to land. The respondent concedes that this question is a question of law of some significance and warrants the grant of leave to appeal if the appeal is not otherwise incompetent. The applicant submits that the grant of exclusive use of common property affects the title to common property.

81. The respondents submit that the only resolutions to which s 223(3)(u) could apply are resolutions which are required to be passed without dissent and which are not excluded by the terms of s 223(3)(u). These are resolutions passed pursuant to s 39 which provides for the acquisition and incorporation into common property of land in fee simple contiguous to the scheme land or a lot included in the scheme, and s 55 requiring the body corporate to consent without dissent to the recording of a new community management statement if there is a change to the exclusive use by-laws. It was submitted that since it could be argued that both of those sections involved questions of title they would be equally excluded by s 231 and therefore s 223(3)(u) would be left with no operation. This would not be a result intended by the legislature.

82. It is true that s 223(3)(u) excludes certain motions required to be passed without dissent from its operation. These include motions for reinstatement[19] , termination[20] or amalgamation.[21] The only resolutions which are required to be passed by dissent in the *BCCM Act* itself are those found in s 39, s 55 and s

[140216]

[140216]

134. In addition, however, the Community Management Statement for Welsby Place, which was in effect at the relevant date provided that the relevant regulation module which applied to this scheme was the *Standard Module Regulation*. In the *Standard Module Regulation*, a number of provisions provide for resolutions that must be passed without dissent in order to exercise powers given by the *BCCM Act*. They include regs 111 and 117 which provide for the disposal of an interest in or the leasing of common property pursuant to s 116 and 119 of the *BCCM Act*; reg 102 which deals with the maximum amount of money that may be borrowed by the body corporate; reg 112 which deals with the grant of easements over common property pursuant to s 117 of the *BCCM Act*; and reg 116 which deals with acquisition of freehold land or entry into a lease of more than 3 years pursuant to s 118 of the *BCCM Act*.

83. Some of these sections relate to title to land; some do not. Section 116 of the *BCCM Act*, for example, deals with the disposal of common property and the grant or amendment of a lease or licence over common property. If the adjudicator were asked to resolve a dispute about a lease over land that was common property, then he or she would be being asked, contrary to s 231, to resolve a question of title to land. A similar problem would not arise if the common property were a chattel or the dispute was over a licence to use land which was common property.

84. In order to determine whether the arbitrator was being asked to resolve a question about title to land[22] one must consider the nature of the right or interest the adjudicator was being asked to consider in this case.

85. In form, what the adjudicator decided was whether or not to give effect to the resolution. However, the substance of that resolution was to allocate areas of the common property for the exclusive use of owners of individual lots. The adjudicator's decision would therefore in substance resolve a question about title to land if it in effect created a demise. The High Court determined in *Radaich v Smith*[23] that the grant of a legal right of exclusive possession gave rise to a lease rather than licence at common law[24] and so created a demise.[25] But this case is concerned with the effect of rights given by statute rather than at common law.

86. The right to exclusive possession might tend to suggest that an exclusive use by-law gives rise to an interest which is in substance a common law lease, but there are a number of reasons why this is not so.[26] An exclusive use by-law is not a common law interest in land but rather a statutory right. The statutory right is created under Part 5 div 2 of the *BCCM Act* which provides for the meaning, requirements, identification of the subject matter and regulation of exclusive use by-laws. It also regulates the making and notifying of allocations, what is prohibited in exclusive use by-laws and how certain of them are reviewed. Although an exclusive use by-law attaches to a lot included in a community titles scheme, it merely grants the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about common property or a body corporate asset.[27] It does not create a demise.

87. This view conforms with the decisions of the Supreme Court of New South Wales. In *North Wind v Proprietors — Strata Plan 3143*,[28] Rath J rejected a submission that an exclusive use by-law created an interest in land in the nature of a leasehold by analogy with the principle in *Radaich v Smith*. His Honour observed:

> ``Counsel could not place the right in any known category of real property interests, and I think that there is no such category, for the reason that the right is not an interest in land in any sense known at common law. The right is not defined directly by reference to some right existing apart from statute, and whatever incidents it has are found in the statute itself."[29]

The statutory rights created are not proprietary rights. The right to have the benefit of an exclusive use by-law exists by virtue of the statute and, as the High Court found in regard to pastoral leases,[30] is not the same as the incidents of a lease at common law. As the respondents submitted, the language of the *BCCM Act* does not support the contention that the rights under an exclusive use by-law constitute a lease. The exclusive use by-law does not take effect by way of a grant or demise, it is not for a term, it does not create a reversion, it is not assignable as a separate proprietary interest, it is not subject to forfeiture, it is not capable of surrender and

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there is no rent reserved. Leasehold interests are elsewhere recognised in the *BCCM Act*.[31]

88. An exclusive use by-law will be part of a community management statement which must be lodged with the Registrar of Titles. Section 53(1) of the *BCCM Act* provides that a community management statement takes effect only when it is recorded by the registrar. However, a community management statement is not an instrument under the *Land Title Act*1994[32] and s 48(4) of the *BCCM Act* provides:

> ``An interest created under a community management statement recorded under this Act does not have effect as a registered interest under the *Land Title Act* 1994."

Once it is registered, the community management statement takes effect as a statutory contract between the body corporate, each member of the body corporate, each registered proprietor and each occupier of a lot or common property. While it affects rights *inter partes*, it can not create a registered interest in the land.

89. It would appear that the adjudicator was not therefore resolving a question of title to land in contravention of s 231 of the *BCCM Act*.

Order

90. The application has raised significant legal questions. I would grant the application to extend time and for leave to appeal, but dismiss the appeal.

Footnotes

1 s 223(1) *BCCM Act*.

2 cf *Birstar Pty Ltd* v *Proprietors ``Ocean Breeze'' Building Units Plan No 4745* [1997] 1 Qd R 117.

3 *R* v *Windridge*; *Ex parte Pacific Coal Pty Ltd* [1992] 2 Qd R 180, 193, 194.

4 *Ibid* 193, 194.

5 [1995] 1 Qd R 567; cf *Nickelseekers Ltd vVance* [1986] 2 Qd R 169.

6 Letter Broadbent Radich Lawyers to the Secretary ``Welsby Place'' dated 1 September 1999: Exhibit RWK 1(f) to the Affidavit of RWJ King sworn 18 May 2001.

7 *BCCM Act* Schedule 4.

8 As Broadbent Radich Lawyers became in late 1999.

9 [2000] NSWSC 1040.

10 *Doe & Bishop of Rochester* v *Bridges*(1831) 1 B & Ad 847 at 859; 109 ER 1001 at 1006; *Josephson* v *Walker* (1914) 18 CLR 691 at 695, 701; *North Wind* v *Proprietors Strata — Plan 3143* (1981) 2 NSWLR 809; cf *Howes* v *Christian Enterprises Ltd* [1996] NSWSC, No 2790 of 1996, 27 November 1996, Cowdroy AJ at 11-13; *Crawley* v *Cochrane* [1998] NSWSC, No 2608 of 1998, 14 October 1998, Cohen J at 17-18.

11 Part 4 (Criminal jurisdiction and procedure).

12 Section 222 (Appeal to a single judge).

13 Section 254 (As to appeals from orders made by single judge).

14 Section 4 (Jurisdiction of Magistrates Courts).

15 [1986] 2 Qd R 169.

16 (supra) at 172.

17 [1995] 1 Qd R 567.

18 (supra) at 570.

19 *BCCM Act* s 70.

20 *BCCM Act* s 75.

21 *BCCM Act* s 82.

22 See, for example, *Lea* v *Moore* [1955] 1WLR 38.

23 (1959) 101 CLR 209.

24 *Hines* v *Hines* [1999] QCA, CA No 6607 of 1998, 7 May 1999 at [6] per Atkinson J.

25 [140218]

[140218]

25. (supra) at 214, 217-218, 220, 222.

26 cf *The Western Australian Club Incorporated vNullagine Inv Pty Ltd* (1991) 6 WAR 441 at 457.

27 *BCCM Act* s 133(1).

28 (supra) at 813-814.

29 *North Wind* (supra) at 814.

30 *Wik Peoples* v *Queensland* (1996) 187 CLR 1 at 116, 195-196, 229.

31 eg ss 12(2), 18(b), 20(b)(iii), 75(1)(b) and 116(2).

32 *BCCM Act* s 48(2).

EVENTANG DEVELOPMENT (PYRMONT) PTY LIMITED v THE OWNERS STRATA PLAN 51573 & ANOR

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(2001) LQCS ¶90-111

NSWSC citation: [2001] NSWSC 452

New South Wales Supreme Court

Judgment delivered 1 June 2001

Strata schemes — Appeal against orders of Strata Scheme Board — Whether Board erred in not finding that the resolutions passed at the meeting were to be treated as a nullity — Strata Schemes Management Act 1996 (NSW), sec 154(1).

On 27 November 1995 Strata Plan 51573 was registered with Eventang Development (Pyrmont) Pty Ltd (``Eventang'') as the original owner. CSM Services Pty Ltd (``CSM'') were appointed as Strata Managing Agents for the owners corporation. On 23 July 1996 Eventang executed under its common seal the appointment of Mr Young (``Young'') as its company nominee with respect to a number of lots in the strata plan.

The first annual general meeting was held on 25 July 1996. Young gave a proxy to Mr Chan. The second general meeting was held on 13 November 1997. There were two proxies noted from Young. The first was given to Mr Chan and the second to Mr Hassell. The meeting's minutes did not evidence that these proxies were invalid or challenged.

A further annual general meeting was planned for 19 August 1999. Young faxed a voting paper to CSM indicating Eventang's voting intention with regard to the agenda items. A proxy form, appointing Mr Hassell, was also faxed to CSM. On the day of the meeting, CSM wrote to Young advising that Eventang's company nominee form of 23 July 1996 did not comply with the Strata Schemes Management Act 1996 (NSW) (``the Act'') and that an updated completed form would need to be supplied. The evidence indicates that the letter to Young was not received prior to the annual general meeting.

The meeting proceeded as scheduled and when the matter of raising a special levy was reached the chairman, Mr Callaghan, announced that Mr Hassell's proxy from Young was invalid because Young's nomination as Eventang's nominee was invalid. The exclusion of Young's proxy vote made it possible for the resolution concerning the proposed special levy to be carried. It was evident that Young's proxy vote was sufficient, if cast against the special levy as intended, to defeat the resolution.

Following the events at this meeting, Eventang sought from an adjudicator of the Strata Schemes Board of NSW (``the Board'') an order pursuant to sec 154 of the Act that the resolution be declared a nullity as Eventang was improperly denied the right to vote. The adjudicator dismissed the application and Eventang appealed this decision on 17 July 2000. On appeal Mr Bordon of the Board also dismissed the appeal stating Eventang's noncompliance with the requirements of sec 118 and 122 of the Act, governing the right of corporations to vote and the conferral of voting rights, as the reason.

Eventang claims in this appeal to the Supreme Court of New South Wales, that the Board erred in not finding that the resolutions passed at the meeting were to be treated as a nullity.

[140219]

[140219]

Held: appeal dismissed.

1. A corporation has voting rights which cannot be exercised unless it has given notice in writing pursuant to the requirements of sec 118(1), (2)(a), (2)(b), and (2)(c) of the Act.

2. The legislative intent of cl 11(4) of Div 1 of Pt 2 of Sch 2 of the Act clearly states that a proxy should not be, in effect, a mere open-ended delegation of voting entitlement. A requirement of a valid proxy appointment is the stipulation of a prescribed time limit.

3. A proxy appointment that does not specify a time limit of voting delegation with proper clarity, such as the form that was given to Mr Hassell by Young, was invalid as an appointment.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

MA Bradford for the plaintiff (instructed by Alex Ilkin & Co).

P Koroknay for the defendant (instructed by David Le Page).

Before: Sully J.

Judgment, in full, below

Sully J: By a summons filed on 3 November 2000 Eventang Development (Pyrmont) Pty Limited, (``Eventang''), appeals against an order made in favour of the Owners, Strata Plan 51673, (``the Strata Owners''), by the Strata Schemes Board of New South Wales, (``the Board''). Such an appeal lies by virtue of s 200 of the *Strata Schemes Management Act 1996* (NSW), (``the Strata Act''). The appeal lies, relevantly, only upon a question of law; and is governed, generally speaking, by the provisions of Part 5 of the *Justices*

Act 1902 (NSW) as applicable to ``a determination that a Justice... made... in the exercise of summary jurisdiction on an information or complaint''.

2. The particular relief claimed in the summons is:

> ``1. An order pursuant to Sec 109(a) of the Justices Act quashing the order of the Second Defendant to dismiss the appeal of the Second Defendant.
>
> 2. An order pursuant to Sec 154(1)(a) of the Strata Schemes Management Act, 1996 (`the SSM Act') declaring that the resolutions passed at the Annual General Meeting of the First Defendant held on 19th August 1999 (`the Meeting') are to be treated as a nullity.
>
> 3. Alternatively to the relief sought in 2 above, an order that the matter be remitted to the Second Defendant to be dealt with according to law.
>
> 4. (a) A declaration that the Second Defendant erred in law in not finding that the principles of waiver and/or estoppel were to be applied so as to preclude the First Defendant from insisting on strict compliance with the requirements of Sec 118 of the SSM Act.
>
> (b) A declaration that the Second Defendant erred in law in not finding that the resolutions passed at the Meeting were to be treated as a nullity pursuant to Sec 154(1)(a) of the SSM Act.
> (c) A declaration that the Second Defendant erred in law in not exercising the discretion to treat those resolutions as a nullity pursuant to Sec 154(1)(a) of the SSM Act.
>
> 5. Costs''

3. Both the Strata Owners and the Board are joined as defendants to the summons. By a notice filed on 1 December 2000 the Board entered a submitting appearance, submitting to the orders of this Court save as to costs. The Strata Owners appeared by counsel at the hearing before this Court and contested Eventang's entitlement to any of the relief claimed by it in the summons.

4. The following facts are either admitted, or are established to my satisfaction on the probabilities:

> [1] On 27 November 1995 Strata Plan 51673 was registered. Eventang was the original owner. The principal of Eventang was one Thomas Young. CSM Services Group Pty Ltd (``CSM'') were appointed Strata Managing Agents for the Owners Corporation.
> [2] On 23 July 1996 Eventang executed under its common seal a document purporting to be a notice given pursuant to the *Strata Titles Act 1973*, the legislative predecessor of the Strata Act, of the
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> appointment of Mr. Young as its company nominee with respect to a number of lots in the Strata Plan. Each lot was identified by its proper lot number. Each of the designated lots was, at the time of the giving of the notice, retained by Eventang in its own ownership. The notice was addressed to: ``The Secretary, the proprietors — Strata Plan Number 51673'' at the appropriate address. It will be necessary to say, presently, something more about the nature and effect of this document.
> [3] The first annual general meeting of the Body Corporate of the Strata Plan took place on 25 July 1996. According to the minutes of the meeting one Mr. P.J. Callaghan of CSM, who was in attendance at the meeting with two other representatives of CSM, was nominated and elected to chair this particular meeting. The minutes contain a list of proxies which were, as I infer, accepted as valid for the purposes of the meeting. Among those proxies Mr. Young is listed. The listing is expressed as: ``Mr. T. Young — Eventang Development (Pyrmont) Pty Limited... (there is here inserted a reference to each relevant lot number)... to Mr. R. Chan''.
> [4] The second annual general meeting of the Body Corporate was held on 13 November 1997. Mr. Callaghan was again nominated and elected to chair the meeting. Once again, proxies were carefully noted. There are only two proxies noted, each of them being a proxy given by Mr. Young. The proxies are noted in the following form: ``Mr. T. Young of Eventang Development (Pyrmont) Pty Ltd to Mr. Chan... (there is then included a reference to the lot number of each relevant lot)'';

and: ``Mr. T. Young of Eventang Development (Pyrmont) Pty Ltd to Mr. D. Hassall... (there is then inserted a reference to each relevant lot number)''. There is nothing in the minutes of this annual general meeting to suggest that the proxies given by Mr. Young were challenged in any way, let alone rejected as invalid.

[5] The proxy form given by Mr. Young to Mr. Hassell in connection with the 1997 annual general meeting was not in evidence at the hearing before the Board and is not in evidence in this Court. There was, however, in evidence before the Board an exhibit in the form of a chronology. It appears from this document that the proxy form given to Mr. Hassall gave his name and gave his address as, simply, ``Sydney''.

[6] On 9 August 1999 a notice of annual general meeting was issued. It notified 19 August 1999 as the intended date of the meeting, and listed eleven agenda items. On 18 August 1999 a voting paper executed by Eventang was faxed to CSM. Indicated on the paper was Eventang's voting intention respecting each of the items 1 to 9 inclusive on the agenda. A proxy appointment form, also executed by Eventang, was also faxed. It appointed Mr. David Hassell as proxy. It will be necessary to consider, presently, the nature and effect of this document.

[7] On 19 August CSM wrote to Mr. Young. The letter reads as follows, formal parts omitted:

> ``Thank you for forwarding your Proxy Notice in respect of the annual general meeting to be held today.
>
> It has now come to our attention that the Company Nominee form dated 23 July 1996 does not comply with the provisions of the Strata Schemes Management Act 1996. It would be appreciated if an appropriate current and complete form could be forwarded to enable the Strata Roll to be updated.''

[8] This letter was despatched by ordinary post. A copy of the letter was exhibit 8 at the hearing before the Board and is part of exhibit A in the hearing before this Court. Noted at the foot of the exhibited copy of the letter is the following: ``Received this morning in mail. Too late to act. Jack''. There is, unfortunately, no indication of the actual date of receipt of CSM's letter of 19 August. What is clear is that the letter was not received prior to the annual general meeting held on 19 August.

[9] The 1999 annual general meeting convened at 5.00 pm on 19 August 1999. Once again, Mr. Callaghan was nominated and elected to chair the meeting. What actually occurred at the meeting is evidenced in part by the minutes of the meeting; and in part by evidence given orally at the Board hearing by Mr. Hassall, and by a Mr. Brownowski whose wife was

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the proprietor of a particular lot in the Strata Plan.

[10] So far as the minutes themselves disclose what happened at the meeting, they show that, once again, a careful note was made of intended proxies. The list is a lengthy one, and the last item in it reads: ``Mr. T. Young — Eventang Development (Pyrmont) Pty Ltd... (there is here included a reference to each relevant lot number)... to Mr. D. Hassall''. The minutes nowhere record that any challenge was made to the legitimacy of the proxy thus notified; or that the proxy was formally disallowed, either by a ruling of the Chairman, or by a resolution of the other persons then present and entitled to vote. What the minutes do note is that resolutions were put and carried in connection with the confirmation of the minutes of the preceding annual general meeting; and in connection with the receiving and the adopting of the Audited Financial Statements for the period ended 31 July 1999. Thereafter the minutes note the carrying of a resolution that a Special Levy of $90,000 be raised ``effective 1 September 1999 to acquit the deficit in the Administrative Fund account as at 31 July 1999 and to allow for some immediate working capital''. It is then noted:

> ``At 5.55 pm Ms J. M. Moore (N 407), Mr. C. Wong (S 2) and Mr. D. Hassall as proxy for Mr. T. Young — Eventang Development (Pyrmont) left the meeting of their own accord.''

[11] On any view of what actually happened at the meeting on 19 August, those minutes are seriously deficient and misleading. For what in fact happened at the meeting was that when the question of the levying of a Special Levy was reached on the agenda, Mr. Callaghan as Chairman of the meeting announced, for the first time and without any prior warning of any kind

whatsoever, that he was ruling Mr. Hassall's proxy from Mr. Young to be invalid for the reason that the nomination by Eventang of Mr. Young as its nominee was itself invalid. It was that confrontation which led to the withdrawal of Mr. Hassall and of the other persons named in the portion of the minutes which I have earlier quoted.

The effect of the exclusion by the Chairman of the proxy given by Mr. Young, as Eventang's nominee, to Mr. Hassall made it possible for the resolution respecting the proposed Special Levy to be carried. It was no secret that Mr. Hassall would cast his proxy against the proposed resolution for the Special Levy. Nor was it any secret that the number of votes covered by Mr. Hassall's proxy was itself sufficient, if cast against the proposed resolution, to ensure the defeat of the resolution.

Mr. Hassall gave oral evidence before the Board member. Part of that evidence, given in chief, was as follows:

> ``Q. We will go to motion 2.2 about the $6,000 (sic: but read `$60,000') levy; do you recall that motion?
> A. Yes.
> Q. There was discussion in that regard, wasn't there?
> A. Yes.
> Q. A vote was taken in regard to it?
> A. Yes.
> Q. How did you vote?
> A. Against.
> Q. How did you show you voted against it?
> A. With my hands raised.
> Q. When Mr. Callaghan was counting the votes, how did he do so when he got to you?
> A. With the pointing of the finger, I believe, for an against.
> Q. Then he declared the result, did he?
> A. That's correct, but the motion was passed.
> Q. At this stage — it is important. Take it slowly. Can you recall roughly, as best as you can, how the conversation occurred then; had he declared that the motion had been passed?
> A. Mr. Broinowski asked how the motion could be passed and there was discussion between him and myself, and then Mr. Callaghan—
> Q. Take it slowly. This has to be written down, you see, sir?
> A. Yes.
> Q. You said `how could the motion have been passed'?
> THE MEMBER: Mr. Broinowski
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> [EVENTANG'S SOLICITOR]: Mr. Broinowski said that, sorry.
> Q. Then did Mr. Callaghan or somebody say something?
> A. Yes. Then Mr. Callaghan said, `The proxy is null and void under section 118(5)'.
> Q. Did you say anything—
> A. We asked could he elaborate on that and he said Mr. Le Page could explain the situation better.
> Q. Do you recall what Mr. Le Page said, as best as you can?
> A. Basically to the effect that the proxy didn't have my address on it, and that a company must have their nominee's address on there.
> THE MEMBER: Q. Sorry, you will have to repeat it `basically to the effect that my proxy did not have an address on it'?
> A. Yep.
> Q. And?
> A. So the proxy was null and void.
> [EVENTANG'S SOLICITOR]: Q. Company nominee as well?
> A. Yes, a company must — no, a company.

THE MEMBER: Q. You used the words `a company nominee'—
A. Yes. A company must nominate the nominee's address. I basically then said, `Was Mr. Tom Young notified of this?'. Where Mr. Callaghan then said, `Yes, I have sent a letter today.'
[EVENTANG'S SOLICITOR]: Q. Was there any discussion about how the letter was sent?
A. I then said maybe he could have faxed it over or given him a call, and then I was told `Under the Act I'm not obliged to'.
Q. Sorry?
A. `Under the Act I'm not obliged to'.
Q. Was there any more of the conversation—
A. Basically I said I didn't think it was fair the way the meeting was being conducted, and I believe then Mr. Le Page then told me that since I'm not a lot owner or have any proxies that I couldn't speak on the issue anyway.
Q. Can you recall any more than that, sir?
A. Basically after that, I said it was, you know, a sham, so to speak, and walked out of the meeting and asked anybody else in support to walk out so as there wasn't enough numbers for the meeting to continue and another meeting could be held."

There was some brief cross-examination of Mr. Hassall, but it did not suggest in any way that he was either untruthful or mistaken in the evidence which he thus gave. The Board member who presided at the hearing before the Board, appears to have accepted his evidence.

[12] Following the events of 19 August 1999, Eventang sought from an Adjudicator of the Board an order pursuant to s 154 of the *Strata Act*. That section provides relevantly:

> ``(1) An Adjudicator may order that a resolution passed at a general meeting of an owners corporation be treated as a nullity on an from the date of the order if satisfied that the resolution would not have been passed but for the fact that the applicant for the order: (a) was improperly denied a vote on the motion for the resolution,... ".

[13] On 9 May 2000 the Adjudicator dismissed Eventang's application. On 6 June 2000 Eventang appealed to the Board against the Adjudicator's decision. The appeal was heard on 17 July 2000 by Mr. J. Bordon of the Board. On 18 September 2000 Mr. Bordon handed down a reserved decision dismissing the appeal. It is from that decision that the present appeal to this Court has been brought.

5. The essential reasoning of the Board member appears in the following passages which conclude the judgment. It is convenient to reproduce, rather than to paraphrase, them:

> ``It is clear that chapter 4 of the Act, which concerns itself with the rights of owners, occupiers and other persons with interests in lots in a scheme, is the governing legislation. It requires notices to be given by these various persons with an interest in lots and is clearly intended to cover all such persons including corporations. It seems to me that the intent here is that non-
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> compliance with the requirements for the giving of this notice means that the person is deprived of a vote. Subsection 118(1) makes this clear in my view.
>
> All other provisions in the regulations relating to the right to cast a vote are to be read subject to this provision. The requirements of section 118 are basic and mandatory. They go directly to the keeping of records by the Owners Corporation of details of owners etc. and their interests which give rise to the right to vote. This includes the clear identification of the person who is nominated by a corporation under section 122. This section provides as follows:—
>
> **122 How can a corporation exercise functions in relation to a lot?**
>
> (1) A corporation may authorise an individual to exercise on its behalf any function conferred by or under this Act on the corporation as owner or mortgagee of a lot or as a covenant chargee having the benefit of a covenant charge affecting a lot and may revoke the authority of any individual so authorised.

(2) A function exercised with respect to a lot by an individual authorised under this section by the owner, mortgagee or covenant chargee is taken to have been exercised with respect to the lot by the owner, mortgagee or covenant chargee.
(3) Nothing in this section affects any liability or obligation imposed by or under this Act on a corporation which is an owner or mortgagee of a lot or a covenant chargee.
(4) A document under the seal of a corporation purporting to be an authorisation under this section or to be a revocation of such an authorisation is admissible in evidence and is, unless the contrary is proved, taken to be such an authorisation or revocation.

Eventang's notice dated 23 July 1996 is clearly deficient in that it does not comply with requirements of 118(2). The proxy appointment form dated 18 August 1999 appointing `David Hassall of Sydney' does not absolve Eventang from having to comply with requirements of Section 118. In this respect I agree with Mr. Le Page's submission that a proxy cannot cast a vote where there is no right to vote in the first place.

Although Clause 10(3) schedule 2 provides that a corporation may exercise the voting rights as an owner by the company nominee in person or by proxy appointed by the corporation, clause 10(10) provides that the clause does not confer the right to vote on a person deprived of the right to vote by failing to comply with section 118. (In any event as pointed out by the Adjudicator and Mr. Le Page the proxy appointment form was otherwise defective).

It is my view that it does not assist the appellant in the present case that in the past the provisions of Section 118 had been ignored. That in the present case, the Chairman of the Owners Corporation of the AGM declared that Eventang was not entitled to cast a vote because of failure to give a proper notice in relation to its nominee can not be said to be `improper' in the sense of `wrong' or `incorrect' (which is the relevant dictionary definition).

I should indicate that I do not draw any inferences adverse to the Owners Corporation from the evidence given by Mr. Hassall and Mr. Brownowski. It may be that Mr. Callaghan and other members of the Owners Corporation who were in favour of the resolutions carried at the AGM acted in a perceived `window of opportunity' This does not make the insistence on the requirements of the legislation `improper'."

6. In connection with the present appeal to this Court, Eventang was required by SCR Part 51B Rule 8 to file and serve a statement of the grounds of the appeal. The grounds thus notified by Eventang are as follows:

``1. The Second Defendant (`the Board') erred in law in finding that any non- compliance by a person (who is otherwise entitled to vote) with the requirements of Sec 118 of the SSM Act means that the person is deprived of the right to vote.

2. The Board erred in law in finding that the Plaintiff had not complied with the relevant requirements of Sec 118 of the SSM Act.

3. The Board should have found that, at the Meeting, the Plaintiff was purporting to exercise its right to vote by a proxy and that it was not in fact tendering a vote through its

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nominee, within the meaning of Sec 118(5) of the Act.

4. The Board erred in law in finding that it did not assist the Plaintiff that in the past the requirements of Sec 118 had been ignored by the First Defendant.

5. The Board should have found that the First Defendant had, by its conduct in the past and/or at the Meeting, waived any non- compliance by the Plaintiff with the requirements of Sec 118, or that the First Defendant was estopped from insisting that the Plaintiff comply strictly with those requirements.

6. The Board erred in law in finding that the Proxy Appointment form was `otherwise defective'.

7. The Board should have found that the Proxy Appointment form substantially complied with the SSM Regulation and that such compliance was sufficient.

8. The Board should have found that the First Defendant, by its conduct in the past and/or at the Meeting, waived any deficiency in the Proxy Appointment form, or that the First Defendant was estopped from asserting that any such deficiency operated to deprive the Plaintiff of its right to vote.

9. The Board erred in law in failing to give any or any sufficient reasons for the finding in 4 above."

7. In order to consider whether the foregoing process of reasoning of the Board member manifests appellable error of law, it is necessary to consider, first, certain provisions of the *Strata Act*.

8. Section 14 of the Act gives legislative effect to the provisions of Schedule 2 to the Act. Schedule 2, in turn, prescribes a scheme respecting the meetings and the procedure of an Owners Corporation. Division 1 of Part 2 of Schedule 2 is entitled, and deals in detail with: ``General provisions relating to procedure for meetings''. Clause 10 of Division 1 is headed: ``Persons entitled to vote at general meetings''. Three in particular of the 11 sub-clauses of clause 10 are relevant in the present case. They are:

``(1) Each owner, and each person entitled to a priority vote, has voting rights that may be exercised at a general meeting of the Owners Corporation, but only if the owner or person is shown on the strata roll and, in the case of a corporation, the company nominee is shown on the strata roll.

(3) The voting rights of an owner, first mortgagee or covenant chargee of a lot (other than a joint owner, mortgagee or covenant chargee) may be exercised:

(a) unless the owner, mortgagee or covenant chargee is a corporation — in person or by proxy, or
(b) if the owner, mortgagee or covenant chargee is a corporation — by the company nominee in person, or by proxy appointed by the corporation.

(10) This clause does not confer a right to vote on a person deprived of the right by failing to comply with section 118.''

9. Section 118 provides, relevantly:

``(1) **Person with right to vote at meetings must notify owners corporation**

A person who has an interest in a lot that, subject to this Act, gives the person a right to cast a vote either personally or by nominee at meetings of the owners corporation must notify the owners corporation in writing of that interest.

(2) **Contents of notice**

The notice must specify the following information and, if the interest in a mortgage, include confirmation by the mortgagor or be verified by statutory declaration of the mortgagee:

(a) the person's full name and an Australian address for service of notices,
(b) the lot concerned and the exact nature of the person's interest in it,
(c) the date on which the person acquired the interest,
(d) if the voting entitlement conferred by the interest is one that, according to Schedule 2, is to be exercised by a nominee, the nominee's full name and address for service of notices.

(4) **Owners corporation may require notice to be given**

The secretary of the owners corporation, if of the opinion that a person obliged to give notice under this section has not done so,

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may by a requisition in writing served on the person, require the person:

(a) to state, within 14 days, whether or not the person is a person required to give notice under this section, and
(b) if the person is such a person, to give that notice.

(5) **Person prevented from casting vote if certain requirements not met**

A person is not entitled to cast a vote at a meeting of the owners corporation if the person has not complied with a requisition served on the person under subsection (4) or, in the case of a vote to be tendered through a nominee, if the nominee's full name and address for service of notices have not been notified under this section."

10. When the owner of a lot is a corporation, then the requirements of section 118 have to be read in conjunction with the provisions of section 122, which latter section, as now relevant, is quoted in the foregoing extract from the published reasons of the Board member.

11. In addition to the relevant legislative provisions respecting company nominees, it is relevant to have regard also to clause 11 of Division 1 of Part 2 of Schedule 2, which clause deals with the appointment of proxies. So far as is now relevant, clause 11 provides:

``(1) **Who is a `duly appointed proxy'?**

A person is a duly appointed proxy for the purposes of this Part if the person is appointed as a proxy by an instrument in the form prescribed by the regulations.

(2) **Form of proxy**

The prescribed form is to make provision for the giving of instructions on:

(a) whether the person appointing the proxy intends the proxy to be able to vote on all matters and, if not, the matters on which the proxy will be able to vote, and
(b) how the person appointing the proxy wants the proxy's vote to be exercised on a motion for the appointment or continuation in office of a strata managing agent

(3) **Proxy to be given to secretary of owners corporation**

The instrument is ineffective unless it is given to the secretary of the owners corporation at or before the first meeting in relation to which the instrument is to operate and it contains the date on which it was made.

(4) **Period for which proxy effective**

An instrument appointing a proxy has effect for the period specified in the instrument (being a period of not more than 12 months) or for 2 consecutive annual general meetings, whichever is the greater, unless sooner revoked."

12. The essential reasoning of the Board member, and the essential reasoning of the submissions put for the Strata Owners at the hearing in this Court, can be expressed in the form of the following connected propositions:

[1] The notice given by Eventang on 23 July 1996 did not state an address for the service of notices upon the designated nominee.
[2] The notice did not comply, therefore, with the requirements of section 118(2)(d).
[3] Those requirements are, in the words of the Board member, ``basic and mandatory".
[4] Eventang, by having failed so to comply with the requirements of section 118(2)(d) had lost its right to vote at all, and whether by nominee or by proxy.
[5] Mr. Hassall had, therefore, no standing at the meeting of 19 July 1999, not because of formal deficiencies in an otherwise proper appointment of a proxy; but because there could not be in any event such a valid appointment of a proxy.

13. In my opinion, this reasoning is erroneous. I consider the correct reasoning to be expressed in the following connected series of propositions:

[1] Section 118(2)(d) does not make it compulsory for an owner which is a corporation to exercise its voting rights only by a company nominee duly appointed pursuant to the *Strata Act*.
[2] An owner which is a corporation has voting rights which it cannot exercise at all unless it first gives notice in writing in such a fashion as satisfies the requirements in that regard of section 118(1), (2)(a), (2)(b) and 2(c) of the *Strata Act*. A failure on the part of the corporate owner to do as much will entail, by reason of the operation of clause 10(1) of Division 1 of Part 2 of Schedule 2, that the corporate owner's voting rights may

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not be exercised until the statutory requirements have been fulfilled.

[3] Once a corporate owner has fulfilled those statutory minimum requirements with regard to the proper notification of its own lawful standing and entitlements, it may thereafter exercise its voting rights in either of two ways; that is to say, either by a nominee duly appointed; or by a proxy duly appointed.

[4] If in a particular case a corporate owner who has fulfilled the requirements of section 118(1) and of paragraphs (a), (b) and (c) of section 118(2), wishes to exercise its voting rights through a nominee, then, undoubtedly, the nominee must be designated in a way that satisfies the requirements of section 118(2)(d).

[5] There is nothing in the legislation that requires that every provision of subsections (1) and (2) of section 118 must be satisfied in a single document. There is no reason apparent on a fair reading of the legislation why a corporate owner cannot satisfy in one particular document provided at one particular time all of the requirements of sub-sections (1) and (2), save only the requirement of paragraph (d) of sub-section (2); and thereafter, as particular occasion may require, furnish the additional information necessary in order to effect a lawful and sufficient designation of a nominee to represent the corporate owner for the purpose, relevantly, of exercising the corporate owner's own voting rights.

[6] That is what happened in the present particular case. It was not disputed at the hearing before this Court that, if Eventang were in default at all in compliance with the requirements of section 118(1) and (2), that default derived from a failure to comply with the requirements of paragraph (d) of sub-section (2). Had Mr. Thomas Young himself attended the meeting in 1999 and sought to vote as company nominee, then in my opinion, and putting to one side for the moment, considerations of waiver and estoppel, Mr. Young's standing would have been vulnerable to challenge for the reason that the notice given in July 1996 did not satisfy the requirements of section 118(2)(d).

[7] The fact is, however, that Mr. Young did not attend the meeting and seek to vote at it; nor did he purport to give, as company nominee, a proxy to Mr. Hassall. The only purported giving of a proxy to Mr. Hassall was evidenced by the proxy appointment form, exhibit 7 before the Board member, which form evidences a purported exercise by Eventang itself of its right pursuant to clause 10(3) of Division 1 of Part 2 of Schedule 2, to exercise its voting rights, not by a company nominee, but by a proxy directly appointed by it as owner.

[8] The question whether Mr. Hassall had been properly appointed as proxy of Eventang for the purposes of the 1999 meeting depended, therefore, not upon any perceived defect in the section 118(2)(d) nomination of Mr. Young, but on the sufficiency of the proxy appointment instrument itself. It is true that the reasons of the Board member include the observation: (``In any event as pointed out by the Adjudicator and Mr. Le Page the proxy appointment form was otherwise defective)''. It seems to me, with respect to the Board member, that a fair reading of the entirety of his judgment justifies the view that the parenthesised material is in the nature of a rhetorical aside or an afterthought, rather than the expression of a fundamental step in the reasoning put forward in support of the ultimate decision reached by the Board member.

14. If the foregoing reasoning be correct, then it becomes necessary to look with some care at the form of the relevant proxy appointment instrument.

15. The *Strata Act* contains a regulation- making power of the kind normal in contemporary statutes. Pursuant to that power the *Strata Schemes Management Regulation 1997* has been gazetted. Clause 26(3) of that Regulation provides that; ``... an instrument appointing a proxy must be in or to the effect of Form 3 in Schedule 2''. The proxy appointment form that was exhibit 7 before the Board member is a printed form following the Form 3 as prescribed in Schedule 2 to the Regulation. The relevant substantive portion of the form, exhibit 7, is as follows:

``Date... 18th August 1999

I/We EVENTANG DEVELOPMENT (PYRMONT) PTY LTD — THOMAS YOUNG

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the owners of lot 50 units In Strata Plan No. 51673

appoint DAVID HASSALL

of SYDNEY

as my/our proxy for the purposes of meeting of the owners corporation (including adjournments of meetings).

Period or number of meetings for which appointment of proxy has effect... *months/ *meetings

***Delete whichever does not apply**

(Note: The appointment cannot have effect for more than 12 months or 2 consecutive annual general meetings, whichever is the greater.)"

The emphasised material in the quotation is reproduced as it appears in the Form prescribed by the Regulation.

16. It will be observed that the proxy appointment form has not nominated a period during which, or a number of meetings for which, the intended proxy is to have effect. It becomes, thereupon, necessary to consider whether the failure to complete that part of the form has the consequence that the intended proxy is ineffective.

17. Relevant to that question are certain of the provisions of section 80 of the *Interpretation Act 1987* (NSW). The relevant provisions are:

``(1) If an Act or statutory rule prescribes a form, strict compliance with the form is not necessary but substantial compliance is sufficient.

(2) If a form prescribed by an Act or instrument requires the form to be completed in a specified manner, or requires specific information to be included in... the form, the form is not duly completed unless it is completed in that manner and unless it includes,... that information."

18. The question whether the prescribed Form 3, when correctly construed, comes within sub-section (1), or within sub-section (2), of section 80, falls to be considered in the light of the only statement of general principle upon which an abundance of particular reported decisions agrees, namely, the following observations of Lord Campbell LC in *Liverpool Borough Bank* v *Turner* (1860) 45 ER 715 at 718:

``No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

19. The importance of anything to do with the correct identification of a lawful entitlement to vote at a meeting of an Owners Corporation to which the *Strata Act*, and its subordinate Regulation, apply is obvious from a reading of the legislation. So far as concerns the exercise by proxy of a lawful entitlement to vote, clause 11 of Division 1 of Part 2 of Schedule 2 makes plain that the due appointment of a proxy is important enough to require adherence to certain prescribed formalities. Sub-clause (4) makes plain, in my opinion, that it is fundamental to the relevant legislative intent that a proxy should not be, in effect, a mere, open-ended delegation of voting entitlement. It is, I think, of great significance for present purposes that one of the things that the Legislature has prescribed, not in the Form contemplated by sub-clause (1) of clause 11, but by a specific sub -clause in clause 11 itself, is the requirement of a time limit, chosen as between two permitted alternatives, that is to be a requirement of a valid proxy appointment.

20. I have considered whether the present question might not be resolved on the basis that the intent behind sub-clause (4) could properly be understood as embracing the notion that, in default of any particular specification of a time period, it is to be deemed that the effect of the particular proxy, unless it is sooner revoked, is to be such a period as encompasses two consecutive annual general meetings.

21. I do not think that it is permissible so to construe sub-clause (4). Had the Legislature intended some such deeming operation of the sub-clause, then nothing would have been simpler than for the Legislature to have enacted the sub-clause in some such form as: ``An instrument appointing a proxy has effect for the period specified in the instrument (being a period of not more than 12 months) and in default of any such specification of a period has effect for such period as encompasses two consecutive annual general meetings, unless sooner revoked''. That the Legislature has not

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adopted some such expedient, easy as it would have been to have done so, seems to me to exclude the reading into the sub-clause as it actually stands of some such unspecified deeming provision.

22. I have come to the conclusion that the better view is that the proper construction of sub-clause (4), when read together with the prescribed Form 3, entails that a proxy appointment form which does not specify with a proper clarity, and by reference to either of the two permitted alternatives, an intended period of duration of the proxy, is ineffective as a valid proxy appointment.

23. It follows that, in my opinion, the proxy appointment form which was furnished to Mr. Hassall in connection with, in particular, the annual general meeting of 19 August 1999 was ineffective as such an appointment.

24. It must follow, therefore, that the present appeal cannot succeed unless Eventang can make good that part of its submissions which postulates that there had been an effective waiver or estoppel raised in connection with any defects in the proxy appointment form of 18 August 1999; and that such waiver or estoppel arises by reason of an antecedent course of conduct by the agents of the Strata Owners, and either at the meeting of 19 August itself, or on other occasions prior to that particular meeting.

25. These submissions of Eventang raise at once a difficult question of law, namely, whether the established principles of waiver or of estoppel have any proper application at all to the operation of the legislative scheme embodied in the *Strata Act* and its subordinate Regulation.

26. It is useful to begin the discussion of this particular topic by noticing the way in which the submissions of Eventang articulate the facts said to give rise to an available waiver or estoppel. The submissions point to the following matters:

> [1] The Strata Owners had accepted Eventang's votes by way of a proxy in favour of Mr. Hassall at previous annual general meetings in 1996, 1997 and 1998.
> [2] The Strata Owners had engaged in correspondence with Mr. Thomas Young, the proposed company nominee, in June of 1999 and in connection with a proposal of Eventang that there should be an Extraordinary General Meeting.
> [3] The Strata Owners had included Eventang's proposed motions on the agenda for the 1999 Annual General Meeting.
> [4] The Strata Owners had failed to requisition Eventang at any stage prior to the 19th August 1999; and then, the only such requisition related to the company nominee form executed in July 1996.
> [5] The Strata Owners had received Eventang's proxy form in favour of Mr. Hassall shortly prior to the 1999 Annual General Meeting, and without demur.
> [6] The Strata Owners had already accepted from Mr. Hassall proxy votes cast by him for Eventang on each of the two motions preceding the motion for the Special Levy.

27. Eventang points, as well, to certain submissions put by the solicitor who appeared for the Strata Owners at the hearing before the Board. The relevant submissions are, to say the very least, revealing in their aggressive frankness. They bear quotation:

> ``STRATA OWNERS SOLICITOR: This is a matter that concerns strictly documents and legislation, but I have taken on board my friend's concern about there not having been given any evidence.
>
> THE MEMBER: What do you say about Mr. Ilkin's argument about the prior behaviour of the strata managing agent in relation to acceptance—
>
> STRATA OWNERS SOLICITOR: All that means is that those prior meetings may have been wrongly decided. You can't avoid the requirements of the legislation by saying: oh, you made that mistake last

time. It's a simplistic argument. It means that if Mr. Ilkin and his client want to invalidate all the prior meetings, here's a heaven-sent opportunity for that. The fact that matters have been overlooked in past meetings is neither here nor there.

Mr. Ilkin is really criticising Mr. Callaghan for not doing to (sic) same thing again. We might have overlooked it the last time. Why couldn't he do it this time? That's what his argument really is and that's just not good enough.

The fact is that there was a very good reason relating to the finances of this body

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corporate why Eventang had to be prevented from voting, if at all possible, and, yes, it was a device. It's not denied. Eventang had to be prevented from voting so that this body corporate would be restored to some financial state of affairs. It was trading in deficit and Mr. Young's — as Mr. Hassall's voting against the motion showed — concern was not to raise money.

We acknowledge that it was a device, but it was a device that was strictly in accordance with the Act. Yes, it has not been taken before. It had been overlooked before. Presumably Mr. Callaghan had not noticed it before, but this time he picked up on it. It may have been unfair to Eventang not to give him more notice. I don't know when Mr. Callaghan first noticed it — presumably on the morning of the meeting, that he wrote that letter, or the day before, whenever he wrote it.

But how does that affect the application of the Act? It doesn't affect it at all."

28. My initial, and strong, reaction to the foregoing material was that it could not be correct to suppose that a proper construction and application of the requirements of the *Strata Act* and its subordinate Regulation would leave without effective remedy the victim of such calculated trickery. It is, therefore, with great reluctance that I have felt constrained to come to the contrary conclusion.

29. I have done so for reasons of principle which are discussed helpfully in a recent publication: *Michael Spence: ``Protecting Reliance: The Emergent Doctrine of Equitable Estoppel''*, especially in the section headed ``Estoppel and statute'' at 72-75. I have had particular regard to the decision there cited of the Full Court of the Supreme Court of Queensland, *Day Ford Pty Ltd* v *Sciacca* (1990) 2 Qd. R 209, especially at 216, 217, where the following principles are summarised:

``A number of cases consider the place of estoppel in supporting the enforcement of a contract which would otherwise be void for illegality. In *Kok Hoong* v *Leon Cheong Kweng Mines Ltd* [1964] A.C. 993 reference is made to the familiar rule which in its ordinary form is stated in this fashion: a party cannot set up an estoppel in the face of a statute. At 1016 the Privy Council suggested that a test to apply in the type of case before it namely one involving the laws of money lending was to ask `whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public'. A similar approach had been adopted in *Maritime Electric Co.* v *General Dairies Ltd* [1937] A.C. 610 especially at 620 where it was said that in deciding whether an estoppel might be set up against the operation of a statute `the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision'. At 621 the Court declared that it was `unable to see how the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute'. There is no need to multiply examples by the citation of authorities since the appropriateness of this approach based on consideration of social and statutory policy is so amply supported."

30. In applying these principles to the given facts of the present case, it seems to me to be significant that section 245 of the *Strata Act* proscribes comprehensively any attempt to contract out of the provisions of the statute. This is consistent with the stated aims of the legislation, which are: to provide for the management of strata schemes; and for the resolution of disputes arising in connection with such management. Critical to the exercise of those legislative policy objectives is the orderly and consistent application of orderly and consistent requirements in the all -important areas of the vesting, and of the practical exercise, of proprietorial voting rights. An approach that had the practical effect of permitting an Owners Corporation or its Managing Agents, or particular owners or groupings of owners, to disregard the legislative requirements

as to orderly and consistent voting principles and practices whenever it suited their convenience to do so, would be, in my opinion, an approach tending to undermine the public policy considerations which are clear from the comprehensive nature and scope of the legislation.

31. I have come, therefore, to the conclusion that whatever it might be thought, on the given facts, should be the position as to waiver and

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estoppel, the legislative scheme is such as to prevent, as a matter of law, the applicability of either of those doctrines so as to avoid the consequences of a failure to comply with the relevant requirements of that scheme.

32. For the whole of the foregoing reasons, I am of the opinion that the appeal should be dismissed with costs.

HUMPHRIES and ANOR v THE PROPRIETORS ``SURFERS PALMS NORTH'' GROUP TITLES PLAN 1955

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(1998) LQCS ¶90-100

High Court of Australia

Judgment delivered 4 May 1994

Unit and Group Titles — Developer constituting sole member of body corporate — Developer entering into building management agreement — Assigning agreement — Body corporate purporting to terminate agreement — Supreme Court finding substantially for the assignees — Appeal allowed — Appeal to High Court — Whether body corporate had power to authorise letting agency — Whether invalid clauses severable — Building Units and Group Titles Act 1980 (Q), sec 37, 50(9).

This is an appeal from the decision of the Queensland Court of Appeal handed down 29 October 1992.

A body corporate entered into a building management agreement with Bartlett Researched Securities Limited (``Bartlett'') in respect of a complex at the Gold Coast. The body corporate agreed that Bartlett should act as building manager on behalf of the body corporate at a commencing salary of $60,000 (cl 8). The management agreement included conducting a letting agency for the benefit of those owners of lots in the complex who required the service (cl 2(r)). No by-law of the body corporate expressly conferred power on it to enter the agreement. The agreement was assigned by Bartlett to the appellants. At the same time the appellants purchased unit 1 in the complex. Subsequently, the body corporate purported to terminate the agreement relying on sec 50(9) and the appellant-assignees sued the body corporate in the Supreme Court of Queensland to enforce the agreement.

The appellants' case substantially succeeded at first instance. The Court of Appeal set aside the orders made by Derrington J. The Court was of the opinion that the agreement did not depend on and was not made under sec 50 of the Act. Accordingly, if the agreement was valid, the body corporate could not terminate it pursuant to sec 50(9). However, the Court held that cll 2(r) and 8 taken together were ultra vires and could not be severed from the agreement. The assignees appealed.

The appellants contended that a body corporate constituted under the Act had power, in the absence of an appropriate by-law, to enter into the agreement by virtue of its general statutory responsibility to control, manage and administer the common property. The body corporate submitted that it had no power to commit its funds for this purpose.

Held: appeal dismissed.

Management agreement

1. There was no statutory power authorising, and there was no by-law which might have authorised, the body corporate to conduct a letting agency for the benefit of those proprietors of lots who might require that service or to procure another person to conduct such a letting agency. Nor was there any agreement under sec 37(2)(a) which might have been implemented by procuring another person to provide a letting service for particular lots, proprietors or occupiers. It was therefore beyond the power of the body corporate to enter into a contract to procure the provision of a service of the kind stipulated in cl 2(r) of the management agreement.

Severance

2. The material in evidence does not sustain a conclusion that the provision of a letting agency was such an insignificant component of the duties of the manager for which the body corporate agreed to pay the base remuneration of $60,000 per annum that it can be disregarded. Nor is there any basis for a finding that a particular proportion or amount of that annual remuneration can be attributed to the manager's promise to conduct a letting agency. That being so, cl 8 cannot be saved by any process of severance or reading down. It

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follows that the clause was, in its entirety, ultra vires and void. The whole agreement necessarily falls with cl 8.

[Headnote by the CCH CONVEYANCING LAW EDITORS]

Mr Brabazon QC and Mr Bell (instructed by Kinneally Teys) appeared for the appellants.

Mr Keane QC and Mr Savage (instructed by Fitz-Walter Cull and Walker) appeared for the respondent.

Before: Brennan, Deane, Toohey, Gaudron and McHugh JJ.

Judgment in full below

Brennan and Toohey JJ: The respondent is a body corporate constituted under the *Building Units and Group Titles Act* 1980 — 1988 (Q.) (``the Act'') for a property known as ``Surfers Palms North''. The appellants are the assignees of a management agreement dated 31 January 1989 between the body corporate as owner and the appellants' assignor, Bartlett Researched Securities Limited (``Bartlett''), as

manager. Bartlett was the developer of the property and, at the time when the management agreement was made, it was the sole proprietor of the lots delineated in the group titles plan. The management agreement contained a clause[1] entitling the manager to an annual remuneration of $60,000 payable monthly and indexed to the All Groups Consumer Price Index. On 17 January 1991 a deed of assignment was executed by Bartlett, the appellants and the body corporate whereby Bartlett assigned all its rights under the management agreement to the appellants and the appellants agreed to perform the duties specified in the management agreement. The appellants sued the body corporate in the Supreme Court of Queensland to enforce the management agreement.

The appellants had acquired one of the lots in the group titles plan. They had started to perform the management duties specified in the agreement. They were paid the stipulated remuneration for a time but a dispute broke out between them and the body corporate. On 26 February 1991 at the annual general meeting of the body corporate a resolution was passed challenging the validity of the management agreement and refusing to make any further payments pursuant to that agreement.

On 7 June 1991, the appellants commenced the action claiming, inter alia, remuneration under the management agreement. On 22 November 1991, they purported to exercise an option to extend the term of the management agreement from 31 January 1992 for a further three years. The period in respect of which remuneration was claimed at the trial commenced on 10 February 1991 and extended to the elapsed portion of the period of the extension purportedly effected by the appellants' exercise of the option.

On 1 February 1992 at the annual general meeting of the body corporate a motion was passed, purportedly pursuant to s. 50(9) of the Act, terminating the appointment of the appellants as managers.

The body corporate denies any liability to the appellants under the management agreement on two grounds: first, that the management agreement was void ab initio and, secondly, that, if the management agreement was valid, it was terminated by the resolution passed on 1 February 1992. The appellants, on the other hand, assert that the management agreement is valid and subsisting and that it was not susceptible of termination pursuant to s. 50(9) of the Act. The body corporate succeeded on its first ground before the Court of Appeal but would have failed on the second. The appeal relates to the first ground; but, if the appellants should succeed on that ground, the body corporate seeks special leave to raise and rely upon the second ground. It is convenient first to consider the question whether the management agreement was invalid.

The body corporate challenges the validity of the management agreement on the ground that among the duties which that agreement purports to impose on the manager is a duty which the body corporate has no power to perform, namely, the duty of conducting a letting agency for the owners of those lots who require that service. The body corporate submits that it has no power to commit its funds for this purpose.

Clause 8 of the management agreement specifies the lump sum remuneration which the body corporate promises to pay the manager for the performance of the duties specified. Those duties are specified in general terms by cl. 1:

> ``SCOPE OF THE MANAGER'S DUTIES — The Manager shall be responsible (to the Owner) to at all times ensure that the
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> Property is properly maintained and administered and kept in good repair, and shall attend to the secretarial requirements of the Owner (as will be involved in the discharge of the Owner's functions pursuant to the Act). The Manager shall be responsible to the Owner for the care and maintenance and administration of the Property in terms of this Agreement."

Clause 2 then sets out specific duties including cl. 2(r). The relevant parts of cl. 2 read as follows:

> “SPECIFIC DUTIES TO BE PERFORMED BY THE MANAGER — Without limiting the generality of the Manager's duties as described in Clause 1 of this Agreement some of the Manager's specific duties and functions shall be as follows:—
>
> ...

(r) Letting Agency — The Manager shall conduct, from his unit, a letting agency for the letting of townhouses on the Property for such owners of the townhouses, as shall require that service, or with prior written approval of the Owner arrange with a licensed real estate agent or agents to provide a letting agency for the lettings. The Manager shall ensure that at all times he is properly licensed to perform these functions having regard to the provisions of the Auctioneers and Agents Act 1971 (as amended) and any other relevant legislation or requirements of other governmental or semi-governmental authorities from time to time."

The remuneration prescribed by cl. 8 is not apportioned among the several duties which, by the terms of the management agreement, the manager is to perform. The promise to pay was therefore made in consideration in part of the manager's promise to provide the letting agency. The submission that a body corporate's funds could not be expended in the payment of remuneration for the provision of this service found favour with the Court of Appeal. Their Honours said:

``Whether or not a body corporate has power to appoint a letting agent to provide a service to individual proprietors who seek to avail themselves of it, no power to expend the body corporate's funds in payment of the letting agent for such services to individual proprietors has been identified."

To ascertain the relevant limit on the powers of a body corporate, the provisions of the Act conferring powers must be construed in context. The Act provides, inter alia, for the registration of building units plans and group titles plans[2] . The land comprised in each group titles plan is divided into lots and common property[3] . The Act provides for the constitution of the proprietors of the lots delineated in a group titles plan as a body corporate[4] . The powers, authorities, duties and functions of the body corporate are prescribed by or under the Act or the by-laws of the body corporate[5] , and the proprietors are liable to pay contributions levied by the body corporate[6] in the amounts which, in the opinion of the body corporate, are necessary to meet its actual and expected liabilities in respect of items of legitimate expenditure[7] .

The chief duties of a body corporate are set out in s. 37(1) of the Act; s. 37(2) sets out powers which, in the discretion of a body corporate, it may exercise. Apart from specific paragraphs relating to the care of the personal property of the body corporate and the provision of a mail box, the duties of a body corporate imposed by s. 37(1) relate either to what is or is part of the common property or to fixtures or fittings in one lot intended to be used for the servicing or enjoyment of any other lot or of the common property. None of the duties extends to the provision by the body corporate of services to the proprietors of individual lots.

The powers of a body corporate conferred by s. 37(2) include the power specified in par. (a) of that sub-section:

"A body corporate may—

(a) enter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof".

Section 37(2)(a) authorizes the making of an agreement for the provision of services ``to the lot or to the proprietor or occupier thereof"; it does not authorize the making of an agreement with a person other than the proprietor or occupier of the lot to whom or to which the body corporate is to provide the services.

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Neither the broadly stated duties imposed by cl. 1 nor the particular duty imposed by cl. 2(r) of the management agreement falls within this paragraph. The body corporate did not enter into an agreement with the proprietor or occupier of any lot to provide the services of a letting agency for the benefit of that proprietor or occupier. Had it done so, it would have had authority to perform that agreement by employing an agent or servant (such as the appellants) to provide the services contracted for: see Fourth Schedule, cl. 1. However, if an agreement had been made with particular proprietors or occupiers, it would not have been a proper exercise of the body corporate's powers to require the funds raised by contribution from all proprietors to bear the cost of provision of the service for particular proprietors or occupiers. In any event, cl. 2(r) of the

management agreement was not made in implementation of any agreement made under s. 37(2)(a) between the body corporate and an individual lot proprietor or occupier. None of the other powers conferred by s. 37(2) authorizes the making of an agreement for the conduct of a letting agency for the benefit of those proprietors of individual lots who might require such a service.

The appellants seek to uphold the management agreement by pointing to the by- law making power conferred on a body corporate by s. 30. That section authorizes the amendment of the pro forma by-laws contained in the Third Schedule ``for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan''[8] . Whatever the scope of that power may be, it does not avail the appellants in this case. There was no by-law made which might have authorized the body corporate to secure the provision of the services of a letting agency for the proprietors of the individual lots. In general, the Third Schedule does not authorize a body corporate to provide services to individual lots although cl. 10 impliedly authorizes a body corporate to provide a garbage disposal service for individual lots. If cl. 10 is an exception to the general scheme of the Third Schedule, the exception is explicable by the common interest of all proprietors and occupiers in the removal of garbage from any part of the premises.

In *Coastalstyle Pty. Ltd. v. The Proprietors, Surf Regency Building Units Plan 4246*[9] . Thomas J. stated his view to be that the making of a letting agreement (similar to the present management agreement) ``is within the general management powers of a Body Corporate for the benefit of unit holders'', but he noted that that view was contrary to an assumption made by the Full Court in a case in which his Honour had agreed with the principal judgment[10] and from which he did not ``feel free to depart''. When *Coastalstyle* went on appeal to the Court of Appeal, the attack on the letting agreement seems to have focused on the granting to the letting agent of special privileges in respect of the common property. The Court of Appeal said[11] :

> ``By sub-s. 37(1)(a), a body corporate is required to `control, manage and administer the common property for the benefit of the proprietors' and, by sub-s. 27(3), it is required, subject to the Act, to `do all things reasonably necessary' for that purpose. These are extensive powers and, except where the Act otherwise expressly provides, there seems no reason to exclude from their ambit a power in the body corporate to grant exclusive use or enjoyment, or special privileges, in respect of the common property for the purpose of a business engaged in on behalf of the proprietors of the units in the building. Provided that the service provided by the business is available for the benefit of all proprietors, it seems unimportant that some may choose not to participate.''

The passage cited suggests that it is within the ordinary powers of a body corporate to provide services for the proprietors of individual lots who wish to use those services. With respect, we are unable to agree. The powers of a body corporate are confined chiefly to management and control of common property, and expenditure of the funds of the body corporate on the provision of services for individual proprietors is not sanctioned merely because the services are available to all proprietors who wish to use them. A power to provide such services is not incidental to the body corporate's statutory duties or powers.

In our opinion, there was no statutory power authorizing, and there was no by-law which might have authorized, the respondent to conduct a letting agency for the benefit of those proprietors of lots who might require that service or to procure another person to conduct

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such a letting agency. Nor was there any agreement under s. 37(2)(a) which might have been implemented by procuring another person to provide a letting service for particular lot proprietors or occupiers. It was therefore beyond the powers of the body corporate to enter into a contract to procure the provision of services of the kind stipulated in cl. 2(r) of the management agreement. The principle, as Lord Selborne stated it in *Ashbury Railway Carriage and Iron Co. v. Riche*[12] , is that—

> ``a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act.''

The appellants submitted that, if cl. 2(r) were held to be ultra vires the body corporate, cl. 2(r) is a term severable from the remainder of the management agreement which is otherwise enforceable. Reliance was placed on the judgment of Jordan C.J. in *McFarlane v. Daniell*[13] :

> ``A valid promise is none the worse for being associated with a void promise from which it is severable; and although a promise which is wholly void cannot be enforced, a promise partly void but not illegal is capable of being enforced to the extent to which it is severable and valid. Again, a promise in consideration of a number of promises some only of which are void, although not illegal, is inherently capable of being enforced: *Marks Bros. v. Park*[14] . If, however, it is made conditionally upon the prior or concurrent performance of all the promises by the other party, whether enforceable or void, it may be unenforceable unless the condition of performance of the void promises is in fact fulfilled."

It was submitted that the appellants in this case are in the same position as the employee in *McFarlane v. Daniell* who was held entitled to recover his remuneration under a contract of employment although the remuneration was payable in consideration, inter alia, of a promise on his part in unreasonable restraint of trade (and therefore a void promise). So, it was said, the manager under the management agreement may recover the stipulated remuneration although it is payable in consideration, inter alia, of the unenforceable promise contained in cl. 2(r). But the two cases are dissimilar. In *McFarlane v. Daniell*, the invalidity of the promise in unreasonable restraint of trade arose because the law would not enforce such a promise against the promisor; but as the promisor's promise was not illegal, there was no legal inhibition against the enforcement of the promisee's promise to pay the stipulated remuneration. In the present case, the invalidity arises not because it is against the policy of the law to enforce a promise such as that contained in cl. 2(r) against the promisor but because the Act prohibits the incurring of an obligation by the promisee to disburse the funds of the body corporate for purposes which it is not empowered to pursue.

Section 38 of the Act provides for the establishment and maintenance of two body corporate funds: an administrative fund and a sinking fund. Sub-section (3) prohibits a body corporate from disbursing moneys from its administrative fund “otherwise than for the purpose of—

> (a) meeting its liabilities referred to in section 38A(1); or
> (b) carrying out its powers, authorities, duties or functions under this Act.”

Substituting s. 38A(2) for s. 38A(1), s. 38(6) imposes a limitation in similar terms on the disbursement of the sinking fund. The liabilities referred to in s. 38A(1) and (2) do not include a liability to pay for the provision of a letting agency in the circumstances of this case.

If the disbursement of the body corporate's funds for the purpose of procuring the provision of a letting agency is prohibited, the incurring of an obligation to disburse funds for that purpose is beyond the powers of the body corporate. The body corporate is thus incapable of providing consideration for the manager's promise contained in cl. 2(r).

The appellants pointed to some evidence to show that the more burdensome tasks imposed on the manager by the management agreement related to the maintenance of the common property — a matter which fell within the duties and powers of the body corporate. But it is not possible to treat the promise to pay remuneration as divisible between purposes on which the body corporate is authorized to disburse its funds and purposes for which the disbursement of its funds is forbidden. It is not suggested that the provision of a letting agency was of such minimal significance as to be immaterial.

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In *Mann v. Edinburgh Northern Tramways Company*[15] , Lord Watson said in reference to a company created by a private Act of Parliament:

> ``it is beyond the power either of promoters or of directors or of shareholders to apply the moneys of the company which are devoted by statute to special purposes to any purpose which is not sanctioned by the provisions of the Act of incorporation."

In that case, the company in effect entered into a contract to pay two of its promoters £17,000 to defray the expenses of securing the passing of the private Act of incorporation. Those expenses were authorized by

the Act but the payment of £17,000 would leave a surplus in the promoters' hands and the company had no authority to provide such a benefit. It was immaterial that the surplus might be large or small or that the payment was in part for a legitimate purpose. As the agreement was to pay the entire sum of £17,000 for the purposes which included an unauthorized purpose, the agreement was held invalid[16] .

Similarly, the body corporate's promise in cl. 8 of the management agreement to pay an entire sum as remuneration for the performance of duties including those specified in cl. 2(r) was not authorized by the Act. The appellants cannot therefore enforce the remuneration clause against the body corporate. This conclusion does not mean, of course, that the appellants were not entitled to payment for the services which they rendered to the body corporate and which the body corporate was authorized to procure. But the appellants' entitlement to payment for what might be termed the legitimate services was not an entitlement enforceable under cl. 8 of the management agreement. The appellants were entitled in restitution to be paid for the legitimate services rendered to the body corporate at its request, being services for which the body corporate was entitled to disburse its funds.

However, that was not the relief which the appellants sought in the action. The appellants sought a declaration that the management agreement is subsisting, either in toto or shorn of any invalid terms. Their pecuniary claim was, as counsel put it, ``for a debt of accruing salary *under the agreement*''. As the agreement is unenforceable, the appellants' action fails.

As the appellants' action fails on the ground advanced by the Court of Appeal, it is unnecessary to determine the body corporate's application for special leave to appeal on the ground that the management agreement constituted an ``agreement between a body corporate and a body corporate manager'' appointed pursuant to s. 50 of the Act and was terminated by the resolution of 1 February 1992.

In the result, we would dismiss the appeal.

Deane and Gaudron JJ: The background to this appeal, the facts involved in it and the relevant statutory provisions are set out in the joint judgment of Brennan A.C.J. and Toohey J. and the judgment of McHugh J. The central issue is whether cl. 8 of the Management Agreement of 31 January 1989 (``the Agreement'') was, by reason of the inclusion in the agreement of cl. 2(r), *ultra vires* and void.

By cl. 2(r), the ``specific duties to be performed by the Manager'' under the Agreement included the ``conduct, from his unit, [of] a letting agency for the letting of townhouses on the Property for such owners of the townhouses, as shall require that service''. Clause 8 provided that the annual remuneration of the Manager should be $60,000 adjusted in accordance with the All Groups Consumer Price Index for Brisbane. The combined effect of cl. 2(r) and cl. 8 was that the ``duties'' for the performance of which the body corporate promised to pay the Manager's annual remuneration included that of conducting the letting agency.

The Court of Appeal concluded that cl. 2(r) required letting services to be supplied by the Manager to individual proprietors free of charge to the particular proprietor. We respectfully disagree with that conclusion. In our view, cl. 2(r) required the Manager to conduct a letting agency whose services would be available to those proprietors who should ``require'' them but did not preclude the Manager from charging a fee or commission to those proprietors who utilized those services in leasing particular units. That construction lends greater plausibility to the appellants' argument that cl. 2(r) was in the interests of proprietors generally. Nonetheless, the fact remains that only those proprietors who wished to let their townhouses would obtain any direct practical benefit from the availability on the premises of a letting agency. Examination of the powers of the body

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corporate to expend its funds discloses that those powers did not encompass the payment of remuneration for the conduct of such an agency from a unit in the complex.

Any payment to the Manager in pursuance of cl. 8 of the Agreement would necessarily be made from the body corporate's administrative fund established and maintained under s. 38 of the *Building Units and Group Titles Act* 1980 (Q.) (``the Act''). Section 38(3) expressly prohibits any distribution from that administrative fund:

“otherwise than for the purpose of—

(a) meeting its liabilities referred to in section 38A(1); or
(b) carrying out its powers, authorities, duties or functions under this Act”.

It is not suggested that the provisions of s. 38A(1) are applicable. That means that the effect of s. 38(3) was that payment of remuneration to the Manager for carrying on the letting agency was beyond the powers of the body corporate unless the payment could be justified as being ``for the purpose of carrying out its powers, authorities, duties or functions under [the] Act''. The powers, authorities, duties and functions of the body corporate under the Act are, as s. 27(3) expressly states, those ``conferred or imposed on it by or under [the] Act or the by-laws.''

By s. 37(1)(a) of the Act, a body corporate is required to ``control, manage and administer the common property for the benefit of the proprietors''. Section 27(3) empowers a body corporate to ``do all things reasonably necessary'' for that purpose. Wide though those powers of control, management and administration may be, they are confined to the common property. They simply do not extend to the making of a contract binding the body corporate to pay ``remuneration'' to the proprietor of a particular unit or townhouse as consideration for the conduct by that proprietor ``from his unit'' of a letting agency whose services would be available to any proprietors who desired, as individuals, to lease their townhouses. Entry into such a contract is neither an incident of, nor reasonably necessary for, the control, management or administration of the common property. As Brennan A.C.J. and Toohey J., and McHugh J. demonstrate in their judgments, there was no other provision of the Act which either expressly or impliedly authorized the body corporate to enter into such a contract or to expend its funds in the payment of such remuneration. Nor was there any by-law of the body corporate which conferred such authority. That being so, cl. 8 of the Agreement involved contravention of s. 38(3) of the Act and was *ultra vires* the body corporate to the extent that it required the application of the funds of the body corporate in the payment of remuneration to the Manager for conducting the letting agency ``from his unit''.

The material in evidence does not sustain a conclusion that the provision of the letting agency was such an insignificant component of the duties of the Manager for which the body corporate agreed to pay the base remuneration of $60,000 per annum that it can be disregarded. Nor is there any basis for a finding that a particular proportion or amount of that annual remuneration can be attributed to the Manager's promise to conduct a letting agency. That being so, we agree with the conclusion of the Court of Appeal that cl. 8 cannot be saved by any process of severance or reading down. It follows that the clause was, in its entirety, *ultra vires* and void.

Our conclusion that cl. 8 was void in its entirety makes it unnecessary that we address the question of the validity of other clauses of the Agreement. The whole Agreement necessarily falls with cl. 8. It is also unnecessary that we address the question which the respondent sought to raise in its application for leave to cross-appeal.

The appeal should be dismissed.

McHugh J: The principal issue in this appeal is whether a body corporate, constituted under the *Building Units and Group Titles Act* 1980 (Q.) (``the Act''), has power, in the absence of an appropriate by-law, to enter into an agreement by which it pays money to a person in consideration of that person conducting a letting agency for the benefit of those owners of lots in the complex who require that service.

The appellants contend that a body corporate constituted under the Act has such a power by virtue of its general statutory responsibility to control, manage and administer the common property. The respondent body corporate denies that there is such power and contends that, in the absence of a special by-law conferring power, such an agreement is ultra vires and void.

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Factual background

On 31 January 1989, the body corporate entered into a building management agreement (``the Agreement'') with Bartlett Researched Securities Ltd. (``Bartlett'') in respect of a complex at the Gold Coast called

``Surfers Palms North''. The body corporate agreed that Bartlett should act as building manager on behalf of the body corporate for an initial period of three years and at a commencing salary of $60,000 per annum. The obligations and benefits of the Agreement ran for an initial term of three years (cl. 10) with an option to renew for a further three years (cl. 14). No by-law of the body corporate expressly conferred power on it to enter the Agreement. The Agreement was assigned by Bartlett to the appellants (Mr and Mrs Humphries) by a Deed of Assignment executed on 17 January 1991. At the same time, the appellants purchased unit 1 in the complex.

On 28 November 1990, the body corporate served a letter on the appellants claiming the Agreement was ultra vires the body corporate. However, the appellants went into possession of their unit and commenced to provide the management services under the Agreement. On 26 February 1991, the body corporate sent a letter to the appellants purporting to determine the Agreement. On 13 March 1991, the body corporate changed the locks on the garden shed and pool shed, frustrating the continued attempts of the appellants to perform most of their duties under the Agreement. On 22 November 1991, the appellants gave notice to the body corporate, pursuant to cl. 14 of the Agreement, of their intention to extend the term of the Agreement for a further period of three years, from 31 January 1992 to 30 January 1995. The body corporate has refused to pay for any services since 10 February 1991. At the annual general meeting of the body corporate on 1 February 1992, a motion was passed purporting to terminate the appointment of the appellants as building managers. In purporting to terminate the Agreement, the body corporate relied on s. 50(9) of the Act.

The appellants have rejected the purported termination. They deny that s. 50(9) of the Act entitled the respondent to terminate the Agreement. They contend that the Agreement did not appoint them as the ``body corporate manager'' within the meaning of that sub- section.

Relevant provisions of the Agreement

Clause 1 of the Agreement provided:

> ``SCOPE OF THE MANAGER'S DUTIES — The Manager shall be responsible (to the Owner) to at all times ensure that the Property is properly maintained and administered and kept in good repair, and shall attend to the secretarial requirements of the Owner (as will be involved in the discharge of the Owner's functions pursuant to the Act). The Manager shall be responsible to the Owner for the care and maintenance and administration of the Property in terms of this Agreement.''

Specific duties of the Manager were listed in cl. 2. Apart from cl. 2(r), the sub-clauses were principally concerned with the care, maintenance and control of the common property. Clause 2(r), however, provided for a letting service in the following terms:

> > ``Letting Agency — The Manager shall conduct, from his unit, a letting agency for the letting of townhouses on the Property for such owners of the townhouses, as shall require that service, or with prior written approval of the Owner arrange with a licensed real estate agent or agents to provide a letting agency for the lettings. The Manager shall ensure that at all times he is properly licensed to perform these functions having regard to the provisions of the Auctioneers and Agents Act 1971 (as amended) and any other relevant legislation or requirements of other governmental or semi-governmental authorities from time to time''.

The respondent contends that this sub-clause is ultra vires the body corporate.

Clause 6 was a curious clause. Under it, the Manager granted ``to all members of the [body corporate], their tenants, licensees and invitees the right to use the facilities on the common property... at such times and upon such conditions as the Manager may impose from time to time''. Clause 12 provided that the management and letting duties of the Manager under the Agreement would be carried out from Lot 1. It also provided that that lot should be the *only* lot ``in the property from which management of the property and letting of units in the property takes place''. Clause 9 provided that the body corporate should not permit any other person or corporation to conduct on the

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property any business similar to that carried on by the Manager under the Agreement. Clause 8 provided a lump sum remuneration to the Manager of $60,000 per annum payable monthly in arrears. The sum was to be increased annually in accordance with the All Groups Consumer Price Index. No proportion of the sum was allocated to any particular duty.

The Supreme Court proceedings

In proceedings commenced in the Supreme Court of Queensland, the appellants sought a declaration that the Agreement dated 31 January 1989 subsisted between themselves and the respondent and that the respondent was bound by its terms. They also sought an order that their damages be assessed. The appellants' case substantially succeeded at first instance. The learned trial judge, Derrington J., held that cll. 2(r), 9 and 12 were ultra vires the body corporate but could be severed from the rest of the Agreement. He declared that, with the exception of those clauses, the Agreement would have subsisted between the parties until 1 February 1992. However, he declared that the Agreement had been terminated as and from 1 February 1992 by notice given by the body corporate to the appellants pursuant to s. 50(9) of the Act. His Honour ordered the body corporate to pay damages for its breach of the Agreement, and he remitted the action to the District Court at Brisbane for the assessment of the damages together with interest thereon.

The Court of Appeal set aside the orders made by Derrington J. The Court was of the opinion that the Agreement did not depend on, and was not made under, s. 50 of the Act. Accordingly, if the Agreement was valid, the respondent could not terminate it pursuant to s. 50(9) of the Act. The Court was also of the opinion that it was unnecessary to consider the validity of cll. 6, 9 and 12 because, ``if objectionable, they are plainly severable"[17] . However, the Court held that cll. 2(r) and 8, taken together, were ultra vires and could not be severed from the Agreement. The Court said:

> ``Whether or not a body corporate has power to appoint a letting agent to provide a service to individual proprietors who seek to avail themselves of it, no power to expend the body corporate's funds in payment of the letting agent for such services to individual proprietors has been identified.
>
> ...
>
> There can be no question of severability and, since clause 8 forms the very basis of the appellants' claim to damages, their action must fail."

The ultra vires issue

As I have said, the central issue in the present case is whether in Queensland, in the absence of an authorising by-law, a body corporate formed under the Act has power to enter into an agreement by which it pays money to a person in consideration of that person conducting a letting agency for the benefit of those owners of lots in the complex who require that service. In my opinion, a body corporate has no such power. Nothing in the Act expressly authorises such an agreement or the payment of moneys to a letting agent for services rendered to individual proprietors. Nor can such a power be implied. Indeed, the implication to be drawn from the Act is that a body corporate has no such power in the absence of an authorising by- law.

The scheme of the Act

Section 9 of the Act provides for the registration of group titles plans. A group titles plan means a plan which is so described and which shows the land comprised therein as being divided into lots and common property and which complies with s. 9 of the Act[18] . Section 9 requires, inter alia, that a group titles plan delineate the lots and common property and distinguish the lots by numbers. Upon registration of the plan, the proprietors of the lots become a body corporate[19] . Section 32 authorises the body corporate to levy contributions from the proprietors. They are to be paid into an administrative fund and a sinking fund[20] . Moneys are not to be disbursed from those funds except to meet the liabilities incurred by the body corporate in performing its duties and functions or exercising its powers and authorities under the Act[21] . The *Companies Act* 1961 (Q.) does not apply to or in respect of a body corporate constituted under the Act[22] . Consequently, the doctrine of ultra vires applies to such a body corporate.

Section 27(3) provides:

> ``Subject to this Act the body corporate shall have the powers, authorities, duties and functions conferred or imposed on it by or under this Act or the by-laws and shall do all things reasonably necessary for the enforcement of the by-laws and the control,
>
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>
> management and administration of the common property.''

The principal duties imposed on a body corporate by the Act are set out in s. 37 of the Act. That section also confers powers on a body corporate. So far as relevant, s. 37 provides:

> “(1) A body corporate shall—
>
> (a) control, manage and administer the common property for the benefit of the proprietors;
> ...
> (c) subject to section 37A, properly maintain and keep in a state of good and serviceable repair...
>
> (i) the common property;
> ...
>
> (2) A body corporate may—
>
> (a) enter into an agreement, upon such terms and conditions (including terms for the payment of consideration) as may be agreed upon by the parties thereto, with a proprietor or occupier of a lot for the provision of amenities or services by it to the lot or to the proprietor or occupier thereof”.

Did ss. 27 and 37 authorise the Agreement?

Unquestionably, ss. 37(1)(a) and 37(1)(c) authorise a body corporate to enter into a contract to maintain and administer the common property. But nothing in those paragraphs confers any authority on a body corporate to enter into an agreement to pay money to a person in consideration of that person providing a letting service for the benefit of unit proprietors. They confer power in relation to the common property. They do not confer a power to enter into an agreement with a third party which affects the lots of other individuals as well as the common property.

Furthermore, nothing in ss. 27 and 37 authorises an agreement which gives the Manager the exclusive right to carry on the business of letting units in a complex. The exclusivity provisions of the Agreement are also inconsistent with the right of other proprietors to conduct lawful businesses from their lots[23] . If a body corporate has power to enter into an agreement giving exclusive rights to a particular person in relation to the use of the lots and common property, it must also have the implied power to prevent proprietors from enjoying those rights. The making of the exclusive arrangement by itself cannot interfere with the rights of the proprietors. Some further power is needed to enable a body corporate to carry out its implied undertaking that it will prevent the proprietors of lots from exercising those rights. However, apart from the by-law making power (see below), nothing in the Act authorises a body corporate to interfere with the rights of proprietors in respect of their lots.

Moreover, by implication, the terms of s. 37(2) exclude the making of an exclusive letting agreement of the kind involved in this case. By authorising an agreement with a proprietor for the provision by the body corporate of services to his or her lot, it impliedly excludes a power to make an agreement with a third party to provide services to that lot and also impliedly excludes any general power in the body corporate to interfere with the rights of proprietors in respect of their lots. That sub-section also tends to indicate that services for the benefit of a proprietor are to be paid for by the proprietor and not out of the funds contributed by the other proprietors.

The general powers conferred on the body corporate by ss. 27(3) and 37 are, therefore, insufficient in my opinion to enable the body corporate to enter into an agreement which would require the body corporate to act in a way which would affect the rights and obligations of proprietors in respect of their lots.

However, the appellants contend that the intended width of the powers conferred by ss. 27(3) and 37 can be seen from the definition of ``prescribed arrangement''[24] in s. 7 of the Act and from the licence provisions of s. 42 of the *Auctioneers and Agents Act* 1971 (Q.). Paragraph (e) of the definition of ``prescribed arrangement'' in s. 7 of the Act includes an agreement ``for the conduct of a business upon the parcel (whether upon a lot or the common property) of letting of lots on behalf of any proprietors of lots''. Section 42 of the *Auctioneers and Agents Act* requires a person carrying on a letting business of the kind involved in the present case to be licensed. Where the business is restricted to the letting of lots in a building in which the applicant resides, however, there is an exemption from certain requirements[25] if the applicant has an office in that building[26] and has entered into an agreement in writing with the body corporate authorising the applicant to carry on the

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business[27] . Contrary to the contention of the appellants, these provisions are not a statutory recognition of a general power in a body corporate to enter into a letting agreement of the kind in issue in the present case. They assume the making of a valid agreement, but they are silent as to how such an agreement can be validly made.

The by-laws

The conclusion that the general powers conferred by ss. 27 and 37 did not authorise the making of the Agreement is confirmed by s. 30(2) of the Act which provides:

> ``Save where otherwise provided in subsections (7) and (11), a body corporate, pursuant to a special resolution, may, for the purpose of the control, management, administration, use or enjoyment of the lots and common property the subject of the plan, make by-laws amending, adding to or repealing the by-laws set forth in the Third Schedule or any by-laws made under this subsection.''

That sub-section indicates that the body corporate can interfere with the rights of proprietors in respect of their lots only by means of by-laws passed in accordance with the Act. The general powers conferred by ss. 27 and 37 are insufficient for this purpose.

The Third Schedule to the Act contains specific by-laws, but none of those by-laws authorised the making of the Agreement. Nor has the body corporate exercised the power conferred by s. 30(2) to make a by-law giving it power to enter into an agreement containing cll. 2(r), 9 and 12 of the Agreement.

Section 30(7) is another indication that the body corporate had no power to enter into the letting clauses of the Agreement. It provides:

> ``Without limiting the generality of any other provision of this section, a body corporate may, with the consent in writing of the proprietor of a lot, pursuant to a resolution without dissent make a by-law in respect of that lot conferring on that proprietor the exclusive use and enjoyment of, or special privileges in respect of, the common property or any part thereof upon such terms and conditions (including the proper maintaining and keeping in a state of good and serviceable repair of the common property or that part of the common property, as the case may be, and the payment of money by that proprietor to the body corporate) as may be specified in the by-law and may, in like manner, make a by- law amending, adding to or repealing any by-law made under this subsection.''

Section 30(7) ensures that, without the concurrence of all proprietors, no proprietor or group of proprietors is to obtain special privileges at the expense of other proprietors. This sub-section is necessary to safeguard the position of proprietors, because the Act imposes an unlimited liability on the proprietors for all liabilities properly incurred by the body corporate[28] . By requiring the enactment of a by- law, s. 30(7) ensures that the rights and obligations of proprietors arising from ownership of their lots can only be affected by an appropriate resolution directed to the particular subject matter. When read with s. 30(2), the terms of s. 30(7)

indicate that the body corporate has no implied power under s. 27(3) or s. 37 to make a letting agreement of the kind in question in the present case.

While the general powers conferred by ss. 27 and 37 authorise the body corporate to enter into contracts concerning the common property, the learned trial judge was correct in saying:

> ``It would be surprising indeed if a general power to contract for the benefit of proprietors could be implied in favour of the body corporate in such a way as to subvert these protective provisions relating to by- laws.
>
> Such a result would assume that the power of contract implied by s. 37(1)(a) overrides the rights of the proprietors over their lots and the common property. This is quite unacceptable."

The appellants relied on the decision of the Supreme Court of Queensland in *Coastalstyle Pty. Ltd. v. The Proprietors Surf Regency Building Units Plan 4246*[29] to support the validity of the Agreement. They submitted that that decision was distinguishable from the earlier decision of that Court in *Victorian Professional Group Management Pty. Ltd. v. The Proprietors ``Surfers Aquarius'' Building Units Plan No. 3881*[30] . *Surfers Aquarius* concerned the granting of a letting agreement which gave a person the sole right to carry on the business of letting and selling in relation to a certain block of units. It required the person to maintain and staff a reception desk in its own

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premises (lot 2) or within the common area and contained a covenant that the defendant body corporate would not grant a lease or licence in respect of any part of the common property to a competitor. The Full Court (Connolly J., with whose judgment Thomas and Ambrose JJ. agreed) held that these covenants conferred special privileges on and contemplated the exclusive use of part of the common property by the proprietor of lot 2 and was in contravention of s. 30(7) of the Act. Consequently, the agreement was ultra vires the defendant.

In *Coastalstyle*[31] , Thomas J. resiled from his concurrence in *Surfers Aquarius* but felt constrained to follow the decision. His Honour pointed out that the power to make by-laws pursuant to s. 30 of the Act was discretionary. He was of the opinion that it was not the only source of power to enter a letting agreement. His Honour said[32] :

> ``I prefer the view that a letting agreement such as that in the present case is within the general management powers of a Body Corporate for the benefit of unit holders and that the assumption in the *Surfers Aquarius Case* (in which I concurred) is incorrect.... My preferred view is that the correct construction of s. 30(7) confines it to special arrangements in favour of proprietors, generally of the kind referred to in the words in brackets in that sub-section. However it is not a matter upon which I feel free to depart from a Full Court decision, notwithstanding my preference to the contrary."

On appeal in that case[33] , the Full Court held that it was not necessary to review the correctness of the decision in *Surfers Aquarius*. The Court considered that the body corporate had power to enter the letting agreement under the general powers conferred by ss. 37(1)(a) and 27(3). It said[34] :

> ``These are extensive powers and, except where the Act otherwise expressly provides, there seems no reason to exclude from their ambit a power in the body corporate to grant exclusive use or enjoyment, or special privileges, in respect of the common property for the purpose of a business engaged in on behalf of the proprietors of the units in the building. Provided that the service provided by the business is available for the benefit of all proprietors, it seems unimportant that some may choose not to participate."

However, for the reasons that I have already given, where a body corporate wishes to affect the rights and obligations of an individual proprietor in respect of his or her lot, a by-law is required. Furthermore, if a service directly affects an individual lot, then contrary to the opinion of the Full Court in *Coastalstyle*, the fact that it is for the benefit of all the proprietors does not entitle the body corporate to act without the authority of a by-law.

In my opinion, the body corporate had no power to enact cll. 2(r), 9 or 12, the clauses concerned with the letting of lots. Furthermore, cl. 2(r) has to be read with cl. 8 which provided for the remuneration of the Manager. Accordingly, cll. 2(r), 9 and 12, and so much of cl. 8 as authorised expenditure by the body corporate on the letting service, were ultra vires the body corporate. But does this mean, as the Court of Appeal held, that the entire Agreement was void? Or is the correct view that the clauses relating to the letting service can be severed from the Agreement leaving the remainder of the Agreement enforceable?

Severance

In the case of promises that are invalid, the general test for determining whether they are severable from the agreement of which they form part was laid down by Jordan C.J. in *McFarlane v. Daniell*[35] in a passage approved by this Court in *Thomas Brown and Sons Ltd. v. Fazal Deen*[36] and by the Privy Council in *Carney v. Herbert*[37] . Jordan C.J. said[38] :

> ``When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature... If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable."

However, this is not an exclusive test. The test of severability is a flexible one. ``There are not set rules which will decide all cases"[39] .

Clauses 2(r), 9 and 12 of the Agreement are wholly void. They must be treated as if they were not part of the Agreement. Furthermore, carrying out the letting service required by cl.

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2(r) was part of the consideration for the payment of $60,000 per annum to the Manager provided for in cl. 8. Part of the funds of the body corporate, therefore, was required to be spent on an unauthorised object. That means that cl. 8 is partly invalid and, if it is to remain part of the Agreement, must be read down. However, the crucial question is whether deleting cll. 2(r), 9 and 12 from the Agreement and reading down cl. 8 changes only the extent of the Agreement or whether it changes its nature. If the nature of the Agreement is not changed, the appellants would be entitled to recover damages against the body corporate for any wrongful deprivation of their right to earn their remuneration under the Agreement.

The conduct of the letting service was one of nineteen specified duties listed in cl. 2. In evidence, the other duties, which included the maintenance and management of the common gardens (said to be between four and a half and six acres) and the large pool and spa, were estimated to require 80 hours work per week in the summer and 40 or 50 hours per week in the winter. On the evidence, the conduct of the letting service was not a large part of the Manager's duties. Accordingly, it seems unlikely that the parties considered the duty of letting to be a dominant element of the Agreement. It was not the ``heart and soul" of the Agreement[40] .

If cll. 2(r), 9 and 12 could be considered independently of cl. 8, they would be severable. This accords substantially with the view of Derrington J. However, as the Court of Appeal pointed out, the remuneration payable under cl. 8 was a lump sum annual payment which was not apportionable among the various duties. If cl. 2(r) was severed from the Agreement, the Manager would be receiving the same remuneration for less work. So the critical issue is whether, having regard to the connection between cl. 2(r) and cl. 8, the invalid promise contained in cl. 2(r) is severable from the rest of the Agreement.

The mere fact that a lump sum payment is provided in consideration of the performance of a range of duties, some of which are unenforceable, is not of itself a bar to severance. In *Goodinson v. Goodinson*[41] , a contract between a husband and wife, who had separated, provided for the payment of a weekly sum by way of maintenance from the husband in consideration of the wife indemnifying him against all debts incurred by her, not pledging his credit and not taking any matrimonial proceedings in respect of maintenance. The English Court of Appeal held the last promise was void because it was an attempt to oust the jurisdiction

of the courts. However, it held that it did not vitiate the rest of the contract because it was not the main consideration furnished by the wife. Somervell L.J. said[42] :

``In the present case I think that there is ample consideration to support this agreement apart from the covenant not to sue, and to enable it to be enforced as against the husband in the way in which the wife seeks to enforce it in these proceedings."

In *McFarlane*[43] , an actor was held entitled to enforce a promise to pay remuneration under a contract of employment that contained restrictive covenants by the actor that were void as being a restraint of trade. Similarly, in *Carney*[44] , as part of a composite transaction for the sale of shares in a company, payment was to be secured by the defendant's guarantee and provision of mortgages over the property of a subsidiary company. The provision of the mortgages was illegal under s. 67(1) of the *Companies Act* 1961 (N.S.W.). The Judicial Committee held that the provision of the mortgages, although illegal and void, was ancillary to the overall transaction and severable. The defendant was, therefore, liable to the plaintiffs for the unpaid instalments of the purchase price.

These three cases show that a contract to pay a lump sum may be enforceable even though part of the consideration for that sum is void and the payment was not apportioned in respect of the various considerations given for it. However, I do not think that they require the conclusion that cl. 2(r) can be severed from the rest of the Agreement in the present case.

Carney is distinguishable from the present case on the ground that the provision of the mortgage security in that case was for the exclusive benefit of the plaintiffs. The defendant was not prejudiced if the Agreement was enforced without the security being furnished. Their Lordships said[45] :

``Subject to a caveat that it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties enter into a

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lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision."

McFarlane[46] is also distinguishable. Although the void restraint was part of the consideration for the payment of remuneration to the plaintiff in that case, the defendant had not alleged that the plaintiff had failed to comply with the restraint, void though it was. Jordan C.J. said[47] :

``if such a defence had been raised the plaintiff might have been able, for aught I know, to prove that he had complied with all the restraints imposed on him by the defendant, iniquitous though the defendant now contends them to be. There would be no reason why the plaintiff should not prove this if it became material."

Goodinson, however, is not readily distinguishable from the present case. It is an authority for the proposition that, if part of the consideration for the promise of a payment is void but not illegal, the promise is enforceable as long as the void consideration was not the main consideration for the promise. But if this proposition was applied generally, it might often lead to injustice. In many cases, without the void consideration, the defendant might not have entered into the agreement or promised to pay the amount of money in question. It is not just that the defendant should have to perform a promise or promises which would not have been given but for the giving of the void consideration.

In my opinion, in cases where a provision in a contract is void, is not for the exclusive benefit of the party seeking to enforce the contract, and is part of the consideration for an indivisible promise of the defendant, the proper test for determining whether the void provision is severable from the indivisible promise is that formulated by the Full Court of the Supreme Court of Victoria in *Brew v. Whitlock (No. 2)*[48] . In that case, the

Full Court said that[49] ``once the conclusion is reached that the invalid promise is so material and important a provision in the whole bargain that there should be inferred an intention not to make a contract which would operate without it'', the invalid promise should be treated as inseverable from the contract.

In the present case, cl. 2(r) was not for the exclusive benefit of the appellants. So the question is whether the provision of the letting service was so material and important a part of the bargain between the parties that the body corporate would not have agreed to pay the sum of $60,000 per annum without that service being provided. Unless that question is answered in the negative, the promise contained in cl. 2(r) must be regarded as inseverable from the promise contained in cl. 8 of the Agreement.

In evidence, Mr Humphries said that the ``letting is only of a permanent nature, so it doesn't require a lot of work. Basically, it is the collecting of rent, either weekly, fortnightly, monthly — whichever the people prefer to pay — and doing any minor repairs on behalf of any unit owners''. He defined a ``permanent'' letting as meaning a letting of ``three months or longer''. Mr Humphries also testified that the letting work was still being carried out at the date of the trial even though the body corporate had purported to terminate the Agreement. However, the materiality of the promise to provide the letting service cannot be determined by the amount of letting actually carried out. There is no evidence before the Court as to what part of the Manager's duties was expected to be taken up with the letting arrangements at the time that the Agreement was made. It may be that the parties contemplated that more would be done than has turned out of the case. Significantly, in his evidence, Mr Humphries said, ``I don't holiday let, when people come for only one or two weeks, which requires a far greater amount of work involvement in the letting side of it''. Yet the terms of cl. 2(r) would indicate that he was obliged to let units on behalf of proprietors whether the lettings were of a permanent or holiday nature.

Upon the evidence, it is not possible to conclude that the body corporate would have paid the Manager $60,000 per annum without its promise to provide the letting service. Indeed, common sense suggests that it is unlikely that a body corporate acting rationally would have done so. The appellants have therefore failed to establish that cl. 2(r) was severable.

The appeal must be dismissed.

[140115]

[140115]

Footnotes

1 cl. 8.

2 s. 9.

3 ``group titles plan'' is defined by s. 7 to mean “a plan which—

(a) is described in the title or heading thereto as a group titles plan;
(b) shows the land comprised therein as being divided into lots and common property; and
(c) complies with the requirements of section 9,

and includes a plan of resubdivision of a lot or common property or a lot and common property in a group titles plan registered under this Act”.

4 s. 27.

5 s. 27(3).

6 s. 32.

7 ss. 38A, 38B.

8 s. 30(2).

9 Unreported, 20 December 1991 at 17. [See also ¶30-118 in this tab.]

10 *Victorian Professional Group Management Pty. Ltd.* v. *The Proprietors ``Surfers Aquarius'' Building Units Plan No. 3881* [1991] 1 Qd R 487. [See also ¶30-106 in this tab.]

11 *Coastalstyle Pty. Ltd.* v. *The Proprietors, Surf Regency Building Units Plan 4246*, unreported, 12 October 1992 at 11-12. [See also ¶30-119 in this tab.]

12 (1875) LR 7 HL 653 at 693.

13 (1938) 38 SR (NSW) 337 at 347. The case was cited with approval as to the severability of illegal promises in *Carney* v. *Herbert* [1985] AC 301 at 310-311; see also *Cheshire and Fifoot's Law of Contract*, 6th Aust. ed. (1992), ch 13, at ¶536-537.

14 (1914) 18 CLR 1 at 13.

15 [1893] AC 69 at 83.

16 See ibid. at 82, 83 and 84.

17 *Carney v. Herbert* [1985] AC 301.

18 s. 7(1).

19 s. 27(1).

20 s. 38.

21 ss. 38, 38A.

22 s. 27(2).

23 See, for example, s. 42(2) of the *Auctioneers and Agents Act* 1971 (Q.).

24 Section 49(2) of the Act requires an original proprietor to give to a prospective purchaser a statement setting out details of any prescribed arrangement.

25 s. 42(2)(a).

26 s. 42(2)(b).

27 s. 42(2)(c).

28 s. 38A(1)(c); s. 38B.

29 Unreported, 20 December 1991. [See also ¶30-118 in this tab.]

30 [1991] 1 Qd R 487. [See also ¶30-106 in this tab.]

31 Unreported, 20 December 1991. [See also ¶30-118 in this tab.]

32 ibid at 17.

33 *Coastalstyle Pty. Ltd. v. The Proprietors Surf Regency Building Units Plan 4246*, unreported, 12 October 1992 at 13. [See also ¶30-119 in this tab.]

34 ibid. at 12.

[140116]

[140116]

35 (1938) 38 SR (NSW) 337.

36 (1962) 108 CLR 391 at 411.

37 [1985] AC 301 at 310-311.

38 *McFarlane* (1938) 38 SR (NSW) 337 at 345.

39 *Carney* [1985] AC 301 at 309.

40 *Amoco Australia Pty. Ltd.* v. *Rocca Bros. Motor Engineering Co. Pty. Ltd.* [1975] AC 561 at 578.

41 [1954] 2 QB 118.

42 ibid. at 123-124.

43 (1938) 38 SR (NSW) 337.

44 [1985] AC 301.

45 ibid. at 317.

46 (1938) 38 SR (NSW) 337.

47 ibid. at 349.

48 [1967] VR 803.

49 ibid. at 813.

JULIAN-ARMITAGE v THE PROPRIETORS ASTOR CENTRE BUP NO 8932

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(1998) LQCS ¶90-101

Supreme Court of Queensland, Court of Appeal

Judgment delivered 29 May 1998

Building Units and Group Titles — By-law requiring proprietors of Lots 2 to 45 to bear cost of maintaining lifts — Whether proprietor of Lot 1 liable to share costs of electricity used to operate lifts — Meaning of word ``maintain''.

The appellant was the proprietor of a ground level lot in a registered building units plan (Lot 1). Because of the level of the lot, the two passenger lifts serving the building did not service the appellant's unit but only those above it.

By-law 56 conferred on the proprietors of Lots 2 to 45 the ``special privileges'' of being able to operate the lifts. The by-law also provided that these proprietors had to bear the cost of properly maintaining the lifts and keeping them in a state of good serviceable repair (para (i)).

Both at first instance (where she was unsuccessful) and on appeal, the appellant argued that she was not liable to bear a share of the cost of electricity used to operate the lifts. She argued that the cost of electricity was covered by para (i) because the expression ``maintain'' ought to be read as meaning ``maintain in operation''.

Held: appeal dismissed.

1. The general principle adopted in the Building Units and Group Titles Act is that proprietors share the expense of maintenance and running costs in proportion to their lot entitlements and that they do so irrespective of the extent to which they in fact make use of the common property or its facilities.

2. By-law 56 introduced a qualification to that general principle in the interest of fairness to the proprietor of Lot 1. However, the fact that it failed in all respects to achieve a completely fair result was not sufficient justification for interpreting the word ``maintain'' in such a way as to alter its natural or ordinary meaning, ie to ensure the lift was in a state of working efficiency.

3. Complete fairness would be virtually impossible to attain. Almost invariably, some proprietors will make more use of the lifts than do others. By-law 56 did not and could not be expected to cater for or equalise all differences of this kind.

[Headnote by the CCH CONVEYANCING LAW EDITORS
[140117]
[140117]
]

PA Keane QC with A Julian-Armitage (instructed by the appellant) appeared for the appellant.

JC Sheahan with JK Bond (instructed by Mallesons Stephen Jacques) appeared for the respondent.

Before: Pincus JA, McPherson JA and Derrington J.

Judgment in full below

Pincus J.A.: I have read and agree with the reasons of McPherson J.A. and with the orders he proposes.

McPherson J.A.: This is an appeal from a decision in the Supreme Court concerning the liability of the proprietor of a lot in a registered building units plan to bear a share of the cost of electricity used to operate a lift or lifts serving the building comprised in the plan. The building, which is residential and is known as *The Astor Centre*, has 13 levels designated A to M accommodating a total of 45 lots or units.

Lot 1, of which the appellant is proprietor, occupies the whole of Level A, which is at ground level and is referred to in the material as being below street level. As such, there is no need to make use of the passenger lifts, of which there are two in the building, in order to have access to that lot; and in fact the lifts do not serve or ``service'' that unit or level but only those above it.

The first Annual General Meeting of the proprietors of the Astor Centre was held on 26 April 1989. Minutes of that meeting show that it was resolved that the following By-law be added to those previously approved:

> ``The proprietors for the time being of Lots 2 to 45 shall be entitled to the exclusive use and enjoyment for themselves, their invitees and their licensees of that part of the common property which is delineated in red on the plans marked `A' (`the area'). In addition to the grant of exclusive use and enjoyment the proprietors for the time being of Lots 2 to 45 shall also be entitled to special privileges for themselves, their invitees and their licensees of being permitted to operate the two passenger lifts

which have been installed in the area. The grant of exclusive use and enjoyment and special privileges are made subject to the following terms and conditions:

(a) The area shall only be used for the operation of passenger lifts;
(b) No proprietor shall create a nuisance or hazard by his use of any of the passenger lifts;
(c) No proprietor shall misuse or permit to be misused any of the passenger lifts and shall not obstruct or damage the same or otherwise interfere with or impede with their normal operation;
(d) The proprietors shall observe the terms of any notice displayed in any of the passenger lifts by the body corporate or by an any relevant statutory authority;
(e) The proprietors shall ensure that, at all times, no rubbish, litter or other unsightly materials or substances be allowed to accumulate in or upon the area or in or upon the internal surfaces of the lift wells;
(f) The proprietors shall ensure that the area and the internal surfaces of the lift wells are at all times kept in a clean and tidy condition;
(g) The proprietors shall at their own cost and expense carry out all the usual and necessary inspections and tests (including any necessary statutory tests) with respect to the passenger lifts;
(h) The proprietors shall at their own cost and expense rectify and make good all stoppages and malfunctions in the operation of the passenger lifts;
(i) The proprietors shall at their own cost and expense properly maintain and keep in a state of good and serviceable repair (including where reasonably necessary renew or replace the whole of part thereof) the two passenger lifts and all associated equipment and appurtenances (including both electrical and mechanical components and wiring);
(j) The proprietors shall at their own cost and expense be responsible for the payment of the costs associated with any lift maintenance agreement which the body corporate may have entered into with respect to the passenger lifts;
(k) The terms and conditions contained in this by-law bind the proprietors jointly and severally;
(l) The liability of the proprietors for the payment of any monies payable under

[140118]

[140118]

this by-law shall be in shares proportional to the lot entitlement of their respective lots; and
(m) In respect of any monies payable by a proprietor under this by-law, then the proprietor of a lot is, liable, jointly and severally with any person who was liable to pay those monies when that proprietor became the proprietor of that lot, to pay such part of the monies as are unpaid when he became the proprietor of that lot;

and that for the purpose of meeting actual or expected liabilities incurred as a result of this By-Law the proprietors of Lots 2-45 contribute to a special fund established for lift maintenance and eventual replacement at a rate of $5.00 entitlement per quarter from 1st May, 1989, which amount shall be reviewed annually each year by the Committee of the body corporate in accordance with lift service agreement increases, maintenance requirements and evaluations as to the life expectancy of the lifts and such fund shall be properly maintained by the body corporate manager/ treasurer and presented as part of the financial report for each annual general meeting."

This additional By-law, which was duly registered or recorded on the plan, was numbered By-law 56. It is the subject of this application, which, before coming before the Court had already been before a referee under the *Building Units and Group Titles Act 1980*, followed by an appeal to the Tribunal and then to the Supreme Court, from which this appeal now comes.

The effect, briefly stated, of the first part of By-law 56 is to confer on the proprietors and their invitees and licensees, the exclusive right to use the access area or areas on each level of the common property delineated on the accompanying plan ``A'' together with the ``special privileges'' of being permitted to operate the two passenger lifts in question. The validity of the By-law is not challenged in these proceedings. What is in issue is the proper interpretation to be given to it.

The only question for determination is whether under its terms the appellant is in law justified in insisting that only those proprietors who enjoy the exclusive rights or privileges of using the lifts should be obliged to pay for the electricity needed to operate it. What this comes down to in the end is whether the cost of that electricity is a charge to be met of the funds of the Body Corporate derived from the levies paid by all the proprietors; or whether those entitled to use the lifts, and not the appellant, are bound to meet that expense from the special fund constituted under the last part of the By- law.

By-law 56 deals in paragraph (h) with the cost of carrying out usual and necessary inspections and tests with respect to the lifts, and in paragraph (i) with the cost of properly maintaining and keeping in good and serviceable repair, ``the two passenger lifts and all associated equipment and appurtences (including both electrical and mechanical components and wiring)''. As to those matters of expenditure, the cost is to be met by proprietors who are privileged to use the lifts. Under paragraph (j), they are also to be responsible for paying the costs associated with any lift maintenance agreement entered into by the Body Corporate.

The By-law does not refer specifically to the cost of the electricity used in operating it. The omission may have been deliberate, or it may have been the result of accidental oversight. The appellant submits that that particular cost or expense is covered under paragraph (i) by the requirement in that paragraph that the privileged proprietors are at their own cost and expenses to ``properly maintain and keep [the lifts] in a state of good and serviceable repair...''. Without keeping the electric current flowing, the lifts, it is said, will not be either maintained or serviceable; in short, it will not be possible for those proprietors to operate the lifts, which is what the first part of By-law 56 expressly says that they are ``permitted'' to do. In effect, therefore, the expression ``maintain'' ought, it is submitted, to be read as meaning ``maintain in operation''.

[140119]

In support of these submissions, reliance was placed on *John Fairfax & Sons Ltd* v. *Australian Telecommunications Commission* [1977] 2 NSWLR 400, 413, where in the context of a contractual duty to maintain two teleprinters, Mahoney J.A. said that the word ``maintain'' referred ``not to the placing of the services with the plaintiff but, in general, to the keeping of them in operating condition''. The appellant also relied on *Greetings Oxford Koala* v. *Oxford Square Investments Pty. Ltd.* (1989) 18 NSWLR 33, 39, where Young J. quoted from *Galashiels Gas Co. Ltd.* v. *O'Donnell* [1949] A.C. 275, 286, in which Lord McDermott said that the word ``maintained'' was synonymous with ``serviced'' or ``looked after'' or ``attended to'' but, in the context of the legislation considered there, concluded that the expression ``every hoist to be properly maintained'' connoted the continuance of a state of working efficiency. None of these authorities is, however, of any real assistance to the appellant here. On the contrary, they tend, if anything, to suggest that machinery or equipment is ``maintained'' if it is in working order, so that it will operate if power or fuel is supplied to make it do so. It is not the ordinary expectation of consumers who hire or purchase equipment, such as photocopiers or computers, that the obligation of someone who undertakes to service or maintain them extends to providing the electric power needed to make the equipment function.

[140119]

In the end, however, it is probably right to say that equally little help is to be gained from examples of this kind, which do not involve arrangements like those encountered in building units, in which proprietors own separate units or lots, but share the right to use as well as the obligation to pay for the upkeep and maintenance of common property. As to that, the general principle adopted in the Act is that proprietors share the expense of maintenance and running costs ratably in proportion to their lot entitlements, and that they do so irrespective of the extent to which they in fact make use of the common property or its facilities.

In providing an exemption from liability to bear some of the expense associated with lifts which the appellant is not privileged to use, By- law 56, apparently in the interests of fairness to the proprietor of Lot 1, introduces a qualification upon that general principle. The fact that it fails in all respects to achieve a completely fair result is not sufficient justification for interpreting the word ``maintain'' in such a way as to alter its natural or ordinary meaning of ensuring it is in a state of working efficiency rather than keeping it operating. Complete fairness would be virtually impossible to attain. Almost inevitably, some proprietors or their licensees will make more use of the lifts than do others; and, as was pointed out in the course of the hearing, those who live at the upper levels of the building will almost certainly use more electricity in doing so than others who reside at lower levels. By-law 56 does not, and probably could not be, expected to cater for or equalise all differences of that kind.

It follows that the primary judge was correct in his interpretation of By-law 56. The appeal should be dismissed with costs.

Derrington J: I agree with the orders of McPherson JA and with his reasons.