"Strata Title in the NSW Court of Appeal"

Address to the Australian College of Strata Lawyers Annual Conference

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Justice A S Bell, President of the Court of Appeal[*]

1 Just over sixty years since the introduction of the first strata legislation in New South Wales (the *Conveyancing (Strata Titles) Act 1961*), and after the third significant set of modifications to the legislative scheme represented by the *Strata Schemes Management Act 2015* (NSW) ("**Management Act**") and the *Strata Schemes Development Act 2015* (NSW) ("**Development Act**"), it may be trite to observe that a growing number of people – approximately one sixth of the population of NSW – now live within a strata title development.

2 The scope for a wide variety of disputes to arise in connection with the form of shared property created by our strata legislation is obvious, and this is evidenced by the range of matters that come before the Court of Appeal. Disputes between neighbours – though of course this is not the only kind of dispute that arises – can take on a deal of complexity in the context of a strata scheme.

3 To give just one example of such a dispute that reached the Court of Appeal, the Court in 2019 heard an appeal in a defamation case involving the Watermark building in Manly (*Murray v Raynor* [2019] NSWCA 274). In that case, emails had been exchanged between a

[*] Justice Bell acknowledges the invaluable assistance of Mr Mischa Davenport, Researcher to the New South Wales Court of Appeal in 2021, for his research and assistance in the preparation of this paper.

tenant of the building and the chair of the strata committee (a resident proprietor) in relation the security of the mailboxes in the complex. The exchange culminated in an email sent by the tenant to the committee chair, and copied to 16 other residents, containing what the tenant accepted to be a number of defamatory imputations to the effect that the committee chair was not only wasting all residents' time with petty emails concerning mailbox security, but had also maliciously harassed the tenant and attempted to publicly humiliate her in emails to other residents. Ultimately the appeal was resolved in the tenant's favour, on the basis that the defamatory imputations were sufficiently connected to an occasion of privilege, namely the communication to residents of the strata scheme on the topic of building management.

4 Clearly the potential for conflict is rife. However I do not mean, by such examples, to trivialise the many perhaps more substantive disputes that can and do arise within and in relation to strata schemes. Ultimately strata law is concerned with rights – real property rights – that are of central significance to our economy and to our society. These rights structure our relations to land and buildings, but also more generally to one another, especially in the context of multi-owned properties.

5 I well recall at the Bar conducting a significant piece of litigation on behalf of the Owners Corporation of the historic Goldsbrough Mort building in a case against Multiplex and a private certifier in relation to alleged fire safety defects. The case was very complex and the litigation extended over a number of years.

6 I have two abiding memories of the case. First, that whilst the building in effect was tied up in litigation, it was next to impossible for strata owners, many of whom held their apartments as investments, to sell them – what was at issue was who would pay the more than $10 million required for the rectification of defects relating to fire safety.

7 The second matter I recall was that the Chairman of the strata committee happened to be the general counsel of a commercial television network. His exposure to and experience in hard fought commercial litigation attuned him to the demands and stresses of taking on a significant piece of litigation against well-funded (and insured) corporate defendants. The case ultimately settled but would probably not have settled as favourably as it did had not the Owners Corporation, through the Chairman's leadership, had the conviction to stay the course.

8 Of course, most strata law disputes are resolved otherwise than before a Court, with only a small fraction reaching the Court of Appeal. Mediations, adjudications or Tribunal decisions represent opportunities for people living in strata schemes, in close proximity to one another, to avoid conflict escalation and continue to live together relatively peacefully, but at the cost of not creating binding precedent, and perhaps even reinforcing the unfortunate impression that strata law disputes generally only raise low-level questions of law.

9 The matters that do come before the Court of Appeal typically do so because they raise important questions of law which in turn give

guidance to NCAT in particular, where the vast majority of disputes are litigated.

10 NCAT in its 2021 Annual Report noted strata and community title matters within its top ten matter types by volume, with over 1600 applications to the Tribunal over the year. It is therefore of note that a relatively large number of strata law matters have come before the Court of Appeal in recent years, especially in relation to the significant legislative changes brought about by the 2015 *Management Act*. I wish to address you today on a number of developments arising from those recent decisions.

11 Recent decisions by the Court of Appeal have considered a number of key elements of the legislative scheme, including:

(1) The nature of an owners corporation and the consequences of its legal personality;

(2) The powers, especially the by-law making power, of owners corporations, and implications for the interpretation of by-laws;

(3) The relationship between developers of strata schemes and subsequent owners; and

(4) The statutory dispute resolution mechanisms provided for by strata legislation and their general law alternatives.

Owners Corporations and legal personality

12 I will begin with one of the more fundamental issues, namely the nature of the owners corporation. The basics will be familiar to this

audience: an owners corporation is an artificial legal person, created by s 8 of the *Management Act*, and constituted by the lot owners from time to time of a strata scheme. Although created by and generally regulated by the *Management Act*, the relationships created by that Act are apt to give rise to rights and duties of and in relation to owners corporations which may be overlaid by general law principles. It is by now well-established that the owners corporation holds common property on behalf of the lot owners as a trustee[1] and that the interest of a lot owner in the common property is thus in the nature of an equitable interest as a tenant in common with other lot owners.[2] But these general principles can only take us so far.

13 In *Trentelman v The Owners – Strata Plan No 76700*[3] a proprietary estoppel was asserted by the Owners Corporation against a lot owner in relation to representations made to the other lot owners in general meeting. The appellant lot owner sought to resist the asserted estoppel on the basis of a distinction sought to be drawn between the lot owners generally and the Owners Corporation with its own separate legal personality. The resolution of the appeal thus required consideration of the nature of the Owners Corporation and of the rights held by it.

14 The strata scheme in question, a property on the far north coast of New South Wales, just inland from Cabarita Beach, was purchased in its entirety by Ms Trentelman and her husband in 2009. At that

[1] *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.
[2] *McElwaine v The Owners Strata Plan 75975* [2017] NSWCA 239; *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* [2018] NSWCA 288; *Community Association DP270447 v ATB Morton Pty Ltd* [2019] NSWCA 83).
[3] [2021] NSWCA 242.

time an easement existed in favour of lots 9 to 48 for the use of a swimming pool on lot 7, which was otherwise vacant. From 2010 Ms Trentelman and her husband began selling off individual lots. In 2014, wanting to free certain lots from the strata scheme for development and resale, and to construct a number of townhouses on lot 7, the Trentelmans put special resolutions to that effect to the Owners Corporation at its AGM. Documents outlining the proposal and an oral presentation by Mr Trentelman indicated that lot owners and occupiers would be given and enjoy a continuing right to use the pool on lot 7. Those representations were not particularly detailed, with the primary judge finding Mr Trentelman's oral representation at the meeting to have been words to the effect of "We will give you continued use of the pool".

15 The resolutions put forward by the Trentlemans were passed unanimously and the proposals implemented, but in 2017, when the original easement for the use of the pool expired, the Trentelmans, who continued to own Lot 7, began to exclude all but a few lot owners from the pool area. In practical terms, this was highly unfavourable for lot owners, many of whom rented out their apartments in the development for holiday letting. Access to the pool was an important benefit and attraction for holiday letting.

16 The Owners Corporation successfully sought an order, on the basis of a proprietary estoppel, resulting in an order, that Ms Trentelman grant an easement in favour of the Owners Corporation for use of the swimming pool.

17 On appeal, most of the findings of primary fact went unchallenged. Instead, the asserted proprietary estoppel was challenged on the basis that the proposal put forward by the Trentelmans at the AGM was inchoate.

18 It was further contended that it could not be said (i) that the promised interest was to be granted *to the Owners Corporation*, as opposed to the lot holders individually, noting that the Owners Corporation was the plaintiff and not the individual lot owners, (ii) that representations were made to the Owners Corporation, as opposed to the lot holders individually, or (iii) that any relevant acts of reliance had to be those of the Owners Corporation as opposed to the lot holders individually. As I have said, these submissions were advanced in circumstances where the lot holders individually were not parties to the litigation, and only a small number had been called to give evidence of why they voted for the proposal.

19 As a proprietary estoppel can arise even where the precise form of the interest to be granted is not identified,[4] it was sufficient that the recipients of the representations reasonably understood the representation to be to the effect that their Owners Corporation would receive an interest in the pool for the benefit of owners of occupiers.[5] As to the identity of the recipients of the representations and the person or persons having detrimentally relied on them, Leeming JA made a number of important observations.[6]

[4] Bathurst CJ at [147].
[5] Ibid at [148].
[6] Leeming JA at [173] – [180].

20 First, his Honour noted that the Owners Corporation is an artificial person created by the strata legislation, and that the distinction between property owned by the owners corporation as agent for the lot holders and property held by lot holders directly is a fine one.[7] With that in mind, there was a degree of artificiality in submissions seizing upon the supposed need to join the lot holders to the action individually in order to enforce and vindicate a right, and a similar degree of artificiality in submissions seeking to distinguish between representations made to the lot holders in their personal capacity as opposed to representations being made to them in their constitutive capacity as an organ of the owners corporation.[8]

21 In response to those submissions, Leeming JA emphasised the rather basic, perhaps elementary, but cardinal proposition that:

> "Corporations act through agents. A representation made to a corporation is made to one or more natural persons whose understanding of the representation is imputed to the corporation. If a corporation relies on a representation, it is because one or more natural persons rely on it and their reliance is treated as that of the corporation."[9]

22 There is no universal rule as to when an act or state of mind of a natural person is to be treated as that of a corporation; rather, in every case the starting point must be to consider why it is necessary to impute the relevant act or state of mind to the corporation. In this case, the purpose of the inquiry was the proprietary estoppel asserted by the Owners Corporation against Ms Trentelman. The

[7] Ibid at [173].
[8] Ibid at [176]-[177].
[9] Ibid at [178].

regard in equity for substance over form spoke strongly against accepting the fine distinctions sought to be drawn on her behalf.

23 The case is, I would suggest, a very important one which will repay close study by practitioners in this area. Indeed, I would describe it as essential reading.

24 Leeming JA noted that:

> "… What is required is an analysis of the relationship between owners corporation, lot owners and common property in the particular context in which the issue arises. The three matters identified above arising from Ms Trentelman's submissions concern the procedural law as to necessary parties, and the elements of proprietary estoppel concerning the certainty of representations and establishing reliance upon them."[10]

25 Considering the particular issue before the Court in *Trentelman*, his Honour noted that any difficulties asserted by the appellant could in any case have been cured by operation of s 254 of the *Management Act*, which provides that an owners corporation may represent owners in proceedings in relation to common property. Importantly, the phrase 'in relation to common property' in that provision was not to be narrowly construed so as to exclude the proprietary estoppel asserted in *Trentelman*, as the provision serves a beneficial purpose of providing a straightforward way of prosecuting litigation affecting common property and therefore, indirectly, all lot owners.[11]

26 On a separate note, it is perhaps surprising that the case for the Owners Corporation was not advanced on the basis of a breach of

[10] Ibid at [195].
[11] Ibid at [202].

s 20 the Australian Consumer Law namely for or in respect of unconscionable conduct in trade or commerce. Given the apparent commercial nature of the Trentelmans' development project, to formulate a claim by the Owners Corporation in this way may well have avoided some of the procedural complications arising from a proprietary estoppel claim.

27 Perhaps the key point in *Trentelman* is that, when assessing the nature of the owners corporation as a legal person, it is essential to bear in mind the precise context in which the question arises, and to look to the substance of the relationship between the owners corporation, the lot owners and the common property.

28 One example of the application of this approach, can be seen in the dismissal of an application for security for costs against an Owners Corporation in *Strata Plan 94417 trading as The Owners-Strata Plan 94417 v TC Build*.[12] In that case an Owners Corporation had brought proceedings against the builder and developer of the strata development in relation to defects in the common property, and the defendants had sought security for costs (estimated in an amount exceeding one million dollars) on the basis that the Owners Corporation had net assets of a little under $18,000. The issue was resolved by reference to straightforward facts about the relationship between the Owners Corporation and the lot owners, Ball J said:

> "[7] … in substance, these proceedings are brought for the benefit of lot owners who ultimately must bear the costs of the proceedings, including any costs orders made against the Owners Corporation. There is no evidence before the Court that the individual lot owners would not

[12] [2021] NSWSC 1284.

ultimately pay any special levy raised to meet any costs order against the Owners Corporation. …

[8] The true position, therefore, is that, not unsurprisingly, the Owners Corporation does not have cash on hand to meet any costs ordered against it. However, it has not only the ability but the obligation to raise that cash from unitholders if an adverse costs order is made against it. At most, all that can be said on the evidence is that it may take some time for the Owners Corporation to raise funds to meet any costs order against it. The question is whether that provides a sufficient basis for an order for security for costs. In my opinion, it does not."

29 Thus in practice many questions concerning the rights and duties of owners corporations may be resolved not by reference to legal categories of agency or trust, but by reference to specific practical elements of the relationship between the owners corporation, lot owners and the common property as set out in the *Management Act*.

The by-law making power

30 The by-law making power of owners corporations is perhaps the greatest source of controversy within strata law, raising difficult issues as to the extent to which a majority, or special majority, of lot owners should be able to interfere in the property rights, or indeed personal rights, of other lot owners.

31 The by-law making power represents a special kind of private legislative power that is unusual in its simultaneously public aspect: not only are by-laws capable of affecting rights – real property rights – of a particularly fundamental nature, but by-laws made by present owners will also bind future owners within a strata scheme. Thus the impact of by-laws must be considered in a broader context than

simply the desires of a particular community to manage its own affairs. As Associate Professor Sherry has noted, the scope of the by-law making power raises a question as to the proper extent of freedom of contract in relation to real property, and the history of and rationale behind restrictions on that freedom, as well as the fundamental nature of the rights in question, should be borne in mind.[13]

32 The by-law making power also represents an area of strata law currently undergoing significant development, especially in light of the still relatively recent introduction, in the 2015 *Management Act*, of the prohibition in s 139(1) on by-laws that are "harsh, unconscionable or oppressive".

33 Before I turn to the most recent Court of Appeal decision concerning the by-law making power under the current legislation – *Cooper v The Owners – Strata Plan No 58068*[14] ("**Cooper**") – it is worth taking a moment to note the approach taken to the power under the former legislation, the *Strata Schemes Management Act 1996* (NSW).

34 *White v Betalli*[15] concerned a by-law giving to one lot holder a right to use an area within the lot of another owner, in this case to store small vessels. It may be noted that the by-law was enacted by a developer before the sale of the lots. The primary judge upheld the validity of the by-law in the following terms:

> "[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

[13] Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (2016, Routledge).
[14] [2020] NSWCA 250.
[15] [2007] NSWCA 243.

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. …

[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."

35 That reasoning was adopted by the majority in *White v Betalli* but rejected by McColl JA in dissent, who noted that the power of a developer or an owners corporation to make by-laws is the same, and that upholding the validity of the by-law in question would "conflict 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". Campbell JA however, agreeing with Santow JA, had a very different take on the power, which could best be summarised in the following passage:

"[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."

36 On the facts of that case, neither Campbell JA nor Santow JA saw any limitation on the by-law making power, arising from the statute itself or the general law, that would have prevented the by-law in question.

37 That reasoning of Campbell and Santow JJA was adopted by the Court of Appeal in *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* ("**Casuarina Rec Club**").[16] In that case the impugned by-law purported to allow the Owners Corporation to enter into a long-term contract for use of a nearby gym by residents of the strata scheme. The developer of the scheme, as initial owner of all the lots, caused the Owners Corporation to enter into such a contract, and subsequent owners later contended that the by-law in question was beyond power. The essence of the reasoning of Young JA, with whom Macfarlan JA and Handley AJA agreed in upholding the validity of the by-law, is reflected in the following two propositions:

> "[89] … The power to make by-laws is to be liberally interpreted subject to the doctrine of fraud on the power and with the proviso that an unreasonable by-law will be held to be invalid.
>
> [90] Furthermore, if an original by-law is to be declared invalid, a very strong case must be made out as people make their purchases on the basis of the original by-laws as filed."

[16] [2011] NSWCA 159

38 These cases represent something of a high water mark in the liberal interpretation of the by-law making power under the 1996 strata legislation. As evidenced by the more recent decision of the Court in *Cooper*, recent changes brought about by the 2015 *Management Act* have had significant implications in respect of the scope of the by-law making power. The significance of the Court's decision in *Cooper* is that it identified limitations on the scope of the by-law making power of the kind alluded to by Campbell JA in *White v Betalli* above.

39 The facts of *Cooper* will no doubt be familiar to many – the case is sometimes referred to by law students as "the Schnauzer case". The appellants, residents in the Horizon building in Darlinghurst, had kept a miniature Schnauzer in their apartment in contravention of a by-law prohibiting an owner or occupier of a lot, from keeping any animal on a lot or on the common property. The Schnauzer's owners successfully applied to NCAT for a declaration that the by-law was invalid, but that declaration was overturned on an appeal by the Owners Corporation to the Appeal Panel. The matter then came before the Court of Appeal as an appeal on a question of law.

40 The reasons of Basten JA, with whom Macfarlan JA and Fagan J agreed, began with an observation as to the nature of the rights held by lot owners in a strata scheme – namely an estate in fee simple in the lot. From this, two propositions were said to flow:

> "[9] First, because the lot owner holds a freehold estate in a stratum, the rights and obligations are those attaching to a well-known form of real property. Secondly, the fundamental principle of indefeasibility of title to real property under the Torrens system has significance in

> identifying the attributes of a particular title, including the constraints imposed by by-laws."

41 Thus the starting point for a consideration of the scope of the by-law making power is that the rights of lot owners are of a fundamental kind (real property rights) and have a public aspect (such that by-laws are not subject to the ordinary rules for the construction of contracts *inter partes*). These features informed the Court's approach both to the constraints implicit in the s 136(1) by-law making power, and to the s 139(1) prohibition on harsh, unconscionable and oppressive by-laws.

42 In relation to the former, Basten JA noted that the parties' attention seemed to have focused on the constraint under s 139(1) because of an assumption that the language of s 136(1), conferring the power to make by-laws, was unconstrained. This assumption may well have arisen from a particularly liberal approach to the scope of the by-law making power under the 1996 legislation, as evidenced in the cases discussed above. However, like any statutory conferral of power, the by-law making power can only be exercised for the purposes for which it was created, notwithstanding the statutory provision that by-laws will bind the owners corporation and lot owners as if in a deed involving mutual covenants.[17] Specifically, "a by-law which restricts the lawful use of each lot, but on a basis which lacks a rational connection with the enjoyment of other lots and the common property, is beyond the power to make by-laws conferred by s 136".[18] At [64], Basten JA dealt specifically with Young JA's comments in *Casuarina Rec Club*, noting that when the power in

[17] Basten JA at [56]-[58].
[18] Ibid at [61]-[63].

question is construed properly, by reference to the specific purposes for which it is created, it becomes difficult to see what such a "liberal interpretation" could amount to.

43 In relation to s 139(1), it was held that the meaning of "harsh, unconscionable or oppressive" is to be understood in the context of the statute as a whole ([25]). This involves consideration of the nature of the rights held by lot owners and the purposes for which the Owners Corporation is to exercise its powers. Importantly, it is also to be understood in the context of the public aspect of property rights mentioned above. This has the consequence that the words are not to be taken to refer to the effect of a by-law on a particular lot owner, taking into account the state of their knowledge of the existence of the by-law, but to the character of a by-law itself. Thus in applying s 139(1) there was no room for any presumption of the kind stated by Young JA in *Casuarina Rec Club* that "if an original by-law is to be declared invalid, a very strong case must be made out as people make their purchases on the basis of the original by-laws as filed".

44 Basten JA further noted that "democratic governance principles" are not a useful guide to the application of s 139(1), as the *Management Act*, by ss 136 and 139, is designed to protect minorities from oppression by a "majoritarian dictatorship" ([48]).

45 Fagan J highlighted that the by-law in question was oppressive because it prohibited an aspect of the use of lots in the strata plan that is an ordinary incident of the ownership of real property, namely, keeping a pet animal, without any material benefit to other occupiers

in the use or enjoyment of their own lots or the common property.[19] Macfarlan JA concluded that:

> "[78] For a by-law to restrict a lot owner in the enjoyment or exercise of his or her rights incident to ownership would in my view be "harsh, unconscionable or oppressive" at least where the restriction could not on any rational view enhance or be needed to preserve the other lot owners' enjoyment of their lots and the scheme common property."

46 For all members of the Court, any interference with the ordinary incidents of property ownership had to be justified, and justified by more substantive reasons than the mere administrative convenience that might result from a blanket ban on animals as opposed dealing with the issue on a case-by-case and nuanced basis. This position is a far cry from that of the primary judge in *White v Betalli*, accepted in 2007 by a majority of the Court of Appeal, that "by-laws frequently interfere with the rights of property of an owner of a lot" and that "no question of […] injustice arises" in relation to original by-laws of which a purchaser of a lot had notice.

47 Elisabeth Peden SC and Wayne Muddle SC, in a recent book that will no doubt be of great practical value to anyone seeking to navigate the new legislative scheme introduced by the 2015 *Management Act* and *Development Act*, have expressed concern that *Cooper* may result in owners corporations spending significant amounts of owners' money on litigation in the Tribunal disputing the niceties of a particular animal and its potential impact on other lot owners in the particular circumstances of a given strata scheme.[20]

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[19] Fagan J at [88].
[20] Elisabeth Peden and Wayne Muddle, *Strata Law in New South Wales* (2021, Lawbook Co) at 27.

Anecdotally it would appear that a number of owners corporations, in response to the decision, have introduced by-laws imposing "application fees" or "pet bonds" for owners seeking to keep animals. It remains to be seen which, if any, of these initiatives may fall foul of the s 139(1) prohibition, but certainly a good working understanding of the Court's reasoning in *Cooper* will prove essential for anyone practising in this area.

Issues with developers

48 A significant feature of the facts in *Casuarina Rec Club*, was that the by-law empowering the Owners Corporation to enter into an onerous "Facilities Agreement" was drafted and enacted, in effect, by the developer of the strata scheme, and the agreement was entered into by the Owners Corporation under the developer's control. A much more common situation, and one specifically addressed by strata legislation, involves the sale by developers of management rights, in the form of caretaker agreements, for sometimes significant profits. The difficulties presented by developers causing owners corporations to enter into long-term agreements that will be paid for by levies on subsequent owners are obvious. They recently came before the Court of Appeal in *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111*[21] ("**ACPM**").

49 The Owners Corporation in *ACPM* had entered into a caretaker agreement with Australia City Properties Management Pty Ltd in 2001, shortly before the commencement in 2003 of amendments to

[21] [2021] NSWCA 162.

the *Strata Schemes Management Act 1996* (NSW)[22] limiting new caretaker agreements to a term, including options to renew, of 10 years. However, those amendments included transitional provisions excepting from the 10 year limit any agreements already in force. The agreement entered into in 2001 was for a term of ten years with options to renew extending until 2026; 2010 and 2015 deeds of variation added further options that, if exercised, would have extended until 2041.

50 The Owners Corporation purported to terminate the caretaker agreement for gross misconduct and negligence in relation to failure to pay for electricity in a lot owned and occupied by the caretaker and to failure to report certain fire safety concerns. The Court of Appeal held that the electricity breach amounted to gross misconduct, in circumstances where the caretaker had mislead the Owners Corporation on the issue, but that the Owners Corporation had nonetheless repudiated the agreement by purporting to terminate otherwise than in accordance with the procedure set out in the agreement. Thus the caretaker, who under the agreement would have been entitled, upon termination in accordance with the contractual procedure, to sell the remaining management rights under the agreement, was entitled to loss of bargain damages. A question therefore arose, for the purpose of quantifying those damages, as to how long the agreement had left to run.

51 The caretaker submitted that the deeds of variation did not materially alter the agreement, such that the agreement in force was the same agreement in force prior to the 2003 amendments and

[22] *Strata Schemes Management Amendment Act 2002* (NSW)

thus not subject to the 10 year limit. The Court considered that the determination of the issues depended on the proper construction of the 2003 amendments, including the transitional provisions. The purpose of those amendments, as revealed by the Second Reading Speech, was:

> "[331]… to limit the extent that lot owners in a strata scheme could be bound by a long-term contract entered into between the developer and Caretaker providing lucrative returns to the Caretaker, the sale of which conferred a significant financial benefit on the developer.
>
> [332] The purpose of the exception in the transitional provisions was to protect caretakers who had already entered into such agreements, and not retrospectively deprive them of rights which they had acquired sometimes for substantial payment. …"

52 The construction contended for by the caretaker, to the effect that the agreement as varied by the subsequent deeds fell within the scope of the transitional provisions, was contrary to the purpose of those provisions, which was to provide a limited exception to legislation designed to protect owners corporations from the consequences of long-term caretaker agreements. Thus the options in the caretaker agreement as varied by the 2015 deed would only have extended until 2025, rather than, as contended by the caretaker, 2041.

Statutory dispute resolution mechanisms

53 I note finally two recent cases dealing with the dispute resolution mechanisms within the strata legislation and their impact on the availability of damages for lot owners.

54 In *McElwaine v The Owners - Strata Plan 75975*[23] ("**McElwaine**") a lot owner brought common law actions in nuisance against the Owners Corporation for failure to repair waterproofing defects in the common property that had resulted in water damage to his unit. The primary judge took the view that the lot owner did not have a right in relation to his unit or the common property arising separately from the 1996 legislation, and was thus confined to the remedies contained in Chapter 5 of that Act (for breaches of various statutory duties), which notably did not include an award of damages. Moreover, the primary judge found that the legislative intention behind the *Management Act* was that disputes, whether or not they involved a common law right, were to be dealt with in the adjudication system in Ch 5.

55 The Court of Appeal held that the 1996 Act did not exclude the common law duties and rights of owners corporations and lot owners, and did not preclude common law rights and remedies. The fact that the Court in *The Owners Strata Plan 50276 v Thoo*[24] had held that damages could not be awarded for breach of a duty under the 1996 Act did not suggest that the Act excluded all other rights or remedies. Ultimately the Court of Appeal found nothing to indicate a legislative intention to affect a lot owner's common law right to sue the owners corporation in relation to its management of the common property, and indeed that this right was expressly preserved by s 226.

[23] [2017] NSWCA 239.
[24] [2013] NSWCA 270.

56 More recently, in *Vickery v The Owners – Strata Plan No 80412*[25] the Court of Appeal faced similar questions in relation to the 2015 *Management Act*. In that case the Court held that s 232 of the 2015 Act, which provides that NCAT may "make an order to settle a complaint or dispute", not only allows for the ordering of damages by the Tribunal in disputes concerning breaches of an owners corporation's duties under the Act, but may also give the Tribunal jurisdiction to hear and determine, and order damages in, common law claims similar to that in *McElwaine*.[26]

Conclusion

57 These are only a few of the strata cases that have come before the Court of Appeal in recent years, but they are illustrative of the breadth of issues that arise. One theme common to the various authorities discussed above is a concern to protect, to the extent compatible with ownership of common property under strata legislation, the ordinary incidents of property ownership for those who choose to live in strata schemes.

58 Thus in *Trentelman* the proprietary right asserted by the Owners Corporation in its estoppel claim was not defeated by nice distinctions between the artificial personage of the Owners Corporation and the individual lot holders. In *Cooper* the ability of the Owners Corporation to interfere with property rights of individual lot holders was significantly constrained, while *ACPM* saw the application of a legislative initiative limiting the extent to which

[25] [2020] NSWCA 284.
[26] See esp. at [165].

positive obligations can be imposed on owners corporations and through them lot holders.

59 This particular area of law is one of great practical importance in our community. It is pleasing that, in the Australian College of Strata Lawyers, we have an association of highly skilled lawyers dedicated to continuing legal education and excellence in the practice of this most important area of law.

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