

Television Education Network

Property Law Conference

Royal Pines Golf Resort, Queensland

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STRUCTURING MIXED USE AND COMPLEX DEVELOPMENT

1. The topic I have been asked to address is the legal structures adopted in relation to mixed use retail, commercial and residential developments, including the structuring of titles through initial and further subdivisions; and the key terms in the managements agreements for each element of the development.

LEGAL STRUCTURES

2. The types of title available in mixed use developments are one more or all of the following:
 - (i) freehold;
 - (ii) leasehold;
 - (iii) strata title (freehold and leasehold); and
 - (iv) company title.

Licence

3. I have not included a licence within the compass of “title” as it provides no propriety rights.

4. *Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor* [2007] NSWCA 176
5. “23 In essential respects, the Café contract was no different from that considered in *Radaich v Smith* [1959] HCA 45; (1959) 101 CLR 209. In that case, the appellant and the respondents were parties to a deed whereby the respondents, as licensors, granted to the appellant, as licensee, for a term of five years “the sole and exclusive licence and privilege to supply refreshments to the public admitted to premises situated at ... Mosman and to carry on the business of a milk bar therein ...” (at 215 to 216 per Taylor J). The deed, according to Taylor J (at 216) consistently avoided the use of the expressions “lease”, “lessors”, and “lessee” and carefully used the words “licence”, “licensors”, and “licensee”.

24 The deed did not provide expressly that the appellant would have exclusive possession of the premises. The High Court, however, had no difficulty in finding that it was implicit that the deed, in fact, conferred the right to exclusive possession on the appellant. The crucial factor was that the deed contemplated that the appellant would carry on the business of a milk bar and café upon the premises for a fixed term and this required her to have exclusive possession of the premises.

25 Taylor J said (at 217):

“I have no doubt that the substance and effect of the instrument in question here was to grant to the appellant a right to the exclusive possession of the subject premises upon the specified conditions for the prescribed term. The deed obviously contemplated that the appellant should have the right to occupy the premises for the purposes of her business and the business was to be carried on upon the premises at all times when they might lawfully be kept open. The character of the business was such that it could only be effectively carried on if the appellant had exclusive occupation and it seems clear that, even at times when they could not lawfully be kept open for the purposes of the business, the premises were to remain under her effective control. That being so it is inevitable that we should hold that the instrument created a leasehold interest and that at the material time the relationship of lessor and lessee existed between the parties.”

Menzies J expressed like views. His Honour said (at 221):

“These obligations to occupy a shop, to carry on a business there that needs plant and stock, and to give up possession at the end of the term, taken together, seem to me to require the conclusion that the occupier has, during the term, the right of exclusive possession.”

Windeyer J said (at 224 to 225):

“I imagine all concerned would have been astounded if they had been told that the appellant had no right to exclude persons from her shop; that the respondent might, if he wished, license other people to carry on any activity there other than the sale of refreshments, provided their presence did not prevent her selling refreshments or

conducting the milk bar ...”

26 As the deed impliedly conferred exclusive possession of the premises for a fixed term on the appellants, it was an agreement for a lease and created a leasehold interest, and not a licence.

27 The Café contract similarly gave the respondents the right to operate the café that was to be situated in the delineated area in the Penrith Whitewater Stadium. It provided that they would be secured in conducting the operation for a period of five years with an option to extend for a further five years and they would pay “rent” for the occupation of the area. Adopting the approach applied by each member of the High Court in *Radaich v Smith*, it is implicit that the Café contract conferred on the respondents exclusive possession of the café premises for the agreed term. That being so, the Café contract was an agreement to provide a lease and not a licence.”

Projects sold off the plan

6. In *Sheppard v Ryde Corporation [1952] HCA 9; (1952) 85 CLR 1* the High Court considered the effect of a contract for the sale of land by reference to a project identified in a plan. The joint judgment of four of the Judges stated at 12-13:

“The plan records in diagrammatic form the features of the project of which the subdivision into lots is only a part. When a prospective purchaser was invited to buy a lot with a home erected upon it, it was upon the footing of the project, the existence and effectiveness of which was, as it appears to us, an assumption from which the transaction was intended to proceed. The allocation of an individual lot to the purchaser, his acceptance of the allocation and the execution of a contract for the purchase of that lot necessarily supposed the prior formulation of Housing Project No 4 as the foundation of the transaction. Unless the main features of the project were fixed, it would be meaningless. It is, we think, a reasonable construction of the Council’s action in putting forward the project as the basis upon which the intending purchaser could proceed, if it is treated as amounting to or involving an undertaking or promise by the Council to him that they would adhere to and maintain the project, if he would become a purchaser of a lot ...”.

The joint judgment continued at 17-18:

“But the cardinal question is the meaning and effect of the description, in the contract, of the allotment of land sold as part of the vendor’s Housing Project No 4 and being allotment No 85 ... The reference to the project makes it both legitimate and necessary to resort to evidence to ascertain what is the project and what are its constituent parts or features ... The evidence before us as to the nature and identity of Ryde Council Housing Scheme No 4 is restricted to the plan ... once the plan is scrutinized, enough appears to show that the project is a planned development of a housing area according to an entire design with parks reserved as an

amenity for the common advantage of the purchasers. For the protection of the purchasers against the destruction of the amenities or diversion of the advantages nothing will suffice short of an obligation to use the land only as parks ..”.

7. In *Tarval Pty Ltd v Stevens* (1990) NSW ConvR 55-552 the NSWCA applied the decision in *Shepperd v Ryde Corporation* to a contract for the sale off the plan of a strata unit in a building described in the contract as an apartment building, a flat building, and a home unit building of 68 home units on 18 residential levels.

Company title

8. Prior to the enactment of the Strata Titles legislation, blocks of flats or residential units were developed under the corporations law prevailing from time to time, eg the *Companies (NSW) Code*. In this type of development, exclusive right to occupy a particular unit is attached to the ownership of a particular share or group of shares in the company. In some cases units are occupied as the shareholder's principal place of residence, while in other cases units are occupied by lessees.
9. In *Wilson & Anor v Meudon P/L* [2005] NSWCA 448, Bryson JA said:

“17 When Company Title Home Units were relatively new various reasons were expressed for doubting the effectiveness of the scheme. ... The effectiveness of creation of contractual rights of occupation by Articles of a company has come to be accepted...

18 After decades of experience some generalisations about Company Title Home Units can now be ventured. One is that Articles of Association like Article 6 of Meudon Pty Ltd create contractual licences, not leases: ... Another should, in my opinion, be that the shares related to each Home Unit are a class of shares, and that rights under them are entrenched against alterations unless the holders of those shares participate. ... Generalisations are no more than they are, and the Constitution of each Home Unit company must be considered separately.”

...

’68 A grant of a right, including a contractual right, of use and occupation carries with it a right to be free from substantial interference with use and occupation..”

10. Thus, mixed use development could, in theory, be undertaken by company title where different classes of shares provide licences to use different areas for different uses.

11. One advantage of company title is the absence of stamp duty applicable on the sale of real property (although tax on share sales is levied); one disadvantage that the security it offers is generally unfamiliar to bankers and thus finance is not easy.

Company title used to sail around LEP's?

12. *1643 Pittwater Road Pty Ltd v Pittwater Council 11 Elvina Avenue Pty Ltd v Pittwater Council Doering v Pittwater Council 1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685.
13. Due to of a concern that dual occupancy developments were too numerous, Pittwater Council decided in 1996 to amend its LEP to prohibit subdivision of dual occupancy development. This was intended to make dual occupancy a less desirable form of development. The Plan was gazetted in February 1996 as Pittwater LEP 1993 (Amendment No 1) and inserted cl 21F. That clause is in the following terms:

"(1) On and after the day on which *Pittwater Local Environmental Plan 1993 (Amendment No 11)* commences, consent must not be granted for a subdivision which creates separate allotments for each of the two dwellings resulting from dual occupancy development carried out in accordance with this Division.

(2) The separate occupation of the proposed lots illustrated by a proposed strata plan relating to the two dwellings resulting from any such dual occupancy development is prohibited. ..."

"23 Following the amendment, without the capacity to provide separate title for each dwelling, there was a significant decline in the number of dual occupancies approved annually in Pittwater.

24 However, from 1998 the Council became aware that company title schemes were being promoted for dual occupancies as a way of giving rights of exclusive occupation to the separate dwellings and thereby enhancing the attractiveness of dual occupancy in the market place. After consideration of the matter and following two decisions of this Court, *Masterton Homes Pty Ltd v Pittwater Council* (2003) 124 LGERA 216, and *Monnock v Pittwater Council* (2003) 127 LGERA 66, to which I shall return, the Council resolved to amend the LEP to deal with company title arrangements. The amendment has not yet been accepted by the Director and has not been made"

14. In the *Masterton* case, there were two questions—
- (i) whether an arrangement providing for the separate use of different parts of building or land colloquially known as "*a company title*" or "*home unit company*" arrangement relevantly falls within the scope of the definition of "*subdivision*" as adopted and applied by the LEP generally and by **cl 21F** in particular; and

(ii) whether the requirements of **Condition D8** for the creation of a restriction on user or a restrictive covenant exceeds the bounds of what may properly be created and registered pursuant to s 88E of the *Conveyancing Act 1919*.

15. The Applicant in *Masterton* intended that the ownership certain lots, when developed by an attached dual-occupancy development, would be vested in a company which would issue shares conferring upon each shareholder the right to exclusive use and occupation of each of the dwellings erected on each lot in the form of attached dual-occupancy development. This was regarded as constituting “*company title*” or “*home unit company*” arrangement

”23. In my opinion, the intended “” arrangement relevantly falls within the scope of the statutory definition of “*subdivision*” applicable to the operation of the LEP and in particular of **cl 21F**.

24. This is because the “*company title*” arrangement will relevantly render the dual-occupancy development “*obviously adapted for separate.....disposition*” within the meaning of the statutory definition.”

Further research:

Greg Young v Parramatta City Council [2006] NSWLEC 116;

Southern Highlands Lifestyle Properties Pty Limited v Wingecarribee Shire Council [2006] NSWLEC 46.

Sub division of land

16. The particular approach of Councils to subdivision is set out in their LEP’s. These generally have maps showing zones, and allowing varying degrees of development in zones, generally allowing greater density the closer one gets to the town centre.
17. LEP’s generally have clauses addressing the relevant Council’s attitude to sub division, eg the Liverpool City Council LEP, being a Council in a Sydney Growth Area.
18. The term “subdivision” is defined by the *Environmental Planning and Assessment Act 1979* (EP&A Act), s 4B.

“4B. Subdivision of land

(1) For the purposes of this Act, "subdivision of land" means the division of land into two or more parts that, after the division, would be obviously adapted for separate occupation, use or disposition. The division may (but need not) be effected:

(a) by conveyance, transfer or partition, or

(b) by any agreement, dealing, plan or instrument rendering different parts of the land available for separate occupation, use or disposition.

(2) Without limiting subsection (1), "subdivision of land" includes the procuring of the registration in the office of the Registrar-General of:

(a) a plan of subdivision within the meaning of section 195 of the Conveyancing Act 1919, or

(b) a strata plan or a strata plan of subdivision within the meaning of the Strata Schemes (Freehold Development) Act 1973 or the Strata Schemes (Leasehold Development) Act 1986.

(3) However, "subdivision of land" does not include..."

19. The *Strata Schemes (Leasehold Development) Act 1986*:

The legislative Note provides:

“The purpose of this Act is to allow land to be subdivided by means of a strata scheme in cases where the owner of the land does not wish, or is not able, to part with ownership of the land. Under a leasehold strata scheme, the owner of the land that is the subject of the scheme retains an estate in fee simple in the land. The purchaser of each lot that is created under the subdivision obtains a leasehold interest, rather than a freehold interest, in the lot. The scheme of subdivision provided for by this Act is an alternative to that provided for by the *Strata Schemes (Freehold Development) Act 1973*, but many of the provisions governing the two types of schemes are the same.”

20. The *Strata Schemes (Freehold Development) Act* 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.

21. The Register is defined in s3(1)(a) of the *Real Property Act* as “the Register required to be maintained by s31B(1)”.

22. 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.”

23. The *Strata Schemes (Freehold Development) Act 1973* Section 5 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.”

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.”

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.”

It defines “*common property*” as meaning:

“... so much of a parcel as from time to time is not comprised in any lot.”

Ie, 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.

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.”

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.

Further sub division

Strata Scheme (Freehold) Development Act

Div 2A

28A Explanation of staged development

- (1) The purpose of this Division is to facilitate the development in stages of a parcel that is subject to a strata scheme (whether or not the parcel is developed together with development of non-strata land adjoining or adjacent to the parcel).
- (2) The development of the parcel contemplated consists of:

- the progressive improvement of the parcel by the construction of buildings or the carrying out of works (or both) on a lot or lots reserved for future development ("development lots"), and
- the subsequent subdivision under this Act of each development lot and the consequential adjustment of unit entitlements within the scheme.

(3) Development lots may be situated wholly or partly above, below or alongside the building to which the strata scheme initially relates, but must be identified as such in the strata plan for the scheme when that plan is registered.

(4) The staged development of a parcel will be carried out subject to a strata development contract that describes separately:

- (a) any proposed development that the developer for the development lot concerned warrants will be carried out and may be compelled to carry out ("warranted development"), and
- (b) any other proposed development that the developer will be authorised but cannot be compelled to carry out ("authorised proposals").

Warranted development and authorised proposals are referred to as "permitted development" because the body corporate for the strata scheme and other persons having estates or interests in lots included in the parcel must allow it to be carried out in accordance with the contract.

(5) This Division is not intended to prevent the development of a parcel otherwise than in accordance with this Division.

28B Obligations of consent authorities

(1) A consent authority must not, at the same time, grant development consent for the subdivision of land by a strata plan and the subsequent subdivision of a lot in that plan by a strata plan of subdivision unless:

- (a) the lot intended to be subdivided is identified in the proposed strata plan as a development lot, and
- (b) the development application is accompanied by a proposed strata development contract.

(2) ...

....”

28C Form and content of strata development contract

(1) A strata development contract and any amendment of such a contract must be in the approved form.

(2) A strata development contract must include a concept plan and a description:

- (a) of the land comprising the parcel, identifying separately the development lot or lots and any non-strata land adjoining or adjacent to the parcel that is proposed to be developed together with the parcel to which it relates, and

- (b) of any land proposed to be added to that parcel at a later time, and
- (c) of so much (if any) of the proposed development as the developer is permitted by the contract to carry out and may be compelled to carry out (identified in the contract as “ warranted development -proposed development subject to a warranty”), and
- (d) of so much (if any) of the proposed development as the developer is permitted by the contract to carry out but cannot, merely because it is described in the contract, be compelled to carry out (identified in the contract as “ authorised proposals -proposed development not subject to a warranty”).

(2A) If a strata development contract relates to development of a parcel together with any non-strata land adjoining or adjacent to the parcel, it must:

- (a) include a description of the non-strata land, and
- (b) indicate that a strata management statement will (unless the requirement for a statement is dispensed with under section 28R) govern both the non-strata land and the parcel, and
- (c) indicate that, if the strata management statement is registered in accordance with Division 2B, a copy of it may be obtained from the Registrar-General.

(3) A strata development contract must include such other documents, particulars and information as may be required by the regulations.

(4) A strata development contract cannot provide for the subdivision of common property without the consent, by special resolution, of the body corporate. “

28D Concept plan

(1) A concept plan must illustrate, in the manner approved by the Registrar-General, the sites proposed for and the nature of the buildings and works that would result from the carrying out of all permitted development under the strata development contract of which the plan forms part.

(2) A concept plan must separately illustrate, in the manner approved by the Registrar-General, the sites proposed for and the nature of such of those buildings and works (if any) as would result from the carrying out of all warranted development.

(3) The Registrar-General may refuse to register an amendment of a strata development contract if it does not include a revised concept plan so that this section will be complied with after the amendment has been registered. “

28 E Variation of liability for common property expenses

28F Signing of strata development contract and amendments

(1) The Registrar-General may register a strata development contract relating to a development lot in a strata plan or an amendment of such a contract only if the contract or amendment has been signed by:

- (a) the developer for the development lot, and
- (b) each registered mortgagee, chargee, covenant chargee and lessee of the development lot, and
- (c) each registered mortgagee and chargee of a lease of the development lot.”

24. *Strata Schemes (Leasehold Development) Act*

Sec 41 Explanation of staged development

(1973 Act, s 28A)

- (1) The purpose of this Division is to facilitate the development of a parcel that is subject to a leasehold strata scheme (whether or not the parcel is developed together with development of non-strata land adjoining or adjacent to the parcel).
- (2) The development of the parcel contemplated consists of:
 - the progressive improvement of the parcel by the construction of buildings or the carrying out of works (or both) on a lot or lots reserved for future development ("development lots"), and
 - the subsequent subdivision under this Act of each development lot and the consequential adjustment of unit entitlements within the scheme.
- (3) Development lots may be situated wholly or partly above, below or alongside the building to which the leasehold strata scheme initially relates, but must be identified as such in the strata plan for the scheme when that plan is registered.
- (4) The staged development of a parcel will be carried out subject to a strata development contract that describes separately:
 - (a) any proposed development that the developer for the development lot concerned warrants will be carried out and may be compelled to carry out ("warranted development"), and
 - (b) any other proposed development that the developer will be authorised but cannot be compelled to carry out ("authorised proposals").

Warranted development and authorised proposals are referred to as "permitted development" because the body corporate for the leasehold strata scheme and other persons having estates or interests in lots included in the parcel must allow it to be carried out in accordance with the contract.

- (5) This Division is not intended to prevent the development of a parcel otherwise than in accordance with this Division.”

25. *White v Betalli* [2007] NSWCA 243. The owners of a waterfront property subdivided it into a 2 lot strata scheme. The rear lot, lot 2, had a right of footway over lot 1 to the water. A special by-law was created upon registration of the strata plan. This entitled the owner of lot 2 to store a small boat on lot 1 adjacent to the footway. The owner of lot 1 sought to prevent the neighbour from using the storage area. Important in the decision at [699] was the fact the owners of lot 1 and lot 2

had purchased their lots with knowledge of the respective rights and obligations under the by-law, created upon registration.

26. The by-law in *Betalli* was found not to be inconsistent with s88B of the *Conveyancing Act 1919* or the *Real Property Act*.
27. By laws can be viewed in two ways “ delegated legislation or a statutory contract. See *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 for the resolution of this issue.
28. Campbell JA in *Bettali* gave a masterly exegesis of the ancient origins of the term “by law” in English law. Here follow certain extracts germane to the topic:

“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’ ...".

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’ ."

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...".

...

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.

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.

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.

29. 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.”

Interrelationship between the EP&A Act , Strata Act and LEP's

30. *Page & Anor v Sutherland Shire Council* [2000] NSWLEC 125

“Conclusions

21. The relationship between the Strata Act and environmental planning instruments under the EP&A Act has been considered in a number of cases. It is convenient to refer to three of them. In *North Sydney Council v Scott Revay and Unn*, Bignold J considered the question of whether the strata subdivision of two dual occupancy developments was governed by clause 11(1) of the North Sydney

Local Environmental Plan 1989, which provided that a person shall not "*subdivide*" land unless the area of "*each allotment*" to be created by the subdivision was of a specified minimum area. Bignold J noted that the expression "*subdivision of land*" is defined in the EP&A Act so as to include "*subdivision effected under Division 1 of Part 2 of the Strata Titles Act 1973*" (as the Strata Act was then called). Bignold J then noted that Cripps J had held in *Fridrich Constructions Pty Limited v Leichhardt Municipal Council* (1983) 50 LGRA 22 that development consent under the EP&A Act would be required for a strata subdivision where the planning instrument adopted the definition of "*development*" contained in the EP&A Act. Bignold J also noted the developer's argument that clause 11(1) of the environmental planning instrument used the term "*allotment*" (rather than term "*lot*") which is foreign to the language of the Strata Titles Act and so manifested a sufficient contrary intention as to displace the application of the definition of "*subdivision*" provided by the Act. In rejecting the argument, Bignold J also noted that although the Strata Titles Act did not employ the term "*allotment*" it did employ the term "*parcel*" which is a comparable or analogous term. His Honour was unable to see within the language of clause 11(1) of the environmental planning instrument any indication to suggest that it was not intended that the defined meaning in the EP&A Act of "*subdivision of land*" was to apply.

22. In *Smith v Wollondilly Council* the applicant had applied for development consent for a strata subdivision of an existing rural holding. Clause 12 of the relevant environmental planning instrument provided that land "*shall not be subdivided unless each separate allotment created thereby will have an area of not less than [a specified area]*". The applicant appealed against the refusal of the council to grant development consent for the strata subdivision of the holding into two strata lots (each of less than the specified area) and common property. Bignold J followed his earlier judgment in *Scott Revay and Unn*, holding that there was nothing to displace the definition of "*the subdivision of land*" in the EP&A Act as including a reference to a subdivision effected under Division 1 of Part 2 of the Strata Titles Act; and further holding that the words "*allotment*" in clause 12 of the environmental planning instrument is to be interpreted as "*an identifiable piece or parcel of land*". In so concluding, Bignold J noted that a strata subdivision effected under Division 1 of Part 2 of the Strata Titles Act is a "*subdivision of land*": vide section 7.

23. The third case is *Phillips v Hunters Hill Council* (Stein J, 12 June 1996, unreported). The application in that case was for a two lot strata subdivision, the council having already agreed to the granting of consent to the erection of a second detached dwelling on the subject land. Sub-clause 10 (1) of the relevant environmental planning instrument provided that the subdivision of land required development consent; and sub-clause 10(2) provided that the council shall not grant consent to the subdivision of land unless each "*allotment*" has a specified minimum area. Stein J noted that the bases of the proposed lots embrace the whole of the surface area of the appeal site as in *Smith v Wollondilly Council*. Stein J then said: "*As with Smith, the subdivision does not extend vertically*". Stein J stated that the question before the court was whether "*an allotment*" referred to in the relevant local environmental plan included a lot as defined in the Strata Titles Act. His

Honour could see no relevant distinction between the instant case and *Smith* and concluded that the proposal, although creating "lots" under the Strata Titles Act, also involved the creation two allotments within the meaning of relevant environmental planning instrument.

24. Mr Craig QC sought to distinguish *Smith* and *Phillips* on the ground that they were subdivisions which created two lots covering the whole surface area of the appeal site and the subdivision in each case did not extend vertically, which is not the present case.

25. It seems to me that there are two answers to this submission. It would mean that sub-clause 25(1) of the LEP in the present case would allow certain types of strata subdivision but not others. It would mean, as Mr Tobias noted, if it was a *Smith* or a *Phillip* type of strata subdivision it would be prohibited, but a horizontal strata subdivision would not be prohibited. I cannot see any purpose behind a clause which would prohibit one kind of strata subdivision and not another. Moreover, if one kind of strata subdivision was prohibited but not a strata subdivision of another kind, then the use of the word "allotment" in sub-clause 25(1) of the LEP loses its significance.

26. The second answer to the submission is that Stein J in *Phillips* appears to be in error in stating that, as with *Smith*, the subdivision did not extend vertically. In *Smith* Bignold J refers (at 443) to the "cubic spaces" comprising the lots. This suggests a subdivision which, contrary to Stein J's assumption, extended both horizontally and vertically. It also seems that Stein J was in error in apparently assuming that the subdivision in *Phillips* did not extend vertically. The proposed subdivision in each case was a division into the strata title "lots". A "lot" is defined in the Strata Act as meaning "one or more cubic spaces forming part of the parcel to which a strata scheme relates..." (section 5). That is to say, the subdivisions with which both Bignold J and Stein J were concerned necessarily include both a horizontal and a vertical division. The long title of the Strata Act states: "An Act to facilitate the subdivision of land into cubic spaces and the disposition of titles thereto..." As noted above, section 7 of the Strata Act enables land (including the whole or part only of the building) to be subdivided into lots or into lots and common property. As I have noted, a "lot" is defined (section 5) as a cubic space, which necessarily involves both vertical and horizontal division.

27. I can see no distinction between the cases of *Scott Revay and Unn*, *Smith* and *Phillips* and the present case. In my opinion sub-clause 25(1) of the LEP applies to the proposed strata in the present case. I am reinforced in this view by the fact that the word "lot" is used elsewhere in the LEP to refer to a parcel of land (clauses 22A, 22B, 22C, 22E and 22F). That is to say, the words "lot" and "allotment" are used loosely and interchangeably in the instrument and not in a narrow or technical sense. I am further reinforced in this view by the definition of "subdivision of land" in the EP&A Act to which I have referred (in paragraph 9 above), which includes a strata plan or a strata plan of subdivision within the meaning of the Strata Act. It follows that the reference in sub-clause of the LEP to "subdivision" includes a reference to a strata subdivision. I am further reinforced in this view by the

presence of sub-section (2) in section 36 of the Strata Act. It would be a nonsense to suggest that if a strata subdivision is prohibited under the EP&A Act then sub-section 36(2) does not apply, but if it is permissible with development consent then the sub-section does apply. The former proposition would entirely contrary to section 37(1)(b) of the Strata Act, noted in paragraph 14. Finally the registration of a plan as a strata plan effects a subdivision (section 7(2), (2A) of the Strata Act).”

MANAGEMENT AGREEMENTS:

31. *Strata Schemes Management Act 1996*

Note to Part 3

"This Part requires an owners corporation for a strata scheme to appoint an executive committee to make decisions for the owners corporation. However, the owners corporation may limit the matters that the executive committee may decide and the Act contains various matters that must be decided by the owners corporation in general meeting.

The executive committee must appoint a chairperson, secretary and treasurer. This Part sets out the functions of those officers.

This Part gives effect to Schedule 3 which contains more detailed provisions about the constitution and procedure of executive committees.

Note to Part 4

This Part allows an owners corporation for a strata scheme to appoint a person who is licensed as a strata managing agent under the *Property, Stock and Business Agents Act 2002* as a strata managing agent for the scheme. An owners corporation may delegate its functions to its strata managing agent. However, an owners corporation may not delegate the making of certain decisions that this Act requires to be made by the owners corporation, such as decisions on the amount of contributions to the administrative and sinking funds to be levied on owners.

32. The first step in considering what terms are permissible in management agreements, is to consider the juristic nature of a body corporate and what things are within its power to legally do ie what is *intra vires* and what is *ultra vires*
33. In *Gillett v Halwood Corporation Limited and Ors* Matter No Ca 40517/95 [1998] NSWSC 431 (26 March 1998) Priestley JA’s general introduction was as follows:

“This is a complicated case. It concerns disputes that have arisen in the management of a large retirement village called Fernbank Retirement Village. The way the case came to court, stated first without legal technicality, was that two residents in the Village (the plaintiffs) claimed that parts of the arrangements they had made when they became residents were void or illegal or both. If their claims

succeeded, the way would be open for several things to happen: a significant reorganisation of the way the Village was managed; a change in the terms upon which residents' units could be sold; and possibly also it would become necessary for a review to be made of past payments made by the Village and its residents for management and services.

To become residents in the Village, each plaintiff bought a strata title unit in it under the Strata Titles Act (STA), and each signed papers by which she agreed with the way the Village was being run. The main things covered were: how services of all the kinds necessary or useful in a retirement village would be provided and paid for; how the cost of running the Village as a whole would be met; how the amounts residents would have to pay would be worked out; who would be eligible to own or otherwise live in units in the Village; and the way in which, and the terms on which, the owner of a unit or the executors or administrators of the owner's will or estate, could transfer the ownership of the unit.

Independent solicitors looked at the various papers connected with the purchases by the plaintiffs of their units, before they signed them, and on the advice of their solicitors they went ahead. Two principal documents among these papers were a Management Agreement between the Body Corporate of the Village and a commercial enterprise, and a Services Agreement which each unit owner signed with the same enterprise.

The Management and Services Agreements were the main targets of the claims made by the plaintiffs in their court proceedings. Rolfe J heard their claims and dismissed them.

Held:

1. The provisions of the Management Agreement required and empowered a company (Management) to perform functions of the Body Corporate;
2. the way in which Management was required and empowered by the provisions of the Management Agreement to perform Body Corporate functions amounted to a delegation within the meaning of s 78(1);
3. the appointment of a managing agent by delegation could only be made by the Body Corporate in general meeting and by instrument in writing;
4. the fixing of the common seal of the Body Corporate to the Management Agreement, on 18 February 1987, was not made by the Body Corporate in general meeting. Therefore, the Body Corporate did not become a party to the Management Agreement.
5. The Body Corporate did not become a party to the Management Agreement by later ratification of it, or by other means;
6. the actions of Management in purporting to perform its functions under the

Management Agreement had the Body Corporate become party to that agreement would not have been lawful because the company was not licensed under the Agents Act;

7. the unenforceability of the Management Agreement against the Body Corporate required that the other ancillary documentation also be treated as unenforceable;

8. two of the three issues arising in the Notice of Contention and cross-claim, estoppel and restitution/unconscionability, have to be left for decision at a further hearing at first instance. The other issue, laches, acquiescence and delay, should not be available to be argued at the further hearing.”

34. In *The Owners of Metro Inn Apartment Strata Plan 11880 v Transmetro Corp Ltd* [2000] WASC 293, (2000) 36 ACSR 42; 24 WAR 1, consideration was given as to whether under the *Strata Titles Act 1985* ("the Act"), a management agreement of a complex involving mixed use (mostly residential units; but also an administration office and a restaurant/ function centre) was *intra vires* (and if so, valid) or *ultra vires* (and thus void).
35. In short, the mortgagee of the residential units had entered into Deed with the Strata Plan that the residential units be used as a hotel; and the Strata Plan duly entered into a Management Agreement with the Defendant to give effect to same.
36. When the management company sought to renew its (presumably lucrative) management contract (it received a basic management fee plus incentive fee), the Strata Plan resisted same *inter alia* on the ground it was *ultra vires*.
37. The thrust of the (unsuccessful) argument for the Strata Plan was that the legislative scheme only empowered the Strata Plan to attend to issues pertaining to *common property*; as opposed to *individual lots*; and the arrangements impugned related to individual lots being managed in a “pool” as part of a hotel operation.
38. The Manager argued it was empowered to contract with the Strata Plan for its management and other obligations under the deeds, being relative to the performance of the powers and duties of the Strata Company. Alternatively, the contracting was "necessary for or incidental to" the performance of those obligations. This argument was upheld, at trial and on appeal.
39. The exercise of power by a Strata Company is limited to those things which are "necessary for or incidental to the purposes for which a strata company is constituted". The "purposes" for which a strata company is constituted are not defined but there are specifications of powers, duties and functions in various provisions of the Act. Eg , Sec 37. (1) provides that a strata company may –“(g) make an agreement with any proprietor or occupier of a lot for the provision of amenities or services by it to that lot or to the proprietor or occupier of that lot; ..."
40. The exercise of such power is authorised for things which are necessary for or incidental to relevant purposes. "Necessary" does not mean essential but

"reasonably required or which are legally ancillary" to accomplishment of the purposes.

41. This provoked a scholarly consideration of the powers of a Strata Plan,

Affd on appeal: [2001] WASCA 135

Taxation aspects of strata developments

42. MMM

Key Management Terms for each element of the development

Terms applicable to retail, residential and commercial elements

- (i) remuneration of manager;
- (ii) tasks manager must do; plus manager's powers;
- (iii) initial period of management agreement
- (iv) periods of renewal of management agreement
- (v)
- (vi)
- (vii)
- (ix)
- (x)
- (xi)
- (xii)

43. Terms applicable to residential component only

44.

Terms applicable to commercial component only

45.

46. Terms applicable to retail component only

- (i)

47. x

Taxation aspects of strata development

48. *Sportscorp v Chief Commissioner of State Revenue* [2004] NSWSC 1029

Postscript

I have attempted to correctly state the law as at August 2008 but experience indicates that such a goal is easier to state than achieve. I thus welcome any comments or positive criticism to

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