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STRUCTURING MIXED USE DEVELOPMENT

Supplementary Paper By:

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VICTORIA ****PPT slides 28-29

The definition of subdivision pursuant to both the *Planning and Environment Act 1987*, and the Subdivision Act is the same:

Subdivision means the division of land into two or more parts which can be disposed of separately.

The *Subdivision Act* 1988 does not in terms provide for stratum sub divisions; but it does provide for staged sub division. The vendor has disclosure requirements if staging is planned: Sec 32 (3) (ba) of the *SA.* For example, if the land being sold is in a second or subsequent stage, then the vendor must provide a copy of the plan for the first stage, and disclose unsatisfied requirements. Information about the second stage must be disclosed e.g. the contents of the planning permit.
Section 37(2) of the Subdivision Act says that if a permit authorises a staged subdivision, that subdivision may be effected either as:
(a) a series of separate subdivisions each in accordance with the provisions of the Act, or by
(b) *sequential plans of subdivision* within the framework of a master plan: s 37(3) -(10). [1]

Case study No. 1

In *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* [1983] HCA 44; (1984) 155 CLR 129, there arose for consideration whether a change in lot entitlement and liability between the date of contract and the date of registration of a building plan could materially affect a person's rights as the proprietor of land. The change resulted in an alteration in the proportionate lot entitlement and liability of Deming from 1/41 of the aggregate of lot entitlements and liabilities to 1/37. Wilson J considered that the circumstance of an increase of almost 11 per cent in Deming's proportionate

[1] For a case on the difference between ''separate'' and ''sequential', see *Maroondah City Council v Fletcher* [2009] VSCA 250

liability in respect of levies made by the body corporate was capable of materially affecting its rights as a purchaser, at p 168, as follows:

"With all respect to the learned primary judge, I think an 11 per cent increase in contributions is capable of materially affecting the rights of Deming. The development was clearly a luxury one. The brochure which was tendered in evidence suggests that the grounds are spacious and it refers to a heated pool, spa, saunas and gym. Having regard to the provisions of ss. 32 and 38 of the Act, the expenses of the body corporate in fulfilling its responsibilities with respect to the property could well be substantial. They would require to be met by contributions from the proprietors of the lots comprising the project in proportion to their lot entitlement. But no doubt it is true that mere quantum is not the only criterion. Its significance must be judged in the light of all the circumstances and the higher the contract price the less may be the impact which an increase in lot entitlement, even of 11 per cent, would have on a prudent purchaser……''

Case Study No 2: Besser v Alma Homes Pty Ltd [2012] VSC 460, Pagone J

Ms Besser bought off the plan, and said that a proposed amendment to a plan of sub division (albeit ''well intentioned'')''materially altered'' her lot, entitling her to rescind, and she sought a declaration under Sec 9 AC of the *Sale of Land Act*. She also sought the return of the deposit.

"[3] The document identified by Ms Besser as the plan of subdivision comprised of four pages. Each page bears the plan number PS638257D. The fourth page is headed "Owners Corporation Schedule" and identifies the lot entitlements and lot liabilities for each of the four lots in the plan. The second page contains drawings showing the location of the properties within the title boundaries and the area set aside as common property. The fourth page of the plan of subdivision stated that there was to be an equal 25 per cent entitlement and liability to each of the four lots (consisting of 100 each totalling 400).''

The plan of sub division was duly registered, and provided to Ms Besser, but disclosed that her lot entitlements had been substantially diluted. Alma Homes argued that the amendment in the lot entitlement and liability was *not* an amendment to the plan of subdivision because the change did not affect the boundaries of the property or its physical features.

Pagone J rejected that argument, as follows:

"[8] I am unable to accept the submission for Alma Homes which would exclude from the meaning of the words "plan of subdivision" in s 9AC the provisions for lot entitlements and liabilities. The word "plan" is not used in the section to mean only the design or layout of the physical boundaries of real estate but is used in its ordinary meaning to include the totality of the scheme and arrangement by which property is to be subdivided. The "plan" for the subdivision of the land in question included the respective rights and obligations which were to attach to each of the lots. The proposed plan of subdivision comprised all four of the pages which had been provided in the contract, and "the s 32 statement", including the fourth page setting out the respective entitlements and liabilities. Part of

the plan of the specific subdivision which was proposed was the proportionate allocation of the entitlements and liabilities attaching to each of the lots. It is not to the point that an amendment may benefit the party seeking rescission. That fact may be relevant to whether it materially affects the lot but not to whether it is an amendment to the plan itself. The form in which the plan of subdivision was subsequently registered requires no different conclusion. The plan of subdivision is expressed to be three pages but expressly refers to and incorporates the Owners Corporation Search Report identifying the respective entitlements and liabilities.''

Pagone J cited extensively from *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* [1983] HCA 44; (1984) 155 CLR 129, and concluded at para [10].

"Whether an amendment will materially affect the lot is not to be judged by reference to the reason the amendment is made but by objective facts and circumstances. Nor is it to be judged by reference to whether a person in the position of the party affected by the amendment might not, or that some might think the party affected should not, elect to rescind. The amendment of the entitlements and liabilities of the lot owners affects them in various ways. The rights of the owners in this subdivision are governed by the *Owners Corporation Act 2006* (Vic). Section 74 provides that a lot owner with more than 25% lot entitlements has the right to call a special general meeting and, by s 83, the right to call a ballot. One of the ways to obtain a quorum under that Act for the purposes of decision-making by owner corporations can be by "at least 50% of the total lot entitlement".[4] A special resolution can be placed by ballot or poll passed by "75% of the total lot entitlements of all of the lots affected by the owners corporation".[5] Lot entitlement also affects votes at a standard meeting.[6] It is not possible to forsee the issues that may arise in relation to the property in the subdivision and, in particular, to the common property. However the change does have an effect upon Lot 4 by reducing the entitlements and liabilities attaching to the lot.''

Case Study No 3: Maroondah City Council v Fletcher [2009] VSCA 250

The Maroondah Planning Scheme made provision requiring a public open space (''POS'') contribution of 5% in the event of the subdivision of residential land. The appeal concerned the power of a municipal council acting as a responsible authority under the Planning and Environment Act 1987 ('P&E Act') to require a contribution of POS as a condition of approval of subdivision.

Case Studies No 4 relating to easements:

What easements are necessary for the reasonable use and enjoyment of lots and common property?

There is a growing jurisprudence on this point [2].

In *Body Corporate 413424R v Sheppard* [2008] VSCA 118; (2008) 20 VR 362,
Dodds-Streeton JA stated (at p374) that "the word 'necessary' bears its ordinary meaning of

[2] *Burford & Ors v Wichlinski* Unreport, SC Vic, Beach J, 30/4/96; Gordon v Body Corporate Strata Plan 3023 (2004) 15 VR 557 ; *BC 413424 R v Sheppard* [2008] VSCA 118

'essential'. It is not however to be construed in isolation, but in the context of the composite phrase, in which it is qualified by the broad concept of reasonable use and enjoyment of the benefited property. Further, it is the easement, rather than the function it secures, which must be 'necessary'. The reasonable use and enjoyment of the property not only clearly exceeds mere use, but also admits consideration of the effect on the reasonable use and enjoyment of property if the function to be achieved by the easement is unavailable and the costs or detriments of securing the function by means other than the easement."

"[8] In determining whether an easement exists over the common property the Tribunal must be satisfied that the easement is necessary to provide 'passage or provision of water, sewerage, drainage, gas, electricity, garbage, air or any other service of whatever nature (including telephone, radio, television and data transmission)'. The easement must also be necessary for the reasonable use and enjoyment of the lot or the common property and consistent with the reasonable use and enjoyment of the other lots and the common property.''

Owners Corporation PS326519P v May (Owners Corporations) [2013] VCAT 933

It is now established that it is the easement, rather than the function it secures, which must be necessary.

In *Wilkinson v Owners Corporation SP0282875 (Owners Corporations)* [2013] VCAT 2206, the tenant of a restaurant premises (Lot 2) obtained a an order for an easement to LP Gas cylinder on common property and an implied easement to allow the passage of gas from the cylinders to Lot 2.

"The Owners Corporation argued that the words "passage or provision" should be read as one. This is not appropriate. The words are separate and separated by the words "or". Passage means allowing the service to travel over the common property and provision is the actual supply of the service. The subsection clearly intends to allow both the travelling over the easement and the actual supply of the service to occur on common property if the other requirements of the subsection can be satisfied.''

The tenant also obtained an easement to install a grease trap on common property.

FRAUD ON A POWER IN THE CONTEXT OF STRATA LAW [3] ****PPT slides 34

The principle was stated in *Sugden on Powers*, 5th Ed, 1831, as follows:

> But there are some cases which a court of law cannot reach. This happens where the power is duly executed according to the terms of it; but there is some bargain behind,

[3] This section has been extracted verbatim form my text, Commercial Damages (ThomsonReuters, loose leaf, para [38.90])

> or some ill motive, which renders the execution fraudulent, and will enable equity to relieve.

The same point was made by Dixon J in *Mills v Mills* (1938) 60 CLR 150 in dealing with a challenge to an issue of shares when he referred, at 185, to resolutions of directors "which … are ostensibly within their powers".

As Gzell J observed in *Lin v The Owners Strata Plan No 50276* [2004] NSWSC 88 [81] "the formal validity of the exercise of a power is a prerequisite for equitable relief against its wrongful exercise".

The doctrine of fraud on a power is of general application. As Lord Lindley said in *Free Church of Scotland v Overtoun* [1904] AC 515 at 695: "I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred."

Lord Parker explained in *Vatcher v Paull* [1914-15] All ER Rep 609: [1915] AC 372 at 378:

> The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct 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.

The application of this doctrine to the exercise of powers conferred on a majority, or special majority, of shareholders at a general meeting is well established. In *British Equitable Assurance Co Ltd v Baily* [1906] AC 35 at 42, Lord Lindley said: "Of course, the powers of altering by-laws, like other powers, must be exercised bona fide, and having regard to the purposes for which they are created, and to the rights of persons affected by them."

The principles were explained in *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457; [1939] ALR 124; HCA 2 by Dixon J at 511:

> If no restraint were laid upon the power of altering articles of association, it would be possible for a shareholder controlling the necessary voting power so to mould the regulations of a company that its operations would be conducted or its property used so that he would profit either in some other capacity than that of member … or, if as member, in a special and peculiar way inconsistent with conceptions of honesty so widely held or professed that departure from them is described, without further analysis, as fraud.
>
> …
>
> The chief reason for denying an unlimited effect to widely express powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of a power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which 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.

See also *Gambotto v WCP Ltd* (1995) 182 CLR 432; 69 ALJR 266; [1995] HCA 12 at 444-5.

In *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46 an unanimous New South Wales Court of Appeal extended the above principles to bodies corporate and to the powers of the proprietors exercisable at general meetings.

The parties were the proprietors of lots in a strata plan. The defendants held 80% of the unit entitlement and the plaintiff 20%. The body corporate passed a resolution to permit the defendants to construct two penthouses in their lot (lot 5) and the roof which was common property. The body corporate passed a by-law allowing the proprietors of lot 5 to "to retain the consequent improvements". Thereafter, a special resolution was passed to authorise the subdivision of lot 5 and common property on and above the former roof to create two penthouse lots. The resolution authorised the body corporate to transfer to the defendants its interests in the penthouse lots derived from common property for $1.

It was held that the special resolution was a fraud on the minority and the court awarded equitable compensation, being 20% of the value of the common property as improved (after expenses) *plus* for the loss of a chance to negotiate to obtain more than 20% of the value of the common property.

This was said to be by analogy with compensation awarded under Lord Cairn's Act.

A valiant attempt to seek special leave was refused, on mainly procedural grounds, although the transcript of the application does leave one with the sense that Gaudron J would have none of the argument that the airspace, which was in effect expropriated for a $1, was not worth more.

FIDUCIARY DUTIES OWED BY DEVELOPER TO LOT OWNERS ****PPT slides 35

"The applicant in *Steel*, the proprietor of several lots in a strata plan, sought the appointment of an "administrator" to the affairs of the body corporate of the strata plan (the statutory remedy at the time). Prior to registration of the strata plan the subject real estate was owned by a company, the majority of the shares in which were controlled by another corporate entity, English and Australasian Holdings Pty Ltd ("Australasian"), a respondent to the summons. Australasian's managing director, a Mr Emmaus Jacombe, procured registration of the strata plan. At the strata plan's initial meeting the proprietors, the majority of whom Australasian controlled, passed several resolutions to regulate the future conduct of the body corporate under Australasian's administration and through Mr Jacombe.

Australasian contested the application to appoint an administrator. Else-Mitchell J found that Australasian was "in the position of a promoter of the strata title enterprise": *Steel* at 469. Else-Mitchell J further reasoned that as such Australasian 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 by-laws of the First Schedule" [to the *Conveyancing (Strata Titles) Act* 1961 (NSW) ("the *1961 Legislation*")]." [4]

In *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527, McDougal J. followed the above line of authorities and held that a developer of a strata scheme is in a position similar to that of a company promoter, and owed a fiduciary duty to the "incipient" body corporate similar to the fiduciary duty owed by the promoters of a company to that company and

[4] Case summary extracted, with further edits, from paras [380] and [381] of *Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381* [2015] NSWSC 202

potential investors. [5]

In *Arrow* McDougall J considered a claim by a community association ("the Association") incorporated under the *Community Land Development Act* 1989 ("the *CLD Act*") against the developer of a community residential development, Australand Consolidated Investments Pty Ltd ("Australand"). In 1998, Arrow Asset Management Pty Ltd ("Arrow") signed a site management agreement ("SMA") to provide services to the Association after the registration of a community plan for the development. There was an assignment of the SMA to a related party, but for convenience, I will simply refer to "Arrow".

The Association alleged *inter alia* that Australand, the developer, owed the Association fiduciary duties as a promoter, when it received a payment of $190,000 from Arrow for causing the Association to enter into the SMA.

In *Arrow* at [216]-[223] McDougall J stated the principles of fiduciary obligations to be applied in the context of promoters of strata title and similar schemes:

"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] HCA 9; (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] USSC 32; (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] HCA 31; (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……

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."*

McDougall J applied these principles in *Arrow*, holding it is appropriate to regard the developer of a community scheme under the *CLD Act* in "a position analogous to the promoter of a company and it follows that the relationship between the developer and the community association is a fiduciary relationship": at [225].

McDougall J held that Australand's duty was to make the SMA with Arrow on the best terms commercially available to the Association. But he found it was in Australand's interest to ensure that the terms of the SMA were sufficiently generous to Arrow to justify Arrow paying Australand the $190,000 premium. McDougall J found (at [227]-[232]) that: this was a conflict between Australand's

[5] Citing *Re Steel and the Conveyancing (Strata Titles) Act 1961* (1968) 88 WN (Pt 1) (NSW) 467. See too *Tracy v Mandalay Pty Ltd* (1953) 28 CLR 215; *Radford v The Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250 at [157] – [162] (*Radford*) Simmons J

interest and its duty to the Association; in substance Australand sold to Arrow the benefit of the rights that would be created under the SMA; and to the extent that the SMA provided for "excessive" remuneration, Australand acted to the detriment of the Association.

"McDougall J concluded (at [234]) that Australand had: put itself in a position where its self-interest conflicted with its duty to the Association; breached its fiduciary duty; and garnered a premium of $190,000 by exploiting its control of the Association. After considering the issue of disclosure, concluding that Australand's disclosure was inadequate (at [235]-[250]) McDougall J found (at [256]) that receiving the $190,000 premium for causing the Association to enter into the SMA was a breach of Australand's duty as a promoter. McDougall J concluded (at [259]-[260]) there were difficulties in establishing equitable compensation for the loss suffered by the Association from entry into the Management Agreement, so (see *Warman International Limited v Dwyer* [1995] HCA 18; (1995) 182 CLR 544, at 559) he awarded the alternative remedy of an account of profits for the $190,000 premium.

In the result because he awarded an account of profits in *Arrow* McDougall J did not have to assess any loss to the Association from entry into the SMA. McDougall J found the expert evidence before him unsatisfactory as to the difference between the market value of Arrow's services and the amounts payable by the Association under the SMA. That was one reason for his deciding (at [263]) that an account of profits was the appropriate remedy. McDougall J also found (at [103]) that the expert evidence justified the conclusion that the actual amount payable under the SMA had exceeded the true value of the services performed under it for a number of years but because of the approach he took on the appropriate remedy he did not have to quantify that difference.'

Paras [393] and [394] of *Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381* [2015] NSWSC 202, summarising the essential reasoning and upshot of *Arrow*.

Arrow has been applied in Qld in *Sphere Southport Living* [2013] QBCCMCmr 338. That is a community titles scheme. The developer's sales information promised purchasers a fully equipped gymnasium; however the developer claimed ownership of gym equipment which it attempted to sell. The Adjudicator noted that the Disclosure Statement issued by the respondent pursuant to section 213 of *Body Corporate and Community Management Act 1997* and section 21 of the *Land Sales Act 1984* included a specific reference to gym equipment.

Referring i.a. to *Arrow's* case (above), the Adjudicator declared the gym equipment to be a body corporate asset and ordered it held on trust for the body corporate.

For a recent analysis of the cases, see *Meriton Apartments Pty Limited v The Owners Strata Plan No. 72381* [2015] NSWSC 201, Slattery J (involving whether a caretaker agreement could be disavowed by the BC, for want of appropriate disclosure).

Meriton developed the well known World Square site, in Sydney's CBD, in stages, into three parts: a parking, lobby/ entrance, commercial and residential portion (which was subject to one strata scheme and known as "Low Rise"), a residential tower (subject to a separate strata scheme and known variously as "Mid Rise" and "Apartments") a tower to be used as serviced apartments (which was retained by an associated company of Meriton ["Properties"] as a single undivided stratum).

In June 2003, Meriton was actively selling off the plan, and attached to at least one sales contracts a draft Caretaker's Agreement in terms substantially different to that ultimately entered into.

In February 2004 and during World Tower's development, Apartments, Properties, and the respective

owners Corporations for the other parts of the building all entered into a single form of Caretaker Agreement ("Caretaker Agreement") for World Tower under the *Strata Schemes Management Act* 1996 ("the *Management Act*"), Part 4A.

At about the same time Apartments (qua developer) registered a Strata Management Statement for the building under the *Strata Schemes (Freehold Development) Act* 1973, Part 2, Division 2B ("the *Freehold Act*").

In 2004, the Caretaker Agreement was renewed. From then, Apartments provided caretaker services to the other parties to the Caretaker Agreement through until July 2012, when Mid Rise asserted it terminated it pursuant to contractual provisions.

Apartments moved to specifically enforce the Caretaker Agreement. Mid Rise contests Apartments' defended its July 2012 termination of the Caretaker Agreement at several levels:

a. at the primary level Mid Rise assumed the validity of the Caretaker Agreement but said that it was entitled to terminate pursuant to the termination clause i.e. a contractual head of power.
b. on a more substantive level, Mid Rise said that its February 2004 making and its October 2004 continuation were each voidable in equity, because Apartments breached fiduciary duties it then owed to Mid Rise. Mid Rise further alleged that Apartments took advantage of its control over Mid Rise at the time, so that Mid Rise could set aside the Caretaker Agreement against Apartments.

Questions provoked by these facts included whether the caretaker agreement bound the owners corporation that had not formally executed it; whether parties intended the contractual termination provision to exclude common law rights of termination; whether the caretaker was in "serious persistent and continuing" breach of the caretaker agreement, entitling the owners corporation to give a notice of termination thereunder and allied questions going to repudiation. This question devolved to whether the developer owed a fiduciary duty as a promoter to the "incipient" owners corporation, to be established, and if so, what the content of such duty might be; and whether there had been any breach. Ancillary questions of affirmation etc. also arose.

[413] Thus, promoters may sell their own property (or relevantly between Apartments and Mid Rise, contract to supply their own services and deploy their own know-how) to the new company. But when promoters do this they come, to use the language of *Erlanger* and *Mandalay*, under a fiduciary duty of sufficient disclosure to the new company. And once the new company is in a position armed with full information to affirm or disclaim the property or contract concerned, it must elect between those courses. This principle is usually found in the context of a sale transaction for an individual piece of property by promoters to a new venture. But there is no reason in principle why it should not also apply to the making of a contract for a term for the supply of services.

[414] None of this authority in my view permits a new company to do what Mid Rise claims in these proceedings: namely to take the benefit of Apartments' services under the Caretaker Agreement in whole or part for many of the years since 2004 and at the same time claim an account of profits against Apartments, measured by the difference between the Remuneration as defined under the Caretaker Agreement and some theoretical measure of the "market" cost price of the same or similar services over that period.

[416] The core promoter's fiduciary duty is full disclosure to an independent board. Equity defines what full disclosure is sufficient to satisfy this fiduciary duty. But in my view, the general equitable

principle in relation to promoters are to a degree modified by the *Management Act* as amended by the *2002 Amendment Act*

[419] *Management Act*, Part 4A provides its own disclosure regime. But this regime does not fully define the nature of the disclosure to a newly formed owners corporation to negate what would otherwise be a breach of fiduciary duty. Whether or not a newly formed company gives fully informed consent is a question of fact in all the circumstances decided according to an objective standard. Compliance with the disclosure regime of Part 4A is, in my view, one important factor in assessing whether the minimum information has been given to allow a fully informed consent.

[420] But it is not difficult to identify circumstances in which a party to a caretaker agreement could comply with the regime of the Act but due to non-disclosure a prima facie breach of fiduciary duty by an associated promoter is not negated. *Arrow* itself and the other secret commission cases are examples of this. Mid Rise persuasively makes the point that if a developer were to receive a secret commission for enabling an owners corporation to make a caretaker agreement with a caretaker who otherwise complies with Part 4A that commission may be recoverable under doctrines of equity from the promoter by way of an account of profits, as the moment that secret commission comes into the hands of the promoter it is in equity owned by the owners corporation. Consistently with those principles, McDougall J in *Arrow* allowed an account of profits in respect of such a sum.

BALANCING COMPETING INTERESTS ****PPT slides 36- 38

Should the users of a commercial tower have access to the swimming pool intended for use by the residential tower? If so, in what proportions should the commercial and residential owners pay for the upkeep of the pool and spa?

Also, take the example of a mixed commercial and residential property:

To what extent are the allocations of costs, penned and probably also registered prior to people buying to the scheme, binding?

Case studies:

Bergin J in *The Owners Strata Plan 78102 v The Owners Strata Plan 78101 & Ors* held that an expert should be appointed to determine the appropriate apportionment of shared costs. Bergin J was required to construe clause 6.4 of the SMS which provided that "disputes regarding proportions...be determined in accordance with clause 18".

An express function of the BMC under the SMS was to "change, add or adjust Shared Costs", and the SMS in *The Owners Corp Strata Plan 78102* expressly provided for an expert to determine disputes "regarding proportions" and the "adjustments to be made" under clause 6.4

The SMS expressly provided under clause 6.3 for the proportions of shared costs to be varied by unanimous resolution and for the experts determination to be "final and binding."

The wording of the SMS was very different in *Strata Plan 70672 v Trustees, Roman Catholic Church* (2011) 1 STR (NSW) 457, in which Sackar J distinguished The Owners, SP 78102.

In SP 70672, the following questions arose:

I. Is the plaintiff bound by the terms of the SMS?
II. Was the SMS registered in contravention of s28V (1)(a) of the Strata Schemes Freehold Development Act 1973 (NSW)?
III. Is the SMS unjust and amenable to being set aside under s7(1)(a) of the Contracts Review Act 1980 (NSW)?
IV. Should the SMS be set aside for being unjust under the Contracts Review Act 1980(NSW)?
V. Can an expert appointed under clause 16 of the SMS to reapportion the ratios of shared costs paid under the SMS?
VI. Should the court amend the SMS under s28U(1)(b) of the Strata Schemes (Freehold Development) Act 1973 (NSW)?

The Cove Apartments are a well-known address in The Rocks, Sydney. The plaintiff was the body corporate. The Owners were the proprietors of Lot 1 which was subdivided by Strata Plan 70672 and which comprised residential apartments ("the Cove" apartments), underground parking, the Belgian Beer cafe, and commercial offices.

The defendants were the Trustees of the Roman Catholic Church for the Archdiocese of Sydney ("the Trustees") and were the proprietors of Lot 2 in DP 1053387, which comprised two buildings and underground parking.

The Strata Management Statement (SMS) for "the Cove," which had been registered was the subject of a negotiation by the Trustees and Grocon (the developer of the site and the vendor of spaces in the development).

The SMS established the Building Management Committee (BMC) of which the Owners and the Trustees were members.

The SMS was negotiated between the developer, Grocon and the Trustees; and naturally drafted without involvement of the Owners as that entity only came into existence after the SMS had been registered along with the Strata Plan. Both Grocon and the Trustees were represented by well-known Firms of Solicitors.

The SMS apportionment shared costs of the operation of the development 95 to % the owners and 5 % to the Trustees (with the exception of insurance). In it, the owners corporation and strata lot owners acknowledged it was fair and reasonable and could not be varied without the Trustee's consent; and it required that *all* decisions of the Committee must be by unanimous resolution and that each owner was entitled to exercise only one vote

In short, the obvious intent of this was that the Trustees were seeking to insulate themselves against future buyers of apartments mounting a challenge to the 95:5 split of payments for shared facilities.

Contracts for the sale of units contained a draft SMS which left the percentage contribution blank. This gave buyers the effective choice to either not proceed to exchange, or to exchange and hope for the best.

Grocon later protested the terms, asserting they were "inappropriate". This was possibly because there were no terms allowing for adjustment of the costs sharing provisions, based on some objective yardstick such as an audit. Grocon felt that a fairer apportionment would be 87:13, in light of actual costs escalations.

The case for the Owners Corporation was that the BMS was "unjust" within the meaning of the *Contracts Review Act* 1980 (NSW)[6]. The Trustees conceded that the *Act* applied, and the judge accepted this concession. The argument for Owners centred on the proposition that it did not exist at the time the SMS had been negotiated and registered. However, Sackar J refused the relief sought, in essence because the SMS was properly negotiated and registered in accordance with the statutory regime. HH noted that Grocon was not exactly a disinterested party; and the deal had initially suited it

HH also emphasised the established principle, that consistent with the remedial legislation in the CRA, one party may look to its own commercial interests; there is nothing inherently unfair about that. Nor was there anything unfair in the 95:5 original split.

BEYOND THE NUMERUS CLAUSUS PRINCIPLE; STRATA BY LAWS, BMS'S AND SMS'S ****PPT slides 39

In *White v Betalli* [2007] NSWCA 243; 71 NSWLR 381, 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.

The by-law in *Betalli* was found not to be inconsistent with s88B of the *Conveyancing Act* 1919 or the *Real Property Act.* By laws can been viewed in two ways: delegated legislation or a statutory contract: see *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207 for further in depth consideration of this issue.

Campbell JA in *Bettali* gave a masterly exegesis of the ancient origins of the term "by law" in English law. Here follow certain extracts germaine 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'."

[6] The *Act* allows orders to be made in relation to both contracts and "land instruments" : Sec 7 (1) (d)

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.

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."

***Italian Forum Limited v Owners - Strata Plan 60919 [*2012] NSWSC 895**

[49] Section 43 provides that a by-law can be made in relation to, amongst other things "*matters appropriate to the type of strata scheme concerned.*" Section 47 entitles an owners' corporation in

accordance with a special resolution to make by-laws for, amongst other things, the purpose of the administration, use and enjoyment of the lots, or the lots and common property, for the strata scheme.

[50] These powers are not to be narrowly confined (see *White v Betalli* [2006] NSWSC 537; (2006) 66 NSWLR 690 and on appeal *White v Betalli* [2007] NSWCA 243; (2007) 71 NSWLR 381). The type of strata scheme concerned in the present case is that the commercial strata scheme is part of a wider development involving a car park, a piazza and residential apartments. One would have thought that matters appropriate to the participation of the commercial strata scheme in that form of development are matters for which by-laws could be made. I think there is a serious question as to whether his Honour was correct in his conclusion as to the scope of ss 43 and 47. His Honour was of the view that the *Strata Schemes Management Act* did not permit the levying of promotional levies. If that is so, I do not see how that consideration necessarily limits the matters that can be dealt with in the strata management statement that is enforceable against the lot owners directly under s 28W of the *Strata Schemes (Freehold Development) Act*.

[51] The *Strata Schemes Management Act* provides for the raising of levies to be applied to the administration fund or to the sinking fund. With respect, it is not obvious that a by-law could not be made under ss 43 or 47 that provided for the levying of other contributions. But in any event, moneys can be raised to be applied to the administrative fund for, amongst other things, the meeting of "*other recurrent expenses*". As presently advised I do not see why that could not extend to levies properly raised pursuant to a strata management statement.

…….

[53] For these reasons, I would not accept the argument advanced that the amendments to the strata management statement were inconsistent with the legislative scheme in either the *Strata Schemes Management Act* or the *Strata Schemes (Freehold Development) Act*

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