Television Education Network

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STRUCTURING MIXED USE AND COMPLEX DEVELOPMENT

- Update September 2015-

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;
   (v) community title.

Licence

3. I have not included a licence within the compass of "title" as it provides no proprietary rights.

4. *Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor* [2007] NSWCA 176

   "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

5. In *Shepperd 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..."

6. 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.

7. A more recent instructive case is *Vella v Ayshan* [2008] NSWSC 84, a judgment of White J. The purchasers/ plaintiffs purchased a townhouse that was under construction.

8. Special condition 15, upon which the purchasers relied provided:

> "*15. Prior to completion the vendor shall in a proper and tradesmanlike manner cause a residence to be erected on the subject property in accordance with the terms and specifications as approved by the Campbelltown City Council and the vendor shall not less than fourteen (14) days prior to completion, serve on the purchaser an Occupation Certificate under the Environmental Planning and Assessment Act.*"

9. There were three departures from the approved plans. So far as landscaping was concerned, the departure was that the landscaping plans required the planting of two rows of kangaroo paw trees at the rear of the premises and two mint bushes at the front of the premises. There were variations to the construction of the kitchen and laundry/toilet-the plans showed they would be separate rooms; but they were built as one room.

10. At para [50], the trial judge commented as follows:

> "That is not to say these changes were necessarily detrimental. Mr Vella was satisfied with the kitchen layout, and had no issue with the combining of the ground floor toilet and laundry into one room or the removal of the external door from the laundry. However, neither he nor his wife had given prior approval to the change."

11. At para [55], HH said this:

> "I do not accept that the deviations from the approved plans were defects or faults due to faulty materials or workmanship within the meaning of SC 16. Counsel for the second and third defendants submitted that not making the laundry and toilet or the kitchen bench in accordance with the approved plans was faulty workmanship. No authority was cited in support of this submission. I do not agree. The difference between the construction and the design was not a fault in materials or workmanship. The "fault" lay in not obtaining agreement to the change from the plans. There was no fault in the materials used or in the execution of the work. These matters did not come within SC 16. Moreover, even if it could be said that it was faulty workmanship to depart from the approved plans for the construction of the laundry, toilet and kitchen bench, the failure to complete the landscaping was not faulty workmanship. It was a failure to supply the materials, that is, the trees, required by the council. In my view, that was a breach of the obligation to erect the "residence" in accordance with the terms and specifications approved by the council. The "residence" included the land surrounding the building upon which landscaping work was to be done. It was part of the curtilage of the building and an integral part of the residence. In other words, the "residence" in SC 15 included the curtilage (*Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P & CR 195 at 204; *Steele v Midland Railway Co* (1866) LR1 Ch App 275 at 289-290; *Cole v The West London and Crystal Palace Railway Co* [1859] EngR 801; (1859) 27 Beav 242; (1859) 54 ER 96).''

[70] "The critical question in this case is whether the vendors' obligation to cause the residence to be erected in a proper and tradesmanlike manner, or their obligation to cause the residence to be erected on the subject property in accordance with the terms and specifications approved by the Campbelltown City Council, was an essential promise, any breach of which would entitle the purchasers to rescind. Mr Canceri, for the purchasers, submitted that it was. He referred to the judgment of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632 at 641-642 where his Honour said:

"*The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor:* Flight v Booth *[1834] EngR 1087; (1834) 1 Bing NC 370 at 377*; Bettini v Gye *(1876) 1 QBD 183 at 188*; Bentsen v Taylor Sons & Co (No 2) *[1893] 2 QB 274 at 281*; Fullers' Theatres Ltd v Musgrove *[1923] HCA 12; (1923) 31 CLR 524 at 537–8*; Bowes v Chaleyer *[1923] HCA 15; (1923) 32 CLR 159*; Clifton v Coffey *[1924] HCA 35; (1924) 34 CLR 434 at 438, 440. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight.*"

……..

[73] However, there is the more fundamental question of what is the subject matter of the contract. It is of first importance that the contract is one for the sale of land. As Walsh JA (as his Honour then was) said in *Beard v Drummoyne Municipal Council* (1969) 71 SR (NSW) 250 at 265:

"*... apart from any relevant special provision, a purchaser [of land] may have a right to rescind, or at his option to go on with the contract, extending to deficiencies between promise and performance which would not be, in the case of other contracts, such as to enable him to treat himself as discharged from the contract, but which would 'sound in damages'.*"

The Court quoted from *Travinto Nominees Pty Ltd v Vlattas* [1973] HCA 14; (1973) 129 CLR 1, where Menzies J said (at 27-28), *inter alia*:

"*At common law, any difference, however trivial, between the land described in the contract and the land produced constituted a defect which entitled the purchaser to rescind.*

Where there was only a slight difference, the Courts of Equity began to interfere and introduced the principle of compensation for deficiency: see Erskine L.C. in Halsey v. Grant *[1806] EngR 290; (1806) 13 Ves. Jun. 73 at 76-9; [1806] EngR 290; 33 ER 222 at 223-224. Unless the deficiency was so substantial as to give the purchaser something*

entirely different from what he had contracted, equity would order specific performance on giving compensation for the deficiency."

12. At para [76], HH said that '' The principle applied not only to the extent of land described in the contract of sale but also to the description of the interests sold.''

……..

[81] The emphasis here is on the subject matter to be conveyed being substantially identical with the subject matter described in the contract. In this context, it is clear that "substantial" does not mean large. It means of substance rather than merely nominal. Hence, in *Dainford Ltd v Lam*, the omission of the "ledges" from the lot to be conveyed, even though they were not usable, was a difference which warranted rescission at law, even though it would have been no answer to a claim by the vendor for specific performance.

[82] The departures from the approved plans are substantial in this sense. Having the toilet and laundry in one room rather than two, having a smaller area for the kitchen bench, omitting an exterior door, and not providing the designated trees are both individually and in combination, matters of substance such that the residence erected is not substantially identical with that described in the contract. It follows that at common law the purchasers were entitled to terminate the contract as they did. Had the vendors sought specific performance, then, subject to the question next to be dealt with (that is, whether the breaches of the promise to cause the residence to be erected in a proper and tradesmanlike manner justified rescission or only damages), it is clear that specific performance would have been ordered, albeit with some small compensation. But specific performance was not sought and the parties' rights are determined by the common law.''

Company title

13. 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.

14. *Wilson & Anor v Meudon P/L* [2005] NSWCA 448, involved home unit company title . The headnote reads as follows:

'….provisions of articles delineating an area of the roof adjacent to the Penthouse as "Roof Garden for Penthouse" were part of the rights annexed by the Articles to the shares relating to the Home Unit immediately under the Penthouse, and were Class Rights which could not be altered except according to Modification of Rights Article, over which holders of those shares had control. The holders of those shares were entitled to restrain

the Company and the holder of the Penthouse shares from acts and decisions which would enable extension of the Penthouse over part of the Roof Garden – Consideration of operation of Articles in Home Unit Company, Class Rights, Modification of Rights Article, whether holder has leasehold or contractual licence, entitlement to quiet enjoyment. Reid House Pty Ltd v Beneke (1986) 5 ACLC 451 disapproved.''

15. 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."

16. 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.

17. 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 TO CIRCUMVENT LEP'S?

18. *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.

19. 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."

20. 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*.

21. 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".

22. 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**.

23. 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.

GENERAL INTRODUCTION TO STRATA AND COMMUNITY TITLE

'Strata and community title[2] are the fastest growing forms of property title in Australia. For decades, successive New South Wales governments have had policies of urban consolidation, with previous targets aiming to fit 70 per cent of Sydney's new development within Sydney's existing footprint.[3] Medium or high density strata title was the only way to achieve this end. While the most recent *Draft Metropolitan Strategy* flags new land releases on Sydney's urban fringe, much development will still occur within existing urban areas and will be strata title.[4] Further, with both local and state government policy favouring new development that minimises costs to the public purse, new 'greenfields' development is likely to be community title.[5] Community title allows roads, parks, sporting facilities, boardwalks, marinas, wetlands, sewerage and water services to be vested in a private body corporate,[6] shifting not just the initial infrastructure costs to private owners, but their maintenance costs in perpetuity. When people buy a home in a 'resort style' master planned development and subsequently become frustrated by ever-rising levies, this is invariably because they have not understood that the marina, tennis court, clubhouse and 'wellbeing centre' – the visually 'public' spaces in the development – are as much their private property as their pergola and back courtyard; they just happen to co-own them with 300 other residents.[7] Common property is not public property, but collectively owned private property.'

As collectively owned private property, common property is privately regulated. All strata and community schemes have by-laws or management statements,[8] which regulate the use of common property by residents. By-laws can be the model form provided by the legislation,[9] or tailor-made by the developer's lawyer. In community title, by-laws can also create a 'theme' for the development, for example a resort or eco-theme.[10] By-laws can be altered by the community, and with the exception of banning children, guide dogs, leasing or transfer,[11] or writing by-laws based on 'race or creed, or on ethnic or socio-economic grouping',[12] there is little limit on the content of by-laws.[13] In New South Wales, the power to write by-laws extends beyond common property to lot property, that is, people's homes. So long as a by-law relates to the 'control, management, administration, use or enjoyment of the lots or the lots and common property', it will be valid.[14]

……..

As the law currently stands, strata and community title by-laws create 'an open-ended bundle of property rights'. They do this by allowing private citizens to attach negative and *positive* obligations to freehold land in the form of by-laws, with the only general limit being that by-laws relate to the use or enjoyment of lots or common property. As we saw above, by-laws regulating personal autonomy or authorising financially burdensome contracts will all meet that description.

The result of this divergence from boundary rules is twofold. First, the economic consequence is that with too many owners with rights of veto, land will become an anticommons. Some eco-communities and strata tourism are already providing us with visceral examples of dysfunctional, underused and/or unsaleable land. As more and more land is subdivided with strata and community title, this has serious implications for our public free functioning land markets. Second, by failing to constrain by-law making power with the principle of negative liberty, strata and community title schemes can create social and political cultures that run counter to mainstream democracy. When multiplied thousands of times, through time and across the physical landscape of our cities, highly regulated schemes will present a real challenge to property owners' and residents' experience of the freedoms ordinarily associated with liberal democracy, and may compromise their very understanding of those freedoms. When thinking about strata and community title law, like all private property law, we must consistently ask ourselves, '[i]n which world would we rather live?'[203]

EXTRACT FROM ARTICLE BY Cathy Sherry '*Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property*'

[2013] UNSWLawJ 13 Doctrines of Property.

SUB DIVISION OF LAND VIA STRATA SCHEMES

24. 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.

25. 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.

26. 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…"

27. 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."

28. 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.

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

30. 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."

31. 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."

i.e. 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

Liability limited by a scheme approved under the Professional Standards Legislation

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."

32. *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."

STRATUMS

STRATA TITLES (LEASEHOLD PART STRATA) AMENDMENT BILL 1992 Act 1992 No. 12 STRATA TITLES (LEASEHOLD PART STRATA) AMENDMENT BILL 1992

NEW SOUTH WALES EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

This Bill is cognate with the Strata Titles (Part Strata) Amendment Bill 1992.

The object of this Bill is to amend the Strata Titles (Leasehold) Act 1986 so as to make further provision relating to the subdivision under that Act of part only of a building. The amendments are aimed at providing uniformity, as far as is practicable, between that Act and the Strata Titles Act 1973 (after that Act has been amended by the proposed Strata Titles (Part Strata) Amendment Act 1992) in dealing with such subdivisions and their consequences.

The opportunity is taken to standardise certain other provisions in the 1986 Act with those intended to be inserted into the Strata Titles Act 1973 by the proposed Strata Titles (Part Strata) Amendment Act.

A subdivision of part of a building under the 1986 Act creates a leasehold strata scheme for a stratum parcel (consisting of lots, or lots and common property), and there is no limit on the number of such schemes that may be created for different parts of the same building and its site. It is not necessary for the whole of a building to be subject to leasehold strata schemes, but (as a consequence of the proposed amendments) a further such scheme will not be allowed in a building if the building has been substantially added to since the initial leasehold strata scheme for the building was created.

The lessor, lessees and other occupiers of a building in which a new stratum parcel is created will have certain aspects of their use of the building and its site regulated by a strata management statement entered into by the lessor and the lessees of the building, unless excepted from having such a statement by direction of the Minister. Strata management statements will also be able to be entered into by the lessors and lessees of buildings already containing stratum parcels.

Provisions of the 1986 Act relating to the resolution of disputes arising in the

administration of leasehold strata schemes currently extend to schemes for stratum parcels that include parts of buildings. However, in appropriate cases, those provisions are varied to take into account more effectively the interests of, and to allow obligations to be imposed on, the lessor and lessees and occupiers of parts of those buildings that are not included in stratum parcels.

INTERPRETATION / CONSTRUCTION OF BY LAWS

33. *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.

34. The by-law in *Betalli* was found not to be inconsistent with s88B of the *Conveyancing Act* 1919 or the *Real Property Act*.

35. 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 the resolution of this issue.

36. 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’."
>
> 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.

37. 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 follow below, building on *White v Bettali* (ibid)

38. [46] In *The Owners' Corporation Strata Plan 70672 v The Trustees of the Roman Catholic Church For the Archdiocese of Sydney* [2011] NSWSC 973; (2011) NSW Titles Cases 80 146 the strata management statement described how costs for the operation of the development were to be shared. There was no suggestion that that was something beyond the power of a strata management statement to deal with.

[47] Pursuant to s 28W a strata management statement once registered has effect as an agreement under seal that binds a body corporate of a strata scheme for part of the building, (in this case the first defendant and the second defendant) a proprietor, mortgagee in possession or lessee, for the time being, of any of the lots in such a strata scheme (in this case including the lot owners of the commercial strata scheme) and any other person in whom the fee simple of any part of the building or its site is vested (in this case the plaintiff). All those persons, including the lot owners, are bound by a covenant that they agree to carry out their obligations under the registered strata management statement as from time to time in force. Even if such obligations could not be enforced through the making of by-laws under the *Strata Schemes Management Act* it does not appear to me that they could not be enforced against the lot owners pursuant to s 28W.

[48] However, a strata management statement has no effect to any extent to which it is inconsistent with "*any other Act or other law*" (s 28W(5)). The learned editors of the CCH Conveyancing and Property Law New South Wales Strata and Community Titles commentary say (at [3-127]) that this includes a by-law for a strata scheme in the building concerned. I think that is right. I think a by-law, though limited in its application to the owners' corporation and lot owners and persons who claim title through them (*Strata Schemes Management Act*, s 44), is nonetheless a law (*Gosling v Veley* [1847] EngR 232; (1847) 7 QB 406 at 451; and *London Association of Ship Owners and Brokers v London and India Docks Joint Committee* [1892] 3 Ch 242 at 252.) But, with respect to the decision of Patten AJ, I do not see why by-laws could not be made to give effect to the obligations in the strata management statement for lot owners to pay promotional levies. At para [20] of his judgment set out above, Patten AJ stated that by-law 11 was not authorised by ss 43 or 47, but did not give reasons for that conclusion.

[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*.

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

39. *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

40. *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.

41. 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*

42. 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."

43. 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).

44. 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.

45. 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.

46. 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.

47. 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.

48. 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; ..."

49. 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.

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

    Affd on appeal: [2001] WASCA 135

51. 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 (level of delegation of the manager;
    (iii) initial period of management agreement;
    (iv) periods of renewal of management agreement

    Terms applicable to residential component only

    Terms applicable to commercial component only

    Terms applicable to retail component only

MANAGEMENT PLANS

52. Cases such as *Shepperd v Ryde Corporation* (1952) 85 CLR 1, a case about the grant of an interlocutory injunction, supports the proposition that it is arguable that a purchaser who receives a pamphlet describing a proposed estate development before contract may be the beneficiary of either a collateral contract or an implied warranty that the areas described in the pamphlet would be used as the pamphlet described.

53. These pamphlets often describe in glowing terms, the amenities that can be expected of a development , and how certain areas will be reserved for certain uses (eg recreation) , how certain building restrictions will apply for the benefit of all (eg uniform building style).

54. However, the *Shepperd* line of authority provides no comfort to people who buy into developments, expecting them to have the amenity advertised , when faced with clauses such as *SEPP (Affordable Rental Housing)* 2009, Clause 9 and *Ballina LEP* , Regulation 29 , which are common clauses in many environmental planning instruments in NSW and authorised by *EPA.*

55. Sec 28 *EP& A* Act is headed ‘’Suspension of laws etc by environmental planning instruments ‘’ and provides as follows :

(1) In this section,
"regulatory instrument" means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.
(2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
(3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.
(4) Where a Minister is responsible for the administration of a regulatory instrument referred to in subsection (2), the approval of the Governor for the purposes of subsection (3) shall not be recommended except with the prior concurrence in writing of that Minister.
(5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in subsection (3) or the concurrence of a Minister as referred to in subsection (4) shall be prima facie evidence of the approval or concurrence.

(6) The provisions of this section have effect despite anything contained in section 42 of the *Real Property Act 1900* .

56. An early case on the above provisions that of Talbot J in *Challister Limited v Blacktown City Council* (1992) 76 LGRA 10 in which his Honour explains the purpose of *EPA* , s 28 and clauses such as *SEPP (Affordable Rental Housing)* 2009, Clause 9 and *Ballina LEP* , Regulation 29:-

" The purpose of s 28 is to overcome any impediment placed on development which is to be carried out in accordance with Pt IV of the *Environmental Planning and Assessment Act* . It recognises that the ultimate regulatory provisions in relation to the carrying out of development resides in Pt IV of the Act. If those provisions are complied with either without consent but pursuant to an environmental planning instrument or in accordance with a development consent then the regime of the *Environmental Planning and Assessment Act* may prevail over any other act or any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made if it is so provided in an environmental planning instrument with the approval of the Governor.

Section 28 was enacted for the purpose of enabling development to be carried out. To that end an environmental planning instrument may include the type of provision of which cl 26 is an example. In order to serve the purpose of enabling development to be carried out a regulatory instrument such as a restriction or covenant shall not apply to development which is carried out in accordance with an environmental planning instrument or in accordance with a consent granted under the *Environmental Planning and Assessment Act* .

Section 28(2) removes any bar to the development being carried out. It has no effect on whether development consent should be granted. The terms of the restrictive covenant are not a bar to the grant of a development consent. If a development consent is granted to permit a use which is in conflict with the terms of the restrictive covenant it does not follow that the development consent will be invalid. Neither does it follow that the developer must make application to the Supreme Court to have the covenant released varied or modified if the person having the power to release vary or modify the covenant refuses to co-operate. A dose examination of s 28(2) shows that it is this last step of releasing varying or modifying the covenant to which the subsection is directed.

The opportunity to make such a provision in an environmental planning instrument is intended to achieve a result whereby development which satisfies the criteria laid down by the planning legislation may proceed notwithstanding any constraint imposed by other regulatory instruments. The Parliament recognised the significance of the extent of this power by subjecting its exercise to the approval of the Governor and in some cases to the concurrences of the relevant Minister. "

57. The Court of Appeal considered the provisions in *Coshott v Ludwig* [1977] NSW Conv R 55-810 where Meagher JA, Giles AJA and Simos AJA agreeing, said of section 28 and a clause equivalent to *Ballina LEP* , Regulation 29:-

" The self-evident purpose of s28 of the Act and cl32 of LEP27 is to nullify and remove all obstacles to the planning principles decided on by the Council or the Minister. In this context s28 of the Act is stating, in effect, "an environmental planning instrument may state what documents should be disregarded", and cl32 of LEP27 is stating that one type of document to be disregarded is a document creating a restrictive covenant. As to the argument about the words "by or under whatever authority made", I am of the view that, although chosen without conspicuous felicity, they mean no more than "howsoever created".

58. Summarising these provisions, the Court in *Barry Edward and Thelma June Harrington v Greenwood Grove Estate Pty Ltd* [2011] NSWSC 833 said at [110]

'' SEPP (Affordable Rental Housing) 2009 Part 2, Division 1 provides a Code for the development of affordable housing in this State. Clause 8 provides that if there is an inconsistency between the *SEPP* and other environmental planning instruments whether made before or after commencement of the *SEPP* then the *SEPP* prevails to the extent of the inconsistency. Clause 9 has been set out earlier in these reasons.''

59. *Greenwood Grove* involved a development at Lennox Head, near Byron Bay.The vendor provided each purchaser/ plaintiff a "Management Plan" that set out the objectives of the Estate's development and described features of the Estate in words and published photographs of it.
60. The defendant prepared a management plan for two purposes: to give to Ballina Council to satisfy the conditions of the Council's June 2004 development consent; and also, to provide to potential purchasers of the lots in the Estate.
61. The developers through the Management Plan painted a rosy picture of low density development.

62. Para [23] of the judgment reads as follows

‘’The Management Plan is a marketing document. It commences with a "Vision Statement" that extols the advantages of the Greenfield Road district. It addresses the reader upon the assumption the reader has already purchased a lot and is enjoying the amenities the Estate has to offer. Mr Chris Condon, a principal of the defendant signed the vision statement, which is reproduced below:-

"Vision Statement

The Greenfield Road area of Lennox Head is one of the most sort- after [sic] locations in the region. Greenwood Grove provides a new opportunity to become a part of this tranquil north coast setting.

The pockets of remnant and rehabilitated rainforest and expansive views over Seven Mile Beach offer contrasting living environments. So, you can chose to go exploring through the rainforest, sit back on your balcony chair and enjoy the views of the water or take a short stroll to the village of Lennox Head to meet with friends or to go for a surf.

At Greenwood Grove we hope to inspire sustainable living so that the rainforests and distinctive character of the site will be preserved into the future. Implementation of detailed ecological restoration management principles and site planning and architectural guidelines, helps us to achieve this vision - and the great views, well what can I say...

Enjoy!"

63. In the "Preamble" following the Vision Statement the Management Plan describes that the Estate's development will be managed in a predictable scheme according to a set of established guidelines that are set out in the Management Plan but leaving some room for variation.

64. Para [44] ‘’ The Vision Statement in Greenwood Grove is associated with the "tranquil north coast setting" and "management principles and a site planning" so that the "distinctive character of the site will be preserved into the future". The document resonates with concepts of stability, tranquillity and ordered planning. The Preamble and the Management Plan emphasise the limited circumstances in which it may be changed "on the basis of specific design merit" and of its own motion "to accommodate any changes in

the statutory controls, design guidelines, policies and regulations of Ballina Shire Council or any other authority", thereby inferring the stability of the Management Plan as the controlling plan for the future Estate development. These ideas are further reinforced in the background section which identifies the aims of the plan in relation to the undeveloped lots as being to incorporate dwellings "up to the approved density" having regard to "...the amenity of surrounding residents, the housing density of the locality...". The Management Plan was aptly crafted to give the impression that the defendant intended it to wholly govern the future development of the site.'

65. All contracts annexed a Planning Certificate under the *EPA Act* , and identified applicable local environmental plans and deemed environmental planning instruments, commencing with the *Ballina LEP* (" *BLEP* ").

    It also identified Development Control Plans prepared under *Environmental Planning and Assessment Act* , s 72, namely the North Coast Regional Environmental Plan 1988. The *EPA Act* , s 149 Certificate described potentially applicable State Environmental Planning Policies the following way:-

    "1(3)(a) As at the date of this certificate, the following State environmental planning policies (SEPPs) apply to the subject land. Clause 29 of the EP & A (Savings & Transitional) Regulation 1998 affects the provisions of certain SEPPs and how they apply to the land. A copy of clause 29 is attached and should be read in conjunction with the SEPPs listed. Any enquiries on the SEPPs should be directed to the NSW Department of Infrastructure, Planning and Natural Resources."

66. Cl 29 of the *EP & A Act* was not, however, attached.

67. In reliance on *inter alia* that rosy picture, the plaintiffs purchased lots in the Estate.
68. None of the purchasers seemed to have read in detail the *Ballina LEP* Regulation 29 and the *SEPP (Affordable Housing) 2009* Clause 9, which the judgment infers were disclosed : para [39
69. The developers tried to develop some fo the lots substantially in accordance with the Management Plan, but that fell foul of the L & E Court.
70. In the meantime the New South Wales State Government promulgated a new State and Environmental Planning Policy to encourage affordable rental housing: *SEPP (Affordable Rental Housing)* 2009.
71. *SEPP (Affordable Rental Housing)* 2009 ,Clause 9 and *Ballina LEP* , Regulation 29 suspended the operation of the constraining provisions in the Management Plan .
72. *SEPP (Affordable Rental Housing)* 2009, Clause 9 and *Ballina LEP* , Regulation 29 were each made under the authority of the *EPA Act,* s 28 which is set out more fully above.
73. *SEPP (Affordable Rental Housing)* 2009 similarly provides for the suspension of covenants, agreements and instruments in similar, but not identical terms. The relevant provisions of *SEPP (Affordable Rental Housing)* 2009 are Clauses 3, 7, 8 and 9 provide:-

"3 Aims of Policy

The aims of this Policy are as follows:

(a) to provide a consistent planning regime for the provision of affordable rental housing,

(b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,

(c) to facilitate the retention and mitigate the loss of existing affordable rental housing,

(d) to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,

(e) to facilitate an expanded role for not-for-profit-providers of affordable rental housing,

(f) to support local business centres by providing affordable rental housing for workers close to places of work,

(g) to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.

...

7 Land to which Policy applies

This Policy applies to the State.

8 Relationship with other environmental planning instruments

If there is an inconsistency between this Policy and any other environmental planning instrument, whether made before or after the commencement of this Policy, this Policy prevails to the extent of the inconsistency.

9 Suspension of covenants, agreements and instruments

(1) For the purpose of enabling development on land in any zone to be carried out in accordance with this Policy or with a development consent granted under the Act, any agreement, covenant

or other similar instrument that restricts the carrying out of that development does not apply to the extent necessary to serve that purpose.

(2) This clause does not apply:

(a) to a covenant imposed by the Council or that the Council requires to be imposed, or

(b) to any prescribed instrument within the meaning of section 183A of the *Crown Lands Act 1989* , or

(c) to any conservation agreement within the meaning of the *National Parks and Wildlife Act 1974* , or

(d) to any Trust agreement within the meaning of the *Nature Conservation Trust Act 2001* , or

(e) to any property vegetation plan within the meaning of the *Native Vegetation Act 2003* , or

(f) to any biobanking agreement within the meaning of Part 7A of the *Threatened Species Conservation Act 1995* , or

(g) to any planning agreement within the meaning of Division 6 of Part 4 of the Act.

(3) This clause does not affect the rights or interests of any public authority under any registered instrument.

(4) Under section 28 of the Act, the Governor, before the making of this clause, approved of subclauses (1)-(3)."

74. The defendant developer thereafter lodged a development application ("the 2010 development application") with the local authority for the Lennox Head area, the Ballina Shire Council, under *State Environmental Planning Policy (Affordable Rental Housing)* 2009 (NSW) (" *SEPP (Affordable Rental Housing) 2009* ") seeking approval to develop substantially increase the density of the development of certain Lots from the represented 18 units to 74 units.
75. The Court held that the developer was entitled to rely on the provisions of the SEP and BLEP to resile form the rosy representations in the Management Plan.

TAXATION ASPECTS OF STRATA DEVELOPMENT

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

Brady King Pty Ltd v Commr of Taxation [2008] FCA 81

Unit Trend Services Pty Ltd v Commissioner of Taxation [2012] FCAFC 112

VALUATION CONSIDERATIONS OF STRATA

Trust Company of Australia Ltd v The Valuer General [2007] NSWCA 181

PLANNING CASES RELATING TO STRATUMS

Chino Pty Limited v Transport Infrastructure Development Corporation and Anor [2006] NSWLEC 768

Stockland and Anor v Manly Council [2009] NSWLEC 1145 (which featured consideration of an air stratum leasehold)

West Apartments Pty Limited v City of Sydney Council [2009] NSWLEC 1411

IMPLICATION OF TERMS INTO A STRATA MANGEMENT STATEMENT (IE A STATUTORY CONTRACT)

The Owners –SP 78102 v The Owners –SP 78101 [2010] NSWSC 973

MIXED USE DEVELOPMENT LEGISLATION IN QLD

Mixed Use Development Act , May 1993

See article by L M Lazarides in ACLN Issue 31 , viewed online Sept 2015

LITIGATION OVER STRATUM LOTS

Sieminski v Brooks Nominees Pty Ltd [1990] TASSC 58; (1990) Tas R 236; A56/1990

Postscript

I welcome any comments or positive criticism to
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