Building management statements and strata management statements: Unholy mixing of contract and property

Cathy Sherry*

Large-scale developments are increasingly subdivided between separate "stratum" owners who share common facilities. The rights and responsibilities of owners are regulated by a registered building management statement (BMS) or strata management statement (SMS). While BMSs and SMSs are negotiated by initial owners and stakeholders, they are not contracts. They are registered Torrens instruments, binding on all subsequent owners, and should be interpreted with reference to property law. Property law has always been reluctant to enforce agreements of predecessors in title, because they can be economically and socially stultifying. While we need mechanisms to ensure the upkeep of buildings, this does not change the fact that initial owners can make agreements that are suboptimal, or become so through the passage of time. Principles of property law have traditionally allowed courts to safeguard the utility of land and courts should continue to perform this role within the BMS and SMS statutory framework.

INTRODUCTION

Stratum or volumetric subdivision is increasingly common in large-scale and/or high-rise development. It allows for the subdivision of a building or land into separate stratum lots, which share common services and facilities.[1] A stratum lot might be further subdivided by a strata plan. For example, a building might comprise a retail section at its base, several floors of commercial office space, and then floors with strata title residential apartments.

The retail, commercial and residential sections will be contained in discrete stratum lots or parcels, but might share the use of air-conditioning, lifts, pumps, fans, car parks and access ways. A building management statement (BMS) or strata management statement (SMS) will be lodged for registration with the plans of subdivision. This will attempt to regulate the future relationship of stratum owners, in particular, their responsibility for shared facilities.

BMSs and SMSs are more complicated than they might seem. They are regulatory instruments operating on the border of contract and property law. While initially negotiated as contracts, they avoid the ordinary rule of privity that contracts do not bind third parties.[2] They also avoid the cardinal

* Senior Lecturer, Faculty of Law, University of New South Wales. My thanks to my university colleagues, Dr Chris Rossiter and Denis Harley, as well as my colleagues in the Australian College of Community Association Lawyers (ACCAL), Michael Allen, Michael Kleinschmidt and Tim Graham, for their invaluable comments on this article. I am also indebted to Gary Budgen for the generous way in which he consistently shares his expertise with fellow professionals.

[1] The first "stratum" or "volumetric" subdivision in Australia was the Paradise Centre in Surfers Paradise, Qld. It comprised a basement car park, ground floor shopping centre, two large residential towers, and an international hotel. The development needed its own project specific legislation: *Registration of Plans (HSP (Nominees) Pty Ltd) Enabling Act 1980* (Qld); *Registration of Plans (Stage 2) (HSP (Nominees) Pty Ltd) Enabling Act 1984* (Qld). In NSW, the first attempted stratum subdivisions were the Connaught building on Hyde Park, Eastgate at Bondi Junction and Eastpoint at Edgecliff. They were all were created with complex easements, covenants and umbrella management agreements, drafted by the developers' lawyers. Legislation allowing for the creation and regulation of these mixed use developments was enacted in response to existing developer practice: Bugden G, *All about Strata and Building Management Statements and Building Management Committees: A Complete Guide to Working With Building Management Committees* (Institute of Strata Management, 2006) pp 2-3 (http://www.mystrata.com/doc-store/Building_Management_Statements_Paper_for_ISTM_Nov_06.pdf).

[2] The legislative provisions were enacted to overcome the limitations of the umbrella management agreements that were initially used in NSW. Being contractual, there was "a high degree of uncertainty as to whether new owners [would] adopt the established management arrangements": Bugden, n 1 p 3.

principle of property law, the numerus clausus principle, that only a narrow class of contractual agreements can be converted into property rights and consequently bind successors in title.

This article will argue that as both the contract and property rules have extremely valid rationales, both must be borne in mind when drafting and enforcing BMSs and SMSs.

LEGISLATION

In New South Wales, stratum subdivisions are effected under a relatively brief section of the *Conveyancing Act 1919* (NSW) (Pt 23, Div 3B). In Queensland, stratum or "volumetric" subdivisions were created under the *Mixed Use Development Act 1993* (Qld), but are now created under the *Land Title Act 1994* (Qld) (s 48D and Pt 4, Div 4).[3] In Victoria, while the term "stratum" is not used, a single building can be divided between multiple owners corporations under the *Subdivision Act 1988* (Vic) (s 27),[4] however, the Victorian legislation only requires a brief statement of "purpose", rather than a more detailed BMS or SMS (ss 27B(2), 27C(2)). While this article will focus on the New South Wales provisions, the conceptual and practical issues raised by the conflicting rights and responsibilities of multiple, changing owners of complex developments, are the same in all jurisdictions.

In New South Wales, in stratum subdivisions without a strata component, a BMS is optional.[5] If however any of the stratum lots are then further subdivided by a strata plan into a "stratum parcel", an SMS must be registered (replacing any BMS, if it existed).[6] The SMS then regulates the relationship between the individual stratum lot owners and the owners corporations of the stratum parcels. Arguably the most important part of a BMS or SMS is the schedule dividing the costs of the shared facilities.[7]

BMSs and SMSs are written by the original owners of the land or the stratum lots, and in the case of SMSs, prior to the registration of the strata plan and sale of any apartments. That is, they will be written by the developer and initial owners, not the ultimate members of the owners corporation. The legislation essentially gives initial owners a free reign to negotiate and write what they please.[8]

BMSs and SMSs must establish a building management committee, made up of all stratum lot owners and any owners corporations, although owners can be excluded with their consent. BMSs and SMSs must contain certain provisions, for example on insurance, damage and disputes. They can also regulate garbage, safety and security measures, the appointment of a managing agent, noise levels, trading activities, service contracts, and an architectural code to preserve the appearance of the building, but significantly, they are not limited by this list.[9]

SMSs and BMSs have the effect of an agreement under seal between all property owners in the building. In the case of BMSs, this is all of the stratum lot owners, mortgagees and lessees, and in the case of SMSs, those entities/people plus the bodies corporate (owners corporations), strata lot owners, lessees and mortgagees.[10] These entities/people are taken to covenant "jointly and severally" to carry out the obligations in the BMS or SMS and to allow those obligations to be carried out.[11] The effect of this section is to turn what began as a contract negotiated by the original parties involved in the

[3] *Mixed Use Development Act 1993* (Qld), Pt 6, as a "specified Act" is still operative for some older stratum scheme schemes; see *Body Corporate and Community Management Act 1997* (Qld), Ch 8, Pt 1.

[4] *Subdivision Act 1988* (Vic), s 27C(4): A subdivision can include limited and unlimited owners corporation. The latter will usually sit "above" the multiple, limited owners corporations and can carry on the powers and functions of the limited owners corporations.

[5] *Conveyancing Act 1919* (NSW), s 196D. They are also optional under *Land Titles Act 1994* (Qld), s 54A.

[6] *Conveyancing Act 1919* (NSW), s 196J; *Strata Schemes Freehold Development Act 1973* (NSW), s 28R.

[7] See Bugden, n 1, pp 5-6.

[8] *Conveyancing Act 1919* (NSW), s 196E, Sch 8A; *Strata Schemes Freehold Development Act 1973* (NSW), s 28S, Sch 1C.

[9] *Conveyancing Act 1919* (NSW), cl 5(3), Sch 8A; *Strata Schemes Freehold Development Act 1973* (NSW), cl 3(3), Sch 1C.

[10] *Conveyancing Act 1919* (NSW), s 196I(1); *Strata Schemes Freehold Development Act 1973* (NSW), s 28W(1).

[11] *Conveyancing Act 1919* (NSW), s 196I(2); *Strata Schemes Freehold Development Act 1973* (NSW), s 28W(2)

development, into a statutory property right that will bind all subsequent owners.[12] Both BMSs and SMSs are registered and are recorded on the folio of the register for the body corporate(s), (if an SMS),[13] and the folios of the register for stratum lots.[14]

STRATA PLAN 70672 v TRUSTEES, ROMAN CATHOLIC CHURCH

The best way to understand an SMS is to look at one in action.[15] *Owners Corporation – Strata Plan 70672 v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2011) 1 STR(NSW) 457; [2011] NSWSC 973 (Sackar J) concerned a stratum subdivision near Circular Quay in Sydney. The land had been owned by the trustees, and developed by Grocon. The stratum subdivision divided the land into two stratum lots. Lot 2 was retained by the trustees and included two buildings and 76 car spaces. Lot 1 was subdivided by a strata plan and included "The Cove" apartments, the Belgian Beer café, commercial offices and six levels of underground parking. The plaintiff was the owners corporation of this strata subdivision.

The buildings were subject to a registered SMS, which had been negotiated by the developer, Grocon, and the trustees, of necessity prior to the registration of the strata plan and the creation of the strata owners corporation. The trustees' solicitor had drafted the SMS to allocate costs (excluding insurance) in 95:5 proportions, with the Trustee Lot bearing the smaller proportion. The trustees' solicitor included Clause 21 in the SMS, stating that the:

> owners corporation and the strata lot owners … acknowledge that the rights and obligations of the owners represent a fair and equitable bargain between the parties … and that the rights of the owners of Lot 2 [the trustees] may not be decreased and the obligations may not be increased except with the express consent of the owner of Lot 2.

Mallesons, which acted for Grocon, protested that these terms were "inappropriate" for an SMS (at [19]-[21]). This was presumably because SMSs usually contain auditing and adjustment provisions for the costs of shared facilities, owing to "the difficulty in identifying all of the shared facilities in advance of the operation of the building and uncertainties as to actual costs of operation and usage".[16] The trustees' solicitor responded to Mallesons' concerns by stating that Clause 21 was:

> specially inserted to provide some protection for the position of the Church in case any application might be made by the Strata Scheme in the future to any court or tribunal to increase the contributions to be made by the Church in respect of Lot 2 to the common expenses of the committee.

In other words, the trustees did not want the ultimate apartment owners to be able to challenge the proportionate payments for shared facilities. Presumably wanting the development to proceed and knowing that they would not be paying the bulk of the costs (the strata apartment owners would be), Grocon agreed to the 95:5 split.[17] During the course of the dispute, the trustees made a number of ex gratia payments towards shared costs. The owners corporation argued that the SMS should be set aside under the *Contracts Review Act 1980* (NSW) for being unjust. The trustees conceded, and Sackar J accepted, that the Act applied to an SMS, although Sackar J did not set out any reasoning in this regard. There are conceptual difficulties applying the Act to an SMS, but it is possible that as an SMS begins life as a contract, before being transformed in to a statutory property interest by registration,

[12] In *Italian Forum Ltd v Owners – Strata Plan 60919* [2012] NSWSC 895 at [49], White J suggested that these provisions would enable the building management committee to enforce the SMS against individual strata lot owners.

[13] *Strata Schemes Freehold Development Act 1973* (NSW), s 28T.

[14] *Conveyancing Act 1919* (NSW), s 196F; *Land Titles Act 1994* (Qld), s 54D(1).

[15] Although governed by the old provisions in *Mixed Use Development Act 1993* (Qld), the considerable litigation in relation to the Cathedral Place development in Brisbane is still instructive, see eg, *Proprietors Cathedral Village Building Units Plan No 106957 v Cathedral Place Community Body Corporate* [2012] QSC 301; *Cathedral Place* [2007] QBCCMCmr 478 (9 August 2007); *Cathedral Place* [2006] QBCCMCmr 360 (5 July 2006); *Cathedral Place* [2009] QBCCMCmr 142 (9 April 2009); *Cathedral Place* [2013] QBCCMCmr 117 (15 March 2013); *Cathedral Place* [2010] QBCCMCmr 167 (14 April 2010); *Cathedral Place* [2010] QBCCMCmr 161 (7 April 2010); *Cathedral Place* [2010] QBCCMCmr 101 (3 March 2010).

[16] Bugden, n 1, p 6.

[17] Grocon actually retained ownership of office space within the development and was liable for 3% of the shared costs. Most developers do not retain any of the property and would not be liable for any of the shared costs in an SMS.

the Act applies. Under the *Contracts Review Act 1980*, a court can make orders not only in relation to contracts, but also in relation to "land instruments" (s 7(1)(d)).[18] This would allow a court to review the SMS agreement and ultimately grant orders that vary or terminate the registered dealing.

Under s 7, a court has the power to terminate or vary a contract it considers to have been "unjust in the circumstances relating to the contract at the time it was made" and to avoid "an unjust consequence or result". Under s 9, a court is to have regard to the "public interest" and whether there was "any material inequality in bargaining power between the parties to the contract", whether the contract provisions were "the subject of negotiation", whether it was reasonably practicable for the party seeking relief under this Act to negotiate for the alteration of or to reject any of the provisions of the contract, and whether any provisions of the contract impose conditions which are "not reasonably necessary for the protection of the legitimate interests of any party to the contract". Not surprisingly, the owners corporation argued that as it did not exist at the time the SMS was negotiated and had obviously played no role in its formation, it satisfied a number of these criteria. It argued there was manifest unequal bargaining power between the parties, (of course there was in fact no "bargaining" at all between the parties who were ultimately bound). It also alleged that the provisions of the SMS were not necessary for the protection of the legitimate interests of the trustees.

Sackar J started his analysis of the Act by saying that it was "a piece of remedial legislation that must be construed liberally" (at [69]) and ended by saying: "Unfairness in commerce, without more, will not for example constitute unconscionable conduct" (at [90]), and quoting Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [80], who when dealing with the respondent's lack of cause of action said:

> [T]he common law does not respond by providing a generalised cause of action "whose main characteristic is the scope it allows, under high-sounding generalisations for judicial indulgence of idiosyncratic notions of what is fair in the market place". Rather, the common law provides particular causes of action and a range of remedies.

Sackar J went on (at [91]) to quote French, Jacobson and Graham JJ in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd* [2008] FCAFC 136 at [131]: "Equity does not provide a remedy on one [sic] respect of conduct in trade or commerce which in the opinion of a judge is unfair."[19]

It is difficult to see the relevance of these cases when the owners corporation clearly had a cause of action, and was not asking the court to apply either a doctrine of the common law or equity at this point. It was asking the court to apply a statute; a statute that Sackar J had accepted gave the owners corporation a right to judicial review of the SMS. Sackar J declined to set aside the SMS as being unjust under the *Contracts Review Act 1980*, essentially because he viewed it as an appropriately negotiated commercial contract. He concluded correctly that there was no suggestion that the legislative regime for SMSs had not been followed. He held that it was "perfectly legitimate for the Trustees … to look after their own commercial interests in order to fix their financial obligations so as to create economic certainty into the future" (at [87]) and that Grocon had "a clear commercial interest in aligning itself with [the apartment] purchasers" (at [85]). He said that there was no suggestion that the 95:5 split was unfair, but because of the escalation of costs, the owners corporation wanted to have the split changed to 83:17.

There are a number of comments that could be made about this reasoning. First, while developers might have some commercial interest in aligning themselves with purchasers, this does not mean they will negotiate contracts that purchasers will have to discharge, in the same way that they would

[18] *Contracts Review Act 1980* (NSW), s 4 defines "land instrument" as "an instrument that transfers title to land, creates an estate or interest in land or is a dealing within the meaning of the *Real Property Act 1900*". In *Real Property Act 1900* (NSW), s 3, a "dealing" is defined as "any instrument other than a grant or caveat which is registrable or capable of being made registrable under the provisions of this Act, or in respect of which any recording in the Register is by this or any other Act or any Act of the Parliament of the Commonwealth required or permitted to be made." SMSs are registered in accordance with *Strata Schemes Freehold Development Act 1973* (NSW), s 28T and appear on the certificate of title for the common property of a strata schemes in a stratum subdivision.

[19] There is a typographical error in Sackar's judgment. French, Jacobson and Graham JJ said: "Equity does not provide a remedy in respect of conduct in trade or commerce which is, in the opinion of a judge, unfair."

negotiate contracts that they themselves will have to discharge. Litigation in relation to contracts formed by developers, prior to the sale of units and binding owners corporations, is rife, demonstrating that developers routinely form contracts that purchasers ultimately find intolerable.[20] Even if we assume that developers are acting in good faith, it is axiomatic that unless a fiduciary, commercial parties do not look after third parties' interests as they do their own.[21] They are not required to.[22] It seems feasible that the developer, Grocon, may have put its own interests first when negotiating the SMS, and those interests were by definition not going to be identical to the apartment purchasers', most obviously because Grocon was not going to pay the lion's share of the agreed costs. Had Grocon's interests been more closely aligned with the purchasers', it arguably would have insisted on an adjustment clause.

More fundamentally, it is essential to recognise that an SMS is not an ordinary commercial contract. It is a contract that by statute had been transformed into a property right; it will bind parties who did not negotiate it simply by virtue of the fact that they own land.[23] The statutory regime avoids the ordinary privity rule.[24] This is significant because privity has a practical and moral rationale: it may not be proper or fair for a person who has not been involved in negotiations to be bound by another's agreement. When privity is present, courts are prepared to enforce robustly a huge range of contractual terms, precisely because they will only be binding on people who agreed them.

Under the general law, contractual terms can be binding on third parties if the contract has been transformed into a property right. If a contractual agreement can be attached to land it will operate as a right in rem, binding "all the world", including subsequent owners of the land who did not negotiate the agreement. But that is a big "if". Property law is extremely reluctant to transform contractual agreements into property rights and only allows a very narrow class of agreements to qualify. This is called the numerus clausus (closed number) principle.[25] While parties are free to dream up almost any contractual rights they please, only a small recognised class of rights will constitute property: fee simples, life estates, leases, mortgages, liens, profits a prendre, easements and restrictive covenants. For example, while I can contractually agree with my neighbour that I am going to pay him indefinitely $2,000 pa to use his backyard (a) to grow vegetables in good rainfall years and (b) to host corporate parties in other years, we cannot transform that agreement into a property right benefiting

[20] *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527; *Owners – Strata Plan 56443 v Regis Towers Real Estate Pty Ltd* (2003) 58 NSWLR 78; *Owners Strata Plan No 61643 v 183 On Kent Management Pty Ltd* [2007] NSWSC 281; *Owners – Strata Plan No 64972 v Rinbac Pty Ltd* [2009] NSWSC 745; *Rinbac Pty Ltd v Owners Corporation Strata Plan 64972* (2010) 77 NSWLR 601; *Council of the City of Sydney v Oaks Hotels & Resorts (NSW) No 2 Pty Ltd* [2010] NSWLEC 181; *Oaks Hotels & Resorts (NSW) No 2 Pty Ltd v Council of the City of Sydney* [2011] NSWLEC 1054; *Yedway Pty Ltd v Owners Corporation of Strata Plan 62871* [2009] NSWSC 8; *OC SP 74565 v Mantra Ettalong Pty Ltd (Strata and Community Schemes)* [2012] NSWCTTT 116; *Waldorf Apartment Hotel, The Entrance Pty Ltd v Owners Corp SP 71623* [2010] NSWCA 226; *Owners Corporation SP 20856 v TS Management Pty Ltd (Strata and Community Schemes)* [2009] NSWCTTT 109; *Santai v Owners – Strata Plan No 77971* [2010] NSWSC 628 (on appeal *Casuarina Rec Club Pty Ltd v Owners – Strata Plan 77971* [2011] NSWCA 159); *Quest Rose Hill Pty Ltd v Owners Corporation of Strata Plan 64025* [2012] NSWSC 1548.

[21] In *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527, McDougall J held that a developer owed a community association (a body corporate in a community title development) a fiduciary duty when creating a management contract. It is not clear that this decision has had any effect on developer practice: see Kleinschmidt M, "Falling short of the target: Some implications of fiduciary duties for developer practice in Queensland and New South Wales" (2011) 19 APLJ 263; Sherry C, "Long-term management contracts as developer abuse" in Blandy S, Dixon J and Dupuis A, *Multi-Owned Housing: Law, Power and Practice* (Ashgate, 2010).

[22] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

[23] See *Owners Corporation – Strata Plan 70672 v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2011) 1 STR(NSW) 457; [2011] NSWSC 973 at [49], where Sackar J quoted Beazley JA in *Idya Pty Ltd v Anastasiou* [2008] NSWCA 102, who had noted that s 28W overcame the problem of privity by statutorily imposing a contractual relationship on certain entities who would otherwise not be bound by the terms of the SMS; however Sackar J made no further reference to this fact.

[24] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

[25] Merrill T and Smith H, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2001) 110 Yale LJ 1; Edgeworth B, "The Numerus Clausus Principle in Contemporary Australian Property Law" (2006) 32 Mon LR 387.

my land and burdening his. The rights granted would not satisfy the law's description of an easement,[26] or a lease,[27] and the $2,000 pa would constitute an impermissible positive covenant on my freehold land.[28]

It is vital to note that this result cannot be changed by "disclosing" or giving purchasers "notice" of our agreement. The numerus clausus principle comes before notice.[29] For example, notice was irrelevant to the validity of the easement in *Clos Farming Estates v Easton* (2002) 11 BPR 20,605; [2002] NSWCA 389. Irrespective of initial contractual agreement and subsequent notice through registration, the rights granted did not match the common law's definition of an easement and the court would not enforce it. Even in lease law, while an original landlord and tenant may agree almost anything as a matter of contract, only those covenants that property law considers objectively rational and efficient will bind assignees; only those covenants that "touch and concern" the land.[30] *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 is a positively heretical property decision because it allowed a successor in title to be bound by a contractual agreement, (to maintain Leicester Square as a pleasure ground), on the basis of notice. Courts spent a century back-peddling from *Tulk*.[31]

Property law's rationale for refusing to enforce any and all contractual agreements against successors in title is simple and as valid today as it was 200 years ago: agreements that individuals currently find economically or personally beneficial may be economically and socially stultifying in the future. While the agreement above might be commercially valuable to my neighbour and me, there is no guarantee that it will be to our successors in title, but if it has become a property right, they will be bound. Of course they can negotiate their way out of it, but only if both agree, and typically with incurred costs.

If all contractual agreements were allowed to attach to land, it would make the purchase of land much more complicated and risk-prone,[32] and it would compromise the use of land by future owners, limiting its economic and social value. As Carol Rose says, "In a wide and commercialized property market, property law acts as an ax that purposely chops out nuances and niceties in the things traded. Too many complications spoil the market."[33] While rarely named by judges, the numerus clausus principle, limiting property to a very narrow class of rights, has been consistently applied by courts for

[26] For example, *Clos Farming Estates v Easton* (2002) 11 BPR 20,605; [2002] NSWCA 389 involved a viticulture development that was created through contracts and an easement. The easement was recorded in *Conveyancing Act 1919* (NSW), s 88B instrument, but the court found that it did not comply with the second and fourth elements of *Re Ellenborough Park* [1956] Ch 131 and was thus unenforceable.

[27] Leases must have a certain duration: *Wilson & v Meudon Pty Ltd* [2005] NSWCA 448.

[28] *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; *Pirie v Registrar General* (1962) 109 CLR 619. The test of whether a covenant is positive is whether it requires the payment of money. It is possible to create valid positive covenants under the *Conveyancing Act 1919* (NSW), ss 88BA, 88F. For an explanation of positive covenants generally, see Victorian Law Reform Commission, *Easements and Covenants: Final Report* (2010).

[29] The general concept of notice has of course been replaced by registration in the Torrens system. Everyone is bound by valid property rights recorded on the register regardless of notice: eg, *Real Property Act 1900* (NSW), ss 42, 43.

[30] *Spencer's Case* (1583) 5 Co Rep 16a; 77 ER 72; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237; cf *Real Property Act 1900* (NSW), s 51; *Karacominakis v Big Country Developments* (2000) 10 BPR 18,235.

[31] *Haywood v Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403; *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; *Pirie v Registrar General* (1962) 109 CLR 619. AWB Simpson, arguably the greatest 20th-century scholar of land law said: "The effect of restrictive covenants is to sterilize the use of a parcel of land permanently; in principle it is not at all clear that a private landowner ought to be allowed to do this without public control of his activities. Whatever their merits, restrictive covenants can have a very detrimental effect on the free development of land, which is not in all cases in the public interest": Simpson AWB, *A history of the land law* (2nd ed, Clarendon Press; Oxford University Press, 1986) p 257.

[32] A Torrens system with a publicly accessible register avoids some of these risks but it is not a cure all. Strata and community title bylaws, BMSs and SMSs are all recorded on the register and yet there is no doubt that many purchasers do not read them, or even if they do, they do not understand them. The documents are frequently voluminous and complicated.

[33] Rose C, "The Moral Subject of Property, the Law and Morality: Property Law" (2006) 48 Wm & Mary LR 1900 at 1917.

centuries.[34] In doing so, courts have performed the important *public* task of maintaining the economic and social utility of land. Property law can never limit itself to only considering the rights of individual land owners because they will inevitably move on; with the exception of Florida sinkholes, the land will remain to be used by others. New owners will be bound by whatever restrictions and obligations affect that land and as a result, unlike contract law, property law must be mindful of its effect, not only on current owners, but future owners (and non-owners), as well.[35]

BMSs, SMSs, strata levies and bylaws are creatures of statute which diverge from these fundamental principles of land law. BMSs, SMSs and strata bylaws can contain a huge range of terms that fall outside the ambit of recognised property rights, in particular, terms that impose positive obligations on freehold land. One of the central functions of the BMSs, SMSs and strata levies is to overcome the property doctrines that limit freehold covenants to negative obligations.[36] Positive covenants on freehold land are still mostly invalid in Anglo-Australian law,[37] because they compromise the economic freedom of future land owners. This doctrine makes it impossible to make obligations to pay money for the physical upkeep of buildings run with the land, binding future owners. In large-scale developments, particularly high rise, we need the legal facility to compel owners to pay for upkeep; this is beyond question.

However – and this is the important point – this does not change the fact that agreements negotiated by predecessors in title can be economically and socially undesirable. No property owner has a crystal ball; even if they genuinely believe that the agreement they are negotiating will benefit future owners, they can make mistakes.[38] They may negotiate agreements that compel owners to pay for services and facilities which future owners do not want or need,[39] and they may prevent land or buildings being used for their best current economic purpose. Current owners may also negotiate agreements which were always intended to only benefit themselves, operating well as contract rights, but not benefiting future owners at all, operating unfairly and inefficiently as property rights.

Trustees of the Roman Catholic Church is a perfect example. While as a matter of contract law it might be perfectly acceptable for the trustees and Grocon to negotiate an SMS that benefits themselves, this agreement may operate unfairly as a property right. First, it will bind people who did not negotiate it; in other words, the moral and economic rationale that motivates contract law's robust enforcement of agreements is completely absent. Secondly, circumstances may change, so that what was once fair or economically beneficial ceases to be. In a large high rise development like "The Cove", the result is hundreds of property owners arguably being compelled to overpay for services and facilities for the benefit of a single property owner, the trustees. As the SMS and legislation required the trustee's approval for change, the apartment owners were potentially condemned to this state of affairs forever. This is neither just nor economically efficient. Nor was it ever the intention of the legislation, which was designed to produce a workable solution to the problem of maintenance of buildings, not to benefit some owners at the expense of others.

While it might be tempting to rely on the concept of "disclosure" or "notice", it is not an adequate answer to this dilemma. First, on a practical level, the disclosure of the terms of the SMS in *Trustees of the Roman Catholic Church* bordered on farcical; not through any fault of the lawyers in question, but simply by virtue of off-the-plan sales and the legislative regime. A draft SMS was attached to off-the-plan contracts but the schedule of costs was blank. These blanks were filled in as 95:5

[34] Classic statements of the doctrine are found in *Keppell v Bailey* (1834) 2 My & K 517; 39 ER 1042 at 1048; *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51.

[35] Alexander GS, "The Publicness of Private Land Use Controls" (1999) 3 Edinburgh LR 176; Heller MA, "The Boundaries of Private Property" (1998) 108 Yale LJ 1163; Singer JW, *Entitlement: The paradoxes of property* (Yale University Press, 2000); Sunstein CR, "Legal Interference with Private Preferences" (1986) 53(4) Univ Chicago LR 1129; Underkuffler LS, "Property: A Special Right" (1996) 71 Notre Dame LR 103.

[36] See n 2.

[37] See n 28.

[38] Heller MA, "Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1997) 111 Harv L Rev 621.

[39] *Casuarina Rec Club Pty Ltd v Owners – Strata Plan 77971* [2011] NSWCA 159 is a good example of this.

proportions when the SMS was lodged with the strata plan but copies of the final SMS were not sent to the apartment purchasers by the vendor, Grocon.

Of course, as Sackar J noted, the purchasers could have ordered the SMS from Land and Property Information and read its terms, however, it is unlikely that this would have benefited them in any way. They were already contractually bound to buy. Sackar J said (at [95]) that Clause 37 of the off-the-plan contract may have given purchasers a right to terminate once they had seen the final SMS, but with all due respect to Sackar J, it is hard to see how this was possible. Clause 37 stated that purchasers had no right to terminate the contract if there was a difference between any draft document attached to the contract and any document ultimately registered, unless the difference affected the property "to an extent that [was] substantial". As the draft SMS was *blank* in relation to shared costs, there could be no meaningful "difference" between it and the registered SMS figures. Logically, for there to be a "difference" which could be assessed as "substantial" or otherwise, there needed to be two sets of figures to compare.[40]

Secondly, even if this had been an ordinary sale in which the completed SMS was on the register, it is important not to overstate the importance of notice. Notice has always had considerable significance in property law – a purchaser who buys with full notice of the burdens that affect their land is generally bound by them[41] – but is not a cure all.[42] Disclosing an agreement that is unfair, economically inefficient or socially undesirable does not miraculously make the agreement acceptable, or worthy of enforcement. This is particularly so if it is only enforceable by virtue of a special statutory provision. Further, it is important to remember, as we saw above, that property law has always solved this dilemma of enforcement of predecessor's agreements in relation to freehold land, by simply refusing to enforce most of them, other than the "closed number" of recognised property interests, irrespective of notice.[43] Property law's rationale is that purchasers, like predecessors in title, make mistakes; not simply because they are careless or foolish when purchasing land, but because purchasers cannot anticipate all of the effects of their predecessors' contractual agreements.[44] The benefit or detriment of these agreements can only be ascertained at the various points in time they operate.[45] What works today, may not work in five years time and will almost certainly not work in 50. It is not wise for property law (whether common law, equity or statute) to swing from one extreme

[40] Some may argue that purchasers had the option of not buying at all when they saw that the draft SMS was blank, but this rationale does not always work for the limited resource that is land (see Conclusion). If purchasers wanted to live in the CBD, there was not a lot of choice. Sydney CBD is small and consists of mainly commercial premises. Further, unlike other assets which people can choose not to purchase at all (eg shares, TVs, boats), this is not true for homes. Everyone must have somewhere that he or she has a legal right to sleep: Waldren J, "Homelessness and the Issue of Freedom" (1991) 39 UCLA LR 295.

[41] Strictly speaking, notice is not actually relevant to a purchaser being bound in a Torrens system; registration is the relevant act: see n 29.

[42] Natelson RG, "Consent, Coercion and 'Reasonableness' in Private Law: The Special Case of the Property Owners Association" (1990) 51 Ohio State LJ 41; Sterk SE, "Foresight and the Law of Servitudes" (1987) 73 Cornell LR 956; Sterk SE, "Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions" (1984) 70 Iowa LR 615; Alexander GS, "Freedom Coercion and the Law of Servitudes" (1987) 73 Cornell LR 883.

[43] We must not to conflate freehold and leasehold land. Courts have always enforced a wide range of covenants in leases, including positive covenants, but these are fundamentally different to covenants over freehold land. First, lease covenants are only enforceable between two parties, the landlord and the tenant, making renegotiation of the terms feasible. Freehold covenants can benefit multiple parties (eg a s 88B covenant can benefit hundreds of lots in a subdivision), and thus negotiating a change to covenants becomes practically impossible. Secondly, even if a landlord or tenant cannot obtain the agreement of the other party to a variation of a lease, the lease will eventually come to an end, freeing the land from the obligations and restrictions in the lease covenants. Freehold covenants attach to a freehold fee simple, and like the fee simple itself, theoretically go on forever. BMSs and SMSs generally attach to freehold land (cf n 60), are unlimited as to duration and bind multiple parties. They are thus analogous to freehold covenants, not leases.

[44] See n 42; cf Epstein RA, "Notice and Freedom of Contract in the Law of Servitudes Comments" (1981) 55 Southern California LR 1353.

[45] The management and service contract litigation referred to above (n 20) is evidence of the inability of purchasers to anticipate the effect of their predecessors in title's contracts.

of refusing to enforce a huge range of contractual agreements made by predecessors in title regardless of notice, to the other extreme of using notice (or more accurately, registration) to enforce almost agreement at all.[46]

So what is the solution? We need legal mechanisms that compel payment for building maintenance and shared facilities in modern high rise buildings; that is not being called into question. However, we also know that current landowners are not always able or willing to negotiate contracts that benefit future owners. How do we reconcile the two? We allow current owners to negotiate contracts that will transform into property rights and run with the land by virtue of statute, but we maintain strong judicial review for when those owners make mistakes or when, through the passage of time, their initial contractual agreements no longer work. This approach is consistent with modern property statutes[47] and hundreds of years of common law and equity.

Whether we are conscious of this or not, the sometimes mind-numbingly complex doctrines of property have allowed judges to safeguard the economic and social utility of land for the benefit of the whole community.[48] Terms like "touch and concern the land", "accommodating the dominant tenement", and "dead hand control" have been used by judges to strike down private land arrangements which produce public (future or non-owner) detriment.[49] Judges must be able to continue to perform that role in relation to statutory provisions that allow individuals to create novel interests in land.[50] Although sui generis, BMSs and SMSs, like strata bylaws,[51] are interests in land. They are recorded on the Torrens register and they bind people by virtue of their ownership of land.

[46] Remembering that the content of BMSs and SMSs is not limited to the mandatory and optional provisions in the legislation (see n 9). See also *Italian Forum Ltd v Owners – Strata Plan 60919* [2012] NSWSC 895 at [45] per White J: "I doubt that there can be any limit on what can be included in a strata management statement, except that it be reasonably adapted for the purpose for which the statement is to be made"; his Honour upheld the validity of an SMS that purported to raise $60,000 pa from each owners corporation in a stratum subdivision for "the administration and promotion of cultural events at the Italian Forum" and "to generally promote the Italian Forum Complex, as a retail and commercial centre".

[47] This is exactly what *Conveyancing Act 1919* (NSW), s 89 does in relation to easements and covenants, which by virtue of time and land owner activity, may have become obsolete. Like BMSs and SMSs, easements and covenants start out as contractual agreements which can transform into interests in land. *Environmental Planning and Assessment Act 1979* (NSW), s 28 performs a similar function when privately negotiated agreements conflict with the public benefit.

[48] See Sherry C, "Lessons in Personal Freedom and Functional Land Markets: What Strata and Community Title Can Learn from Traditional Doctrines of Property" (2013) 36(1) UNSWLJ 280.

[49] Consider also, the rule against perpetuities, which while terrifying for students, stops current landowners tying up land for generations compromising its economic and social value. While trust law allows the benefit of property to be split between multiple owners, it also provides for a single (or small number) of legal owners who can control and transfer the land efficiently. All common law and equitable property rules have an economic or social rationale.

[50] The US, from which we have copied a lot of our large-scale development, has always allowed judges robust powers to adjudicate on positive and negative obligations on land, or "servitudes" as they are called. Traditionally, US judges used a freehold version of the "touch and concern" doctrine to strike down inefficient or unfair obligations: French SF, "Toward a Modern Law of Servitudes: Reweaving the Ancient Strands" (1981) 55 Southern California LR 1261; Reichman U, "Toward a Unified Concept of Servitudes" (1981) 55 Southern California LR 1177. This has now been replaced by the Restatement (Third) of Property: Servitudes, which allows courts to strike down servitudes that are illegal, unconstitutional, against public policy, unreasonable restraints on alienation, undue restraints on trade, or unconscionable. When modernising the "touch and concern" doctrine the Restatement explicitly stated that "it is not intended to remove courts from their historic role of safeguarding the public interest in maintaining the social utility of land resources. By reformulating the inquiry to ask the question directly–whether the servitude in issue poses such a threat to the public welfare that the rights or obligations it creates should not be allowed to run with land–the law will encourage clearer identification of the issues and clearer explanations of the reasons why servitudes may not be used to implement particular arrangements than was ever possible using the touch-or-concern doctrine."

[51] There is enormous inconsistency in judicial interpretation of strata bylaws. Exclusive-use bylaws are acknowledged to be proprietary interests (*White v Betalli* (2007) 71 NSWLR 381 at [53] (Santow J); *Chauhan v Jaynrees Services Pty Ltd* [2008] NSWSC 969 at [42] (Young CJ in Eq)) but they and other bylaws have also been interpreted as commercial contracts (*Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344 (Harrison J; Mason P agreeing)), a statutory contract or delegated legislation (*Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344 (McColl JA)). While they are certainly a form of delegated legislation, they are also interests in land and must be interpreted as such: Sherry C, "How Indefeasible Is Your Strata Title? Unresolved Torrens Problems in Strata and Community Title" (2009) 21(2) Bond LR 159.

While they begin life as contractual agreements, they do not remain so, and thus it is inappropriate to use the "hands off" ordinary principles of commercial contract law to adjudicate them.

Whether the *Contracts Review Act 1980* (NSW) is the appropriate vehicle for judicial review of BMSs and SMSs is unclear, but in any event, in New South Wales, both the *Conveyancing Act 1919*[52] and *Strata Schemes Freehold Development Act 1973* (NSW) (SSFDA)[53] give courts a power of review.[54] Unfortunately, the power is very briefly stated, which may have led Sackar J in *Trustees of the Roman Catholic Church* to conclude that s 28U(1)(b) of the SSFDA only gave a court power to amend an SMS if *another* section of the SSFDA or other Acts specifically empowered the court to do so. His Honour said that "unless a court is specifically charged with authority to amend the SMS by this or any other Act (if any) the question of amendment is otherwise a matter for the parties pursuant to their contract".[55] There are two problems with this analysis. First, as argued above, SMSs are not contracts; they are statutory property rights that bind all owners of the land and will bind people who had no hand in negotiating the agreement. This provides ample rationale for judicial review. Secondly, there is almost no mention of SMSs elsewhere in the SSFDA.

However brief, it does seem that s 28U(1)(b) is the power that the legislature gave to courts to amend SMSs when necessary. In *Owners – Strata Plan 78102 v Owners – Strata Plan 78101* [2010] NSWSC 973 at [79], Bergin CJ in Eq said that the court had a "broad power" to amend an SMS. In *Italian Forum Ltd v Owners – Strata Plan 60919* [2012] NSWSC 895 at [58]-[60], White J, while not deciding the issue, referred to the Explanatory Memorandum to the *Strata Titles (Part Strata) Amendment Bill 1992* (NSW) which introduced s 28U, to demonstrate an intention that the section "would itself provide jurisdiction to the Court to order an amendment."

CONCLUSION

BMSs and SMSs will become a more common feature of property ownership. This is partly the inevitable result of our democratic society in which freehold ownership is widely dispersed amongst the population. If freehold title to all large buildings were vested in single wealthy and/or aristocratic owners, as has traditionally been the case in the England and cities like New York, we would not need to worry about the difficulty of attaching obligations to pay for maintenance to freehold titles.[56] However, for better or for worse, Australia governments and people love their freehold.[57] As a result, many large buildings will always be owned by multiple parties.

Some of the increase in BMSs and SMSs is arguably also a result of uncritical enthusiasm for shared facilities. In theory, shared facilities allow people to enjoy access to services and assets they could not afford alone. Instead of everyone owning their own pool or gym, they can minimise costs and own a pool and gym in common. The theory does not always work in practice when people cannot agree on how to use or pay for that common asset or worse still, no longer want to pay for the

[52] *Conveyancing Act 1919* (NSW), s 196G(1)(b) states that a "registered building management statement may be amended only if … the amendment is ordered under this or any other Act by a court."

[53] *Strata Schemes Freehold Development Act 1973* (NSW), s 28U(1)(b) states that a "registered strata management statement may be amended only if the amendment is….ordered under this or any other Act by a court."

[54] Compare *Land Titles Act 1994* (Qld), s 54E, which only allows amendment of a BMS with the agreement of all registered lot owners, however, s 54C(4) stipulates that a BMS is ineffective to the extent it attempts to completely exclude (as opposed to defer) court adjudiction.

[55] *Owners Corporation – Strata Plan 70672 v Trustees of the Roman Catholic Church, Archdiocese of Sydney* (2011) 1 STR(NSW) 457; [2011] NSWSC 973 at [140].

[56] Many of Sydney's premium grade buildings have only one or two freehold owners, such as investment trusts. The buildings are subdivided by leases, not stratum or strata plans and arguably function better as a result.

[57] Fitzgerald JD (barrister), Chairman, NSW Housing Board (1912-1917), Minister for Local Government (1916-1820), argued: "If you want to make the working man contented, you must give him better housing conditions than he has hitherto had, and let him own his own house in addition … human nature is in favour of the freehold": see Freestone R, *Model communities: The garden city movement in Australia* (Nelson, 1989) p 96. Australian governments associated long-term urban leasehold with the undesirable class hierarchy in England.

asset at all.[58] Should the pool be heated all year? Should it be open from 5 am to 11 pm? What kind of equipment should the gym contain and how often should it be replaced? Should the gym be closed altogether? The reality of co-owned property is complex and many of these market demands would be more appropriately satisfied by pure contract law, not property. People do not need to own their own gym, they can just pay for membership at someone else's gym (eg *Fitness First*) as and when they need.

Just as developers and the market are beginning to realise this, governments have become extremely enthusiastic about shared "green" facilities, such as grey and black water treatment plants. While government can legitimately mandate environmentally sustainable land use, it needs to be better informed about the complexity of legal structures necessary when private facilities are required to achieve that end. The proposed BMS for Barangaroo South is mind-boggling in its complexity, primarily as a result of the co-owned "green utilities" mandated by the government.[59] No matter how well the documents are drafted, it is inevitable that some, if not all of the ultimate purchasers, particular in the residential strata scheme, will have limited understanding of the BMS regime at the point of purchase.[60] Further, as desirous as commercial investors may be to have certainty about future shared costs, because none of us can say how the world will be in 50 years time, any agreement that attaches to land titles must have the potential to change.

While BMSs and SMSs should always be drafted with clauses allowing for negotiated change, negotiated change will not always be possible. BMSs and SMSs are not contracts with two parties; they are statutory property rights that benefit and burden multiple land titles whose owners may never be able to agree on change. In exactly the same way as the theoretical possibility of renegotiating out-dated restrictive covenants evaporates in the face of hundreds of benefited and burdened parcels in a residential subdivision,[61] the theoretical power to renegotiate no longer workable BMSs and SMSs may prove equally illusory. And like the land in residential subdivisions, we cannot just walk away from premium CBD sites. Unlike the subject of many commercial contracts, land is a limited and essential resource; that is why it has always had its own special rules. We have to use land to carry on our businesses and lives. If large numbers of premium sites in the CBD are affected by unworkable and apparently unchangeable BMSs and SMSs, it is no answer to say to large companies: "Open your national headquarters in Wyong. There is plenty of unaffected land there." Current owners, future owners and non-owners (the citizens of Sydney) need those land titles to remain commercially viable.

It is up to courts to perform this role, just as they have done for centuries. Doctrines of land law such as the numerus clausus principle, have maintained land's economic and social value by consistently preventing current land owners attaching their contractual agreements to land. While the *Conveyancing Act 1919* and SSFDA give current owners the power to do exactly that, the Acts equally give courts the power to mediate those agreements' potentially harmful effects. Ideally, courts should not shy away from using that power.

[58] Experienced strata practitioners are amply aware of this. As Budgen (n 1, p 5) says: "Well structured stratum developments usually focus heavily on design solutions to minimise shared facilities and equipment and to deal appropriately with them where they cannot be minimised. Where this has not occurred, for good reason or because of poor structuring, then legal mechanisms have to be used to resolve potential difficulties. Design solutions are always preferable to legal solution in these types of projects."

[59] "Barangaroo: Inside a Deal", presentation by King, Wood & Mallesons, 8th Annual ACCAL Conference, Sydney, 21 March 2013.

[60] Baranagaroo will be leasehold, not freehold title, but as it will be a 99-year lease, it is unlikely that the land will be regulated in any meaningful way on a day-to-day basis by the government head lease. Long-term leasehold in effect operates similarly to freehold, at least for the first 75 years of a 99-year lease.

[61] Hence why we need *Conveyancing Act 1919* (NSW), s 89; *Environmental Planning and Assessment Act 1979* (NSW), s 28 (see above, n 47).