Court of Appeal
Supreme Court

New South Wales

Case Name:	Bessemer v Owners of Strata Plan 6925/35054
Medium Neutral Citation:	[2018] NSWCA 57
Hearing Date(s):	9 February 2018
Decision Date:	26 March 2018
Before:	McColl JA at [1]; Simpson JA at [120]; Sackville AJA at [121]
Decision:	Application for judicial review dismissed with costs
Catchwords:	APPEAL AND REVIEW – judicial review – review of order in criminal jurisdiction of District Court – jurisdictional error – whether District Court judge decision that he lacked power to relieve lot owner in strata scheme of levy imposed by owners corporation infected by jurisdictional error CRIMINAL LAW – effect of annulment of conviction – where applicant convicted in 1993 and 1994 of contraventions of orders made by Strata Titles Board pursuant to Strata Titles Act 1973 (NSW) in proceedings commenced by body corporate – where on conviction applicant fined and ordered to pay court costs, professional costs and witness expenses – where convictions annulled in 2015 pursuant to Crimes (Appeal and Review) Act 2001, s 4 – where owners corporation determined not to pursue original informations which were dismissed – whether applicant could recover costs alleged to have been incurred consequent upon convictions CRIMINAL LAW – effect of annulment of conviction – where applicant convicted in 1993 and 1994 of

contraventions of orders made by Strata Titles Board pursuant to Strata Titles Act 1973 (NSW) in proceedings commenced by body corporate – where convictions annulled in 2015 pursuant to Crimes (Appeal and Review) Act 2001, s 4 – where owners corporation determined not to pursue original informations which were dismissed – where owners corporation incurred legal costs in seeking advice as to whether to pursue original informations – where owners corporation raised a levy on owners of lots in strata scheme including applicant to recover costs of legal advice – whether applicant could be relieved of levy pursuant to either Strata Titles Act 1973 (NSW), s 150, or Strata Schemes Management Act 1996 (NSW), ss 229 and 230

STRATA TITLES – whether lot owner entitled to be relieved of paying levy raised by owners corporation – Strata Titles Act 1973 (NSW), s 150 – Strata Schemes Management Act 1996 (NSW), ss 229 and 230

WORDS AND PHRASES – "enforcement action" – Crimes (Appeal and Review) Act 2001 (NSW), s 10(1)

Legislation Cited:

Crimes (Appeal and Review) Act 2001 (NSW)
Crimes (Local Courts Appeal and Review) Act 2001 (NSW)
Criminal Procedure Act 1986 (NSW)
District Court Act 1973 (NSW)
Fines Act 1996 (NSW)
Interpretation Act 1987 (NSW)
Justices Act 1902 (NSW)
Justices (Amendment) Act 1967 (NSW)
Local Courts Act 1982 (NSW)
Local Courts (Civil Claims) Act 1970 (NSW)
Local Government Act 1919 (NSW)
Sale of Goods Act 1923 (NSW)
Statute Law (Miscellaneous Provisions) Act 1999 (NSW)
Strata Schemes Development Act 2015 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)
Strata Schemes Management (Miscellaneous Amendments) Act 1996 (NSW)

	Strata Titles Act 1973 (NSW) Strata Titles (Freehold Development) Act 1973 (NSW) Supreme Court Act 1970 (NSW) The Constitution
Cases Cited:	Bagshaw v Director of Public Prosecutions (NSW) [2016] NSWCA 340 Bagshaw v Director of Public Prosecutions (NSW) [2018] NSWCA 14 Commissioner for Railways (New South Wales) v Cavanough (1935) 53 CLR 220; [1935] HCA 45 Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58 Director of Public Prosecutions v Emanuel [2009] NSWCA 42;(2009) 193 A Crim R 552 Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290 Garde v Dowd (2011) 80 NSWLR 620; [2011] NSWCA 115 Mayfair Trading Co Pty Ltd v Dreyer (1958) 101 CLR 428; [1958] HCA 55 Miller v Director of Public Prosecutions [2004] NSWCA 90; (2004) 145 A Crim R 95 Mulder v Director of Public Prosecutions (Cth) [2015] NSWCA 92; (2015) 25 A CrimR 154 R v Bates [1982] 2 NSWLR 894 Re Culleton (No 2) [2017] HCA 4; (2017) 91 ALJR 311 Re Trim Perfect Australia Pty Ltd; National Australia Bank Ltd [2005] NSWSC 972; (2005) 55 ACSR 237 Scott v Director of Public Prosecutions (NSW) [2015] NSWCA 60 Spanos v Lazaris [2008] NSWCA 74 Trad v Harbour Radio Pty Ltd [2017] NSWCA 64 Yousaf v Director of Public Prosecutions [2012] NSWCA 397
Texts Cited:	Archbold’s Criminal Pleading, Evidence and Practice 21st ed (1893) Introduction to Justices (Amendment) Bill, the Hon Mr J Maddison, Minister of Justice, New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 14 March 1967 Justices Legislation Amendment (Appeals) Bill 1998 (NSW)

Category:	Principal judgment
Parties:	Lorraine Helen Bessemer (Applicant) Owners of Strata Plan 6925/35054 (First Respondent) District Court of New South Wales (Second Respondent)
Representation:	Counsel: Lorraine Helen Bessemer (In Person) Owners of Strata Plan 6925/35054 (Mr J McKenzie) District Court of New South Wales (Submitting Appearance) M McHugh SC, A Justice (Amici Curiae) Solicitors: Applicant (In Person) Owners of Strata Plan 6925/35054 (In Person) District Court of New South Wales (Lea Armstrong, Crown Solicitor)
File Number(s):	2017/220710
Publication Restriction:	No
Decision under appeal:	
Court or Tribunal:	District Court of New South Wales
Jurisdiction:	Criminal
Date of Decision:	10 November 2016
Before:	Conlon DCJ
File Number(s):	2014/289101, 2014/289137, 2014/289171

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **McCOLL JA:** The applicant, Lorraine Helen Bessemer, seeks judicial review pursuant to s 69 of the *Supreme Court Act 1970* (NSW) of a decision of Judge Conlon given in the District Court in its criminal jurisdiction on 10 November 2016. The respondents are the owners of lots in Strata Plan 6925/35054 (Owners Corporation).[1] There are three lots in the Strata Plan, one of which is owned by Ms Bessemer.

2 The complex and lengthy history of the matter stems from attempts by the owners of the other two lots in the Strata Plan to require Ms Bessemer to comply with orders made, in 1992 and 1993 respectively, by the Strata Titles Board (STB), pursuant to the *Strata Titles Act 1973* (NSW) (STA). Those attempts included the Owners Corporation successfully prosecuting Ms Bessemer in 1993 and 1994 in the Local Court of New South Wales pursuant to s 142(2A) of the STA for contravention of those orders, for which contraventions she was convicted.

3 Some 20 or so years later, in 2015, in the circumstances detailed later in these reasons, Ms Bessemer's convictions were annulled by his Honour Judge Scotting in the District Court of New South Wales pursuant to s 4 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CAR Act). In 2016, the Owners Corporation determined not to pursue the prosecutions afresh, withdrew the informations by which they had commenced and the proceedings were dismissed (2016 proceedings).

4 In the 2016 proceedings Ms Bessemer sought to recover from the Owners Corporation costs she asserted she had incurred consequent upon her convictions. Ms Bessemer ultimately withdrew her costs application. Notwithstanding this, she subsequently sought to appeal to the District Court asserting she had not, in fact, withdrawn the costs application. She also sought on appeal to be relieved of a levy imposed by the Owners Corporation

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[1] At the time of the events giving rise to the controversy between the parties, those who owned lots in a strata plan were referred to as "proprietors" of those lots, and the "owners corporation" was known as the "body corporate". Those expressions were changed on the enactment of the Strata Schemes Management Act 1996 (NSW). Henceforth a "proprietor" was referred to as an "owner" and the "body corporate" was known as an "owners corporation". For convenience I have used the post-1996 expressions notwithstanding the date referred to.

(apparently after the conclusion of the 2016 proceedings) on all lot owners in proportion to their respective unit entitlements, to recoup legal costs it had incurred in seeking advice and legal representation in relation to the 2016 proceedings (strata levy issue).

5 Conlon DCJ dismissed the appeal on the basis, in part, that he did not have jurisdiction in relation to the strata levy issue.

6 In her summons Ms Bessemer describes the orders she seeks as follows:

> "A judicial review. Exemption from paying cost [sic] of the Owners Corporation. Reimbursement of property and money taken from me unlawfully."

7 Ms Bessemer was self-represented. Mr James Mackenzie, the secretary and treasurer of the Owners Corporation, appeared on its behalf.

8 The Court was greatly assisted by Mr Michael McHugh of Senior Counsel and Mr A Justice who appeared as *amici curiae*.

9 As Gleeson JA explained in *Bagshaw v Director of Public Prosecutions (NSW)*,[2] "[t]here is no right of appeal to this Court from a decision of the District Court on an appeal against a conviction or sentence in the Local Court."[3] Section 176 of the *District Court Act 1973* (NSW) provides that no adjudication on appeal of the District Court is to be removed by any order into the Supreme Court.[4] Its effect is not entirely to exclude proceedings by way of judicial review but to limit relief to cases in which the applicant can demonstrate jurisdictional error.[5] Accordingly, the scope for any intervention by way of judicial review by this Court in a decision of the District Court on an appeal against either a conviction or sentence imposed by the Local Court is limited.[6] Thus, any relief this Court may be able to afford on the judicial review summons depends on Ms Bessemer demonstrating jurisdictional error.[7]

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[2] [2016] NSWCA 340 (Bagshaw) (at [32]).

[3] Garde v Dowd (2011) 80 NSWLR 620; [2011] NSWCA 115 (Garde v Dowd) (at [9]) per Basten JA (Giles and McColl JJA agreeing); Scott v Director of Public Prosecutions (NSW) [2015] NSWCA 60 (Scott) (at [19]); Mulder v Director of Public Prosecutions (Cth) [2015] NSWCA 92; (2015) 25 A CrimR 154 (at [32]).

[4] Garde v Dowd (at [9]).

[5] Garde v Dowd (at [10]). See also Spanos v Lazaris [2008] NSWCA 74 (at [15]) per Basten JA (Beazley and Bell JJA agreeing); Director of Public Prosecutions v Emanuel [2009] NSWCA 42; (2009) 193 A Crim R 552; (at [18]) (Spigelman CJ) (and [45]) (Basten JA).

[6] Bagshaw v Director of Public Prosecutions (NSW) [2018] NSWCA 14 (Bagshaw) (at [45] – [46]).

[7] Ibid.

10 Jurisdictional error is sufficiently described in this case as arising where an inferior court "mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist",[8] where a judicial officer misconstrues the relevant statute and, accordingly, "misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case and where a party has been denied procedural fairness."[9]

11 Due, no doubt, to both the passage of time, and the way the proceedings have been conducted, primary documents have not been produced in relation to many of the historical events. Accordingly, some of those matters, such as the formalities surrounding the prosecutions of Ms Bessemer have been drawn from documents in the nature of submissions produced for the purpose of recent proceedings. None of these historical accounts has been disputed by Ms Bessemer.

12 For the reasons that follow, I would dismiss the judicial review application with costs.

Legislative history

Strata Titles

13 Pursuant to STA, s 157 (as in force at the time the 1993 and 1994 proceedings were commenced) proceedings for an offence against STA, s 142 such as those commenced against Ms Bessemer, could "only be taken before a court of petty sessions held before a stipendiary magistrate". Section 157 had survived in this form notwithstanding the enactment of the *Local Courts Act 1982* (NSW), which relevantly commenced on 1 January 1985 and provided for the creation of Local Courts within New South Wales and abolished courts of petty sessions and the position of stipendiary magistrate.[10]

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[8] Craig v South Australia (1995) 184 CLR 163 (at 177); [1995] HCA 58.

[9] Ibid; see also Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290 (at [46]); Yousaf v Director of Public Prosecutions [2012] NSWCA 397 (at [30]) per Barrett JA (McColl and Meagher JJA concurring).

[10] See Local Courts Act, s 6(1), s 9; s 157 of the STA was amended by Sch 4.90 of the Statute Law (Miscellaneous Provisions) Act 1999 (NSW) to read "Proceedings for an offence against any provision of this Act may only be taken before a Local Court constituted by a Magistrate sitting alone".

14 However, by reason of Sch 1, cl 2(1), in the Savings and Transitional Provisions to the Local Courts Act, all courts of petty sessions which existed immediately before the Local Courts Act commenced were deemed to be Local Courts established under s 6(1) of the Local Courts Act. In addition, pursuant to Sch 1, cl 7(1)(a), a reference in any other Act to Courts of Petty Sessions or Petty Sessions was to be read and construed as a reference to Local Courts established under s 6(1). Accordingly, the 1993 and 1994 proceedings were appropriately commenced in the Local Court in its criminal jurisdiction.

15 Ms Bessemer contends she is entitled to relief in relation to the strata levy issue by reason of s 150 of the STA as in force at the time of her convictions, or, alternatively by reason of one of its successor provisions.

16 Section 150 of the STA as in force at the time of the 1993 and 1994 proceedings provided:

> "**Costs proceedings by proprietors against body corporate**
>
> (1) In any proceedings brought by one or more proprietors against the body corporate, or *by the body corporate against one or more proprietors (including one or more proprietors joined in third party proceedings), the court may order that any moneys (including costs) payable by the body corporate pursuant to an order of the court made in those proceedings shall be paid, only in respect of such lots as are specified in the order and in such proportions as may be so specified, by the body corporate out of contributions levied for the purpose*.
>
> (2) Where a court makes an order under subsection (1) the body corporate shall, for the purpose of paying the moneys ordered to be paid by it, levy contributions in accordance with the terms of the order and shall pay the moneys out of the contributions paid pursuant to that levy, and section 59, subsection (3) excepted, applies to and in respect of contributions levied under this subsection in the same way as it applies to contributions levied under that section." [Emphasis added.]

17 The STA was renamed the *Strata Titles (Freehold Development) Act 1973* (NSW) (Freehold Development Act) on the enactment of the *Strata Schemes Management (Miscellaneous Amendments) Act 1996* (NSW) (Miscellaneous Amendments Act 1996).[11] The Miscellaneous Amendments Act 1996 came into force on 1 July 1997.[12] It repealed s 150 of the STA.[13] The *Strata Schemes Management Act 1996* (NSW) (Management Act 1996) also came into effect on 1 July 1997. Its objects included providing for the management of strata

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[11] Miscellaneous Amendments Act 1996, cl [2.30[1]].

[12] Section 2 and Government Gazette No 68 of 27.6.1997.

[13] Schedule 2, cl [2.30[25]].

schemes created under the Freehold Development Act and providing for the resolution of disputes arising in connection with the management of strata schemes.[14]

18 Pursuant to Sch 4 (Savings, transitional and other provisions), Pt 2, cl 3 of the Management Act 1996, any proceedings commenced but not determined or finalised under provisions of the Freehold Development Act repealed by the Miscellaneous Amendments Act 1996 could be dealt with and determined as if that Act had not been amended by the Miscellaneous Amendments Act 1996.

19 Pursuant to Sch 4, Pt 2, cl 4(1) of the Management Act 1996, an order made by a strata titles board under the Freehold Development Act was taken to have been made by the Strata Schemes Board under the corresponding provision of the Management Act 1996. However, despite that subclause, the provisions of the Freehold Development Act relating to the contravention of orders as in force immediately before their repeal continued to apply to such an order: cl 4(2)(b).

20 Pursuant to Sch 4, Pt 2, cl 5, a decision, consent or approval of an owners corporation under the Freehold Development Act before its amendment by the Miscellaneous Amendments Act was taken to have been made under the Management Act 1996.

21 Chapter 7, Pt 1 (Matters relating to proceedings) of the Management Act 1996 dealt with proceedings for an offence against the Act or the regulations. It contained s 229 on which Ms Bessemer sought to rely in the alternative to s 150 of the STA. It was in substance in like terms to s 150. Relevantly, s 229 provided:

> "(2) The court may order in proceedings that *any money (including costs) payable by an owners corporation under an order made in the proceedings* must be paid from contributions levied only in relation to such lots and in such proportions as are specified in the order.
>
> (3) If a court makes such an order the owners corporation must, for the purpose of paying the money ordered to be paid by it, levy contributions in accordance with the terms of the order and must pay the money out of the contributions paid in accordance with that levy.

[14] Management Act 1996, s 3.

> (4) Division 2 of Part 3 of Chapter 3 (section 78(2) excepted) applies to and in respect of contributions levied under this section in the same way as it applies to contributions levied under that Division." [Emphasis added.]

22 In addition, the Management Act 1996 also contained a new provision, s 230, s 230(1) of which provided that "An owners corporation cannot, in respect of its costs and expenses in proceedings brought by or against it under Chapter 5, levy a contribution on another party who is successful in the proceedings." Chapter 5 of the Management Act 1996 dealt with disputes, complaints or problems concerning a strata scheme.[15] It enabled applications to be made to the Civil and Administrative Tribunal to resolve such issues.

23 For completeness, I note that the Freehold Development Act was, in turn, repealed by the *Strata Schemes Development Act 2015 (*NSW) (Development Act 2015) which came into force on 30 November 2016.[16] The Management Act 1996 was repealed by the *Strata Schemes Management Act 2015* (NSW) (Management Act 2015) which also came into force on 30 November 2016.[17] The current "equivalents" to s 229 and s 230 are ss 90 and 104. Each Act contained a savings provision to the effect that proceedings commenced but not determined or finalised under either the Freehold Development Act or the Management Act 1996 (respectively "former Act") were to be dealt with and determined as if the former Acts had not been repealed.[18]

Costs

24 At the times Ms Bessemer was convicted in 1993 and 1994, where an order was made dismissing summary offence proceedings, pursuant to s 81(1) of the *Justices Act 1902* (Justices Act) the Court could order the prosecutor or complainant to pay to the clerk of the court, to be paid by that clerk to the defendant, such costs as seemed "just and reasonable."[19] The amount allowed for such costs was to be specified in the order: s 81(2).

25 The Justices Act was amended in 1998 to insert Pt 5A (Appeals to District Court), Div 2 (Appeals by defendants and other persons), s 121(3) of which

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15 Management Act 1996, s 123.

16 Section 2 and 2016 (658) LW 4.11.2016.)

17 Section 2 and 2016 (492) Legislation Website 12.8.2016.

18 Development Act 2015, Sch 8, Pt 2, cl 9, Management Act 2015, Sch 3, Pt 2, cl 7.

19 There were some preconditions to the award of costs in favour of a defendant in s 81(4), but they did not apply to awarding costs against an informant or a complainant acting in a private capacity: s 81(5).

provides, "An appeal may not be made against a decision of a Magistrate not to make an order for costs against an informant."[20] "Informant" was defined for the purposes of Pt 5A to include "a complainant, the Director of Public Prosecutions and any other person responsible for the conduct of a prosecution."

26 The Justices Act was repealed on and from 7 July 2003. The costs power, s 81(1), conferred in the case of dismissal, was not re-enacted. Rather, a Local Court was only empowered to award costs in summary proceedings in accordance with the *Criminal Procedure Act 1986* (NSW) (CPA).[21]

27 Section 213(1) of the CPA empowers a magistrate, where summary proceedings were dismissed or withdrawn, to order the prosecutor pay professional costs to the Registrar of the Court, for payment to the accused person. Such costs are defined in s 211 to mean "costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court." Section 214(1) limits the power of the Court to award professional costs in the case of summary proceedings brought by a prosecutor acting in public capacity, however s 214 does not apply to the awarding of costs against a prosecutor acting in a private capacity.

The prosecutions

28 As I have said, in 1992 there were three lots in the Strata Plan. Their proprietors were Ms Bessemer, Mr and Mrs Tolley and Ms Mary Brown respectively. Mr and Mrs Tolley owned unit 2, Ms Brown owned unit 1 at the relevant time, whilst Ms Bessemer owned unit 3.

29 On or about 13 December 1991, Ku-ring-gai Council, in whose municipality the building the subject of the Strata Plan is located, made an order pursuant to s 317D of the *Local Government Act 1919* (NSW) requiring the proprietors of the Strata Plan to ensure all common walls in the building had a 1-hour fire resistance rated standard (fire resistance works).

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[20] Justices Legislation Amendment (Appeals) Bill 1998 (NSW), Sch 1, cl [2]; date of commencement, 1 March 1999, s 2 and GG No 25 of 26.2.1999, p 973.

[21] Section 212(1), CPA.

30 From about December 1991, when the Owners Corporation was served with the s 317D order by the Ku-ring-gai Council, until on or about 21 or 22 October 1993, Ms Bessemer failed to provide contractors access to her unit to enable the fire resistance works to be completed. In addition, it appears she was undertaking, or was seeking to undertake, work upon the common property without the approval of the Owners Corporation.

31 In August 1992 there were two members of the council of the Owners Corporation, Mr Tolley and Ms Brown. As the Owners Corporation had two or more members, a quorum required both Mr Tolley and Ms Brown to be present.[22]

32 On 14 August 1992, the Council of the Owners Corporation passed, or purported to pass, the following resolutions:

> "Resolution 5: That all necessary steps be taken by the Body Corporate and its delegated agent to gain access to Unit 3 to complete the works relating to the fire rating order issued by Ku-ring-gai Council on 13/12/91, within the required time specified by the Council in subsequent correspondence.
>
> Resolution 6: That NHSM [the strata manager] be instructed to make application to the Strata Titles Commissioner for an order to prevent the proprietor Unit 3 [sic, as in original] from carrying out any work to the Common Property and the Building without the prior written approval of the Body Corporate.
>
> Resolution 7: That approval be granted to Council and/or the Managing Agent to pursue the enforcing of any strata order(s) so granted, by any means, including the taking of further legal action".

33 The meeting on 14 August 1992 was chaired by the Strata Manager, Mr Allan Cameron of North Harbour Strata Managers Pty Ltd, who declared there was a quorum. However, only Mr Tolley was present.

34 Mr Tolley sold his unit on or about 3 September 1993. Ms Brown died at some stage before the annulment application.

1993 proceedings

35 In 1992, Pt 5 of the STA dealt with disputes. Pursuant to s 100, applications for orders under Pt 5 were to be made to the Strata Titles Commissioner (STC) who could refer any such application to a Strata Titles Board (STB) in the circumstances set out in s 100(2). On 18 September 1992, following an

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22 Section 74(1), STA.

application made by the Owners Corporation, the STB made an interim order pursuant to s 104A(2) of the STA, that Ms Bessemer "desist forthwith from carrying out any unauthorised work on the property, particularly relating to the undertaking of plumbing and electrical works upon the common property" (1992 STB Order).[23]

36 Acting, it would appear, pursuant to the 14 August 1992 resolutions, and in order to enforce the 1992 STB order, the Owners Corporation commenced proceedings in 1993 against Ms Bessemer.

37 On 23 September 1992 and 12 October 1992 two informations were filed in the Local Court alleging breaches by Ms Bessemer of the 1992 STB Order (1993 proceedings). Mr Tolley was named as the informant on each information. The informations sought to recover penalties from Ms Bessemer pursuant to s 142(2A) of the STA.

38 The 1993 proceedings were heard by Magistrate Evans on 12 March 1993. He found the contraventions proved, convicted Ms Bessemer and fined her $800 (1993 convictions). He also ordered her to pay professional costs in the sum of $850, witness expenses of $432 and court costs of $90.

39 Pursuant to s 142(4)(a) of the STA, the imposition of the fine (penalty) operated as a judgment under the *Local Courts (Civil Claims) Act 1970* (NSW) (Civil Claims Act) against Ms Bessemer and in favour of the Owners Corporation for the amount of the penalty. Pursuant to s 142(4)(b), the costs order operated as a judgment for that amount, also under the Civil Claims Act, against Ms Bessemer and in favour of the Owners Corporation.

1994 proceedings

40 On 25 March 1993 the STB made another order (1993 STB Order) requiring Ms Bessemer to comply with Ku-ring-gai Council's s 317D notice.
Ms Bessemer did not comply with that Order.

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[23] This statement is based on Mr Tolley's submissions to the Local Court for the purposes of Ms Bessemer's costs application. It is not clear that in 1992 the STB was empowered to make an order pursuant to s 104A(2) (cf s 118(1), STA), however the STC to whom the Owners Corporation's application would have been made did not have that power.

41 On 17 September 1993, the Owners Corporation took proceedings against Ms Bessemer, again apparently pursuant to s 142(2A) of the STA, on this occasion alleging she had contravened the 1993 STB Order (1994 proceedings). According to submissions filed on behalf of Mr Tolley in the 2016 proceedings referred to later in these reasons, those proceedings were commenced by a solicitor on behalf of the Owners Corporation.

42 The 1994 proceedings were also heard by Evans LCM at Hornsby Local Court, on this occasion on 22 April 1994.

43 Evans LCM found the offence proved, but resolved to deal with Ms Bessemer on the basis that no conviction be recorded against her, and that she enter into a good behaviour bond/recognizance for 2 years for $500. Ms Bessemer refused to sign the recognizance. Accordingly, Evans LCM recorded a conviction against her and fined her $400 (with $46 court costs, $400 professional costs and $240 witness expenses) (1994 conviction).

44 Ms Bessemer appealed against Evans LCM's order. Phelan DCJ heard the appeal on 4 September 1995. After some discussion between his Honour and Ms Bessemer, she was given leave to withdraw her appeal and the conviction and fine were confirmed. She was also ordered to pay $2,000 professional costs and witness costs of $300.

Annulment proceedings

Attorney-General's certificate

45 Pursuant to CAR Act, s 5(1) and (1A), any person may make an application for annulment of a conviction or sentence made or imposed by the Local Court to the Minister at any time after the relevant conviction or sentence is made or imposed.

46 Approximately twenty years after her convictions, on 2 July 2014, the NSW Attorney General, Brad Hazzard MP, issued a certificate pursuant to s 5 of the CAR Act permitting Ms Bessemer to institute annulment proceedings in relation to her conviction in the 1994 proceedings. There is no explanation for the lengthy delay between the convictions and this decision. The Attorney General's certificate noted that he was, "satisfied that a question or doubt had arisen as to the guilt or liability for the conviction and sentence imposed on" Ms

Bessemer. He referred the matter to Hornsby Local Court to be further dealt with in accordance with Part 2 of the CAR Act.

Viney LCM

47 Ms Bessemer's annulment application pursuant to CAR Act, s 4(2)(b) was heard by Viney LCM on 25 March 2015. Although the s 5 certificate in this Court's papers only related to the 1994 conviction, it appears from her Honour's decision of 2 April 2015 that the Attorney-General had also referred the 1993 convictions to the Local Court pursuant to s 5 of the CAR Act.

48 Pursuant to CAR Act, s 8(2)(c), the Local Court must grant an application for annulment made by the defendant if it is satisfied, that "having regard to the circumstances of the case, it is in the interests of justice to do so."

49 By 25 March 2015, as I have explained, neither Mr Tolley nor Ms Brown owned a lot in the Strata Plan. Given the antiquity of the proceedings and costs considerations, the Owners Corporation informed the Court that it had no interest in being represented in the annulment proceedings.

50 On 2 April 2015 Magistrate Viney refused Ms Bessemer's annulment application. Her Honour held that the following factors were relevant:

- The applicant was legally represented in the first determination;
- All three matters went to fully contested hearings on the merits of each summons and judicial officers gave detailed reasons;
- Ms Bessemer had a right of appeal and did in fact appeal one of those determinations to the District Court;
- No new evidence had come to light since the original determination; and the unexplained elapse of 20 years since the convictions was difficult to understand and was relevant to the application; and, accordingly,
- It was not in the interests of justice for the Court to grant the application for annulment.

Scotting DCJ

51 Section 11A(1) of the CAR Act enables "[a]ny defendant whose application under section 4 for annulment of a conviction has been refused by the Local Court [to] appeal to the District Court against the refusal."

52 Ms Bessemer appealed from Viney LCM's decision to the District Court pursuant to s 11A. Scotting DCJ heard the appeal *ex parte* on 9 September

2015. Although it appears members of the Owners Corporation may have been told informally of the fact of the appeal, it is not apparent whether they were told the date the appeal was to be heard. Mr Tolley was not advised of the appeal, nor, it would appear, of the annulment application.

53 Before Scotting DCJ, Ms Bessemer's grounds for an annulment were based on the validity of the 14 August 1992 meeting. She submitted that there was no quorum at the Council meeting on that day so that the resolutions it purported to pass in respect of the STB work orders were invalid and could not authorise the filing of the informations commencing the 1993 and 1994 proceedings. Accordingly, she contended her convictions were invalid.

54 As far as the transcript of the appeal reveals, Ms Bessemer did not tender any evidence before Scotting DCJ to found her assertions as to the want of a quorum on 14 August 1992. Rather, it appears his Honour accepted her assertion that the convictions were based on resolutions passed at a "meeting" at which only Mr Tolley, one member of the Council, was present. However, in the course of the 2016 proceedings, written submissions prepared by Mr Aitken of counsel acknowledged that Mr Tolley was the only member of the Council present at the 14 August 1992 meeting.

55 Scotting DCJ allowed the appeal. He quashed the 1993 and 1994 convictions and set aside any orders in respect of penalty. His Honour referred the file to the Local Court to be dealt with in accordance with s 9 of the CAR Act. Ms Bessemer did not seek a costs orders.

Subsequent proceedings

McIntyre LCM

56 Pursuant to the CAR Act, s 9(2)(a) and (3), upon the annulment of the convictions, the Local Court was required to deal with the original matters afresh as if no conviction or sentence had been previously made or imposed.

57 Further, CAR Act, s 10 relevantly provided:

> "**Effect of annulment of conviction or sentence**
>
> (1) *On being annulled*, a conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed.
>
> […]

> (3) If a fine is annulled, any amount paid towards the fine is repayable to the person by whom it was paid.
>
> (4) The Consolidated Fund is appropriated to the extent necessary to give effect to subsection (3).” [Emphasis added.]

58 On 29 February 2016, the s 9 rehearing was listed for mention before McIntyre LCM. Ms Bessemer appeared in person. The Owners Corporation was represented. Mr Tolley also appeared and was also represented.

59 The Owners Corporation advised the Court that given the proceedings were “over 20 years old” and “the state of the records the owners don’t wish to continue with the proceedings and seek [they] be discontinued.” Mr Aitken, who appeared for Mr Tolley, advised the court that Mr Tolley had sold his unit in 1993 and “ought not be regarded as the informant on the face of the informations”.

60 Ms Bessemer sought costs for the original hearings and, apparently, reimbursement of other expenses and the return of her fines.

61 All three proceedings were noted as being withdrawn and dismissed and the matters were listed for her costs application to be heard on a later date.

62 McIntyre LCM made orders requiring Ms Bessemer, the Owners Corporation and Mr Tolley to file written submissions in respect of the costs application. Extensive submissions were filed.

63 In her written submissions dated 28 March 2016, Ms Bessemer contended she had paid costs of $39,749.05 to the Owners Corporation pursuant to s 142 of the STA to which it was no longer entitled. She further contended those costs could be repaid to her pursuant to s 150 of the STA or either s 229 or s 230 of the Management Act 1996. In addition to the amount of $39,789.05 she sought interest and any further costs. In a schedule to her submissions, she listed a variety of costs allegedly incurred over the period 1993 – 2016. Some of these included “court costs paid to [the] proprietors.” As the Owners Corporation observed in its written submissions, the amounts set out in the schedule were not supported by tax invoices or receipts. Nor, to a large extent, did they apparently relate to either the 1993 or 1994 proceedings.

Farnan LCM – 24 May 2016

64 The costs application came before Farnan LCM on 24 May 2016. The Owners Corporation and Mr Tolley were represented by a Mr Blackwell and Mr Aitken respectively. Ms Bessemer appeared in person.

65 Ms Bessemer informed the Magistrate that the costs she sought to recover were "all to do with the original ones that they withdrew." She also said that if Farnan LCM granted costs against the Body Corporate, she "would need an order … that I didn't have to pay any part of that either." She drew the magistrate's attention to ss 229 and 230 of the Management Act 1996. Farnan LCM expressed the view that she could not change Ms Bessemer's rights or liabilities as a unit holder in a body corporate.

66 After lengthy discussions/submissions, which are unnecessary to recount, Farnan LCM noted:

> "Application withdrawn by Mrs. Bessemer and [dismissed] on that basis that there is no order for costs against her in respect of these proceedings (including the annulment proceedings). Noted that the Body Corporate is to repay any amounts originally paid to it as fines arising out of these proceedings (s.10 Crimes Appeal & Review Act) 2001." [Sic, as in original.]

Primary judgment

67 On 24 June 2016 Ms Bessemer filed a notice of appeal to the District Court asserting, as its basis, "[D]ismissal of costs order on basis Defendant never withdrew application."

68 As I have said, the appeal was heard by Conlon DCJ in the District Court's criminal jurisdiction on 10 November 2016. Ms Bessemer appeared in person. Mr McKenzie, the secretary and treasurer of the Owners Corporation, appeared on its behalf.

69 Once again, there were lengthy submissions/discussions in the course of which it was apparent that Ms Bessemer sought to complain about, and be relieved of paying, $8000, being her unit's "share" of a special levy of $30,000 the Owners Corporation had raised on its 3 members (that is to say, including her) to pay the legal costs of obtaining legal advice in relation to the 2016 proceedings. In the course of the hearing, it became tolerably apparent that the strata levy from

which Ms Bessemer seeks to be relieved was raised following the proceedings before Farnan LCM.

70 Conlon DCJ delivered an *ex tempore* judgment, a large part of which entailed spelling out to Ms Bessemer that Farnan LCM had made no orders as to costs against her in the proceedings and had commented that the Owners Corporation accepted it was liable to repay to her amounts she had paid by way of fines, court costs and witnesses' expenses in disposing of the 2016 proceedings.

71 His Honour added:

> "So that is what the Magistrate has ordered and beyond that she has ordered nothing so there is nothing for me to determine here. I do not have jurisdiction in my view to make any determination in respect of you saying that you are not responsible to accommodate the levity [sic, levy] that has been issued against you by the Owners Corporation. That is not a matter for this Court."

72 Accordingly, Conlon DCJ ordered that Ms Bessemer's appeal be dismissed.

Applicant's submissions

73 In her lengthy handwritten submissions, Ms Bessemer repeats aspects of the history of the matter. She submits she should be exempted from paying her unit entitlement of what she describes as "the costs which the Owners Corporation … paid to Bannerman's Solicitors to pursue three Criminal Summons issued against me pursuant to s 9 of the [CAR] Act." Although it is not entirely clear, these costs appear to be those the Owners Corporation incurred in seeking to determine whether to pursue the prosecutions against Ms Bessemer consequent upon the annulment of her convictions.

74 Ms Bessemer submits such "an exemption" can be granted pursuant to ss 229 and 230 of the Management Act 1996. She complains that neither Farnan LCM nor Conlon DCJ granted her that relief.

75 In addition, Ms Bessemer complains that she has been "forced to pay $40,417.97 to the owners corporation for matters which are now acknowledged to have no legitimacy, from 1 March 1993 to 28 February 1999."[24] In support of this contention, Ms Bessemer annexed to her written submissions 12 pages of

[24] The $40,417.97 appears to be an update of the amount of $39,749.05 sought before Farnan LCM.

what appeared to be statements of accounts prepared by the managing agents of the Owners Corporation during the period referred to.

76 Next, Ms Bessemer complains of an amount "directly stolen from me by way of fines and penalties for the prosecutions and convictions which were unlawfully founded [of] $23,695.74 [which] I alone had to pay this to the Owners Corporation." [Sic, as in original.]

77 The $40,417.97 to which Ms Bessemer refers also appears from other documents attached to her written submissions to represent her unit entitlement [26.7%] of an amount of $62,630.06 ($16,722) which she describes as "misappropriated monies" and the "stolen amount of $23,695.74." The so-called "misappropriated monies" all appear to be amounts paid to either firms of solicitors or managing agents, presumably retained by the Owners Corporation over the years. There is no manifest connection between those amounts and Ms Bessemer's convictions.

Owners Corporation submissions

78 The Owners Corporation opposes the Court granting Ms Bessemer any relief.

79 The Owners Corporation relies relevantly on the agreed outcome of the proceedings before Farnan LCM on 24 May 2016. It also notes that Farnan LCM advised Ms Bessemer that the majority of the costs she sought "were not directly relevant to the matters being decided and were not properly evidenced."

80 The Owners Corporation also submitted that ss 229 and 230 of the Management Act 1996 did not apply in the circumstance.

81 Finally, the Owners Corporation complained that Ms Bessemer's written submissions were "a small sample of the store of grievances Mrs Bessemer has against the previous owners, and her burning desire to rain these down on the current owners … Mrs Bessemer will almost certainly bring these rambling accusations before the courts, at little cost to herself (she does not engage legal counsel), and high cost to the current Owners Corporation (of which she is a member). Somehow Mrs Bessemer needs to be stopped from bringing these vexatious court actions frivolously."

Amici Curiae submissions

82 The Amici Curiae set out the background to the matter and also the legislation in force as at the relevant time. In particular, the Amici Curiae submitted that, if relevant, s 150 of the STA applied in 1993 and 1994.

83 The Amici Curiae suggested that there was a question whether Ms Bessemer abandoned her claim for an exemption from the levies during the proceedings before Farnan LCM, or alternatively the Amici Curiae questioned whether there was an agreement between the parties before Farnan LCM not to pursue any such recovery application, so that a form of "estoppel" might arise against the Owners Corporation "now pressing Ms Bessemer for her share of [their] costs of the [2016 proceedings]."

84 The Amici Curiae suggested that if Ms Bessemer did not abandon her exemption argument before Farnan LCM, it was arguably available on appeal to Conlon DCJ who did not consider it.

85 Insofar as Ms Bessemer sought costs in the sum of approximately $40,000, once again, the Amici Curiae queried whether such costs were also abandoned before Farnan LCM.

86 The Amici Curiae submitted that consequent upon the annulment decision, Ms Bessemer could seek to recover quantified costs directly related to the 1993 and 1994 proceedings, including court costs and fines, the latter flowing automatically from the operation of CAR, s 10(3).

Annulment of convictions

87 At common law, a conviction which was reversed by proceedings in error, by being quashed or set aside upon a statutory appeal was avoided *ab initio*: "The judgment reversed is the same as no judgment". Such a conviction was described as "utterly defeated and annulled".[25]

88 The effect of the reversal of a conviction, however, was not to set aside all that had happened consequent upon the conviction. Rather, as was said in *Cavanough*:

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[25] Commissioner for Railways (New South Wales) v Cavanough (1935) 53 CLR 220 (at 225); per Rich, Dixon, Evatt and McTiernan JJ; see also Starke J; [1935] HCA 45 (Cavanough) (at 227 – 228).

> "Acts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice which are compulsive' – (*Dr Drury's Case*). And proceedings which, although based upon a judgment, are brought to completion before its reversal are not avoided. For 'collateral acts executory are barred, but not collateral acts executed' – (*Dr Drury's Case*). *But 'upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void.* If living, he (or if dead his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him' (*Archbold's, Criminal Pleading, Evidence and Practice*, 21st ed. (1893), pp. 226, 227)."[26] [Emphasis added.]

89 Until 1967, there was no statutory avenue in New South Wales by which a person could seek an annulment of a conviction. Rather, the only avenue by which that course could be pursued was to petition the Governor seeking to attract the exercise of the prerogative of mercy.[27] Annulment provisions were first introduced by way of amendments to the Justices Act,[28] and are now found in the CAR Act.

90 Section 10 of the CAR Act was considered by the High Court in *Re Culleton (No 2)*,[29] in which the High Court had to determine the effect on Mr Culleton's eligibility to remain a senator despite his conviction in the Local Court in his absence, of larceny, prior to his nomination for the 2016 Senate election and before polling day for the election. By reason of his conviction, he was liable to be sentenced to imprisonment for a maximum term of two years when he was brought before the Local Court. The Local Court subsequently granted an annulment of the conviction, proceeded to deal with the matter afresh, found him guilty of the offence, on his own plea, but dismissed the charge without proceeding to conviction.[30]

91 Mr Culleton was "incapable of being chosen or of sitting as a senator" if he "ha[d] been convicted and [was] under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by

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26 Cavanough (at 225); per Rich, Dixon, Evatt and McTiernan JJ.

27 Introduction to Justices (Amendment) Bill, the Hon Mr J Maddison, Minister of Justice, New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 14 March 1967 at 4065; see also Miller v Director of Public Prosecutions [2004] NSWCA 90; (2004) 145 A Crim R 95 (at [33]).

28 The Justices (Amendment) Act 1967 (NSW) inserted a new Part IVA (Annulment of Convictions) into the Justices Act.

29 [2017] HCA 4; (2017) 91 ALJR 311; (at [29]).

30 Re Culleton (No 2) (at [2]).

imprisonment for one year or longer".[31] Accordingly, the issue was whether his conviction had the effect of disqualifying him from being elected as a senator. That turned on whether the annulment of his conviction operated retrospectively or prospectively.

92 Kiefel, Bell, Gageler and Keane JJ held that the requirement in CAR Act, s 9(2)(a) that if a conviction was annulled, the Local Court must "deal with the original matter afresh"; and that the Local Court "is to deal with the original matter as if no conviction ... had been previously made" (s 9(3)), "require[d] the Local Court to proceed upon the fiction that a conviction has not been made, *because, in truth, the conviction was not a nullity from the beginning*".[32]

93 This was because the effect of CAR Act, s 10(1), providing that "*[o]n being annulled, a conviction ... ceases to have effect* and any enforcement action previously taken is to be reversed", was that the annulment of the conviction "was not apt to expunge the legal rights and obligations arising from it, save in relation to the future and in the reversal of things done under it" [emphasis added]. Thus, CAR Act, s 9 and s 10, did "not purport to operate retroactively to deny legal effect to a conviction from the time that it was recorded."[33]

94 Accordingly, "[t]o say, as s 10(1) does, that the conviction 'ceases to have effect' is to acknowledge that it has been in effect to that point".[34] Further, the effect of the statement in s 10(1) that "enforcement action ... is to be reversed", is "to leave the legal state of affairs previously established by the conviction unaffected, save for the actual reversal of any action taken by way of enforcement against the defendant."[35]

95 At the date of the 2016 Senate election, the conviction recorded against Mr Culleton for which he was liable to be sentenced to imprisonment for a maximum term of two years was legally in effect. That position was not altered by the annulment because the effect of CAR Act, s 10, was that the annulment did not purport retrospectively to treat the conviction as if it had never

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31 Section 44(ii) of the Constitution.
32 Re Culleton (No 2) (at [27]) [emphasis added].
33 Ibid (at [28]).
34 Ibid (at [29]).
35 Ibid.

occurred.[36] Accordingly, Mr Culleton was incapable of being chosen as a senator.[37]

The strata levy issue: relief under strata titles legislation

96 Two issues appear to arise in respect of the strata levy issue. First, was it open to Farnan LCM to make an order that any costs of the Owners Corporation in respect of the 1993 and 1994 proceedings be paid only in respect of lots other than Ms Bessemer's? Secondly, could the raising of the strata levy, even as late 2016, be characterised as "enforcement action" reversible on the annulment of Ms Bessemer's convictions? In my view, each question must be answered in the negative.

97 It is unnecessary to decide whether s 150, which was in force at the time of the convictions, or s 229, which was in force at the time of the annulments, might apply consequent upon the annulment of Ms Bessemer's convictions. The 1993 and 1994 proceedings had been finalised prior to the enactment of the Management Act 1996, so, prima facie, the transitional provision in Sch 4, Pt 2, cl 3 of the Management Act 1996 had no operative effect.

98 In any event, both s 150 of the STA and s 229 of the Management Act 1996, on which Mr Bessemer relied to found her claims to relief from the imposition of the strata levy, only operated in respect of "any money (including costs)" payable by a body corporate or owners corporation as the case may be pursuant to a court order "made in those/the proceedings". The Owners Corporation has never been ordered to pay any money, whether by way of costs or otherwise, in respect of either the 1993 or 1994 proceedings. Accordingly, whichever is the applicable provision neither could afford relief against a strata levy imposed independently of a court order pursuant to a private resolution of the Owners Corporation.

99 Nor is s 230 of the Management Act 1996 of any assistance. It applied in respect of proceedings under Ch 5 of that Act, which, as I have said, concerned disputes, complaints or problems concerning a strata scheme. It did not concern criminal proceedings prosecuted summarily in the Local Court.

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36 Ibid.

37 Ibid (at [4]).

The strata levy issue: enforcement action

100 Nor, in my view, could the raising of a strata levy constitute “enforcement action” reversible consequent upon the annulments.

101 Pursuant to CAR Act, s 10(1), on the annulment of a conviction, “any enforcement action previously taken is to be reversed.” Does that have any operative effect insofar as Ms Bessemer is concerned?

102 “Enforcement action” is not defined in the CAR Act. It must be understood by reference to the text of s 10, and in the context, of the CAR Act.

103 In context, as the Amici Curiae submitted, as the repayment of annulled “fines” is dealt with by s 10(3), “enforcement action” in s 10(1) must refer to matters other than fines. However, the fact that fines are dealt with in s 10(3) gives some insight into the meaning of s 10(1). A “fine” is a monetary penalty imposed by a court for an offence.[38] It is, accordingly, a form of punishment. Prima facie, and as a matter of ordinary English usage, it would accord both with the text and context that “enforcement action” in s 10(1) refers to punishment consequent upon conviction.

104 The plurality’s statement in *Re Culleton (No 2)* that the effect of s 10(1) was “to leave the legal state of affairs previously established by the conviction unaffected, save for the actual reversal of any action taken by way of enforcement against the defendant”,[39] supports that interpretation of “enforcement action” in that provision.

105 Such a construction is also consistent with the ordinary meaning of “to enforce” which is “to compel observance of”.[40] In the context of securities, for example, the words “enforce”, “enforceable” and “enforcement” may “be properly applied to the exercise of any of the remedies which the security may give”.[41] Punishment consequent upon a conviction is the imposition of the State’s “remedy” for the offence committed.

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[38] Fines Act 1996 (NSW), s 4(1)(a).

[39] Re Culleton (No 2) (at [29]).

[40] R v Bates [1982] 2 NSWLR 894 (at 895) per Samuels JA (Cantor and Enderby JJ agreeing).

[41] Mayfair Trading Co Pty Ltd v Dreyer (1958) 101 CLR 428 (at 448); [1958] HCA 55 per Dixon CJ (McTiernan J agreeing).

106 Whether an action is “enforcement action” depends upon its inherent legal character, not the subjective classification someone may place upon it or whether the action is antecedent to, or postdates, an act which is, by its inherent legal character, “enforcement action”.[42]

107 At the times Ms Bessemer was convicted in 1993 and 1994 pursuant to STA, s 142(2A), for contravening the STB orders, the court could order the defendant to pay a maximum of 5 penalty units.[43] As I have earlier said, insofar as costs were concerned, in the case of an order of dismissal pursuant to s 81(1) of the Justices Act, the Court could order the prosecutor or complainant to pay to the clerk of the court, to be paid by that clerk to the defendant, such costs as seemed “just and reasonable.” The amount allowed for such costs was to be specified in the order: s 81(2).

108 As I have also said, the imposition of a penalty under s 142 operated as a judgment under the Civil Claims Act against the defendant and in favour of the prosecutor for the amount of the penalty: s 142(4)(a). Such a penalty was not enforceable or recoverable other than as s 142(4) provided: s 142(5). Accordingly, s 87(1) of the Justices Act which provided for imprisonment in default of payment of a fine or penalty did not apply.

109 Pursuant to s 47(1) of the Civil Claims Act, the registrar of the Local Court in which a judgment was given or entered up was empowered to “make an order that all debts due or accruing to the judgment debtor from any person specified in the order shall be attached to answer the judgment debt” (garnishee order). The balance of s 47 dealt with the application, making and service of a garnishee order, as well as the power of the registrar to refuse to make such an order having regard to the “smallness of the judgment debt or of the amount to be recovered or of the debt sought to be attached or for any other reason” (s 47(5)).

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[42] Re Trim Perfect Australia Pty Ltd; National Australia Bank Ltd [2005] NSWSC 972; (2005) 55 ACSR 237 (at [19]) per Palmer J.

[43] Pursuant to s 56 of the Interpretation Act 1987 (NSW) as then in force, the reference to 5 penalty units was to be read “as a reference to an amount of money equal to the amount obtained by multiplying $100 by that number of penalty units.”

110 Section 52 set out the procedure to be followed where a garnishee order was not complied with. It is unnecessary to recount the details of the procedure. It is sufficient to note that if the garnishee either failed to appear or did not satisfy the court that the debt alleged by the judgment creditor to be owing by the garnishee to the judgment debtor was bona fide in dispute, the court was empowered to "order execution to issue and it may be sued out accordingly without any other writ or process to levy the amount alleged to be due" (s 52(3)). The registrar of the Local Court in which a judgment is given or entered up was empowered, on the application of the judgment creditor, to issue a writ of execution in the nature of a writ of *fieri facias* directed to the sheriff and all bailiffs appointed for the purposes of the Civil Claims Act (s 58). At the time Ms Bessemer was convicted, such a writ bound the property in the goods of the execution debtor as from the time when the writ was delivered to the sheriff to be executed.[44]

111 All those steps, if taken, might properly be regarded as "enforcement action" within the meaning of CAR Act, s 10(1).

112 However, there are limits to how far the concept of "reversing enforcement action" can be taken. Practically, for example, it cannot apply to invalidate the custodial term served by a person whose conviction is annulled. That would be contrary to the fundamental principle, as explained in *Cavanough*,[45] that such acts are protected because they are "'acts done in the execution of justice, which are compulsive'". As Basten JA observed in *Trad v Harbour Radio Pty Ltd,*, the statement in *Archbold's Criminal Pleading, Evidence and Practice*,[46] cited in *Cavanough*,[47] that "upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void" cannot be taken literally. If it were, "the sentence of imprisonment served pending the determination of an appeal would be a trespass entitling the accused to damages. That is not the law."[48]

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44 Sale of Goods Act 1923 (NSW), s 29.
45 (At 225).
46 21st ed (1893), (at 226 – 227).
47 At (225).
48 [2017] NSWCA 64 (at [31]) (McColl and Ward JJA agreeing).

113 The strata levy was raised consequent upon the operation of a legislative scheme which depended on the relationship between strata lot owners and the Owners Corporation. At the time the strata levy from which Ms Bessemer seeks to be relieved was raised (that is to say, between 24 May and 10 November 2016), Ch 3, Pt 3 of the Management Act 1996 dealt with the finances of strata schemes. Division 2 dealt with the levy of contributions. The Owners Corporation was required to determine the amounts to be levied as a contribution to the administrative fund and the sinking fund, as well, if necessary to levy on each owner a contribution to the administrative fund, to meet expenses it could not "at once meet from either fund": (s 76). An owners corporation could "recover as a debt a contribution not paid at the end of one month after it [became] due and payable, together with any interest payable and the expenses of the owners corporation incurred in recovering those amounts:" (s 80(1)).

114 This analysis demonstrates that the strata levy was remote from Ms Bessemer's convictions and their annulment, even if the legal advice sought pursuant to which the Owners Corporation raised the levy concerned whether to proceed with the historic informations. Obtaining that advice and/or raising that levy could not be said to be a form of punishment or a remedy consequent upon Ms Bessemer's convictions so as to constitute "enforcement action" which was reversed, or, reversible consequent upon the annulments.

115 Although the primary judge did not engage in any analysis in concluding that he did not have power in respect of the strata levy issue, his conclusion that he did not was correct.

Recovery of costs

116 Since 7 July 2003, appeals by defendants from convictions or sentences in the Local Court have been governed by Pt 3, Div 1 of the CAR Act.[49] "Sentence" is defined in s 3 of the CAR Act to include "any order for costs made by the Local Court against a person in connection with summary proceedings taken against the person." The appeal Ms Bessemer pursued in the District Court did not fall into this category. Rather, it was an appeal from her failure to obtain a costs

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[49] Originally the Crimes (Local Courts Appeal and Review) Act 2001 (NSW).

order consequent upon the dismissal of the proceedings brought by the Owners Corporation and which the Owners Corporation declined to pursue after the original convictions were annulled. I will assume, without deciding, that it is arguable that a failure to award costs in summary proceedings could be the subject of such an appeal.

117 As the transcript of the proceedings before Farnan LCM makes plain, Ms Bessemer withdrew her costs application. It was within the magistrate's jurisdiction to permit her to do so. There was nothing in that respect against which Ms Bessemer could appeal. It is clear this is what Conlon DCJ sought to explain to her when he read onto the record Farnan LCM's note of the outcome of the costs application. His Honour was correct to do so. No jurisdictional error has been identified in this respect.

118 In so saying, I should not be understood to suggest that the lengthy list of amounts Ms Bessemer sought to recover as costs and which accrued over the many years following her convictions could have been the subject of a costs order. The tenor of both s 81 of the Justices Act and s 213 of the CPA is that any costs order directly relates to costs incurred in defending the proceedings, not costs incurred after their completion.

Orders

119 The judicial review application should be dismissed with costs.

120 **SIMPSON JA:** I agree with McColl JA. I also agree with the additional observations of Sackville AJA.

121 **SACKVILLE AJA:** I agree with McColl JA. I add the following observations.

122 As McColl JA has pointed out, it is not clear why the Attorney-General issued a certificate permitting the applicant to institute annulment proceedings some 20 years after the Local Court recorded convictions against her. No doubt the applicant has nurtured feelings of injustice about the events leading to her convictions and subsequent actions taken in consequence of those convictions. But the annulment proceedings, brought so many years after the convictions, have spawned a significant volume of litigation.

123 The parties, who have mostly been unrepresented, have encountered the difficulty that some of the legislation governing their rights and obligations has been repealed. As McColl JA's careful examination of the legislation demonstrates, it is no easy task – virtually impossible for many lay people – to identify which historical version of legislation applies to events occurring long ago.

124 It is also no easy task to find one's way through the procedural complexities of litigation in which the issues are not clearly defined and the parties themselves are not necessarily clear as to their objectives. This Court was fortunate to have the assistance of Mr McHugh SC and Mr Justice in unravelling the history of the matter and the issues arising on the application for judicial review.

125 Formally speaking, the litigation initiated by the applicant has involved the same owners corporation responsible for commencing the prosecutions against her. In practical terms, however, the litigation has embroiled the two current proprietors of lots in the strata plan (other than the applicant). Neither of these proprietors had anything to do with the disputes that occurred in 1993 and 1994. Nor is there anything in the evidence to indicate that they had any inkling when they acquired their lots that they would effectively be subject to litigation arising out of proceedings concluded many years earlier.

126 The principal issue the applicant seeks to agitate in the judicial review proceedings is her entitlement to be relieved of her 26.7 per cent share of the special levy imposed by the body corporate on the three unit holders in the strata plan. The special levy was apparently imposed to meet the legal costs incurred by the body corporate in connection with the annulment proceedings and the subsequent litigation initiated by the applicant. Her share of the levy amounts to approximately $8,000.

127 There may have been some costs orders the applicant could have sought in her annulment application and in the subsequent rehearing of the criminal prosecution. However, she did not press any claim for such orders.

128 For the reasons given by McColl JA, the applicant's reliance on s 150 of the *Strata Titles Act 1973* (NSW) or ss 229 – 230 of the *Strata Schemes Management Act 1996* (NSW) to exempt her from the levy imposed by the

body corporate was misplaced. McColl JA has also explained why the applicant is unable to rely on s 10(1) of the *Crimes (Appeal and Review) Act 2001* (NSW).

129 Accordingly, the application for judicial review of the decision of the District Court must be dismissed.

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Amendments

26 March 2018 - corrected footnote numbering

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