



Supreme Court
New South Wales

Case Name: The Owners-Strata Plan 47027 v McGinn

Medium Neutral Citation: [2018] NSWSC 1230

Hearing Date(s): 16-17 July 2018

Date of Orders: 8 August 2018

Decision Date: 8 August 2018

Jurisdiction: Equity

Before: Darke J

Decision: Plaintiffs successful in obtaining final injunctive relief

Catchwords: LAND LAW – strata title – owners corporation – meetings of owners corporation – validity of general meeting – resolutions of meeting invalid where chairperson not validly elected and not all lot owners invited to attend or vote – injunction in aid of a statutory right – proper administration of owners corporation interfered with – defendant restrained from holding herself out or acting as a member of strata committee unless and until duly elected

Legislation Cited: Strata Schemes Management Act 1996 (NSW), Sch 2 cl 15
Strata Schemes Management Act 2015 (NSW), s 19
Uniform Civil Procedure Rules 2005 (NSW), rr 36.15, 36.16

Cases Cited: King v Goussetis (1986) 5 NSWLR 89
Malouf v Prince (No 2) [2010] NSWCA 51
Owners Corporation SP 47027 v Peter Clisdell Pty Ltd [2017] NSWCATAP 188

Category: Principal judgment

Parties: The Owners-Strata Plan 47027 (First Plaintiff)
Peter Miller (Second Plaintiff)
Sophia McGinn (First Defendant)
Westpac Banking Corporation (Second Defendant)

Representation: Counsel:
Mr D L Cook SC (Plaintiffs)
Ms S McGinn (First Defendant – in person)

Solicitors:
Madison Marcus (Plaintiffs)

File Number(s): 2017/331810

Publication Restriction: None

JUDGMENT

Introduction

- 1 These proceedings concern Strata Plan 47027, a large strata scheme comprising 134 lots in a building in Forest Road, Hurstville. Since about late 2016 numerous disputes have arisen concerning the governance of the scheme, and in particular as to who has authority to carry out the functions of the owners corporation.
- 2 One of the disputants is Ms Sophia McGinn, who is a lot owner in the scheme (Lot 56). In June 2017 Ms McGinn, claiming to have the authority of the owners corporation, took steps to establish an account (No 16-8162) with Westpac Banking Corporation (“Westpac”) in the name of “Strata Plan 47027”. Ms McGinn thereafter took steps to request at least some of the lot owners to pay strata levies into the Westpac account. Between August 2017 and November 2017 a total of about \$11,000 was paid into the account by lot owners.
- 3 On 2 November 2017 the owners corporation commenced these proceedings by filing a Summons with the leave of the Duty Judge (Slattery J). Ms McGinn was named as the first defendant, and Westpac was named as the second defendant. By the Summons, interlocutory relief was sought including injunctions restraining Ms McGinn from claiming that she is permitted to act on behalf of or represent the owners corporation unless and until she is elected as a strata committee member, and restraining her from carrying out any of the

functions of the treasurer, secretary or chairperson of the strata committee unless and until she is elected to such positions. Injunctions were also sought against Ms McGinn and Westpac to restrain the disbursement of the funds in the Westpac account. The final relief claimed in the Summons was in the nature of permanent injunctions against Ms McGinn, and an order that Westpac pay the funds in the account to the owners corporation.

- 4 The proceedings came before Lindsay J as Duty Judge on 7 November 2017. The Court noted that a solicitor acting for Westpac had indicated that Westpac would abide the orders of the Court without entering any appearance. (Later, Westpac in fact filed a submitting appearance, save as to costs). Ms McGinn appeared in person. (She has done so throughout the course of the proceedings.) The Court made a notation in the following terms:

NOTE that there is a dispute about control of the "Strata Committee" of the plaintiff (the Owners-Strata Plan Number 47027); namely:-

There are presently two groups of proprietors of Strata Plan 47027 who claim to be the only duly authorised members of the "Strata Committee" of the Strata Plan.

One of those groups includes Peter Miller, and excludes the first defendant.

The other of those groups includes the first defendant, but excludes Peter Miller.

- 5 The Court then made various orders including:
3. ORDER that Peter Miller be joined in the proceedings as a plaintiff.
 4. ORDER that the plaintiffs be designated as follows:
 - a) The Owners-Strata Plan No 47027 is designated as the first plaintiff.
 - b) Peter Miller is designated as the second plaintiff.
 5. ORDER, subject to further order, that the solicitor on the record for the first plaintiff may represent both plaintiffs in these proceedings.
 6. ORDER, subject to further order, that the second plaintiff be appointed to represent in these proceedings all registered proprietors of a Lot in Strata Plan 47027 other than the first defendant.
 7. ORDER that the plaintiffs file, and serve on the first defendant, no later than 8 November 2017 an amended summons recording the joinder of the second plaintiff in the proceedings.
 8. NOTE that the purpose of order 6 is only to ensure that all proprietors of Strata Plan 47027 are bound by whatever decision is made by the Court in these proceedings, and not to limit the entitlement of any proprietor to support one or the other of the cases respectively advanced in the proceedings by the second plaintiff or the first defendant.

9. RESERVE to any proprietor of Strata Plan 47027 liberty to apply to the Court (at his, her or its own risk as to costs) to be joined as a party in the proceedings in his, her or its own right.

10. RESERVE to any proprietor of Strata Plan 47027 liberty to apply to the Court (at his, her or its own risks as to costs) for an order that these orders be discharged or varied.

11. ORDER that the plaintiffs, no later than 6.00pm today (7 November 2017), serve a copy of these orders on all proprietors of Strata Plan 47027.

12. ORDER that order 11 may be complied with by service with a copy of these orders at each proprietor's address for service of notices, or email address, recorded in the Strata Roll of Strata Plan 47027 maintained pursuant to Part 10 of the Strata Schemes Management Act 2015 NSW.

- 6 The proceedings, including the plaintiffs' application for interlocutory relief and Ms McGinn's Notice of Motion (filed on 6 November 2017) for summary dismissal, were listed before the Duty Judge on 9 November 2017. On that occasion, the Court (Lindsay J) was informed by Senior Counsel for the plaintiffs that service upon lot owners of the orders made on 7 November 2017 had been effected. Ms McGinn accepted that was so. No lot owner has since sought to be joined as a party to the proceedings.
- 7 The applications for interlocutory relief and summary dismissal were heard on 9 November 2017, and Lindsay J delivered an ex tempore judgment. In brief, his Honour rejected Ms McGinn's contention that due to the pendency of certain proceedings in the Civil and Administrative Tribunal ("the Tribunal") the Court lacked jurisdiction, and granted interlocutory relief substantially in accordance with prayers 6 to 8 of the Amended Summons.
- 8 The orders of the Court restrained Ms McGinn pending final determination of the proceedings from:
- (a) making any representations that she is a committee member of Strata Plan 47027 unless and until she is elected as a committee member in accordance with the procedures set out in the *Strata Schemes Management Act 2015* (NSW) (the Act);
 - (b) claiming that she is permitted to act on behalf of or represent The Owners-Strata Plan No. 47027 (the Owners Corporation) in any way, unless and until she is elected as a committee member in accordance with the procedures set out in the Act;
 - (c) carrying out any of the functions of the strata committee, treasurer, secretary or chairperson of Strata Plan 47027, unless and until she is elected to one of those positions in accordance with the procedures set out in the Act;

- (d) sending out any levy notices for any amounts allegedly payable as contributions to the Owners Corporation, unless and until authorised by the Owners Corporation to do so in the event she is duly elected treasurer or secretary of the strata committee in accordance with the procedures set out in the Act;
- (e) disbursing any money in bank account BSB 032 323 account number 168162 held with the second defendant (the Bank Account), unless and until authorised to do so in the event she is duly elected treasurer of the strata committee in accordance with the procedures set out in the Act; and
- (f) establishing any other bank account in the name of the Owners Corporation, unless and until authorised to do so in the event she is duly elected treasurer of the strata committee in accordance with the procedures set out in the Act.

- 9 Ms McGinn was further ordered to serve within 14 days an affidavit containing certain information about the payment of strata levies into the Westpac account. An order was also made against Westpac, restraining it from disbursing any money held in the account pending final determination of the proceedings.
- 10 On 16 November 2017 Ms McGinn filed a Notice of Motion pursuant to Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”) r 36.15(1) seeking to set aside the orders that were made against her on 9 November 2017, and replace them with different orders.
- 11 The matter was before Senior Deputy Registrar Hedge on 20 November 2017 for directions. On that occasion, Senior Counsel for the plaintiffs referred to the order made on 9 November 2017 about the provision of an affidavit, and reminded Ms McGinn that she was required to comply with the order (see transcript pages 17-18). It appears that Ms McGinn did not accept that position. She referred to the filing of her motion under UCPR r 36.15 and “the right within 14 days to set aside the judgment” (see transcript page 18). Further discussion followed, in which it was stated by Senior Counsel for the plaintiffs that the orders were binding notwithstanding the filing of the motion, and Senior Deputy Registrar Hedge told Ms McGinn that “you still have to comply with the orders” and noted that no stay had been sought (see transcript pages 18, 19 and 21). Ms McGinn maintained that she had the right to set the orders aside,

but also foreshadowed that she would file another motion to seek a stay (see transcript pages 19 and 21).

- 12 Ms McGinn filed a Notice of Motion on 21 November 2017 seeking a stay of the orders that were made against her on 9 November 2017.
- 13 The proceedings, including both of the motions filed by Ms McGinn, came before Registrar Walton on 6 February 2018. By that time the plaintiffs were represented by a different firm of solicitors (Madison Marcus). The Registrar transferred the matter to the Real Property List. On 9 February 2018 the proceedings on the Summons were listed for hearing on 16 July 2018, and a direction was made that those proceedings be heard separately from the proceedings on a Cross-Summons brought by Ms McGinn, against additional parties, that raised claims in defamation. It was agreed at the hearing on 16 July 2018 that the Court would also deal with the Notices of Motion filed by Ms McGinn on 16 November 2017 and 21 November 2017.

Salient facts

- 14 In September 2000 the owners corporation resolved at the Annual General Meeting to appoint Peter Clisdell Pty Ltd (“Clisdell”) as managing agent of the strata scheme. That company and the owners corporation entered into a Strata Management Agency Agreement on 31 October 2000. It seems that the term of this agreement was extended on numerous occasions, and it appears to be common ground that Clisdell continued to be the managing agent of the scheme until at least 18 November 2016. A central issue in the proceedings is whether, as asserted by Ms McGinn, the agency was terminated by a resolution passed at a meeting held on 18 November 2016.
- 15 An Annual General Meeting of the owners corporation was held on 31 August 2016. Ms McGinn was elected as one of nine members of the Executive Committee. The other members elected were Daniel Leung, Candy Haddad, Kevin Chen, Paul O’Brien, Phillip Greer, Kelly Li, Peter Miller and Bruce Qian.
- 16 At a meeting of the Executive Committee held immediately after the Annual General Meeting, Ms McGinn was appointed as the secretary of the owners corporation. Mr Chen was elected as chairperson and Mr O’Brien was elected as treasurer.

- 17 The Executive Committee met on 23 September 2016. One of the matters discussed was whether the contract of the building caretaker (Mr Joseph Tan) should be terminated. There is a dispute about what occurred at this meeting, in particular as to whether a majority of the Executive Committee resolved to call an Extraordinary General Meeting to consider the caretaker issue (see cl 31(2) of Schedule 2 to *Strata Schemes Management Act 1996* (NSW) (“the 1996 Act”).
- 18 The evidence on this matter is sketchy. Mr O’Brien informed Ms Marie Cregan of Clisdell on 3 October 2016 that there was definitely no majority at the meeting for the calling of an Extraordinary General Meeting. Ms McGinn asserts, by way of minutes she sent to Clisdell at about that time, that there was a resolution passed “to convene an EGM on 14 October 2016 (to resolve the motion of terminating Joseph’s contract)”.
- 19 On 11 October 2016 Ms McGinn sent an email to Ms Cregan’s assistant setting out seven “motions to be included in the Notice of EGM for 21 October 2016”. The provenance of that date is not clear, but may be the result of a suggestion made by Ms Cregan’s assistant on 6 October 2016 that there was insufficient time to give notice for a meeting to be held on 14 October 2016. In any event, it should be noted that the motions forwarded by Ms McGinn included one to resolve to terminate the strata manager’s contract.
- 20 On 12 October 2016 Ms Cregan informed Ms McGinn that Clisdell would not be sending out the paperwork for the proposed Extraordinary General Meeting “as we have insufficient evidence of any authority given to you to call this meeting”. Ms McGinn, in response, stated that Mr O’Brien had proposed to have an Extraordinary General Meeting “to terminate caretaker” and the Committee “unanimously agreed”. Ms McGinn further stated that as the chairperson she, not Mr O’Brien, had authority to advise of the outcome of the meeting. I note that the minutes sent by Ms McGinn describe her as “Chair”.
- 21 Ms McGinn’s version of events gained some support from Mr Qian, although the water is further clouded by Ms McGinn’s statement in her email to Ms Cregan on 24 October 2016 that Mr O’Brien had “proposed to convene an EGM on 23 September 2016, and the EC agreed”. In any case, Ms Cregan,

based on her enquiries, maintained the position that an Extraordinary General Meeting had not been properly convened. She stated in her email to Ms McGinn on 25 October 2016 that:

There was no Motion on that Agenda requesting and [sic] EGM to be convened and therefore that could not be voted on. This was also confirmed by quite a few owners who attended the Committee Meeting.

- 22 On about 9 November 2016 Ms McGinn sent a letter to lot owners which included the following:

Dear Fellow Owners,

The adjourned Extraordinary General Meeting (EGM) is rescheduled on 18 November 2016.

In response to owners' feedback on the cost of new caretaker and strata manager, we obtained revised quotations from the suppliers to match the current budget.

In response to owners' feedback on the location of new strata manager, we obtained new quotation from Hurstville area.

...

You might receive a Notice from Clisdells with a different date, please disregard it, because it is unauthorised. That is just another reason why we need a new strata manager.

- 23 A Notice of Adjourned Extraordinary General Meeting was attached to the letter. It stated that the adjourned meeting would be held at 7:30pm on 18 November 2016 at the pool area (Gym room) of the building. The notice also set out a number of motions on the agenda including a motion to remove Mr Leung and Mr Miller from the Executive Committee and appoint two new members in their place, and motions to terminate the contract with Clisdell and appoint a new strata manager in its place.
- 24 Ms Cregan considered that the proposed 18 November 2016 meeting had not been properly convened. She arranged for a solicitor, Mr James Moir, to attend the meeting holding a proxy given by Mr O'Brien.
- 25 Mr Moir attended the meeting on 18 November 2016. His account of what took place is recorded in a memorandum he prepared on 21 November 2016. The memorandum includes the following:

I attended the "extraordinary general meeting" scheduled for 7.30pm on Friday, 18 November 2016.

When I got there, I spoke to Paul O'Brien and Peter Miller as to what we hoped to achieve out of the meeting. Basically, it was agreed that we would try to have Paul appointed chairman for the meeting and that he would rule the motions out of order, because:-

There was no authority to convene the meeting in the first place. The EC vote to convene the meeting was split 2-2;

Insufficient notice was given. Some owners only got the agenda the day before the meeting. I do not know if Ms McGinn had a strata roll;

There were non-compliant and incorrect motions on the agenda. For example, the motions to terminate the caretaker and strata manager were not properly set out; and

The notice/agenda itself was non-compliant. It failed to comply with the requirements in Schedule 2, including those in clause 8(1) and (2).

Ms. Sophia McGinn tried to call the meeting to order at around 7.40pm. I asked her on what basis. She said she was chairing the meeting. I pointed out clause 15(2) of Schedule 2, and said that as a matter of law, if the chairperson is not present, then the people present are to elect one of them to preside at the meeting.

Ms. McGinn said she knew this. However, she continued to attempt to chair the meeting. She asked me if I thought it had been validly called or was a valid meeting, and I said "no". She then said "please leave". I asked her on what basis she was asking me to leave. She could not coherently answer this.

I said to her that she is not the chairman and had no authority to ask anyone to leave. We need to first appoint a chairman for the meeting.

Ms. McGinn then took some time aside and made a telephone call. I am told by others present that she was apparently calling the police. She later confirmed this. She seemed to intend for the meeting to wait until the police arrived. I said that was ridiculous and the meeting should proceed. The police might not come or might not come for hours (and hadn't come when I left around an hour later).

I then said to everyone present that I am a strata lawyer and that the correct legal process must be followed. That process involves electing someone present to chair the meeting. I nominated Paul O'Brien to chair the meeting and asked for a show of hands as to who agreed or not. Ms McGinn ignored everyone and was determined to chair the meeting herself, despite me showing and telling her what the correct procedure was. I specifically went over to Ms. McGinn and her faction and said: "We are currently voting on who should chair the meeting. The current motion is for Paul to chair the meeting. You should state if you are in favour of or against this motion".

Ms. McGinn ignored me.

Of those who participated in the meeting and did not abstain from voting, all voted in favour of Paul O'Brien chairing the meeting.

Paul O'Brien then declared the meeting open, declared the motions out of order (in accordance with clause 14 of Schedule 2) and closed the meeting.

Around this time, Ms. McGinn took her friends to a different part of the common property, outside the pool. I'm not sure what she did there. She may have been trying to call her own meeting separately, which of course she

cannot do. She did not invite any owners to participate in the meeting, effectively holding it in secret.

- 26 Mr Moir was called as a witness by the plaintiffs. He was cross-examined by Ms McGinn but she did not seek to challenge any particular aspect of his account of what took place on 18 November 2016.
- 27 Mr O'Brien prepared minutes of the meeting. These were in the following terms:

**MINUTES OF A MEETING DESCRIBED ON THE UNAUTHORISED
AGENDA AS AN EXTRAORDINARY GENERAL MEETING,**

THE OWNERS - STRATA PLAN 47027

**ADDRESS OF THE STRATA SCHEME - 438 FOREST ROAD ,
HURSTVILLE, NSW 2220.**

**DATE, PLACE AND TIME OF MEETING -18/11 /2016 ON SITE IN THE GYM
ROOM COMMENCING AT 7.45 PM.**

ELECTION OF CHAIRPERSON:

Due to the absence of the chairperson, the meeting had to elect someone present to that role for the subject meeting only. This person needed to be entitled to vote.

Executive committee member and treasurer, Paul O'Brien, was nominated and accepted the nomination and was then elected unopposed and unanimously.

LEGAL ADVICE:

The chairperson advised that prior to the meeting legal advice had been received that all the listed motions conflicted with the New South Wales Strata Scheme Management Act 1996 (the Act) and therefore were invalid. (Note: This and related legal advice continued to be available during the meeting and for a time afterwards. The lawyer providing the advice, Mr. James Moir, was entitled to speak at the meeting as he held a valid proxy.)

MOTIONS OUT OF ORDER:

The chairperson informed the meeting that as a consequence of this legal advice he was obliged to rule all the listed motions as being out of order under the provisions of Schedule 2, Clause 14, of the Act. Thus none of their content could be legally considered and certainly not later implemented.

CLOSURE OF MEETING:

As no other business was raised the chairman declared the meeting closed at 7.55 pm and thanked all present for their interest and attendance and apologised on behalf of the Owners Corporation for the inconvenience arising.

P O'Brien

Chairperson of the Meeting

Executive Committee Member and Treasurer, SP 47027.19th Nov 2016.

28 Ms McGinn also prepared minutes of the meeting. There are at least three versions of these minutes. The versions differ in relation to the resolution to appoint a new strata manager. The version annexed to Ms McGinn's affidavit of 9 December 2017 is in the following terms:

MINUTES OF ADJOURNED EXTRAORDINARY GENERAL MEETING

The Owners Strata Plan No. 47027

Address: 438 Forest Road, Hurstville NSW 2220

The Adjourned Extraordinary General Meeting of the Owners Strata Plan 47027 was held on 18 November 2016. The meeting commenced at 7.45pm.

Peter Miller and Daniel Leung attempted to sabotage the meeting again by challenging the validity of the meeting. James Moir (proxy of unit 74) claimed that the A/Chairperson is not the Chairperson, and attempted to move a motion to elect a Chairperson.

The A/Chairperson asked them to leave the meeting and take the matter to Fair Trading, so as, other owners can proceed with the meeting, but they refused to, therefore, the A/Chairperson relocated the meeting to front court (outside of swimming pool). They subsequently left the meeting.

Present

Owners representing lots:

1, 10, 19, 21, 22, 37, 41, 52, 55, 56, 86, 95, 102,112, 119,124;

Proxies

Lots 9, 26, 27, 40, 52, 94,103, 131 to Candy Haddad

Lots 108 to Kelley Li

Lots 11, 13, 17, 29, 30, 31, 42, 46, 48, 57, 66, 69, 70, 82, 84,87, 103, 113, 114, 118, 126 to Sophia McGinn

Chairperson

Sophia McGinn (acting)

Quorum:

Declared

Motions

1. Minutes

Resolved that the minutes of Annual General Meeting held on 31/8/2016 is confirmed and accepted.

2. Caretaker

Resolved - to retain Caretaker for further three months, give Joseph last chance to improve the performance and to resolve GST overcharge with the Owners Corporation.

3. Executive Committee

- a. **Specially resolved** to vacate Peter Miller and Daniel Leung's office as members of Executive Committee
- b. **Resolved** to reduce the number of member of Executive Committee from nine to seven
- c. **Accepted** Executive Committee member Kelley Li's resignation
- d. **Resolved** to appoint Joanna Xu as new Executive Committee member

4. Strata Manager

- a. **Resolved** to terminate the current strata management contract with Peter Clisdell Pty Ltd pursuant to clause 7.4(a) with immediate effect, in that, the breach (GST error) was notified on 17/10/2016, but Clisdell failed to rectify the breach in 30 days.
- b. **Resolved** that the Owners Corporation authorises Executive Committee to execute the agency agreement to give effect to appoint new strata manager on behalf of the Owners Corporation for one year term, with Michael Roberts be the first option, STM the second, PSMG the third, and Acumen the fourth, subject to a condition of 15% insurance commission and delegation to the agent is to be limited to the conditions specified.
- c. The Owners Corporation delegates to the agent the functions of the Chairperson, Secretary, and Treasurer and all other functions necessary to enable the agreed services and the additional services to be supplied, and the power to affix the Common Seal as directed by the Executive Committee.

The meeting closed at 9.45pm

- 29 It appears clear from the above that Ms McGinn, who was claiming to be the "A/Chairperson", objected to Mr Moir's attempt to move a motion to elect a chairperson, then "relocated the meeting" to an area outside the pool area, and proceeded to conduct a separate meeting involving a number of other lot owners. It further appears that at that meeting a resolution was passed to terminate the contract with Clisdell.
- 30 On 21 November 2016 Ms McGinn sent a Notice of Termination to Clisdell which was in the following terms:

YOU ARE HEREBY NOTIFIED that you are in breach of your obligations of the Strata Management Agency Agreement (signed on 31 October 2000) which result in significant financial loss to the Owners Corporation. The breach was notified on 17 October 2016 via email, and that breach has continued for 30 days after that notice.

The Owners Corporation of Strata Plan No. 47027 resolved on 18 November 2016 in the Extraordinary General Meeting that the Strata Management Agency Agreement with Peter Clisdell Pty Ltd be terminated pursuant to clause 7.4(a), without affecting any other rights it may have, with immediate effect.

All the books, records, keys and other property of the Owners Corporation are to be made available at your office for collection within 30 days of this Notice of Termination.

Regards,

Sophia McGinn

Secretary of Executive Committee

- 31 Ms Cregan, relying at least in part on Mr Moir's memorandum concerning the events of 18 November 2016, took the view that the Notice of Termination was not valid. Ms Cregan deposed that Clisdell continued to manage the scheme, and was paid the agreed management fees. Ms McGinn took the view that the agency agreement with Clisdell had been validly terminated. She called for Clisdell to hand over the books and records of the scheme, but it declined to do so.
- 32 On about 22 March 2017 Ms McGinn, describing herself as "A/Chairperson & Secretary", lodged two applications in the Tribunal (SC17/13846 and SC17/13849) in the name of the owners corporation seeking various orders against Clisdell. These applications were dismissed on 31 March 2017 and 1 May 2017 respectively. The first application was dismissed due to a lack of urgency. The second application was dismissed due to a failure of the applicant to appear. An appeal brought by Ms McGinn in the name of the owners corporation was dismissed by an Appeal Panel of the Tribunal on 20 September 2017.
- 33 In the meantime, an Extraordinary General Meeting of the owners corporation was convened by Clisdell for 30 May 2017.
- 34 The functions of the secretary of the owners corporation had been delegated to Clisdell, although not exclusively, pursuant to cl 2.1 and 2.3 of the agency agreement. By s 19(1) of the *Strata Schemes Management Act 2015* (NSW) ("the 2015 Act"), which relevantly commenced operation on 30 November 2016, the secretary is empowered to convene general meetings (other than annual general meetings) of the owners corporation. Ms Cregan deposed that she caused a notice of the meeting to be sent to all lot owners at the addresses listed for them in the strata roll. Ms McGinn, presumably after receiving the notice, sent an email to Ms Cregan, stating that "You are fully aware that

Clisdell's contract is terminated" and that Clisdell had no delegation to issue the notice without authorisation.

- 35 The agenda set forth in the notice of the meeting contained a motion to appoint Clisdell as the strata managing agent of the scheme, delegate various functions to Clisdell, and execute an agreement to give effect to such appointment and delegation. Ms Cregan deposed that absent a re-appointment of Clisdell, its term would have expired on 31 May 2017 (see cl 14 of Sch 3 to the 2015 Act). The agenda also contained a motion to specially resolve to remove Ms McGinn from office as member and secretary of the strata committee. (The 2015 Act provided for a strata committee whereas the 1996 Act provided for an executive committee.)
- 36 The minutes of the 30 May 2017 meeting record that the motion concerning Clisdell was passed unanimously. The minutes further record that it was specially resolved to "vacate Sophia McGinn from office of member and secretary of the strata committee of Strata Plan 47027". A resolution of that type is envisaged by s 35(1)(e) of the 2015 Act.
- 37 Following the meeting a new Strata Management Agency Agreement was entered into between the owners corporation and Clisdell.
- 38 On 9 June 2017 Ms McGinn sent an email to Ms Cregan in the following terms:
- Please be advised that the strata committee resolved to appoint me as the Treasurer (see below).
- I hereby request Clisdell to add the following office holders as the signatories on Owners Corporation's trust account at Macquarie Bank: Kevin Chen, Chairperson; Sophia McGinn, Treasurer
- Please provide a copy of account balance.
- No reply by next Monday is taken as a refusal.
- 39 It appears from some emails sent on 8 June 2017 and 9 June 2017 that Ms McGinn's appointment as treasurer was supported by no fewer than four persons, namely, Candy Haddad, Kevin Chen, Bruce Qian and Jiajuan (Joanna) Xu. The first three of those had been elected to the executive committee on 31 August 2016. Ms Xu was not so elected. According to Ms McGinn's minutes of the meeting she chaired on 18 November 2016, Ms Xu was appointed to the executive committee on that occasion.

- 40 Ms Cregan responded to Ms McGinn's email later on 9 June 2017. Ms Cregan queried whether notice of the "alleged committee meeting" had been sent to all owners, and referred to the resolution of 30 May 2017 to remove Ms McGinn from the committee. Ms Cregan also stated that Clisdell, having been re-appointed as strata manager, would "retain control of the books and records, including the money in the accounts".
- 41 Clisdell gave notice of a strata committee meeting to be held on 19 June 2017. There was a motion on the agenda to withdraw or discontinue Tribunal proceedings 17/13849, and the appeal therefrom, 17/16314.
- 42 Ms McGinn prepared minutes of a strata committee meeting "originally scheduled on 19 June 2017", but "due to a number of members being unavailable on that day, motions were voted in writing via emails". Presumably that is a reference to the emails of 8 and 9 June 2017 referred to above. The minutes refer to various resolutions, including a resolution to appoint Ms McGinn as the treasurer (in place of Mr O'Brien), and a resolution to open a new bank account for the owners corporation to collect levies (in place of the existing account at Macquarie Bank "under the name of Clisdell").
- 43 These minutes were sent by email by Ms McGinn to Ms Cregan on 23 June 2017 in support of a request to Clisdell to close the Macquarie Bank account and transfer the funds to a Westpac account (No 168162). The Westpac account had been opened on 19 June 2017. Ms McGinn agrees that she effected the opening of the account.
- 44 On 23 August 2017 Clisdell arranged for notices to be delivered or sent to lot owners for an Annual General Meeting to be held on 7 September 2017. The notice contained a meeting agenda that included a motion for the election of the strata committee. By cl 2.1 and Schedule A3 of the agency agreement entered into between Clisdell and the owners corporation in May 2017, the power to send out notices of the Annual General Meeting was delegated, although not exclusively, to Clisdell.
- 45 On about 30 August 2017 Ms McGinn, purporting to be the secretary of the owners corporation, sent letters to at least some lot owners in the following terms:

We are still waiting for NCAT's decision in relation to an order for former strata manager, Clisdell to handover the books and accounts. I understand it has been a few months and thank you for your patience.

The next AGM is scheduled on 18 October 2017 and meeting notice will be sent in the coming weeks.

Please ignore Clisdell's notice.

The motion to appoint the new strata manager was passed on 18 November 2016, however, Clisdell disputed it, therefore, we will move it again in this AGM to facilitate NCAT to focus on real issue in dispute.

In relation to transferring the funds form our previous trust account at Macquarie Bank (which is under Clisdell's name), it is currently with Financial Ombudsman Service for resolution, therefore, the balance of your account is not included in this quarter's levy notice (see attached).

The payments are to be made to new Owners Corporation's account.

- 46 The attached notice was a Notice of Levies Due in October 2017. The notice called for the levies to be paid into the Westpac account. As noted earlier, about \$11,000 had been paid into the account by November 2017.
- 47 An Annual General Meeting was held on 7 September 2017. The minutes of the meeting indicate that at least 45 lot owners were present, either in person or by proxy. The minutes also record that an election for the strata committee was held, with 7 members being duly elected. Ms McGinn (who was not present at the meeting) was not one of those elected.
- 48 On 20 September 2017 an application that had been brought in the Tribunal seeking an order removing Ms McGinn as secretary of the owners corporation was withdrawn, and the application was thus dismissed under s 55(1)(a) of the *Civil and Administrative Tribunal Act 2013* (NSW). The stated reasons for the withdrawal included that the Annual General Meeting had been held at which a new strata committee had been elected which did not include Ms McGinn, and that a strata committee meeting had been held at which a new secretary had been elected.
- 49 On 30 September 2017 an Appeal Panel of the Tribunal dismissed the appeal, brought in the name of the owners corporation by Ms McGinn, against the dismissal of the applications that had been brought in March 2017 (see *Owners Corporation SP 47027 v Peter Clisdell Pty Ltd* [2017] NSWCATAP 188). There had been no resolution of the owners corporation or of the strata committee authorising the filing of the appeal. A question was thus raised as to whether

Ms McGinn had authority to file the appeal pursuant to s 226 of the 2015 Act as either an officer of the owners corporation or as a lot owner. The Appeal Panel held (at [28]-[38]) that in the absence of a delegation of authority to her by the owners corporation, Ms McGinn did not have authority to file the appeal. The Appeal Panel declined to deal with an application made by Clisdell that the Tribunal make an order under s 237 of the 2015 Act that Clisdell be appointed as strata managing agent to exercise all the functions of the owners corporation (see at [39] and [44]).

- 50 On 9 October 2017 solicitors acting for the owners corporation sent a lengthy letter to Ms McGinn which included, amongst other things, demands that she cease making representations that she was permitted to act on behalf of the owners corporation, including by sending out levy notices. Various undertakings, and information concerning the collection and disbursement of levies, were called for, failing which proceedings in this Court to seek injunctive relief were threatened to be commenced. Ms McGinn did not provide the undertakings or the information sought.
- 51 On 10 October 2017 Ms McGinn sent a letter to at least some lot owners in the following terms:

Dear Fellow Owners,

After three months, NCAT advised on 20 September 2017 that a resolution of Owners Corporation (instead of Strata Committee) is required to lodge NCAT applications. Clisdell admitted the scheme is dysfunctional and sought a s237 order at NCAT to appoint itself, but was refused.

The Owners Corporation has the options to appeal the decision or to pass a resolution to accommodate the requirement. The Strata Committee resolved to convene an EGM instead of AGM on 18 October 2017. (see attached Notice of EGM). The Owners Corporation has an obligation to review the by-laws by 30 November 2017. A motion is moved accordingly.

Peter Miller, Daniel Leung, Garry Finn, Paul O'Brien, and Philip Greer withdrew their application at NCAT seeking an order to remove me as the Secretary of Owners Corporation, therefore, it is dismissed on 20 September 2017.

In relation to the funds in the trust account under Peter Clisdell's name, Macquarie Bank advised that Owners Corporation can't instruct the closure and transfer. FOS will have a decision; therefore, levies paid into that account will not be booked until funds are transferred.

Accordingly, the voting rights in the coming EGM will be determined on the levy payment for October 2017 quarter. Please make sure your levy is paid to the new Owners Corporation's Westpac account stated on the levy notice.

If you can't attend the EGM, please complete the proxy and post it to the address on the form.

Kind regards,

Sophia McGinn

Secretary of Owners Corporation

- 52 The accompanying notice referred to motions to authorise the strata committee to commence legal action to recover property "withheld" by Clisdell, and authorise Ms McGinn to lodge and manage the applications.
- 53 On 25 October 2017 Ms McGinn filed another two applications in the Tribunal in the name of the owners corporation against Clisdell, seeking orders that Clisdell make available all property of the owners corporation. This was presumably done pursuant to resolutions passed to that effect, as referred to in minutes of an Extraordinary General Meeting held on 18 October 2017 that were attached to the applications. The reasons in support of the applications included that the owners corporation had resolved on 18 November 2016 to terminate the agency agreement with Clisdell.
- 54 The proceedings in this Court were commenced on 2 November 2017, one day before the first directions hearing was to take place in the Tribunal in respect of the recently filed applications.
- 55 The orders made by Lindsay J on 9 November 2017 are referred to above (at [8] and [9]). The evidence is clear that Ms McGinn has failed to comply with those orders in material respects. For example, on 8 March 2018 Ms McGinn, purporting to be the secretary of the owners corporation, sent a letter to lot owners. The letters were accompanied by a levy notice, prepared by Ms McGinn, requiring payment of levies into the Westpac account by 1 April 2018. Ms McGinn was involved in the convening and holding of an Extraordinary General Meeting on 26 April 2018 at which a resolution was passed to appoint Next Gen Strata Pty Ltd as the strata managing agent of the scheme. On 6 May 2018 Ms McGinn sent a letter to lot owners (again as secretary of the owners corporation) advising of the appointment of Next Gen Strata Pty Ltd.

Ms McGinn has also failed to serve the affidavit containing information about the payment of levies into the Westpac account.

56 Ms McGinn does not seem to contest that she has not acted in accordance with the terms of the orders made by Lindsay J on 9 November 2017. She claims that because she filed a motion seeking to set aside the orders, and that motion has not been determined, the orders are not enforceable against her.

57 Next Gen Strata Pty Ltd, after having been made aware of these proceedings, has indicated that it does not wish to be involved and will abide the outcome.

Submissions

58 Written submissions were provided by the parties. These submissions are in the Court Book (including the submissions handed up by Ms McGinn in the course of her closing submissions). The principal contentions of the parties on the matters arising on the Amended Summons are summarised below.

59 The plaintiffs submitted that the circumstances warranted the grant of permanent injunctions against Ms McGinn as sought, and the making of an order that the funds in the Westpac account be paid to the owners corporation. In relation to the injunctive relief, it was submitted that the restraints were required in aid of the statutory rights conferred under the strata titles legislation (in particular the 2015 Act) in respect of the management of strata schemes. It was submitted that the owners corporation itself, or alternatively Mr Miller as representative of lot owners other than Ms McGinn, had interests in the enforcement of those rights sufficient to confer standing to seek the relief. It was submitted that it was clear that Ms McGinn has interfered with the statutory rights concerning management of the scheme (including as to the finances of the scheme), even after the making of the interlocutory injunctions in November 2017. It was put that this was causing difficulties and confusion, and there was every reason to think that, unless restrained, Ms McGinn would continue to interfere in the management of the scheme. It was contended that, on any view, Ms McGinn has not held a position on the strata committee since the Annual General Meeting held on 7 September 2017.

60 In relation to the funds in the Westpac account, it was submitted, in effect, that even though the account was established without authority it is in the name of

the owners corporation, and the monies deposited into the account were plainly intended to be funds for the use of the owners corporation. It was submitted that in those circumstances the funds should be ordered to be transferred to the owners corporation as the legal owner of the funds so that it obtains control over them. Alternatively, it was put that such an order could be made on the basis that the funds are at least beneficially owned by the owners corporation (perhaps pursuant to a trust of the Quistclose variety), and to the extent that legal title was held by Ms McGinn it would be unconscionable for her to retain the funds in the face of a demand from the owners corporation.

61 Ms McGinn challenged the authority of the plaintiffs to commence (and carry on) the proceedings. She asserted that it was common ground that the owners corporation did not have proper authority to commence the proceedings. Ms McGinn suggested that the first plaintiff was really Clisdell. As for Mr Miller, Ms McGinn submitted that he did not have authority to commence proceedings on behalf of the owners corporation, but she seemed to accept that he could continue the proceedings in his capacity as a lot owner. (She also stated that the first plaintiff could continue the proceedings as Clisdell.)

62 Ms McGinn submitted that she was the secretary of the owners corporation. In support of that submission, she claimed that the Extraordinary General Meeting held on 30 May 2017 was convened without authorisation, so the resolution passed removing her as a member and secretary of the strata committee was invalid. Ms McGinn further claimed that the Annual General Meeting of 7 September 2017 had been convened by Clisdell without authorisation and was therefore invalid, consequently leaving her in place as secretary. These submissions seem to rest at least in part on the proposition that Clisdell had been removed as the strata managing agent in November 2016 and had not been re-appointed on 30 May 2017. Ms McGinn further submitted that she was appointed as treasurer of the owners corporation at a strata committee meeting held in June 2017.

Determination

63 It is convenient to commence by considering Ms McGinn's submission that Clisdell had been removed as the strata managing agent in November 2016.

That removal is said to have been effected pursuant to a resolution passed at the meeting chaired by Ms McGinn on 18 November 2016. The resolution was to the effect that the agency contract with Clisdell be terminated.

64 Leaving aside the question whether an Extraordinary General Meeting had been validly convened for the evening of 18 November 2016, it is my opinion that the meeting chaired by Ms McGinn was not held in accordance with the requirements of the applicable legislation. Clause 15 of Schedule 2 to the 1996 Act relevantly provided:

15 (1) The chairperson of the owners corporation is to preside at any general meeting of the owners corporation at which the chairperson is present.

(2) In the chairperson's absence from any such meeting, the persons present at that meeting and entitled to vote on motions submitted at that meeting may elect one of their number to preside at that meeting and the person so elected is, while so presiding, taken to be the chairperson of the owners corporation.

65 Ms McGinn did not act in accordance with those provisions. She evidently considered that she had earlier been appointed by the chairperson to be the acting chairperson in his absence, and that she therefore had the right to chair the Extraordinary General Meeting. It is clear that Ms McGinn resisted the notion that, in the absence of the chairperson, the persons present at the meeting were entitled to elect a person to preside at the meeting. I accept that an election of that character was held, and that Mr O'Brien was elected. I further accept that Ms McGinn, in the company of a number of lot owners, then left the place appointed for the meeting and went to a different area, where a separate meeting was held. Ms McGinn's minutes do not suggest that she was elected to preside at this meeting; rather, she chaired the meeting in her capacity as "A/Chairperson". In addition, I am not satisfied that all lot owners present were invited to attend (and to vote) at the meeting chaired by Ms McGinn. In these circumstances, I am unable to accept that any of the resolutions passed at this separate meeting, including the resolution to terminate the agency contract, were valid resolutions of the owners corporation. It follows in my view that the purported termination of the contract by notice given on 21 November 2016 was ineffective. The giving of the notice was not authorised by the owners corporation.

- 66 The changes to the number of members and composition of the executive committee that were the subject of resolutions passed at the separate meeting were similarly ineffective. It is not necessary to decide whether an Extraordinary General Meeting had been validly convened for the evening of 18 November 2016.
- 67 Clisdell was thus the strata managing agent when it convened the Extraordinary General Meeting for 30 May 2017. The functions of the secretary of the owners corporation had been delegated, although not exclusively, to Clisdell (see cl 2.1 and 2.3 of the agency contract); and by s 19(1) of the 2015 Act the secretary has the power to convene a general meeting (other than an Annual General Meeting) at any time. The challenge made at the time by Ms McGinn to the convening of the Extraordinary General Meeting was based at least in part on her assertion that the agency contract had been terminated. To the extent that Ms McGinn further maintained that it was necessary for Clisdell to be authorised by the strata committee to convene an Extraordinary General Meeting, I think she was in error. It was open to the secretary (who happened to be Ms McGinn), and hence Clisdell under the delegation of power, to convene an Extraordinary General Meeting without first being authorised by a resolution of the strata committee. The power to convene is conferred by s 19(1) of the 2015 Act on both the secretary and the strata committee. I have therefore reached the conclusion that the Extraordinary General Meeting of 30 May 2017 was validly convened, and that the resolutions passed at the meeting were themselves valid resolutions of the owners corporation.
- 68 Accordingly, the special resolution to remove Ms McGinn as a member and secretary of the strata committee was valid; so, too, were the resolutions concerning the re-appointment of Clisdell as strata managing agent. Ms McGinn's assertion that she remained a member of the strata committee and remained the secretary cannot be accepted. Similarly, her challenge to the validity of the new Strata Management Agency Agreement entered into with Clisdell must be rejected.
- 69 I also do not accept Ms McGinn's submission that her removal should be held to be invalid because Mr Miller (or perhaps the owners corporation)

subsequently sought orders in the Tribunal to remove her as secretary of the owners corporation, and this amounted to an admission by the owners corporation that her removal was ineffective. It is not clear on the evidence as to who brought the application, but it seems likely that it was Mr Miller and some other lot owners purporting to act on behalf of the owners corporation. It is also not clear when the application was made, what relief was sought, and what grounds were relied upon. In any case, I do not think that conduct of the type alleged by Ms McGinn could itself affect the validity of the proceedings at the 30 May 2017 meeting, that being a matter of law. I should add that the fact that Clisdell applied for an order that it be appointed as strata managing agent under s 237 of the 2015 Act cannot be construed as an admission by Clisdell or the owners corporation that Clisdell was not then the strata managing agent of the scheme. I do not accept Ms McGinn's submission that there was an admission to that effect.

- 70 It is not suggested that Ms McGinn was appointed to the strata committee after 30 May 2017. Rather, Ms McGinn asserts, erroneously in my view, that she has continued to be a member and continued as the secretary.
- 71 Ms McGinn claims to have been appointed as treasurer in June 2017. I do not accept that claim. The purported appointment appears to have proceeded on the false basis that Ms McGinn remained a member of the strata committee. The proposal was to appoint "another member as Treasurer". Further, Ms McGinn seems to have been nominated by Ms Xu, who was not elected to the committee on 31 August 2016 and was not validly appointed to the committee on 18 November 2016, and Ms McGinn received the support of only three persons who were members of the committee. Finally, the relevant emails in evidence (which were sent to only some committee members, and not to Mr O'Brien who was elected as treasurer on 31 August 2016) do not support the conclusion that Ms McGinn's appointment occurred in the course of a properly convened strata committee meeting.
- 72 In any event, any tenure Ms McGinn had as treasurer came to an end when a new strata committee was elected at the Annual General Meeting on 7 September 2017. My conclusion that Clisdell remained the strata managing

agent after 30 May 2017 means that the submission that the Annual General Meeting of 7 September 2017 was not validly convened must also be rejected. Clisdell had the power under its new contract to send out notices for the Annual General Meeting of 7 September 2017. A new strata committee, not including Ms McGinn, was elected on that occasion. Ms McGinn does not suggest that she was subsequently appointed to the strata committee.

- 73 For the above reasons, I am satisfied that Ms McGinn is not a member of the strata committee, and her claims that she is the secretary and treasurer of the owners corporation are without foundation. She is not entitled to hold herself out as a member of the committee or as the holder of either of those positions, and she is not entitled to perform acts as if she was. In particular, Ms McGinn is not entitled to send levy notices to lot owners requiring payment of levies into the Westpac account she established in June 2017.
- 74 There is no substance in Ms McGinn's submission that the proceedings were commenced without authority (still less that this was common ground). The evidence shows that the commencement by the owners corporation of proceedings to seek injunctive relief against Ms McGinn and an order remitting the money in the Westpac account was the subject of resolutions passed by the strata committee on 10 October 2017 and by the owners corporation in the Extraordinary General Meeting on 20 October 2017. No question of authority arises in relation to Mr Miller, who became the second plaintiff on 7 November 2017. Mr Miller did not purport to carry on the proceedings in the name of the owners corporation. When he was added as a party the Court made an order appointing him until further order as the representative of lot owners other than Ms McGinn. Ms McGinn seemed to accept that Mr Miller could continue the proceedings in his capacity as a lot owner.
- 75 I am further satisfied that the plaintiffs have standing to seek the relief claimed in the proceedings. The relief is directed to the enforcement of rights under the 2015 Act, so that the affairs of the owners corporation are conducted in accordance with the legislative regime and not subverted by actions contrary to that regime. The nature of the statute clearly indicates that the owners corporation itself (and, if necessary, a representative of lot owners in the strata

scheme) has the right to seek enforcement of the statutory regime concerning the management of the scheme. At the very least, the plaintiffs have a special interest, over and above that held by ordinary members of the public, in such enforcement (see *King v Goussetis* (1986) 5 NSWLR 89 at 93-4).

- 76 In my view, it is appropriate for the Court to issue final injunctions substantially as sought in prayer 9 of the Amended Summons. These injunctions would restrain Ms McGinn from holding herself out as a committee member or office holder, or carrying out any of the functions of the committee or such offices (including the sending out of levy notices, disbursing money from the Westpac account, and establishing any other bank account in the name of the owners corporation) unless and until she is duly elected and authorised in accordance with the procedures set out in the 2015 Act. I agree with the submissions of the plaintiffs that Ms McGinn has conducted herself in a manner contrary to the statutory regime, thereby impermissibly interfering in the management of the scheme, and there is every reason to think that, unless so restrained, Ms McGinn will continue to so act.
- 77 It is also appropriate to make an order requiring Westpac to pay the funds in the Westpac account to the owners corporation so that the funds can be placed into an account under its control. It is undoubtedly the case that the funds paid into the account were intended to be held by and used for the purposes of the owners corporation. However, even though the account is in the name of the owners corporation, the account was not established by the owners corporation, and is not presently under the control of the owners corporation. In my opinion, the owners corporation is beneficially entitled to the funds. Westpac, which has entered a submitting appearance, should be ordered to pay the funds to the solicitors for the owners corporation. That remedy is more expedient than the alternative of making mandatory orders against Ms McGinn to cause the funds to be paid to the owners corporation.
- 78 It remains to consider the motions filed by Ms McGinn on 16 November 2017 and 21 November 2017.
- 79 By the first motion, Ms McGinn sought an order under UCPR r 36.15(1) to set aside orders 1 and 4 made on 9 November 2017. Orders 1 and 4 are the

orders for the interlocutory injunctions and the costs order. These orders were sought to be set aside:

on the basis that the orders were given illegally as neither the first plaintiff nor the second plaintiff has authority to commence the proceedings on behalf of the Owners Corporation Strata Plan 47027, and was given against good faith as the plaintiffs failed to demonstrate the “urgency” and “irreparable damages”, Lindsay J acknowledged but nevertheless made the orders.

- 80 I have already dealt with the question of authority to commence the proceedings. There was nothing illegal about the making of the orders. Neither were the orders made against good faith. Even if Lindsay J had proceeded as alleged (and the transcript of the proceedings indicates that he did not) it would not amount to a lack of good faith for the purposes of the rule. The matters referred to would at best amount to arguments that could have been raised on an appeal from his Honour’s decision.
- 81 Ms McGinn also sought orders to “replace” the orders made on 9 November 2017. These were an order that Mr Miller provide evidence of his authority to commence the proceedings on behalf of the owners corporation; and an order for the setting up of a new bank account to be jointly controlled by Mr Miller (or the owners corporation) and Ms McGinn. These orders were not the subject of submissions and do not seem to have been pressed. In any case, I would not make those orders. Mr Miller has not sought to proceed on behalf of the owners corporation, so there is simply no basis for the first order. In view of my conclusion that Ms McGinn is no longer on the strata committee, the second order would be plainly inappropriate. The motion filed on 16 November 2017 will be dismissed.
- 82 I should note that Ms McGinn submitted that as the plaintiffs did not file any affidavits in opposition to the motion, the motion should be treated as unopposed, and the orders of 9 November 2017 should be set aside as a result. The submission cannot be accepted. If a party does not seek to adduce evidence on an application it does not mean that the application is thereby not opposed by that party. The Court would not be bound to accede to the application even if it was unopposed.

83 I should also note that this motion is the basis of Ms McGinn's claim that the orders of Lindsay J made on 9 November 2017 were not enforceable. In that regard, she pointed to UCPR r 36.16(3A) which is in the following terms:

If notice of motion for the setting aside or variation of a judgment or order is filed within 14 days after the judgment or order is entered, the court may determine the matter, and (if appropriate) set aside or vary the judgment or order under subrule (1), as if the judgment or order had not been entered.

84 Ms McGinn submitted that as the motion was filed within the specified time (indeed even before the orders were entered on 24 November 2017) the orders could not be enforced. It was submitted that because UCPR r 36.16(3A) contemplates the setting aside of an order as if it had not been entered, it could not have been intended that the order would in the meantime be able to be enforced; otherwise if the order was set aside it would not be as if it had not been entered.

85 UCPR r 36.16(3A) should not be read in that way. The expression "as if the judgment or order had not been entered" refers to the status the judgment or order is deemed to have for the purposes of determining whether to set the judgment or order aside. So, even if the judgment or order has been entered, the judgment or order is treated, for that purpose, as not having been entered. It follows that if the requisite motion is filed within the stipulated time, the limitations that would otherwise apply to the setting aside of judgments or orders that have been entered do not operate (see *Malouf v Prince (No 2)* [2010] NSWCA 51 at [11]).

86 If the rule was construed in the manner suggested by Ms McGinn the mere filing of a motion within the specified time would impose a stay of any orders sought to be set aside. That outcome would have far reaching consequences for the orderly administration of justice. In my view, such an outcome is highly unlikely to have been intended.

87 It is not necessary to further consider this matter, which really only relates to Ms McGinn's justification, or excuse, for her undoubted non-compliance with the orders made on 9 November 2017. In the light of Ms McGinn's insistence that she is the secretary and treasurer of the owners corporation, I would issue

the final injunctions sought even if I was satisfied that she genuinely believed that the orders of 9 November 2017 were not enforceable against her.

88 In her second motion, filed on 21 November 2017, Ms McGinn sought a stay of orders 1 and 4 made on 9 November 2017. This step, taken after the directions hearing before Senior Deputy Registrar Hedge, might suggest an awareness on her part that those orders were in force. However, I express no view on that question.

89 It is not clear whether Ms McGinn presses this motion. Even if she did, I would dismiss it. There is no point ordering a stay of the interlocutory injunctions. The interlocutory injunctions operate in their terms until the final determination of these proceedings. Final injunctions will issue as a result of this judgment. There is no basis for any stay of the costs order. The motion filed on 21 November 2017 will also be dismissed.

90 The plaintiffs have succeeded in obtaining the relief they sought against Ms McGinn. There seems to be no reason why costs should not follow the event. The Court will therefore order that Ms McGinn pay the plaintiffs' costs of the proceedings. The plaintiffs seek an order that their costs be paid on an indemnity basis. Some submissions were made in support of that outcome. However, Ms McGinn did not address that issue. Directions will be made for brief written submissions to be made on that question. The Court proposes to deal with that matter on the papers.

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