Court of Appeal
Supreme Court

New South Wales

Case Name:	The Owners Strata Plan No 57164 v Yau
Medium Neutral Citation:	[2017] NSWCA 341
Hearing Date(s):	26 April and 15 May 2017
Decision Date:	21 December 2017
Before:	Beazley P at [1]; Leeming JA at [195]; Emmett AJA at [196]
Decision:	Appeal dismissed with costs.
Catchwords:	REAL PROPERTY – strata scheme for a residential and commercial building – application of Strata Schemes Management Act 1996 (NSW) – effect of non-compliance with notice requirements for a meeting of the executive committee specified in Sch 3, cl 6 – whether resolution passed by Executive Committee in breach of ss 65A and 80A – whether Executive Committee has authority to instruct legal representatives to settle legal proceedings PROCEDURE – consent orders – whether consent orders may be set aside – orders already entered – circumstances in which orders may be set aside – whether court has a discretion to set aside orders when basis for setting aside the order has been established AGENCY – ostensible authority – whether senior counsel has ostensible authority to enter settlement agreement – whether parties acted in reliance on representation of authority – whether no question of ostensible authority as a result of the principle that estoppel does not operate against a statute

Legislation Cited:	Strata Schemes Management Act 1996 (NSW), ss 6, 17, 21, 62, 65A, 75, 80A, 153, 181, 207, Sch 3, cls 6, 17 Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 36.15
Cases Cited:	2 Elizabeth Bay Road Pty Limited v The Owners - Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409 Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27; [2009] HCA 41 Australian Federation of Islamic Councils Inc v Farrell [2016] NSWCA 256 Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49 Balog v Independent Commission Against Corruption (1991) 169 CLR 625; [1991] HCA 28 Barron v Potter [1914] 1 Ch 895 Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 1164 Burns v Corbett (2017) 316 FLR 448; [2017] NSWCA 3 Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56 CIC Insurance Ltd v Bankstown Football Club Ltd (1995) 9 ANZ Insurance Cases ¶61-232 Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72; [1975] HCA 49 DJL v The Central Authority (2000) 201 CLR 226; [2000] HCA 17 Donellan v Watson (1990) 21 NSWLR 335 Doyle v Hall Chadwick [2007] NSWCA 159 Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 Gamser v Nominal Defendant (1977) 136 CLR 145; [1977] HCA 7 Geissler v Accro Motors Pty Ltd (1955) 73 WN (NSW) 31 Harvey v Phillips (1956) 95 CLR 235; [1956] HCA 2 House v The King (1936) 55 CLR 499; [1936] HCA 40 Huddersfield Banking Co Ltd v Henry Lister & Son Ltd [1895] 2 Ch 273 Katter v Melhem (2015) 90 NSWLR 164; [2015] NSWCA 213 Kinch v Walcott [1929] AC 482

	Lin v The Owners - Strata Plan No 50276 (2004) 11 BPR 21,463; [2004] NSWSC 88 Logwon Pty Limited v Warringah Shire Council (1993) 33 NSWLR 13 Lucke v Cleary (2011) 111 SASR 134; [2011] SASCFC 118 Minister for Immigration and Ethnic Affairs v Kurtovic (1990) 21 FCR 193 Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; [1990] HCA 32 Owners Strata Plan 50276 v Thoo (2013) 17 BPR 33,789; [2013] NSWCA 270 Pavlovic v Universal Music Australia (2015) 90 NSWLR 605; [2015] NSWCA 313 Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd (1976) 15 ACTR 45 Pratten v Warringah Shire Council [1969] 2 NSWR 161 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Quach v New South Wales Health Care Complaints Commission (No 4) [2016] NSWCA 285 Roach v Bickle (1915) 20 CLR 663; [1915] HCA 80 Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42 Romeo v Papalia [2012] NSWCA 221 Ryan v Kings Cross RSL Club Pty Ltd [1972] 2 NSWLR 79 Singh v Ginelle Pty Ltd [2010] NSWCA 310 St Alder v Waverly Local Council [2010] NSWCA 22 Stolfa v Hempton (2010) 15 BPR 28,253; [2010] NSWCA 218 SZTAL v Minister for Immigration and Border Protection [2017] HCA 34 Thoo v The Owners Strata Plan No 50276 (2011) 15 BPR 29,309; [2011] NSWSC 657
Texts Cited:	G E Dal Pont, Law of Agency (3rd ed, 2014, LexisNexis) 460 [20-7]
Category:	Principal judgment
Parties:	The Owners Strata Plan No 57164 (Appellant) Annie May Fun Yau (First Respondent)

	Andy Sung Kit Yau (Second Respondent)
Representation:	Counsel: J Kelly SC; V Kerr SC; A Carr (Appellant) P Greenwood SC; I Griscti (Respondents) Solicitors: Rutland's Law Firm (Appellant) LLL the Law Firm (Respondents)
File Number(s):	2016/257182
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity
Citation:	The Owners Strata Plan No 57164 v Yau [2016] NSWSC 1056
Date of Decision:	2 August 2016
Before:	Darke J
File Number(s):	2014/370045

[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.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant is the Owners Corporation of a large strata scheme for a residential and commercial building. The respondents are the registered proprietors of one of the commercial lots in the strata plan. A dispute arose when the respondents sought access to a grease arrestor and kitchen exhaust system located on the common property for the purposes of their restaurant that they conducted in their commercial strata lot.

The respondents commenced proceedings against the Owners Corporation in the Equity Division of the Supreme Court. At a meeting of the Executive Committee of the Owners Corporation on 13 August 2013, senior counsel for the Owners Corporation was instructed to settle the matter. The following day, a settlement agreement was entered into and consent orders were made by Bergin CJ in Eq.

Sixteen months later, on 17 December 2014, the Owners Corporation commenced proceedings to set aside the consent orders. At that time, most of the consent orders had been complied with. On 2 August 2016, Darke J dismissed these proceedings with costs. The Owners Corporation appealed this decision.

The primary issues on appeal where:

(i) whether, as a matter of law, the consent orders could be set aside;

(ii) whether the decision made at the meeting of the Executive Committee held on 13 August 2013 was invalid by reason of the fact that notice had not been given pursuant to the *Strata Schemes Management Act 1996* (NSW), Sch 3, cl 6;

(iii) whether the decision made by the Executive Committee on 13 August 2013 was in contravention of the *Strata Schemes Management Act 1996*, ss 65A and 80A;

(iv) whether senior counsel for the Owners Corporation had actual authority to settle the proceedings;

(v) whether, if senior counsel for the Owners Corporation did not have authority to enter the settlement agreement, the agreement was ratified by subsequent conduct of the Owners Corporation.

The Court held, dismissing the appeal:

In relation to (i):

Beazley P (Leeming JA and Emmett AJA agreeing)

(1) Consent orders that have been entered may be set aside in the Court's inherent jurisdiction if the underlying agreement upon which they were based is void or voidable. [72], [76], [80], [195], [226]

Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49; *Gamser v Nominal Defendant* (1977) 136 CLR 145; [1977] HCA 7; *DJL v The Central Authority* (2000) 201 CLR 226; [2000] HCA 17; *Quach v New South Wales Health Care Complaints Commission (No 4)* [2016] NSWCA 285; *Katter v Melhem* (2015) 90 NSWLR 164; [2015] NSWCA 213; *Harvey v Phillips* (1956) 95 CLR 235; [1956] HCA 2; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273; *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45; *Logwon Pty Limited v Warringah Shire Council* (1993) 33 NSWLR 13; *Singh v Ginelle Pty Ltd* [2010] NSWCA 310; *Doyle v Hall Chadwick* [2007] NSWCA 159; *Romeo v Papalia* [2012] NSWCA 221, cited.

(2) The court, in its inherent jurisdiction, has a discretion to set aside consent orders that have been entered, even if some basis for setting aside the order has been established. [81]-[83], [195], [226]

(3) In the circumstances of this case, the consent orders ought not to be set aside in the exercise of the court's discretion. [84], [195], [226]

Emmett AJA:

(4) There is no inherent power in a court to vary an order where that order has been formally drawn up and entered. However, in exceptional circumstances, a court may have jurisdiction to reopen final orders where those orders were entered by a person purporting to act on behalf of a party who did not have authority to act for that party. [217]-[219]

Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49; *Gamser v Nominal Defendant* (1977) 136 CLR 145; [1977] HCA 7, cited.

In relation to (ii):

Beazley P (Leeming JA and Emmett AJA agreeing):

(5) Non-compliance with the notice requirements for a meeting of the executive committee specified in the *Strata Schemes Management Act 1996*, Sch 3, cl 6 does not result in the invalidity of any resolutions passed at such a meeting. [116], [195], [226]

2 Elizabeth Bay Road Pty Limited v The Owners - Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409; *Barron v Potter* [1914] 1 Ch 895; *Balog v Independent Commission Against Corruption* (1991) 169 CLR 625; [1991] HCA 28; *Ryan v Kings Cross RSL Club Pty Ltd* [1972] 2 NSWLR 79, cited.

In relation to (iii):

Beazley P (Leeming JA and Emmett AJA agreeing):

(6) The decision made by the Executive Committee at the meeting on 13 August 2013 was a decision to instruct counsel to settle the proceedings and not a decision to undertake the works the subject of the settlement agreement. Accordingly, the decision was not in contravention of the *Strata Schemes Management Act 1996*, s 65A. [145], [156], [195], [226]

(7) The decision made by the Executive Committee at the meeting on 13 August 2013 did not involve expenditure contrary to *Strata Schemes Management Act 1996*, s 80A in circumstances where no sum had been allocated to the settlement, the paying of damages or the carrying out of the works agreed in the settlement agreement at the preceding annual general meeting. [146], [195], [226]

In relation to (iv):

Beazley P (Leeming JA and Emmett AJA agreeing):

(8) Given the nature of the decision made at the Executive Committee meeting on 13 August 2014, senior counsel for the Owners Corporation had actual authority to enter the settlement agreement. [177], [195], [226]

(9) In the alternative, senior counsel for the Owners Corporation had ostensible authority to enter the agreement as a result of the principle that counsel retained to conduct litigation ordinarily have ostensible authority to bind their client to a compromise of those proceedings. [172], [177], [195], [226]

Donellan v Watson (1990) 21 NSWLR 335; *Pavlovic v Universal Music Australia Pty Ltd (No 2)* [2016] NSWCA 31; *Pratten v Warringah Shire Council* [1969] 2 NSWR 161; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, cited.

In relation to (v):

Beazley P:

(10) There will be no ratification unless the subsequent actor has the authority to undertake the act being ratified. In this case, there was an act of ratification when, at the Extraordinary General Meeting held on 18 February 2014, a resolution was passed to raise a special levy to cover the works, damages and costs associated with the proceedings. This at least involved a ratification of the term of the settlement agreement relating to the payment of damages. [179], [183]

JUDGMENT

1 **BEAZLEY P**:

Introduction

2 The appellant is the Owners Corporation of a strata scheme for a residential and commercial building in Sydney known as the Millennium Towers. The strata scheme was a large strata scheme within the meaning of the *Strata Schemes Management Act 1996* (NSW) (since repealed). The respondents are the registered proprietors of one of the commercial lots in the strata plan.

3 In 2011, the respondents commenced proceedings against the Owners Corporation in the Equity Division of the Supreme Court. The litigation related to resolutions passed by the Owners Corporation on 16 December 2010 in relation to the maintenance, renewal, replacement and repair of a grease arrestor and kitchen exhaust system located on the common property.

4 On 14 August 2013, the litigation was settled and consent orders were made by Bergin CJ in Eq. Sixteen months later, on 17 December 2014, the Owners Corporation commenced proceedings to set aside the consent orders. On 2 August 2016, Darke J dismissed the Owners Corporation's proceedings with costs. The Owners Corporation have appealed against his Honour's dismissal of their claim.

5 The central issue raised by the Owners Corporation on the appeal was whether the legal representatives for the Owners Corporation, in particular, senior counsel, had actual authority to settle the proceedings. In this regard, the Owners Corporation contended that the Executive Committee of the Body

Corporate (the EC) did not have actual authority to instruct senior counsel to enter into the settlement agreement on behalf of the Owners Corporation.

6 The Owners Corporation asserted two bases for the lack of actual authority. First, the meeting of the EC held on 13 August 2013, at which it was decided to instruct senior counsel to settle the matter, was not convened in accordance with the *Strata Schemes Management Act 1996*, Sch 3, cl 6. Secondly, the authority to give instructions to settle was reserved, exclusively, to the Owners Corporation in General Meeting, or alternatively, involved expenditure in respect of which the EC was precluded from spending by reason of the *Strata Schemes Management Act*, s 80A.

7 The Owners Corporation submitted that the primary judge had erred in finding that it had sought to invoke the power under the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 36.15 to set aside the consent orders as having being made and entered irregularly or unlawfully. The Owners Corporation submitted that the consent orders should have been set aside in the exercise of the court's inherent jurisdiction, and if a proper basis for setting aside the orders was established, the court was required to set aside the orders, there being no residual discretion to refuse to do so. The Owners Corporation submitted, alternatively, that if UCPR, r 36.15 was the relevant power, his Honour had erred in the exercise of his discretion in refusing to set aside the orders.

8 The respondents' primary approach on the appeal was to seek to uphold the consent orders on the basis that orders of a court, once entered, cannot be set aside except in specific and limited circumstances, such as where the orders have been procured by fraud. They contended that none of the circumstances in which consent orders may be set aside applied here. The respondents further submitted that the legal representatives had actual authority to enter into the agreement. In an argument introduced during the course of argument, the respondents submitted, alternatively, that the legal representatives also had ostensible authority to enter into the settlement agreement on behalf of the Owners Corporation and to seek that the court make the consent orders.

Background facts

9 The dispute between the parties first arose in 2010, when the respondents sought access to the grease arrestor and kitchen exhaust system located on the common property for the purposes of their restaurant that they conducted in their commercial strata lot. The respondents had contended that they were entitled to have the grease arrestor and exhaust system connected to their lot so as to service the restaurant.

10 The matter was considered at a meeting of the EC on 1 March 2010 and, amongst other things, a decision was made to obtain a consultant's report. The consultants reported that the existing kitchen exhaust system located on the common property was not currently operational, but could be made operational by undertaking certain works. The consultants also reported that the grease arrestor was not operational as it was located in an enclosed room with no connection to an inlet or outlet. The consultants reported that it could be made operational if certain works were undertaken but it may not be compliant with the local authority's planning requirements.

11 The respondents also insisted that the Owners Corporation was under a duty to maintain the equipment pursuant to the *Strata Schemes Management Act 1996*, s 62. The Owners Corporation disagreed that it was under any such obligation and on 16 December 2010, passed two special resolutions in respect of the grease arrestor and exhaust system as follows:

> "SPECIALLY RESOLVED pursuant to Section 62(3) of the Strata Schemes Management Act 1996, that it is inappropriate to maintain, renew, replace or repair that part of the common property comprising any grease arrestor or ancillary equipment that is located in any part of the common property."

The special resolution in respect of the kitchen exhaust system was in relevantly identical terms.

12 In late April 2010, the Owners Corporation engaged solicitors, Peter Murphy & Associates, in relation to the dispute with the respondents.

13 The respondents commenced proceedings against the Owners Corporation in June 2011, claiming that the 16 December 2010 resolutions constituted a fraud on the minority and were void. The respondents sought consequential relief, requiring the Owners Corporation to maintain and repair the equipment in

accordance with the *Strata Schemes Management Act 1996*, s 62, and sought a mandatory injunction requiring the Owners Corporation to connect their lot to the equipment. The respondents also claimed equitable compensation. In an amended statement of claim, the respondents further claimed damages for breach of the Owners Corporation's duty under s 62. This claim was based upon first instance decisions of the Supreme Court in *Lin v The Owners - Strata Plan No 50276* (2004) 11 BPR 21,463; [2004] NSWSC 88; *Thoo v The Owners Strata Plan No 50276* (2011) 15 BPR 29,309; [2011] NSWSC 657 in which it had been held that a breach of s 62 gave rise to a statutory cause of action.

14 In October 2012, senior and junior counsel were retained by the Owners Corporation. They advised that the court had a broad discretion in relation to the claim made by the respondents and that it was likely that the court would make the orders the respondents sought.

15 On 18 March 2013, the Owners Corporation held its Annual General Meeting, at which its budget for the period 2013-2014 was passed. There was no item of expenditure specifically identified as relating to the Supreme Court proceedings, nor in respect of funds for the payment of damages or legal costs to the respondents, although there was an item in the sinking fund identified as "*Maint Bldg – Legal*" in the sum of $70,000.

16 The following motions were also put to the meeting but were lost:

"**9.**	**GENERAL RESTRICTIONS ON EXECUTIVE COMMITTEE:**	**MOTION LOST** that the Owners Corporation decide if any matter or type of matter is to be determined only by the Owners Corporation in general meeting
10.	**FINANCIAL RESTRICTIONS ON EXECUTIVE COMMITTEE**	**MOTION LOST** that the Owners Corporation remove the limitation imposed under Section 80A(1) generally or in relation to any particular item or matter."

17 The first of these motions related to decisions that may be made pursuant to s 21(2) of the *Strata Schemes Management Act 1996*. The second related to restrictions on the expenditure that may be made by the EC pursuant to s 80A of that Act. The relevant legislation is set out below at [44]ff.

18 The hearing of the proceedings had been set down to commence on 12 August 2013. Prior to that, the legal proceedings were discussed at meetings of the EC on 27 May, 30 July and 6 August 2013. All unit holders had been given notice of these meetings. One of the matters discussed at the meeting of the EC on 27 May 2013 was the Owners Corporation's agreement to engage in a mediation. The following resolution was passed at the meeting:

> "RESOLVED that an Extraordinary General Meeting be convened on a date to be determined and at the discretion of the Secretary and the Strata Manager for the purpose of determining the matter further arising from mediation including an appropriate settlement offer to the Owners if, on the advice of counsel is that, in all the circumstances, that it is reasonable to consider any offer made."

19 The mediation was conducted on 14 June 2013 but was unsuccessful. Following the mediation, the respondents made an offer of compromise. The offer was open until 26 July 2013. At the meeting of the EC on 30 July 2013, the offer of compromise was discussed. Although time for acceptance had passed, its terms were not in any event agreed to. There were three unit holders present at that meeting in addition to members of the EC.

20 The next meeting of the EC was on 6 August 2013, where it was decided that the Owners Corporation would make an offer of settlement, the effect of which involved the Owners Corporation agreeing to carry out works relating to the connection of the respondents' lot to the equipment on the common property, the costs of that work, the terms of use of the equipment and the payment of damages. Six unit holders were present at the meeting in addition to members of the EC.

21 The minutes of that meeting also recorded that:

> "… the Offer of Settlement if accepted is to be presented to owners at an Extraordinary General Meeting for determination."

22 The settlement offer was made to the respondents on 7 August 2013. No mention was made in the offer that, if accepted, the offer was to be submitted

to an Extraordinary General Meeting for approval. However, that requirement was conveyed to the respondents' solicitors later that day. The offer was not accepted and the respondents made a counter-offer.

23 On the afternoon of 9 August 2013, senior counsel for the Owners Corporation recommended that, subject to some amendments, the respondents' counter-offer be accepted with some amendments. The respondents made a further offer later that day incorporating some of the amendments proposed by senior counsel for the Owners Corporation and requiring that the EC accept the offer on behalf of the Owners Corporation. The offer, together with an advice by senior counsel recommending acceptance, was discussed by the EC at a meeting held on the evening of 9 August 2013. In recommending that the offer be accepted, senior counsel advised that if the respondents were successful in their claim, "*damages could be in the order of $800,000*".

24 The hearing of the respondents' proceedings commenced on 12 August 2013 before Bergin CJ in Eq. Senior counsel for the Owners Corporation quickly formed the view that the proceedings were not going well for the Owners Corporation and again recommended settlement.

25 At the conclusion of the second day of the hearing on 13 August 2013, senior counsel for the Owners Corporation attended a meeting with the EC. Shortly prior to the meeting, senior counsel sent an email to the members of the EC and to the Owners Corporation's solicitor, in which he advised that the Owners Corporation "*will lose this case. Comprehensively*". He acknowledged that he was aware that some members of the EC were not prepared to make a decision on behalf of the Owners Corporation, but said:

> "… There is no alternative but for the EC to make a decision. It has the power of the OC. It is said that some owners will not be happy. Those owners may or may not be happy, but they are not likely to be fully informed about the litigation.
>
> …
>
> Unfortunately, when litigation is underway, a body usually needs to make decisions through its representatives, in this case an executive committee. I accept entirely that it is not easy. But nevertheless it is the obligation of an EC to make a decision."

26 The Owners Corporation's legal representatives, including senior counsel, attended a meeting of the EC that evening, at which most members of the EC

were present. Senior counsel again strongly recommended that he be given instructions to settle the matter. Six of the seven members present voted in favour of settling on the best terms possible, generally in accordance with the last offer made by the respondents, notwithstanding that the offer had expired. Senior counsel advised the meeting that it was his view that if there was any procedural irregularity in the calling of the EC meeting, it was not such as would invalidate the decision of the EC.

27 Later that evening and the following morning, there were a number of exchanges between senior counsel for the Owners Corporation and counsel for the respondents in relation to settlement. During the course of those exchanges, senior counsel for the Owners Corporation indicated that there was a concern held by some members of the EC regarding the fact that less than 72 hours' notice was given of the meeting of the EC held the night before, and whether that would invalidate its decision to instruct senior counsel to settle the matter. Counsel for the respondents informed senior counsel for the Owners Corporation that he was proceeding on the basis that any offer to settle was "*cloaked in counsel's ostensible authority to settle the proceedings*" and that he would proceed on that basis unless told otherwise.

28 Further negotiations resulted in an agreement as to terms upon which the matter was to be settled. Those terms were formalised in short minutes of order in the following terms which were presented to the court:

> "By consent and in full and final resolution of the proceedings, the Court:
>
> 1. Notes that [the Owners Corporation] undertakes to [the respondents] to pass special resolutions at a General Meeting of the Owners Corporation revoking Special Resolutions 4 & 5 (as passed at the general meeting of the Owners Corporation on 16 December 2010) pursuant to cl 23, Schedule 2 of the *Strata Scheme Management Act 1996*.
>
> 2. Orders that [the Owners Corporation] maintain, renew, repair or replace the common property kitchen exhaust system pursuant to s 62(1) and/or s 62(2) of the *Strata Scheme Management Act 1996*.
>
> 3. Orders that [the Owners Corporation] maintain, renew, repair or replace the common property grease waste system pursuant to s 62(1) and/or section 62(2) of the *Strata Scheme Management Act 1996*.
>
> 4. Orders that, generally in accordance with the report of Collin Derome of GWA Consultants dated September 2012, and in compliance with all applicable Building Codes and Standards, [the Owners Corporation], whether

by itself or its agents, is to as soon as reasonably practicable and no later than 15 October 2013 [carry out certain kitchen exhaust system works]…

5. Orders that, generally in accordance with the report of David Page of Harris Page & Associates dated 16 September 2012 and in compliance with all applicable Building Codes and Standards, [the Owners Corporation], whether by itself or its agents, is to as soon as reasonably practicable and no later than 15 October 2013 [carry out certain grease waste system works]…

6. Orders that [the Owners Corporation] do all things reasonably necessary to allow [the respondents' lot] to be connected to the grease waste system and kitchen exhaust system.

7. Orders that [the respondents] do all things reasonably necessary required for [the Owners Corporation] to comply with its obligations to maintain, renew, replace or repair the common property grease waste system or kitchen exhaust system (referred to in [2] & [3] above) and in respect of the kitchen exhaust system works and the grease waste system works.

8. Orders that [the Owners Corporation] pay damages to [the respondents] in the amount of $285 000 within 28 days.

9. Orders that [the Owners Corporation] pay damages to [the respondents] in the amount of $600 per day for each and every day the Defendant fails to complete the works in either paragraphs [4](a)-(d) or [5](a)-(h) by 15 October 2013 …

10. Orders pursuant to section 229 of the *Strata Schemes Management Act 1996* that the damages payable by [the Owners Corporation] to [the respondents] be paid from contributions levied on all lots of the strata scheme other than [the respondents' lot] in proportion to each lot's unit entitlement.

11. Orders that [the Owners Corporation] pay [the respondents'] costs of the proceedings on the ordinary basis as agreed or assessed, within 28 days of agreement or assessment.

12. Orders pursuant to section 229 of the *Strata Schemes Management Act 1996* that the costs payable by [the Owners Corporation] to [the respondents] be paid from contributions levied on all lots of the strata scheme other than [the respondents' lot] in proportion to each lot's unit entitlement.

13. Notes [the Owners Corporation] agrees that [the respondents] shall not be liable for, or subject to a levy for, any contribution to the Owners Corporation in payment of, or recompense for, the costs of the proceedings incurred by [the Owners Corporation].

14. Notes the parties agree that in carrying out the works described in Orders 4(a)-(d) & 5(a)-(h) above, [the Owners Corporation] is acting in accordance with its obligations to maintain, renew, repair or replace the common property as per Orders 2 and 3 above.

15. …"

29 Save for some minor amendments, Bergin CJ in Eq made orders in accordance with paras (2)-(12) of the short minutes of order. Her Honour additionally ordered that the orders be sent to all lot owners in the strata scheme and that became para (15) of the short minutes of order. Her Honour

also noted the matters in paras (1), (13) and (14) of the short minutes of order. The unit owners were advised of the settlement on the afternoon of 14 August 2013. It is convenient to observe here that the terms of the consent orders, including the matters noted by the court in the short minutes of order, essentially reflected the terms of the respondent's offer of 9 August 2013.

30 There were meetings of the EC on 26 August 2013, 26 September 2013 and 3 December 2013. Again, all unit holders were given notice of each meeting and a number of unit holders additional to the members of the EC attended. At the meeting on 26 August 2013, the settlement, senior counsel's advice and the orders and notations made by Bergin CJ in Eq were discussed, along with the works agreed to be undertaken as required by the consent orders. At the meeting on 26 September 2013, the respondents' claim was discussed "*at length*". This discussion was recorded in the minutes as involving discussion of the hearing before Bergin CJ in Eq, senior counsel's advice in respect of settlement, the fact an Extraordinary General Meeting should be convened as soon as practicable to attend to matters surrounding the settlement and works and matters to be attended to under the orders. At the meeting on 3 December 2013, an update of the position was discussed, as were the legal advices that had been received, the works undertaken up to that point and the Owners Corporation's duties to other owners.

31 In addition to these meetings, the following occurred subsequent to the settlement of the proceedings.

32 This Court's decision in *Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789; [2013] NSWCA 270 was delivered, in which the Court observed, in obiter remarks, that the *Strata Schemes Management Act 1996*, s 62 did not give rise to a common law duty of care by the Owners Corporation of a Strata Plan to a unit holder, a breach of which would sound in damages. This prompted an enquiry to the Owners Corporation's legal representatives by a member of the EC as to whether the decision might enable the Owners Corporation to vary the court orders in respect of the order requiring it to pay damages to the respondent. On 30 August 2013, the Owners Corporation's solicitor advised that it appeared from the decision that the respondents had

received a "*windfall*" in circumstances where the court had held that a breach of s 62 did not give rise to an action for damages for breach of statutory duty.

33 On 30 August 2013, the Owners Corporation's solicitor was advised that the EC had settled on the orders as they stood and was "*attending to the practicalities as* [*to*] *how the decision can be best managed going forward*". For that reason, they asked the solicitors to cease to act in the matter.

34 On 17 September 2013, the Owners Corporation paid to the respondents' solicitors the damages sum in the amount of $285,000.

35 The works required to be undertaken pursuant to the orders of the court were substantially completed by late October 2013. Thereafter, the respondents commenced the works they were required to undertake pursuant to the orders. In this regard, the respondents spent in excess of $57,000. More than $23,000 of this sum had been spent by the end of 2013.

36 Prompted by this Court's decision in *Owners Strata Plan 50276 v Thoo*, an Extraordinary General Meeting was held on 18 February 2014, at which a resolution was passed authorising the Owners Corporation to obtain legal advice, including in respect of available options to the Owners Corporation in relation to the proceedings. A resolution was also passed, pursuant to s 76(4), to raise a special levy in the sum of $821,150 "*to cover the works, damages and costs associated with the proceedings*".

37 On 17 June 2014, the Owners Corporation held its AGM, at which the following resolution was passed:

> "RESOLVED that the Owners Corporation disagrees with the decision of the Executive Committee made on 13 August 2013 to settle the case of Yau & Yau vs the Owners SP 57164 and disagrees with the terms of the 'Consent Orders' proposed by the Yaus and agreed to by the Executive Committee."

38 A costs assessment application in respect of the costs ordered in favour of the respondents was filed on 10 October 2014. The Owners Corporation engaged in the assessment process without raising any protest or contention that the process was invalid because the underlying consent order was invalid. The respondents' costs were assessed in the sum of $262,372.21. On 2 November 2015, that sum was garnisheed from the Owners Corporation's bank account and paid to the respondents.

39 In December 2014, the Owners Corporation commenced the proceedings subject of the appeal. By an amended statement of claim filed on 6 June 2016, the Owners Corporation sought orders that the orders made on 14 August 2013 be set aside; that the respondents pay to the Owners Corporation $285,000 together with interest calculated from 17 September 2017; that the respondents pay to the Owners Corporation $2,472.61 together with interest calculated from 3 June 2014; and that the respondents pay to the Owners Corporation $262,372.21 together with interest from 2 November 2015. The first of these amounts was the damages sum the Owners Corporation had paid to the respondents; the second amount was a further component of interest; and the third amount was the amount of the assessed costs.

40 No orders were sought seeking to have the agreement leading to the orders of 14 August 2013 set aside, or to have the costs orders set aside or the costs judgment registered following the costs assessment. Nor were orders sought relating to the physical works undertaken to connect the respondents' unit to the grease arrestor and kitchen exhaust that had been carried out pursuant to the consent orders. In oral argument on the appeal, the Owners Corporation confirmed that it was not seeking relief that would require that the works that had been undertaken be 'undone' in some way. Its concern was to recover the monies that it had paid to the respondents by way of damages and in respect of costs, and to be freed of its s 62 obligations that were the subject of para (7) of the short minutes.

41 One further matter should be mentioned at this stage. One of the lot owners, Ms Curnick, brought an application in the Consumer, Trader and Tenancy Tribunal (CTTT) seeking an order under the *Strata Schemes Management Act*, s 153 to the effect that the meeting of the EC on 13 August 2013, at which it had been resolved to instruct senior counsel to settle the proceedings, was invalid and that the resolutions made at the meeting were null and void. The Owners Corporation made a submission in that proceeding to the effect that the decisions made at the meeting of the EC on 13 August 2013 were ratified by the decisions made at its meeting on 26 August 2013.

42 Ms Curnick's application was dismissed by the CTTT and she appealed to the New South Wales Civil and Administrative Tribunal (NCAT). That appeal was settled on 31 July 2014, when Ms Curnick and the Owners Corporation entered into a deed of settlement and consent orders were made. Those consent orders included an order that the resolution made by the EC on 13 August 2013 in respect of the settlement of the proceedings with the respondents was of no force or effect.

Legislation

43 The issues raised on the appeal involve the application of the provisions of the *Strata Schemes Management Act 1996* to the particular circumstances of the case, especially as those provisions apply to the relationship between the Owners Corporation and the EC. Accordingly it is important at the outset to understand the functions of each and their relationship as prescribed by the Act.

44 An owners corporation of a strata scheme was constituted as a body corporate under s 11 of the Act and had the principal responsibility for the management of the strata scheme: s 8. Pursuant to s 9, an owners corporation may be assisted in the carrying out of its management functions under the Act, by, relevantly, an executive committee established in accordance with Pt 3. An executive committee was appointed pursuant to s 16. Section 20(2) provided that Sch 3, Pt 2 made further provision with respect to meetings of an executive committee. Relevantly for the purposes of the appeal, Sch 3, Pt 2, cls 6 and 17 provided:

> "**6 Notice of executive committee meetings**
>
> (1) An executive committee of a large strata scheme must give notice of its intention to hold a meeting at least 72 hours before the time fixed for the meeting:
>
> (a) by giving written notice (which may be done by electronic means) to each owner and executive committee member, and
>
> (b) if the owners corporation is required by the by-laws to maintain a notice board, by displaying the notice on the notice board.
>
> …
>
> (3) The notice must specify when and where the meeting is to be held and contain a detailed agenda for the meeting.
>
> …

> **17 Acts and proceedings of executive committee valid despite certain circumstances**
>
> Any act or proceeding of an executive committee done in good faith is, even though at the time when the act or proceeding was done, taken or commenced there was:
>
> (a) a vacancy in the office of a member of the executive committee, or
>
> (b) any defect in the appointment, or any disqualification of a member of the executive committee,
>
> as valid as if the vacancy, defect or disqualification did not exist and the executive committee were fully and properly constituted."

45 The Owners Corporation contended that in accordance with the *Strata Schemes Management Act 1996*, s 21(2), the decision made by the EC on 13 August 2013 was not within its decision-making power and accordingly was void. In addition to s 21(2), ss 21(1) and 21(4) are relevant to the determination of the appeal. The terms of those provisions were as follows:

> "**21 Executive committee's decisions to be decisions of owners corporation**
>
> (1) A decision of an executive committee is taken to be the decision of the owners corporation, subject to subsection (4).
>
> (2) However, the following decisions may not be made by the executive committee:
>
> (a) a decision that is required by or under any Act to be made by the owners corporation by unanimous resolution or special resolution or in general meeting,
>
> (b) a decision on any matter or type of matter that the owners corporation has determined in general meeting is to be decided only by the owners corporation in general meeting.
>
> …
>
> (4) Despite any other provision of this Act, in the event of a disagreement between the owners corporation and the executive committee, the decision of the owners corporation prevails."

46 The effect of s 21 is that, subject to s 21(2), an executive committee may make any decision that an owners corporation may make and any such decision is binding on the owners corporation: see *2 Elizabeth Bay Road Pty Limited v The Owners - Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 per Barrett JA at [29].

47 Chapter 3 of the Act dealt with key management areas, including, in Pt 2, the maintenance, repairs, alteration and use of common property. Sections 62 and 65A in particular, contained within this chapter, were at the forefront of the

Owners Corporation's challenge to the decision made by the EC on 13 August 2013 and the subsequent settlement and court orders. The Owners Corporation contended that the work to be undertaken pursuant to paras (4) and (5) of the short minutes of order could only be undertaken in accordance with the provisions of s 65A and that had not occurred.

48 The relevant terms of ss 62 and 65A were as follows:

> "**62 What are the duties of an owners corporation to maintain and repair property?**
>
> (1) An owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation.
>
> (2) An owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation.
>
> (3) This clause does not apply to a particular item of property if the owners corporation determines by special resolution that:
>
> (a) it is inappropriate to maintain, renew, replace or repair the property, and
>
> (b) its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.
>
> **Note**. The decision of an owners corporation under subsection (3) may be reviewed by an Adjudicator (see section 138).
>
> …
>
> **65A Owners corporation may make or authorise changes to common property**
>
> (1) For the purpose of improving or enhancing the common property, an owners corporation or an owner of a lot may take any of the following action, but only if a special resolution has first been passed at a general meeting of the owners corporation that specifically authorises the taking of the particular action proposed:
>
> (a) add to the common property,
>
> (b) alter the common property,
>
> (c) erect a new structure on the common property.
>
> (2) A special resolution that authorises action to be taken under subsection (1) in relation to the common property by an owner of a lot may specify whether the ongoing maintenance of the common property once the action has been taken is the responsibility of the owners corporation or the owner.
>
> (3) If a special resolution under this section does not specify who has the ongoing maintenance of the common property concerned, the owners corporation has the responsibility for the ongoing maintenance.

…"

49 Chapter 3, Pt 3 dealt with the finances of the strata scheme. The Owners Corporation further challenged the validity of the settlement on the basis that the relevant expenditure had not been approved by it. The following provisions were relevant to this argument.

> "**75 Estimates to be prepared of contributions to administrative and sinking funds**
>
> …
>
> (5) An owners corporation of a large strata scheme must include in the estimates prepared under this section at an annual general meeting specific amounts in relation to each item or matter on which the owners corporation intends to expend money, or on which the owners corporation is aware money will be likely to be expended, in the period until the next annual general meeting.
>
> …
>
> **80A Limit on spending by executive committees of large strata schemes**
>
> (1) If a specific amount has been determined as referred to in section 75 (5) for expenditure on any item or matter, the executive committee of the owners corporation concerned must not, in the period until the annual general meeting next occurring after the determination was made, spend on the item or matter an amount greater than that determined amount for expenditure on the item or matter plus 10 per cent.
>
> (2) The owners corporation of a large strata scheme may by resolution at a general meeting remove the limitation imposed by subsection (1) generally or in relation to any particular item or matter.
>
> …"

50 Finally, it is necessary to have regard to the provisions of ss 153 and 181 contained within Ch 5, Pt 4 of the *Strata Schemes Management Act 1996*, entitled "*Orders of Adjudicator*". These provisions were relevant to the question of statutory construction in which the primary judge engaged for the purposes of determining whether the settlement agreement was void or voidable.

> "**153 Order invalidating resolution of owners corporation**
>
> (1) An Adjudicator may make an order invalidating any resolution of, or election held by, the persons present at a meeting of an owners corporation if the Adjudicator considers that the provisions of this Act have not been complied with in relation to the meeting.
>
> (2) An Adjudicator may refuse to make an order under this section but only if the Adjudicator considers:
>
> (a) that the failure to comply with the provisions of this Act did not adversely affect any person, and

(b) that compliance with the provisions of this Act would not have resulted in a failure to pass the resolution or have affected the result of the election.

(3) An application for an order under this section may be made only by an owner or first mortgagee of a lot.

…

181 Determination of appeal from order of Adjudicator

(1) This section applies to the determination by the Tribunal of an appeal from an order of an Adjudicator.

…

(3) … the Tribunal may determine an appeal by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.

…

(5) An order made by the Tribunal under subsection (3) has effect, and the provisions of this Act (other than the provisions conferring a right of appeal to the Tribunal) apply to it, as if it were an order made under the same provision as the order appealed against.

…"

Can consent orders be set aside?

51 As the Owners Corporation sought to set aside the consent orders made by the Court on 14 August 2013, it is appropriate first to deal with the circumstances in which consent orders may be set aside.

Primary judge's reasons

52 The question whether the consent orders made by Bergin CJ in Eq on 14 August 2013 can be set aside was considered by the primary judge by reference to UCPR, r 36.15(1). That rule provides:

"**36.15 General power to set aside judgment or order**

(1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.

…"

53 The primary judge considered, at [140], that if it were shown that the underlying agreement was not binding on the Owners Corporation he would have accepted that the making of the orders could be regarded as irregular within the meaning of the rule: see *Romeo v Papalia* [2012] NSWCA 221. However, his Honour held that the Owners Corporation had not established that the

orders had been made irregularly, illegally, or against good faith within the meaning of the rule. His Honour further observed, at [141], that had he found that the orders had been made irregularly, illegally or against good faith he would not have exercised the power under the rule to set aside the consent orders, in circumstances where he considered that the conduct of the Owners Corporation following the making of the orders amounted to a ratification of the agreement and there had been a substantial delay in seeking to have the orders set aside.

Owners Corporation's submissions

54 On the appeal, the Owners Corporation submitted that the court had power in its inherent jurisdiction to set aside consent orders that had been entered if the underlying agreement upon which the consent orders were based was void or invalid: see *Harvey v Phillips* (1956) 95 CLR 235; [1956] HCA 2. It contended that if it established that the consent orders were based upon an invalid or void agreement, then no question of discretion arose and the court, in its inherent jurisdiction, was compelled to set aside the orders. The Owners Corporation continued to rely upon UCPR, r 36.15 as a secondary argument.

55 The issue of voidness or invalidity was based upon the Owners Corporation's contention that the EC had no authority to authorise senior counsel to enter into the agreement that underlay the consent orders. It followed on this argument that senior counsel had no authority to seek to have the court make the consent orders. Senior counsel lacked authority, on the Owners Corporation's argument, on two bases. First, because the meeting of the EC at which it had been determined to instruct senior counsel to settle the matter was not properly constituted, as 72 hours' notice of the holding of the meeting had not been given: see Sch 3, cl 6. Secondly, because the underlying settlement involved matters that could only be determined by the Owners Corporation: see ss 21(1)(a), 65A and 80A.

Respondents' submissions

56 The respondents, for their part, submitted that the Owners Corporation had not sought to challenge, in the court below or on the appeal, the authority of the legal representatives to seek to have the court make the consent orders. This

was relevant, according to the respondents, as different principles applied to setting aside court orders as opposed to setting aside a compromise or agreement entered into between parties. They contended that, save for specific circumstances such as fraud, which did not apply here, orders of a court that have been entered are final and cannot be set aside: see *Bailey v Marinoff* (1971) 125 CLR 529; [1971] HCA 49 at 530-531 per Barwick CJ, 531-532 per Menzies J, and 537 per Walsh J; *Gamser v Nominal Defendant* (1977) 136 CLR 145; [1977] HCA 7 at 154; *DJL v The Central Authority* (2000) 201 CLR 226; [2000] HCA 17. The respondents contended that the Owners Corporation's argument failed to recognise this distinction.

Consideration

57 The starting point for the determination of the question whether a court can set aside consent orders is based upon the well-established principle that an order once regularly made and entered is beyond recall: see *Bailey v Marinoff*. In *Bailey v Marinoff*, an order had been made that an appeal be dismissed if the appellant failed to file appeal books by a certain date. The appellant having failed to comply, an order dismissing the appeal was made and entered.

58 Barwick CJ, who agreed generally with the reasons of Menzies J and Walsh J, at 530-531 stated the principle in the following terms:

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed."

59 Menzies J, at 531, characterised the issue as:

> "… the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court."

His Honour considered, at 531-532, that:

> "However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend the making of orders in litigation that has been brought regularly to an end."

60 Walsh J, at 534, approached the question before the court as being whether:

> "… the Court has an inherent power to deal further with an appeal which by its formal order, not being at variance with its intended order, has already been dismissed"

and concluded, at 537, that:

> "… there is no inherent power to vary an order by which an appeal stands dismissed in a case such as the present one in which the order was formally drawn up and entered before any application to vary it was made …"

61 *Bailey v Marinoff* was followed in *Gamser v Nominal Defendant* where a seriously injured plaintiff had his damages reduced by the Court of Appeal. Justice Aicken, with whom Barwick CJ, Gibbs and Stephen JJ agreed, reiterated the principle that the court did not have inherent jurisdiction to make the orders sought. His Honour said, at 154, that *Bailey v Marinoff* was authority for the proposition that:

> "... when an appeal has been finally disposed of in a court of appeal by an order duly entered it has no inherent power to reopen the case on an application made after the order has been entered ... The majority judgments in *Bailey v Marinoff* appear to me to make it clear that there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of."

62 In *DJL v The Central Authority*, the principle in *Bailey v Marinoff* was applied to a final order made by the Family Court of Australia which had been entered. The plurality reiterated, at [37]-[38], the general principle articulated by Barwick CJ in *Bailey v Marinoff*, noting, however, that the court traditionally had jurisdiction in equity to set aside judgments in cases of fraud.

63 In *Quach v New South Wales Health Care Complaints Commission (No 4)* [2016] NSWCA 285, McColl JA, with whom Macfarlan JA and Sackville AJA agreed, explained, at [10], that the principle in *Bailey v Marinoff* reflected the policy of finality in litigation and that, except in well-established defined circumstances, "*controversies, once resolved, are not to be reopened*". See also *Katter v Melhem* (2015) 90 NSWLR 164; [2015] NSWCA 213 at [70]-[71] per Campbell AJA, McColl and Leeming JJA agreeing, and the cases cited therein.

64 However, the Owners Corporation relied upon a distinct principle governing the setting aside of consent orders derived from *Harvey v Phillips*. In that case, the Court had been informed that the matter was settled and terms of settlement were handed up. The primary judge authorised entry of judgment in

accordance with the terms of settlement but judgment had not been signed or entered when the plaintiff brought an application to have the orders set aside on the basis that she had been pressured into the settlement by her legal counsel.

65 There was no question that the plaintiff had been subject to extreme pressure. The High Court also noted that the plaintiff was deaf and had said that, although she was present, she did not understand what had occurred when the court was asked to make the orders. This led the Court to observe, at 241, that it appeared clear that the plaintiff "*was temporarily overborne by the extreme pressure exerted upon her by her counsel supported by her solicitor and perhaps others*".

66 The Court doubted that had judgment been signed, it was open to challenge at the instance of the plaintiff in an action to set aside the judgment and compromise. However, in circumstances where judgment had not been signed or entered, the difficulty for the plaintiff, as the Court observed at 242, was that when counsel had signed the terms of settlement, counsel had acted within the authority the plaintiff had given him. The Court considered that as counsel had acted within his authority, there was no discretion "*to set aside the compromise or to intercept the judgment*", notwithstanding that pressure had been exerted upon the plaintiff to settle and the fact that she had not understood what had occurred in court. Their Honours, at 242, distinguished the case from one in which "*there was some misapprehension or mistake by counsel in consenting to an order or settlement*" or some limitation on counsel's authority that had been exceeded.

67 The Court observed, at 243:

> "… at all events, until the judgment or order embodying the compromise has been perfected an authority exists in the court to refuse to give effect to or act upon the compromise or perhaps to set it aside."

Their Honours continued:

> "The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of

> confidence or the like. The rule appears rather from positive statements of the grounds that suffice …
>
> > '[I do not have] the slightest doubt that a consent order can be impeached, not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual … To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course if that agreement cannot be invalidated the consent order is good': *Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd*." (citations omitted)

68 *Harvey v Phillips*, involving as it did a case where the orders of the court had not been perfected, does not directly apply to the circumstances here, where judgment had been entered, and the doubt that the Court expressed, at 242, as to whether the judgment or order and the compromise could be set aside had the judgment or order been perfected, might seem to favour the respondents' position. However, the Court's reference to *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 does not bear out that observation. In that case, the plaintiff bank had a mortgage over property belonging to the defendant, which was being wound up. The plaintiff consented to orders for the sale of certain "*fast-power looms*", but later learned that it was entitled to that property under its mortgage and brought an application for the consent orders to be set aside. The orders had been entered and the looms had been sold pursuant to the orders, but the money remained with the receiver.

69 Lord Justice Lindley, at 280, stated that he had not:

> "… the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.
>
> … if that agreement cannot be invalidated the consent order is good. If it can be, the consent order is bad."

His Lordship considered that as the agreement had been based on a common mistake of fact, namely, that the looms were fixtures, whereas they were not, the agreement and the underlying consent orders could be set aside.

70 Lord Justice Lopes agreed, stating, at 283, that:

> "The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside. It appears to me that when once a common mistake is established you can set aside an agreement."

71 Lord Justice Kay also agreed. In his view, at 284, a consent order was "*only the order of the Court carrying out an agreement between the parties*". His Lordship could find no reason why, if an agreement could be set aside on the ground of common mistake of material fact, it could not be set aside "*simply because an order has been founded upon it*". His Lordship considered that:

> "… both on principle and on authority, when once the Court finds an agreement has been come to between parties who were under a common mistake of a material fact, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon that agreement."

His Lordship added that "*if the order had been acted upon, and third parties' interests had intervened and so on, difficulties might arise*", but observed that nothing of that kind had occurred in that case.

72 The principle that a consent order may be set aside where the underlying agreement is void or voidable, notwithstanding that the order has been perfected, was recognised by Brennan J (then sitting as an additional judge of the Supreme Court of the ACT) in *Permanent Trustee Co (Canberra) Ltd (Executor estate of Andrews) v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45. However, his Honour declined to set aside the consent judgment in that case on the grounds that he was not satisfied that third party rights would be unaffected by his doing so.

73 In *Logwon Pty Limited v Warringah Shire Council* (1993) 33 NSWLR 13, consent orders requiring the appellant developer to carry out certain remedial work on land had been made and entered The appellant subsequently applied to the Land and Environment Court to have the consent orders set aside on the grounds of mistake. The primary judge dismissed the application and the appellant appealed to the Court of Appeal. Sheller JA, with whom Kirby P and Giles JA relevantly agreed, referred, at 28, to the "*general rule*" that "*a perfected judgment cannot be recalled or varied*": see *Bailey v Marinoff* and *Gamser v Nominal Defendant.* His Honour then referred to the "*exceptions*" to the general rule referred to by Brennan J in *Permanent Trustee Co (Canberra) v Stocks & Holdings (Canberra)*, including the exception where judgment is obtained by an agreement which is void or voidable.

74 Sheller JA noted, at 29, that consent orders have traditionally been regarded as "*a mere creature of the agreement*", citing *Huddersfield Banking v Henry Lister* per Vaughan Williams J (at first instance). His Honour referred to *Kinch v Walcott* [1929] AC 482 at 493 where Lord Blanesburgh, speaking for the Privy Council, said of a consent order that it stands unless and until it is discharged by mutual agreement or is set aside by another order of the court, as distinct from other orders that stood unless and until discharged on appeal.

75 Sheller JA also referred to *Harvey v Phillips*, and concluded, at 30, having identified the Land and Environment Court as a "*superior court of limited jurisdiction*", that:

> "A superior court's inherent jurisdiction to uphold, protect and fulfil its function by ensuring that justice is administered according to law and in an effective manner in my opinion enables it in the absence of a statutory limitation to discharge or revoke a consent order made by it giving effect to a compromise of proceedings before the court and entered into by a party under a mistake [or on other established grounds]."

76 The principle that consent orders that have been entered may be set aside if the underlying agreement upon which the orders were based is void or voidable was also recognised in *Singh v Ginelle Pty Ltd* [2010] NSWCA 310, see especially at [35]-[36] per Campbell JA, with whom Handley AJA and I agreed.

77 *Doyle v Hall Chadwick* [2007] NSWCA 159 concerned another species of orders again, which were treated by this Court as analogous to consent orders in that they were not based on a decision of the court. In that case, costs certificates were filed under the *Legal Profession Act 1987* (NSW), s 208J, pursuant to which the certificates merge into a judgment of the court. Hodgson JA, with whom Mason P and Campbell JA agreed, observed at [51], citing *Logwon Pty Limited v Warringah Shire Council* that judgments entered by consent were "*'mere creatures' of the agreement, and may be set aside, without an appeal, on any ground on which the underlying agreement may be set aside".* His Honour concluded, at [52], that the same applied to a judgment based upon the registration of a costs certificate "*if the certificate on which it is based is set aside or varied*".

78 In *Romeo v Papalia*, to which the primary judge referred, consent orders were made and entered on the basis of short minutes of order signed by solicitors on behalf of the parties to the dispute. The appellant brought an application to set aside the consent judgment on the basis that the solicitor who signed the short minutes of consent orders had neither actual nor ostensible authority to do so on behalf of the appellant, or alternatively, that he would suffer injustice because he had a defence to the claims the subject of the consent orders.

79 Sackville AJA, with whom Basten and Campbell JJA agreed, having first referred to the principle in *Bailey v Marinoff*, stated, at [80]:

> "However, a judgment that has been entered is not unassailable. It may be challenged on the ground that it was obtained by fraud or mistake or by an agreement which is void or voidable: *Permanent Trustee Co (Canberra) Ltd v Stacks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45, at 48, per Brennan J."

80 As this review of the line of authority commencing with *Harvey v Phillips* makes apparent, there are circumstances in which a court, in the exercise of its inherent jurisdiction, may set aside a consent order that has been entered as a formal order of the Court.

81 In my opinion, contrary to the Owners Corporation's submission, it is also apparent from the authorities that the court has a discretion whether to set aside consent orders that have been entered, even if some basis for setting aside the ordered has been established. *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra)* is an example. In that case, the court refused to set aside consent orders because it was not satisfied that the interests of third parties had not been affected. Kay LJ in *Huddersfield Banking Co v Henry Lister* also observed that although there was power to set aside a consent order that had been entered, difficulties might arise "*if the order had been acted upon, and third parties' interests had intervened and so on*".

82 That the court has such a discretion is an integral aspect of the court's inherent jurisdiction. As Sheller JA explained in *Logwon Pty Limited v Warringah Shire Council*, integral to a superior court's inherent jurisdiction is the fulfilment "*of its function by ensuring that justice is administered according to law and in an effective manner*". The jurisdiction, as his Honour pointed out, is such as "*to*

enable" the court to discharge or revoke consent orders. That is not the language of compulsion.

83 Albeit in a different context, another factor that supports the existence of a discretion is the requirement in the *Supreme Court Act 1970* (NSW), s 101(2) that an appeal against consent orders requires the leave of the court. This is a recognition both that consent orders are not unassailable and that such orders need not necessarily be set aside if a proper basis for leave is not made out. This could occur, for example, if the amount in question was insignificant, even if any arguable basis for setting aside the orders was made out: see *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 1164; *Australian Federation of Islamic Councils Inc v Farrell* [2016] NSWCA 256.

Should the Court set aside the consent orders?

84 In order for the consent orders to be set aside, it was necessary for the Owners Corporation to establish that senior counsel did not have actual or ostensible authority to enter into the settlement agreement. As I explain, I consider that senior counsel had that authority. However, even if senior counsel lacked the necessary authority, I consider that the consent orders ought not to be set aside in the exercise of the court's discretion, the Owners Corporation having failed to demonstrate appellate error in the *House v The King* sense: *House v The King* (1936) 55 CLR 499; [1936] HCA 40.

85 My determination in both these respects, that is, that counsel had authority, but that in any event, the consent orders ought not be set aside in the exercise of the court's discretion, involves a consideration of the following issues:

(1) Whether the failure to give notice as required by Sch 3, cl 6 invalidated the meeting of the EC held on 13 August 2013 and any decision made at it;

(2) Whether the terms of settlement agreement:

(a) amounted to a decision that was required to be made by the Owners Corporation by way of a special resolution: s 21(2)(a) and, relevantly, whether the decision of the EC on 13 August 2013 involved a contravention of s 65A;

(b) involved a decision that could not be made by the EC as the agreement involved expenditure in respect of which no provision had been made in the budget: see s 80A;

(3) Subject to the matters in (1) and (2), whether senior counsel had actual or ostensible authority to enter into the settlement agreement and had authority to request the court to make the consent orders;

(4) If senior counsel lacked authority, whether the settlement agreement had been ratified;

(5) The consequence of the fact that most of the terms of the consent orders had been complied with before the Owners Corporation commenced the subject proceedings. There are also various ancillary matters that are relevant to the exercise of the court's discretion.

The notice issue

Primary judge's reasons

86 The primary judge found, at [82], that the EC had not given notice of the meeting of the EC held on 13 August 2013 as required by Sch 3, cl 6. His Honour observed, at [88], that the Act did not expressly specify the consequences of such a failure, including whether the meeting was invalid or whether the decisions made at such a meeting were invalid or of no force or effect. His Honour thus turned to the text of cl 6 and in particular to the use of the imperative language of "*must*" in cls 6(1) and 6(3), set out above at [44], to determine whether the legislature intended that the consequence of non-compliance with the notice provision was that the meeting or any decision made at it was invalid: *see Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 especially at [91] and [93].

87 The primary judge then examined, at [91]-[92], the reasons of Barrett JA in *2 Elizabeth Bay Road Pty Limited v The Owners - Strata Plan No 73943* and in particular his Honour's consideration of the language such as "*may*", "*must not*" and "*cannot*" were used in relation to various functions of an owners corporation. Section 80D, which was the section under consideration, provided that an owners corporation must not seek legal advice or initiate legal proceedings for which payment may be required without there first being a resolution passed at a general meeting approving such action. The primary judge referred to Barrett JA's conclusion that "*must not*" provisions were directed to regulating the exercise of power rather than denying corporate

capacity and, therefore, s 80D did not cause legal proceedings commenced in contravention of that provision to be "*invalid*".

88 The primary judge considered, at [93], that similar reasoning was applicable to the "*must*" provisions of Sch 3, cl 6 and supported the conclusion that cl 6 regulated the exercise of powers by the EC and that compliance with them was not a necessary condition for the existence of power on the part of the EC. Further, his Honour did not discern a legislative purpose to invalidate an act of the EC where there was non-compliance with the notice provisions of cl 6. He noted, at [94], that cl 9(4) contained the notion of an invalid executive committee meeting and cl 11(2) contained the notion of a decision of an executive committee having no force or effect, but that similar notions were not incorporated into cl 6.

89 His Honour also observed, at [95], that s 153 of *the Strata Schemes Management Act 1996*, set out above at [50], conferred a power upon an adjudicator to make an order invalidating any resolution of persons present at a meeting of an owners corporation if the provisions of the Act had not been complied with in relation to the meeting. This suggested, in his Honour's view, that non-compliance did not itself result in invalid resolutions or decisions. Rather, s 153 provided a remedy which may be given in appropriate cases.

90 His Honour was further of the opinion that the consent order made by NCAT on 26 August 2014 that the decision made by the EC was of no force and effect did not operate to retrospectively remove the power and authority of the EC to instruct senior counsel to settle the matter.

91 His Honour noted, at [96], that a failure to comply with the notice requirements of Sch 3, cl 6 might take any number of forms, some significant and some trifling, and considered that it was:

> "… difficult to see why the objects or purpose of the Act would be promoted by holding that every resolution or decision of an executive committee made at a meeting convened contrary to the notice requirements was invalid and of no effect."

92 Accordingly, his Honour concluded, at [97], that the failure of the EC to comply with the requirements of Sch 3, cl 6 did not render the meeting invalid, or cause the EC's resolution or decision to instruct senior counsel to settle the

proceedings to be invalid or of no effect. His Honour also considered, at [99], that the Owners Corporation had the power to enter into a settlement agreement with the respondents on the terms of the agreement made on 14 August 2013.

Owners Corporation's submissions

93 The Owners Corporation submitted that the meeting of the EC held on 13 August 2013 was not properly convened, so that any decision made at that meeting was not valid. The consequence, on this argument, was that senior counsel for the Owners Corporation was not authorised to enter into any agreement or compromise on the part of the Owners Corporation. In this regard, the Owners Corporation accepted that his Honour had correctly identified the relevant principles of statutory construction but contended that his Honour had erred in the application of those principles in the following respects.

94 First, the Owners Corporation submitted that Sch 3, cl 6 stood in a different position to the sections of the *Strata Schemes Management Act 1996* to which Barrett JA referred in *2 Elizabeth Bay Road v The Owners - Strata Plan No 73943.* It pointed out that Barrett JA's analysis in that case related to provisions of the Act that provided for something that "*must not*" be done as compared to sections that provided for matters that "*cannot*" be done. Schedule 3, cl 6, on the other hand, specified that the EC "***must***" be given notice of its intention to hold a meeting at least 72 hours before the time fixed for the meeting.

95 Secondly, the Owners Corporation submitted that s 153 provided no basis for the presumption of validity which the primary judge ascribed to it. On its submission, s 153 did not have the effect that a resolution of an owners corporation which would be invalid at law was to be treated as valid unless invalidated by an order.

96 Rather, it submitted that an invalidating order under s 153 operated retrospectively in the sense that it confirmed that a resolution passed at a non-compliant meeting had always been invalid. It submitted that in this respect it was arguable that the NCAT order could operate to set aside the earlier Supreme Court orders. The Owners Corporation resisted an argument put

against it that as the NCAT order was entered by consent, it was not a finding of the adjudicator pursuant to s 153 and therefore did not take effect as an order under that section.

97 Thirdly, the Owners Corporation contended that Sch 3, cl 17 and the position at common law were of more assistance in determining whether a meeting or a decision made at a meeting of the EC at which adequate notice had not been given was valid. The Owners Corporation noted that the primary judge had not considered Sch 3, cl 17.

The respondents' submissions

98 The respondents submitted that, for the reasons the primary judge gave, his Honour was correct in holding that the meeting of the EC held on 13 August 2013 and any decisions made at it were not invalid by reason of the failure to give requisite notice.

99 The respondents also pointed out that Sch 3, cl 17 dealt with a different circumstance from cl 6. Clause 17 dealt with the situation where decisions were made in good faith but not properly made in that there was a vacancy in the office of a member of the EC or a defect in appointment or disqualification of any member. In other words, cl 17 dealt with the consequence of an absence of power to make a decision in certain circumstances. By contrast, cl 6 was a regulating provision relating to the exercise of a power.

100 The respondents further submitted that the order of NCAT did not operate retrospectively to remove the authority of the EC to instruct senior counsel. They argued this on two bases. First, that the orders were merely a "*self-serving*" attempt to try to set aside the Supreme Court orders and secondly, that the orders were not properly made in accordance with s 153, as they were entered by consent and therefore it could not be said that there was a consideration by an adjudicator.

101 The respondents submitted that irrespective of the effect of the NCAT order, the orders of the Supreme Court were valid at the time they were entered.

Consideration

102 The question whether the failure to give adequate notice of the meeting of the EC held on 13 August 2013 invalidated the meeting or any decision made at it, raises a question as to the proper construction of Sch 3, cl 6.

103 The principles of statutory construction are well established. In *Project Blue Sky v Australian Broadcasting Authority* the plurality (McHugh, Gummow, Kirby and Hayne JJ) at [69]-[70], set out the following principles:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> … Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions." (citations omitted)

104 The significance of context was further emphasised by the High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; [2009] HCA 41, where the plurality explained at [47], that:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy." (citations omitted)

105 This approach to statutory construction was confirmed in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56 and most recently in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14] and [36]-[38].

106 In *Project Blue Sky v Australian Broadcasting Authority*, the High Court was specifically concerned with the consequences, as a matter of statutory construction, of a failure to comply with a condition regulating the exercise of power. The plurality observed, at [91], that:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition."

107 The context in which Sch 3, cl 6 is to be construed includes, to the extent relevant, the Act as a whole and, in particular, the other provisions of Sch 3, Pt 2. Schedule 3 made provision, relevantly, for the constitution of meetings of the executive committee of an owners corporation. Clause 9(1) provided that a motion "*must not be considered*" at a meeting of an executive committee unless a quorum was present and specified what the quorum of an executive committee was. Clause 9(4), to which the primary judge referred, provided that if two executive committee meetings were held at the same time, both meetings were invalid. Clause 11(1) provided that a decision of the EC was one that was voted on by a majority of the members present at a meeting at which there is a quorum. However, again as the primary judge pointed out, cl 11(2) specified the consequence where notice in writing had been given to the secretary of an executive committee that the making of a decision was opposed by unit owners with the specified aggregate of unit entitlements.

108 As the respondents submitted, cl 17, to which the Owners Corporation referred, dealt with a different circumstance from cl 6. Clause 17 dealt with an absence of power to make a decision. By contrast, cl 6 was a regulating provision relating to the exercise of a power in respect of which no consequence was specified should there be non-compliance. In my opinion, the primary judge was correct in his construction of the clause.

109 The reasoning of Barrett JA in *2 Elizabeth Bay Road v The Owners - Strata Plan No 73943* to which the primary judge referred also supports this construction. Barrett JA, at [51], was of the view that the "*must not*" terms of s 80D did not:

> "… deny or curtail the capacity of an owners corporation to commence legal proceedings or cause proceedings to be 'invalid'. The contrary analysis … does not recognise the co-existence of 'must not' and 'cannot' provisions in relation to functions and powers of an owners corporation, with the latter denying corporate capacity and the former, in general, regulating the exercise of power ..."

110 On Barrett JA's analysis, an act to which s 80D applied was within the powers of the owners corporation albeit performed without authority: see at [52]. His Honour at [59], further expressed the view such a decision was capable of being ratified by a subsequent resolution passed at a general meeting of the owners corporation.

111 I am also of the opinion that s 153 is relevant to the construction of cl 6. Section 153 provided that a resolution of an owners corporation may be invalidated by order of an adjudicator. It thus provided a forum in which unit owners could seek relief in respect of resolutions where there had been non-compliance with the Act where the consequence of non-compliance was not otherwise specified in the Act. The purpose of a provision such as s 153 confirms the construction given to cl 6 by the primary judge and with which I agree. I should add one further observation in relation to s 153. In oral submissions, the Owners Corporation submitted that s 153 did not apply to decisions of the EC. It did not elaborate upon that submission and I do not agree with it. Section 21(1), in my opinion, supports the contrary construction.

112 The Owners Corporation also relied upon the common law principle that an improperly convened meeting was invalid: *Barron v Potter* [1914] 1 Ch 895 and that any resolutions passed at an invalid meeting were also invalid. It argued that there was a presumption that legislation did not alter common law doctrines in the absence of clear words: see *Balog v Independent Commission Against Corruption* (1991) 169 CLR 625; [1991] HCA 28. The Owners Corporation submitted, therefore, that as proper notice had not been given, the meeting of 13 August 2013 was invalid.

113 In my opinion, *Barron v Potter* does not stand for the simple proposition for which the Owners Corporation contended. In that case, the Court held that no board meeting was convened at all. The chairman of the company had given notice of a meeting of directors to elect new directors. The only other director, who was at the company's offices to attend an extraordinary general meeting, had not received the notice and refused to speak to the chairman. The chairman then purported to use his casting vote as if at a directors meeting and declared the persons he had proposed to be directors of the company.

114 Warrington J, having considered the interaction between the chairman and second director immediately before the extraordinary general meeting, stated, at 901:

> "… there was no director's meeting at all for the reason that [the second director] to the knowledge of [the Chairman] insisted all along that he would not attend any directors' meeting with [the Chairman] … It is not enough that one of two directors should say 'this is a director's meeting' while the other says it is not."

115 The Owners Corporation further contended that a failure to give proper notice in accordance with a corporation's constituent documents resulted in invalidity: *Ryan v Kings Cross RSL Club Pty Ltd* [1972] 2 NSWLR 79. In that case, McLelland CJ in Eq held that a resolution passed by a board was invalid in circumstances where there had been a failure to give the required notice pursuant to the company's articles to a member subject of the resolution.

116 However, the case with which this appeal was concerned did not involve non-compliance with the Owners Corporation's constitution. Rather, this case involved non-compliance with a statutory provision relating to the giving of notice of a meeting. The question for the primary judge, therefore, was whether, as a matter of statutory construction, non-compliance with the particular provision resulted in the meeting or any decision made at it, being invalid. In my opinion, for the reasons his Honour gave and, as I have explained above, non-compliance with the time required for the giving of notice specified by Sch 3, cl 6 did not result in invalidity of the meeting and any resolutions passed at it.

117 It follows, in my opinion, that his Honour was correct in finding, as a matter of statutory construction, that the failure to give notice as specified in cl 6 did not invalidate the decision that was made at the meeting on 13 August 2013.

118 There are two further questions, however, as to the effect of the consent orders made by NCAT and the impact of the resolution of the Owners Corporation made on 17 June 2014, disagreeing with the decision of the EC made at the meeting on 13 August 2013, set out above at [37]. The second of these questions is dealt with below.

The effect of the NCAT order

119 In order to determine the effect of the consent order made by NCAT that the EC's resolution was of no force and effect it is necessary to understand first, the status of the order and secondly, what the terms of the order meant. Although NCAT exercises judicial power, it is not a court of the State: *Burns v Corbett* (2017) 316 FLR 448; [2017] NSWCA 3 at [29]-[30]. The consequence, therefore, is that any decision made by NCAT is administrative in nature.

120 A monetary order made by NCAT may be registered in a court of competent jurisdiction and, when registered, "*operates as a judgment of the Court*": *Civil and Administrative Tribunal Act 2013* (NSW)*,* s 78. However, the consent order made by NCAT in this case did not involve a monetary sum. It is necessary, therefore, to return to the *Strata Schemes Management Act 1996.* Section 207 of that Act provided that orders of an adjudicator and tribunal made under certain sections are taken to have effect as a resolution of the owners corporation. Section 153, under which Ms Curnick's application was brought, was not one of those provisions. Accordingly, it is necessary to consider the effect of any order made by an adjudicator. Under s 153, an order could be made invalidating a resolution. On appeal, NCAT could substitute its own order for the order appealed against.

121 Two observations need to be made at this point. The use of the language of "*order*" in ss 153 and 181 does not convert an administrative decision into a judicial order. Accordingly, a decision of NCAT could not, of itself, override an order of a court, including a consent order. It follows that the consent order made by NCAT of itself did not override the consent orders made by Bergin CJ in Eq on 14 August 2013.

122 However, the consequence for the underlying agreement involves different considerations. It should be noted at the outset that the order made by consent, that the decision made by the EC on 13 August 2013 was of no force and effect, does not accord with the language of s 153 which provides for invalidation. If it be assumed, however, that that the intention was that the decision of the EC was invalid, that would mean that the decision to instruct senior counsel was invalid. On that basis, it would be correct to say that senior

counsel acted without actual authority when he entered into the settlement agreement and asked the court to make the consent orders. It does not, however, impact on the question whether senior counsel had ostensible authority. But in any event, the later invalidation of an agreement that had significantly been performed raises discretionary considerations in relation to setting aside the consent orders to which I refer below.

Whether the decision made by the EC on 13 August 2013 was a decision within s 21(2)(a) or involved contraventions of the Strata Schemes Management Act 1996, ss 65A and 80A

123 The next question is whether the decision made at the meeting of the EC on 13 August 2013 was a decision within s 21(1)(a,) or involved contraventions of the *Strata Schemes Management Act 1996*, ss 65A and 80A. If so, the Owners Corporation contended that senior counsel thereby had no authority to agree to the terms of settlement.

Primary judge's reasons

124 The question whether the EC had authority to instruct senior counsel to enter into the settlement agreement was considered by his Honour at [98]-[115]. His Honour observed, at [99], that the Owners Corporation had the power to compromise proceedings brought against it. In this regard, his Honour relied on the provisions of the *Interpretation Act 1987* (NSW), ss 50(1)(c) and 50(1)(e), which provided, relevantly, that a corporation has the power to do all things necessary for or incidental to its functions. His Honour also recognised that there was a question whether the subject matter of paras (1), (4), (5), (8), (9) and (11) of the short minutes of order were such that the EC did not have the authority to instruct senior counsel to enter into the agreement.

125 His Honour, at [102], referred to s 21 of the *Strata Schemes Management Act 1996* and noted, at [104], that, subject to ss 21(2) and 21(4), the EC possessed a decision-making power that corresponded to that of the Owners Corporation. His Honour held, at [105], that the EC had the power to make the decision to instruct senior counsel to settle the proceedings "*on the best terms possible, generally in accordance with* [*the respondents'*] *latest offer, which had been made at about 5pm on 9 August 2013*".

126 The primary judge was of the view that that decision did not fall within the matters specified in s 21(2), nor was it conduct which involved the EC spending money contrary to s 80A. Rather, in his Honour's view, at [106], the decision was properly characterised as a decision "*to authorise* [*senior counsel for the Owners Corporation*] *to settle the proceedings along certain lines*".

127 His Honour further observed, at [106], that the respondents' offer included a term that the Owners Corporation undertook to pass resolutions to revoke the special resolutions made on 16 December 2010, set out above at [11], noting that the validity of those resolutions was a matter that had been in issue in the proceedings brought by the respondents against the Owners Corporation. His Honour also observed that the resolutions of 16 December 2010 (on the assumption they were valid) were required to be revoked by special resolution passed by the Owners Corporation pursuant to Sch 2, cl 23, and thus fell within s 21(2)(a).

128 However, his Honour stated, at [107], that:

> "… the giving of an undertaking to pass a special resolution is not the same as the passing of such special resolution, which remains a matter for the owners in general meeting. *A fortiori*, a decision to authorise an agent to enter into an agreement which includes an undertaking to pass a special resolution is distinct from the passing of such special resolution."

129 Accordingly, his Honour considered that a decision to authorise an agent to enter into an agreement which included an undertaking to pass a special resolution did not fall within s 21(2) of the Act.

130 His Honour then dealt with s 65A. After referring to the terms of that section, his Honour stated, at [109], that while a decision to undertake such work fell within s 21(2), a decision to authorise an agent to enter into an agreement which included an obligation to carry out such work did not fall within s 21(2)(a), because that decision was distinct from the decision to carry out the work.

131 In respect of s 80A, his Honour observed, at [111], that specific amounts for expenditure on damages or costs had not been determined at the Annual General Meeting of the Owners Corporation. His Honour held, therefore, that s 80A(1) was not engaged in relation to expenditure on such items. His Honour

further considered that authorising senior counsel for the Owners Corporation to settle proceedings on terms that included obligations on the part of the Owners Corporation to pay damages and costs did not amount to the spending of money by the EC, and therefore this conduct did not involve the EC spending money contrary to s 80A of the Act.

132 Accordingly, his Honour concluded, at [112], that the subject matter of the settlement agreement did not result in the EC not having authority to instruct senior counsel to enter into it.

133 By way of summary, his Honour said, at [113]:

> "In my opinion the EC possessed the power and the authority to instruct [senior counsel for the Owners Corporation] to settle the … proceeding on the best terms possible, generally in accordance with [the respondents'] latest offer. The EC, in so acting, was exercising the power of the Owners Corporation to compromise the proceedings that had been brought against it. The EC had been carrying out the task of providing instructions to the lawyers retained by the Owners Corporation, and the Owners Corporation in general meeting did not place any restrictions or limitations upon the EC in respect of the instructions it may give to the lawyers, including in relation to any compromise of the proceedings (see s 21(2)(b) of the Act). Neither the failure of the EC to comply with clause 6 of Schedule 3, nor the subject matter of the compromise in respect of which the EC provided instructions, removed or curtailed the power and authority of the EC to instruct [senior counsel] to settle the proceedings."

134 His Honour said, at [114], that it followed that the decision of the EC to instruct senior counsel to settle the proceedings was not invalid or of no effect at the time that the decision was made. His Honour considered that neither the consent order made by NCAT on 26 August 2014 to the contrary nor the resolution passed at the AGM to the effect that the Owners Corporation disagreed with the decision of the EC to settle proceedings operated retrospectively to remove the EC's power and authority to give its instruction to senior counsel.

135 His Honour concluded, at [115], that in circumstances where there was no suggestion that the agreement did not accord with the instructions given by the EC, senior counsel had express actual authority to make the settlement agreement on behalf of the Owners Corporation and accordingly the settlement agreement became binding upon the Owners Corporation.

Owners Corporation's submissions

136 The Owners Corporation submitted that authority to settle legal proceedings resided exclusively in the Owners Corporation in general meeting and that the primary judge had made a false distinction in isolating the EC's resolution to instruct senior counsel to settle the proceedings on "*the best terms possible*" from any decision that fell within s 21(2)(a). The essence of this argument was the EC could not do indirectly that which could not be done directly.

137 The Owners Corporation's principal argument was based on s 65A in circumstances where the grease arrestor and kitchen exhaust fan had not been connected to any part of the common property. The Owners Corporation submitted that the work in relation to the kitchen exhaust fan and the grease waste system specified in paras (4) and (5) of the short minutes of order fell within s 65A and could only be undertaken if a special resolution had been passed authorising such work at a general meeting of the Owners Corporation. Accordingly, the Owners Corporation submitted that, by the combined operation of ss 21(2)(a) and 65A, a decision in relation to the grease arrestor and kitchen exhaust system was one that could only be made by the Owners Corporation. The Owners Corporation submitted that the settlement agreement reflected in the short minutes of order was thus entered into contrary to ss 21(2)(a) and 65A.

138 In relation to his Honour's reasoning in respect of s 80A, the Owners Corporation submitted that if the primary judge were correct and s 80A was not engaged in respect of an item for which there was no estimate, an executive committee "*may spend unrestrainedly on items not specified in its annual budget*". It submitted that this was an "*an absurd construction*" that not only "*fails to give effect to, but indeed defeats, the evident statutory purpose of the budgeting regime*". The Owners Corporation pointed to the words "[*i*]*f a specific amount has been determined*" and submitted that this must mean that in respect of any item not included in the budget an amount of $nil had been determined.

139 Accordingly, on the Owners Corporation's submission, the EC lacked the power to agree to paras (8), (9) and (11) of the short minutes of order. This

raised the question of the consequences of the EC spending money or agreeing to spend money beyond the limits permitted by s 80A.

140 The Owners Corporation argued that this question was answered by determining the effect of the words "*must not*" in s 80A(1). It relied on the reasoning of Barrett JA in *2 Elizabeth Bay Road v The Owners - Strata Plan No 73943* at [51]-[59] considering s 80D of the *Strata Schemes Management Act 1996*. Adopting his Honour's approach, it is "*only possible for the executive committee to authorise the expenditure of money if the executive committee has itself been authorised to authorise that expenditure*". The Owners Corporation thus submitted that in these circumstances the expenditure would only bind the Owners Corporation if it was ratified by an instrumentality with authority, which it submitted was the Owners Corporation in general meeting. On its submission, no such ratification had occurred for the reasons set out below at [178]-[181].

141 In respect of the resolutions passed at the AGM on 16 December 2010, set out above at [11], the Owners Corporation acknowledged that they were purported to be resolutions pursuant to s 62(3). It submitted, however, that the resolutions should have been passed pursuant to s 65A, as the works referred to involved addition and alteration to the common property and, accordingly, that the installation of these items and any decision to connect them to a lot resided only in the Owners Corporation pursuant to s 65A(1)(c). On the Owners Corporation's submission, the agreement to carry out the works in paras (4) and (5) of the short minutes of order, meant that the EC was indirectly doing the very thing that s 65A reserved to the Owners Corporation in general meeting.

Respondents' submissions

142 The respondents submitted that s 65A only comes into play when s 62 does not operate: see *Owners Strata Plan 50276 v Thoo*; *Stolfa v Hempton* (2010) 15 BPR 28,253; [2010] NSWCA 218, and that, as in this case, where there is equipment that is not in serviceable repair, s 62 operates and s 65A has no application. The essence of the respondents' submissions on this point was

that s 65A was not relevant to the case as was apparent from the fact that it was not part of the case run before Bergin CJ in Eq.

143 The respondents submitted that the primary judge was correct in his approach to the questions raised by s 80A. Moreover, they submitted that the decision of the EC was not a decision to spend money but rather was a decision "*whether to **save** the Owners Corporation up to $500 000*" (emphasis in original). In other words, it was not a question of spending money but rather of settling the proceedings. However, the respondents acknowledged that provision should have been made for the expenditure in the budget but submitted that "*the failure to do so was not going to prevent the Court from making the necessary order*".

Consideration

144 The starting point of the matter presently under consideration is, as his Honour found, that no decision had been made by the Owners Corporation in general meeting to limit the powers of the EC: see the *Strata Schemes Management Act 1996*, s 21(b). Accordingly, the EC had authority to instruct counsel both to appear and to settle the proceedings. The real question, as the Owners Corporation submitted, was the nature of the decision that was made at the meeting on 13 August 2013. Was it simply a decision to instruct senior counsel to settle or did the EC arrogate to itself a decision-making function in contravention of ss 21(2)(a) and 65A and in fact make a decision the subject of those sections? Alternatively, did the settlement involve expenditure in contravention of s 80A?

145 In my opinion, the primary judge was correct to distinguish the decision of the EC to instruct counsel to settle the proceedings from what was required to be done under the settlement agreement and pursuant to the court orders made consequent upon the settlement. As his Honour found, subject to a decision not being one that the EC was precluded by s 21(2) from making, s 21(1) provided that a decision of the EC was taken to be the decision of the Owners Corporation, such that the decision-making powers of the EC were co-extensive with those of the Owners Corporation.

146 I agree with the primary judge that in deciding to instruct counsel to settle the proceedings, the EC did not purport to make decisions that could only be made by the Owners Corporation or which involved expenditure contrary to s 80A. In this regard, it is important to note that there was no evidence to which the Court was referred that at the annual general meeting that preceded the settlement, the Owners Corporation intended to spend monies by way of paying damages to the respondents, or in carrying out works as agreed to in the short minutes of orders, or that it was aware that monies were likely to be expended on those matters. In those circumstances, s 80A did not come into play. If my view on these matters is correct, this part of the Owners Corporation's case falls away.

147 However, there are further matters, both in respect of characterisation as to what was agreed and relevant to the exercise of discretion more generally, which require consideration. It will be recalled that, in the view I have taken, the primary judge was correct in his characterisation that senior counsel's instructions were "*to settle generally along the lines contained in* [*the respondents'*] *offer of 9 August 2013*". There are three aspects of that offer that call for particular analysis.

148 First, para (1) of the short minutes of order involved an undertaking to the respondents to pass a special resolution revoking the special resolutions passed on 16 December 2010 in relation to the maintenance and repair of the kitchen exhaust and grease arrestor systems. Although it was within the remit of counsel's instructions to negotiate in respect of that term, the fact is it became part of the settlement agreement without amendment. For obvious reasons, that part of the agreement could not be and was not made an order of the court and thus stands as an agreement between the Owners Corporation and the respondents.

149 Interesting questions could arise as to the enforcement of such a term, but the position at the present is that the Owners Corporation has not taken the appropriate steps to place the resolution before a meeting of the Owners Corporation. Subject to what I say below in relation to the Owners Corporation's resolution of 17 June 2014 (see above at [37]), there is no

impediment upon the Owners Corporation doing so, although the resolution would have to be passed in accordance in the current legislation, the *Strata Schemes Management Act 2015* (NSW).

150 Secondly, the resolution of the Owners Corporation made on 17 June 2014 expressed disagreement with the decision of the EC of 13 August 2013 to settle the proceedings and with the consent orders the EC had agreed to. The Owners Corporation submitted that "*disagreement*" within the meaning of s 21(4) meant "*inconsistency*", so that the decision of the Owners Corporation on 17 June 2014 had the effect of neutralising or rendering nugatory the decision of the EC on 13 August 2013.

151 By way of an initial observation, it should be noted that the terms of the resolution of 17 June 2014, whilst not identical to the primary judge's characterisation of the decision made by the EC at the 13 August 2013 meeting are at least consistent with his Honour's characterisation. The terms of the resolution were certainly not consistent with the manner in which the Owners Corporation now seeks to characterise that decision. Leaving that aside, there is also a question as to what the Owners Corporation resolved on 17 June 2014 and what the consequence of that decision was. At the least, the Owners Corporation did not resolve not to settle the proceedings and not to consent to orders. Nor did it resolve not to instruct senior counsel, although that may be implicit in the terms of the disagreement.

152 Section 21(4) governs the position where there is a disagreement between an owners corporation and an executive committee. The section would seem to have been directed to circumstances where there are reasonably contemporaneous decisions of the respective entity. Importantly, the section does not deal with the position where conduct has been engaged in by an executive committee in respect of which the owners corporation later disagrees, as was the position here.

153 The third aspect that requires analysis relates to paras (4) and (5) of the short minutes of order. As I have already indicated, the primary judge appears to have accepted, or at least assumed, that at least some of the works identified in those paras fell within s 65A. However, in para (14) of the short minutes of

order, the Owners Corporation expressly agreed that those works fell within paras (2) and (3) of the short minutes of order and were aspects of the Owners Corporation's obligations to maintain, repair, renew or replace.

154 There was no evidence to explain the reason for the inclusion of para (14), but there was no prohibition on the parties reaching an agreement to that effect. It may have reflected the reality, that is, that the nature and extent of the work did in fact fall within ss 62(1) and 62(2). Another possibility is that the agreement in para (14) may have provided certainty to the settlement agreement where the proper characterisation of the work was doubtful or arguable. It could also have reflected a deliberate step by the Owners Corporation or by both parties to circumvent the requirements of s 65A, although there was no evidence, or even any suggestion, of the last of these possibilities.

155 The parties' characterisation of this work as being within s 62 is, however, significant. If the works fell within s 65A, and there being no special resolution to authorise the works, the court, at the request of the parties, made an order that caused the Owners Corporation to be in breach of the *Strata Schemes Management Act 1996*. It was not suggested that the parties had done so or intended to do so. Clearly, the purport of the settlement agreement was that these were works that fell within s 62. This is apparent from para (1) in which the parties had agreed to pass a special resolution to revoke the resolutions made on 16 December 2010, and so remove the impediment to complying with s 62. As I have already indicated, it appears that no steps have been taken by the Owners Corporation to remove that impediment, but there is no reason why that cannot still be done.

156 Alternatively, if the works that have been carried did fall within s 65A, then the Owners Corporation has acted in breach of the *Strata Schemes Management Act 1996* in carrying out the works. It should be noted, however, that there was no direct, nor any specific finding, that that was so. But assuming that the works carried did fall within s 65A, and accepting that that his Honour's characterisation of the decision of the EC was correct, as I consider it to be, the fact that work was carried out would not invalidate the EC's decision. Whatever

relief, if any, a unit holder might have as against the Owners Corporation in that circumstance, is not a matter that arises on the appeal.

157 The important point for present purposes is that the Owners Corporation's agreement as to the characterisation of the works to be undertaken in para (14) of the consent orders is relevant, should the matter fall to be determined as a matter of the Court's discretion. As would be apparent, it points in favour of exercising the discretion to refuse to set aside the consent orders.

Did senior counsel have authority to settle the proceedings?

Primary judge's reasoning

158 Having regard to the primary judge's characterisation of the decision made by the EC on 13 August 2013, which I consider was correct, it followed that senior counsel had express actual authority to make the settlement agreement on behalf of the Owners Corporation. Accordingly, his Honour did not find it necessary to consider the argument advanced by the respondents that senior counsel for the Owners Corporation had ostensible authority to make the agreement.

159 Nevertheless, his Honour made some brief comments on the issue. Citing *Donellan v Watson* (1990) 21 NSWLR 335, his Honour observed, at [117], that as a legal representative retained by the Owners Corporation in relation to the proceedings, senior counsel "*would ordinarily possess an implied and an ostensible authority to bind the Owners Corporation to a compromise of the proceedings*". However, his Honour observed that the respondents were aware that senior counsel for the Owners Corporation was acting on the instructions of the EC. In those circumstances, his Honour considered, at [118], that:

> "… it is debatable whether [the respondents] were in fact placing reliance upon an implied or ostensible authority held by [senior counsel] by virtue of his retainer … That is, it is questionable whether [the respondents] entered into the settlement agreement in reliance upon any representation made by the Owners Corporation, in retaining [senior counsel], that he had an implied or ostensible authority to bind it to a compromise."

160 Nevertheless, at [119], his Honour referred to the fact that the first respondent had given evidence that she understood the EC to have authority to make decisions about the running of the case. Having found that senior counsel for the Owners Corporation had actual authority to settle the proceedings, his

Honour did not seek to explain whether the first respondent's understanding had any impact upon the doubt he had expressed at [118], set out in the passage quoted above.

Notice of contention

161 In a notice of contention dated 28 April 2017, the respondents sought leave to contend that senior counsel for the Owners Corporation had ostensible authority to enter into the settlement agreement. The notice of contention was filed after the first day of hearing on the appeal on 26 April 2017. The Owners Corporation did not argue that it was prejudiced by the late notice and accordingly, did not oppose the application. In my opinion, leave to rely upon the contention should be granted.

Respondents' submissions

162 On the respondents' submission, there were two limbs to the ostensible authority argument. The first concerned the authority of senior counsel for the Owners Corporation to enter into the settlement agreement. The second concerned senior counsel's authority to ask the Court to make the consent orders. The respondents submitted that the Owners Corporation had only raised the second of these arguments in this Court and that it was not part of the case below. Accordingly, the respondents submitted that it was not open to the Owners Corporation to raise the point. The respondents further submitted that:

> "… one might think it's unarguable in any event to suggest that Bergin CJ in Eq wasn't entitled to find [senior counsel] as having authority to request the Court to make the orders and the same with our clients."

163 As to the first limb of the ostensible authority argument, the respondents submitted that the court and parties are entitled to rely upon the fact that counsel appearing in a case possesses authority to conduct and resolve proceedings *unless* something is said or done that puts them on notice that counsel does not have that authority. Accordingly, the respondents submitted that the onus lay on the Owners Corporation to establish that the parties did not rely on senior counsel's ostensible authority or acted unreasonably in relying upon his authority. The respondents argued that the Owners Corporation had failed to meet this burden of proof.

164 In support of their argument that the parties relied on senior counsel's ostensible authority, the respondents pointed to the fact that the first respondent gave evidence before the primary judge that she had understood that senior counsel had authority to settle the proceedings and that the EC's role included making decisions as to the handling of litigation. The respondents also referred the first respondent's evidence that she was aware of the presence of Mr Burns at court on 14 August 2013 and considered that he had authority from the Owners Corporation to settle the matter. Mr Burns was the member of the EC who had been nominated by the EC to be the point of contact with the legal representatives of the Owners Corporation. The first respondent said that it was her belief that any notice requirement in respect of the meeting on 13 August 2013 was overridden by Mr Burns' presence.

165 The respondents further relied on the fact that on 14 August 2013, senior counsel for the Owners Corporation raised the question of whether adequate notice had been given of the meeting of the EC held the previous evening. Counsel for the respondents replied that:

> "In respect of authority to settle, I am proceeding on the basis that any offer communicated by you to me is cloaked in counsel's ostensible authority to settle the proceedings. Unless and until you tell me you do not have authority to settle the matter, I will continue to proceed on that basis."

166 At no time did senior counsel for the Owners Corporation indicate to the respondents or the respondents' counsel that he did not have authority. In that regard, the respondents' counsel gave evidence before the primary judge of his belief that senior counsel had both actual and ostensible authority and confirmed that his advice to the appellants proceeded on this basis.

167 The respondents rejected any attempt to differentiate between whether the first respondent was relying on the actual or ostensible authority of senior counsel for the Owners Corporation. On the respondents' submission, the court should infer that the respondents relied upon senior counsel's actual *and* ostensible authority in entering into the settlement agreement and in proceeding to have the orders entered.

Owners Corporation's submissions

168 The Owners Corporation submitted that the final sentence of his Honour's reasons at [118], set out above at [159], was a finding that he was not satisfied as a matter of fact that the respondents entered into the settlement agreement in reliance upon any representation that senior counsel had an implied or ostensible authority to bind the Owners Corporation to a compromise.

169 The Owners Corporation pointed to the fact that ostensible authority is founded on estoppel and to establish ostensible authority, it must be proved that a representation was made by a principal with actual authority and that reliance was placed on this representation. On the Owners Corporation's submissions, the finding in the final sentence of [118] established that there was no reliance as "[*t*]*he issue of* [*senior counsel's*] *authority did not concern*" the first respondent.

170 The Owners Corporation further submitted that there was an "*abundance*" of evidence that supported the finding that the respondents were aware of the "*true position*", namely, that the EC had no authority to bind the Owners Corporation and hence no authority to confer on senior counsel any authority to do likewise.

171 Finally, the Owners Corporation argued that the *Strata Schemes Management Act 1996* limited senior counsel for the Owners Corporation's authority by limiting the powers of those from whom he derived his authority, being the EC. In this respect, the Owners Corporation relied on the principle that estoppel, of which ostensible authority is a form, does not operate against a statute: *Roach v Bickle* (1915) 20 CLR 663; [1915] HCA 80 at 671; *St Alder v Waverly Local Council* [2010] NSWCA 22 at [42]-[44].

Consideration

172 The legal principles governing ostensible authority were not in issue. The Owners Corporation, in its submissions to the primary judge, acknowledged that:

> "Both solicitor and counsel retained to conduct litigation ordinarily have ostensible authority to bind their client to a compromise of those proceedings. Any instruction from the client which restricts that authority will only affect the

> other party if it is on notice of the restriction: *Donellan v Watson* (1990) 21 NSWLR 335 at 342"

173 Whether or not a person has ostensible authority (also described at times as 'apparent authority') is a question of fact: see *Geissler v Accro Motors Pty Ltd* (1955) 73 WN (NSW) 31; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 9 ANZ Insurance Cases ¶61-232 at 75,554. It usually involves an inference based upon a representation or representations made by the principal that the agent has authority to contract within the ambit or scope of the 'apparent authority': *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 503.

174 As the Owners Corporation pointed out, ostensible authority is traditionally described in terms of estoppel by representation. Reliance is a necessary element of the estoppel: *Freeman & Lockyer v Buckhurst Park Properties* at 503; *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; [1975] HCA 49; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146; [1990] HCA 32 at 200; G E Dal Pont, *Law of Agency* (3rd ed, 2014, LexisNexis) 460 [20-7].

175 The question as to the extent of a solicitor's ostensible authority was discussed by this Court in *Pavlovic v Universal Music Australia* (2015) 90 NSWLR 605; [2015] NSWCA 313 at [150], where the Court adopted the statement of principle in *Lucke v Cleary* (2011) 111 SASR 134; [2011] SASCFC 118 of Stanley J, Gray and David JJ agreeing, at [61], that:

> "… in the context of litigation, a legal practitioner has ostensible authority to bind his or her client to a contract which relates to and, in particular, compromises that litigation …" (citations omitted)

176 As I have indicated, the Owners Corporation relied on the principle that an estoppel does not arise in the face of a statute. In *Pratten v Warringah Shire Council* [1969] 2 NSWR 161, cited with approval by this Court in *St Alder v Waverly Local Council* at [43], Street J, at 167-168, after referring to legislation dealing with drainage reserves vested in a council, and which required the approval of the Governor before dealing with any such land, stated:

> "… The Governor's approval is no less necessary in a case where it is sought to propound an estoppel against the council than it is in a case where it is sought to allege that the council has expressly by deed purported to deal with a drainage reserve. The approval of the Governor is a statutory pre-requisite to

> any dealing by the council. To give effect to the estoppel propounded … would allow that estoppel to override this statutory requirement of the Governor's approval."

See also *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 212.

177 If I am correct in my agreement with the primary judge that the decision of the EC made on 13 August 2013 was a decision to instruct counsel to settle the proceedings, then the question of ostensible authority does not arise. But in any event, I consider that senior counsel was clothed with ostensible authority to enter into the settlement agreement of behalf of the Owners Corporation and to seek to have the consent orders made. The Owners Corporation's submission that ostensible authority does not arise in the face of a statute was based on its argument that the decision of the EC made on 13 August 2013 was contrary to ss 21(2) and 65A and was not authorised by s 80A. I have rejected each of those arguments. Accordingly, should it be necessary, I would uphold the notice of contention.

Ratification

178 As the primary judge found that senior counsel for the Owners Corporation had authority to make the settlement agreement, it was not necessary for his Honour to determine whether the agreement was ratified by the subsequent conduct of the Owners Corporation. Given that I likewise consider that senior counsel had authority to make the settlement agreement and to seek to have the consent orders made, it is sufficient if I deal with this question relatively briefly.

179 The relevant principle as to ratification was stated by Barrett JA in *2 Elizabeth Bay Road v The Owners - Strata Plan 73943* at [57], as follows:

> "There will be no ratification unless the subsequent actor has the necessary authority. Thus, if, in the company context, the usual division of authority between the directors and the members in general meeting prevails, purported ratification by the members in general meeting of something exclusively within the province of the directors will not be effective: *Massey v Wales* [2003] NSWCA 212; 57 NSWLR 718."

180 Insofar as that principle applied s 80D, Barrett JA observed at [59] that the performance of the relevant act was capable of being ratified by a subsequent resolution of the owners corporation in general meeting.

181 The primary judge in this case considered that ratification could occur other than by resolution of the Owners Corporation and he identified certain conduct as amounting to ratification including the fact that the EC subsequently confirmed the minutes of the meeting held on 13 August 2013, that notices of the consent orders were sent to unit holders, that monies had been paid and work carried out in accordance with the short minutes of order.

182 I am not certain that his Honour was correct as the question of ratification only arose if there was an absence of authority. There was only an absence of authority if his Honour's characterisation of the decision made by the EC on 13 August 2013 is incorrect and the proper characterisation is as contended by the Owner's Corporation.

183 However, there are two short points that may be made. The first is that there was an act of ratification when, at the Extraordinary General Meeting held on 18 February 2014, a resolution was passed to raise a special levy to cover the works, damages and costs associated with the proceedings. That at least involved a ratification of the term relating to the payment of damages. Secondly, if that resolution was not sufficient to ratify the terms in relation to the carrying out of the works, it is relevant to the Court's discretion that the Owners Corporation do not seek any relief in respect of paras (4) and (5) of the short minutes of order and, in particular, do not seek to have that work reversed.

Other discretionary and ancillary matters

184 As has been explained at [9]ff, the consent orders, save for the obligation contained in paras (2), (3) and (7) of the short minutes of order, which imposed a continuing obligation on the Owners Corporation, have been fully performed. The agreed damages sum was paid on 17 September 2013. The works referred to in paras (4) and (5) relating to the exhaust system and grease extractor were substantially completed by late October 2013. The respondents have also expended monies as required by the consent orders.

185 As already stated, the Owners Corporation, at an Extraordinary General Meeting on 18 February 2014, resolved to obtain legal advice in relation to the settlement and also resolved to raise a special levy to cover the costs of the work, the damages and the costs payable pursuant to the consent orders.

However, it was not until 17 June 2014, 10 months after the consent orders had been made and entered, that the Owners Corporation, at its AGM, resolved to 'disagree' with the decision to settle the case and with the consent orders. Notwithstanding this resolution, the Owners Corporation, by engaging in the costs assessment, continued to engage in conduct that was consistent with the orders being on foot and enforceable.

186 The present proceedings were not commenced until December 2014, at which time all the matters that were the subject of the consent orders had been fully performed, other than the continuing obligation to maintain, renew and repair the grease extractor and exhaust system pursuant to s 62 of the *Strata Schemes Management Act 1996*. Accordingly, there was a delay of 15 months from the entry of judgment on the consent orders until the Owners Corporation commenced proceedings seeking to have them set aside.

187 These considerations were the same considerations taken into account by the primary judge in finding that he would not have exercised his discretion under UCPR, r 36.15. In my opinion, these are compelling reasons why the court, albeit acting in its inherent jurisdiction, would not exercise its discretion and set aside the consent orders.

188 In my opinion, for those reasons and having regard to the following further considerations, the Owners Corporation has failed to demonstrate error in the *House v The King* sense such that I consider that, in the exercise of the Court's discretion, the consent orders should not be set aside.

189 The Owners Corporation has taken, at different times, inconsistent positions. Some have already been referred to but, by way of recapitulation, they are: the characterisation, in the short minutes of order, of the work to be performed as being work within s 62; the participation in the costs assessment process without protest, even after a decision had been made to obtain legal advice; and, less significantly, a submission in this Court that s 153 did not apply to decisions of the EC, notwithstanding that the Owners Corporation participated in that process in relation to the decision of the EC of 13 August 2013.

190 Further, the Owners Corporation seeks that the orders be set aside and that the matter be remitted to the Equity Division for hearing. However, it does not

seek that the work undertaken pursuant to paras (4) and (5) of the short minutes of order be reversed. If those orders were made, the relief sought by the Owners Corporation in these proceedings is puzzling, impractical and would mean that the proceedings may well be of a very different nature than as presently constituted.

191 The Owners Corporation has not separately sought to set aside para (1) of the short minutes of order, which, as I have explained constituted an agreement between the parties. Likewise, it has not sought to impugn the agreement reached in para (13), in relation to levies or contribution in respect of the costs of the proceedings, or para (14).

192 There is also a question of the costs order, made pursuant to the costs assessment. That is a separate judgment of the Supreme Court which does not fall within the relief claimed in the present proceedings. The Owners Corporation indicated that it would need to amend its claim to include the setting aside of that judgment. Although it has not formally done so, the Court could so direct. But it is not readily apparent that the costs judgment necessarily must be set aside, even if the Owners Corporation establishes that the agreement was entered into without authority because of non-compliance with s 65A, being its central argument. In fact, questions of estoppel might arise, given the Owners Corporation's participation in the costs assessment process.

193 Further, in circumstances in which the costs judgment is a separate judgment of the Court, its setting aside would be subject to the exercise of the Court's discretion. Thus, there is at least arguably an inconsistency in setting aside the costs judgment and requiring the respondents to repay the costs in circumstances where the Owners Corporation does not seek to undo the work in connecting the exhaust and grease extractor. In other words, at a practical level, the respondents have achieved a significant part of what they set out to achieve in the proceedings.

Conclusion

194 It follows in my opinion that the appeal should be dismissed with costs.

195 **LEEMING JA**: I have had the privilege of reading Beazley P's reasons in draft. I agree with the orders proposed by her Honour and her reasons, save that I prefer not to express a view on the question of ratification which is considered by her Honour at [178]-[183]. That point was on the periphery of the matters in issue. No differently than was the case in *2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [109], I do not consider this Court heard full submissions on the issue.

196 **EMMETT AJA**:

Background

197 The question in this appeal is whether orders made by consent by the Chief Judge in Equity on 14 August 2013 (**the Impugned Orders**) should be set aside. The Impugned Orders were made in proceedings 2011/183457 brought in the Equity Division (**the Original Proceedings**) by the present respondents, Ms Annie Yau and Mr Andy Yau (**Mr & Mrs Yau**), against the present appellant, The Owners Strata Plan No 57164 (**the Owners Corporation**).

198 Mr & Mrs Yau brought the Original Proceedings seeking relief in relation to the alleged failure on the part of the Owners Corporation to maintain properly and keep in a state of good and serviceable repair the common property and personal property vested in the Owners Corporation. An obligation to do so is imposed by s 62 of the *Strata Schemes Management Act 1996* (NSW) (**the Management Act)**. In the Original Proceedings, the Owners Corporation was represented by senior and junior counsel who were instructed by solicitors retained on behalf of the Owners Corporation.

199 The Original Proceedings were fixed for hearing before the Chief Judge in Equity for several days commencing on 12 August 2013. On the third day of the hearing, the parties, by their respective counsel, asked the Chief Judge to make the Impugned Orders, which were embodied in short minutes that had been prepared by counsel for the parties following discussions between them. By the Impugned Orders, the Chief Judge noted undertakings given by the Owners Corporation to Mr & Mrs Yau to pass resolutions at a general meeting of the Owners Corporation and ordered the Owners Corporation to maintain, renew, repair or replace the kitchen exhaust system and the grease waste

system said to be part of the common property of the Owners Corporation. Her Honour also made orders relating to the carrying out of certain works by the Owners Corporation in relation to a kitchen exhaust fan and an existing grease arrestor. The Owners Corporation was ordered to pay damages to Mr & Mrs Yau in the amount of $285,000 and to pay their costs of the Original Proceedings as agreed or assessed.

200 In accordance with the Impugned Orders, the Owners Corporation paid the sum of $285,000 to Mr & Mrs Yau and, following the assessment of their costs, paid a further sum of $262,372.21 in respect of the costs order. Most of the work required by the Impugned Orders was also carried out by the Owners Corporation. Mr & Mrs Yau also paid out monies in connection with those works.

201 On 17 December 2014, the Owners Corporation commenced fresh proceedings in the Equity Division (**the Revocation Proceedings**) seeking orders, inter alia, that the Impugned Orders be set aside. The Owners Corporation also sought orders that Mr & Mrs Yau repay the sum of $285,000 together with interest and repay the sum of $262,372.21 together with interest. For reasons published on 2 June 2016, a judge of the Equity Division (**the primary judge**) ordered that the Owners Corporation's amended statement of claim in the Revocation Proceedings be dismissed with costs. The Owners Corporation now appeals to this Court from those orders.

202 Instructions given by the executive committee of the Owners Corporation to compromise the Original Proceedings formed the basis for the Impugned Orders. The basis for the claims made by the Owners Corporation in the Revocation Proceedings is that the executive committee did not have authority to give instructions to compromise the Original Proceedings on that basis. Those contentions raise questions as to the effect of provisions of the Management Act that deal with meetings of the executive committee and the powers of the executive committee. Specifically, the Owners Corporation contends that a purported meeting of the executive committee held on 13 August 2013 resolving to compromise the Original Proceedings was not duly convened in accordance with the Management Act. It also contends that

the executive committee did not, in any event, have authority to authorise the expenditure that would be called for by reason of the Impugned Orders.

203 The claims by the Owners Corporation raise questions as to the doctrine of finality of proceedings: *interest rei publicae ut finis litium*. That is to say, it is in the interests of the community generally that there be an end to litigation. That principle is reflected in other maxims, such as *nemo debet bis vexari pro eadem causa* and *res judicata pro veritate accipitur*. That is to say, no one should be harassed a second time in relation to the same claim and a judicial decision must be accepted as correct. Those maxims support the doctrines of *res judicata*.[1]

204 In order to put the dispute in its context, it is desirable to say something about the scheme of the Management Act. It will then be appropriate to address the legal principles relevant to the authority of lawyers to settle litigation.

Scheme of the Management Act

205 Under s 11 of the Management Act, the owners of the lots from time to time in a strata scheme constitute a body corporate. However, an owners corporation is declared to be excluded from the operation of the *Corporations Act* 2001 (NSW). Under s 12, an owners corporation has the functions conferred or imposed on it by or under the Management Act or any other Act. Nevertheless, it appears that an owners corporation is a separate legal entity capable of suing and being sued. Accordingly, an owners corporation has the capacity to instruct and retain legal advisers, subject to the qualification referred to below as to embarking on litigation. Under s 8, on the registration of a strata plan for a strata scheme, there is established an owners corporation in accordance with Pt 2. An owners corporation has the principal responsibility for the management of the scheme. Schedule 2 applies to an owners corporation. This schedule deals with meetings and procedure of owners corporations.

206 Under s 245 of the Management Act, the provisions of the Act have effect despite any stipulation to the contrary in any agreement, contract or arrangement entered into and no agreement, contract or arrangement, whether oral or wholly or partly in writing, operates to annul, vary or exclude any of the

[1] See Rogers v The Queen (1994) 181 CLR 251; [1994] HCA 42 at 273.

provisions of the Management Act. The owners corporation relies on that provision in some respects as vitiating any estoppel relied on by Mr & Mrs Yau, including ostensible authority, which is ultimately based on an estoppel.

207 Section 21 of the Management Act relevantly provides that a decision of an executive committee is taken to be the decision of the owners corporation, provided that in the event of a disagreement between the owners corporation and the executive committee, the decision of the owners corporation prevails. However, under s 21(2)(b), a decision on any matter or type of matter that the owners corporation has determined in general meeting is to be decided only by the owners corporation in general meeting may not be made by the executive committee. Further, under s 21(3), an owners corporation may continue to exercise all or any of the functions conferred on it by the Management Act even though an executive committee holds office.

208 Division 1 of Pt 3 of the Management Act deals with the constitution of the executive committee. Under s 16, which is in Div 1, an owners corporation must appoint an executive committee. If there is no executive committee of an owners corporation, the strata scheme must be administered by the owners corporation. Under s 17 an adjudicator may, on application, make an order appointing a person to convene a meeting of the owners' corporation if no executive committee exists after the first annual general meeting of the owners corporation. Under s 18, the members of an executive committee must, at the first meeting of the executive committee after they assume office as members, appoint a chairperson, secretary and treasurer of the executive committee. Under s 19, an adjudicator may make an order appointing a person to convene a meeting of the executive committee if there is not a chairperson, secretary and treasurer after the first meeting of the executive committee has been held.

209 Part 2 of Sch 3 makes further provision with respect to meetings of an executive committee. In particular, cl 6 of Pt 2 of Sch 3 provides that an executive committee of a large strata scheme **must** give notice of its intention to hold a meeting at least 72 hours before the time fixed for the meeting by giving written notice to each owner of a unit in the scheme and to each executive committee member. It is common ground that the scheme of the

owners corporation in this case is a large strata scheme within cl 6 and that the meeting of the executive committee purportedly held on 13 August 2013 was not convened in accordance with cl 6.

210 Section 62 of the Management Act provides that an owners corporation must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the owners corporation. In addition, an owners corporation must renew or replace any fixtures or fittings comprised in the common property and any personal property vested in the owners corporation. However, those provisions do not apply to a particular item of property if the owners corporation determines by special resolution that:

- it is inappropriate to maintain, renew, replace or repair the property, and
- its decision will not affect the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme.

211 Section 65A of the Management Act relevantly provides that, for the purpose of improving or enhancing the common property, an owners corporation may take action to add to the common property, alter the common property or erect a new structure on the common property. However, that action may only be taken if a special resolution has first been passed at a general meeting of the owners' corporation that specifically authorises the taking of the particular action proposed.

212 Section 75 of the Management Act relevantly provides that an owners corporation must, at each annual general meeting, estimate how much money it will need to credit to its administrative fund for actual and expected expenditure to maintain in good condition, on a day-to-day basis, the common property and any personal property vested in the owners corporation. Under s 75(5), an owners corporation of a large strata scheme must include in the estimates prepared under s 75 at an annual general meeting specific amounts in relation to each item or matter on which the owners corporation intends to expend money or on which the owners corporation is aware money will be likely to be expended, in the period until the next annual general meeting. Under s 80A, if a specific amount has been determined as referred to in s 75(5) for expenditure on any item or matter, the executive committee of the owners

corporation concerned **must not**, in the period until the annual general meeting next occurring after the determination was made, spend on the item or matter an amount greater than the amount determined for expenditure on the item or matter, plus 10%.

213 Under s 80D, an owners corporation or executive committee of an owners corporation must not seek legal advice or the provision of any other legal services, or initiate legal action, for which any payment may be required, unless a resolution is passed at a general meeting of the owners corporation approving the seeking of the advice or services or the taking of that action.

214 Section 153(1) relevantly provides that an adjudicator may make an order invalidating any resolution of the persons present at a meeting of an owners corporation if the adjudicator considers that the provisions of the Management Act have not been complied with in relation to that meeting. An adjudicator may refuse to make an order under s 153 only if the adjudicator considers that the failure to comply with the provision did not adversely affect any person and that compliance with the provisions would not have resulted in the failure to pass the resolution. Under s 154, an adjudicator may order that a resolution passed at a general meeting of an owners corporation be treated as a nullity if satisfied that the resolution would not have been passed but for the fact that the applicant for the order was improperly denied a vote on the motion for the resolution or was not given due notice of the item of business in relation to which the resolution was passed.

Relevant Legal principles

215 Where terms of settlement are signed by counsel for a party in accordance with the authority given by that party, in circumstances where there was no misapprehension or mistake made by counsel in consenting to the terms of settlement, it is doubtful whether it would be open to the party to impugn a judgment signed and entered in pursuance of those terms of settlement. However, where, owing to a mistake or misapprehension, a compromise is agreed upon by counsel in opposition to the client's instructions or in excess of some limitation that has been expressly placed on the authority of counsel, the court may, prior to a judgment or order embodying the compromise being

effected, refuse to give effect to the compromise or act upon the compromise. The question whether a compromise should be set aside depends upon the existence of a ground that would suffice to render a simple contract void or voidable or to entitle the party to equitable relief in respect of it, such as illegality, misrepresentation, non-disclosure of a material fact, duress, mistake, undue influence, abuse of confidence or the like. The question is whether the agreement on which a consent order is based can be invalidated or not. If the agreement cannot be invalidated, a consent order is good.[2]

216 Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, apart from any specific and relevant statutory provision, that proceeding is at an end in that court and is, in its substance, beyond recall by that court. It would not promote the due administration of the law or justice for a court to have a power to reinstate a proceeding of which it has finally disposed.[3] While the inherent jurisdiction of the court may extend to varying orders that have been made, it cannot extend to the making of orders in proceedings that have been brought regularly to an end without any error or lack of jurisdiction.[4]

217 Thus, there is no inherent power to vary an order by which an appeal stands dismissed in a case where the order has been formally drawn up and ended before any application to vary it is made and in which no question arises as to the power of the court to vary an order of that kind.[5] It is a well settled rule that, once an order of a court has been passed and entered or otherwise perfected in a form that correctly expresses the intention with which it was made, the court has no jurisdiction to alter it. The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. On the other hand, the court has the power to vary an order so as to carry out its own meaning or to make plain language that is doubtful. Such a power is inherent in the court.[6]

---

[2] See Harvey v Phillips (1956) 95 CLR 235; [1956] HCA 2 at 242-244.
[3] See Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49 at 530.
[4] See Bailey v Marinoff at 531-532.
[5] See Bailey v Marinoff at 537.
[6] See Bailey v Marinoff at 539.

218 When an appeal has been finally disposed of in a court of appeal by an order duly entered, that court has no inherent power to reopen the case on an application made after the order has been entered. That general proposition may be subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud. However, there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of.[7]

219 It may be that, in wholly exceptional circumstances, a court may have jurisdiction to reopen final orders where the orders were entered by a person purporting to act on behalf of a party who did not have authority to act for the party. However, whether or not counsel appearing in proceedings has actual authority, either express or implied, to compromise the proceedings, counsel properly instructed in any proceedings has ostensible or apparent authority to compromise the proceedings on behalf the party for whom counsel appears. If it be established that counsel entered into a compromise agreement without having actual authority, either express or implied, to do so, the other party would be entitled to rely on the ostensible or apparent authority of counsel, in the sense that the party for whom counsel appears would be estopped from denying authority, unless the other party was aware of the lack of express authority.

Disposition of the Appeal

220 There is no suggestion that senior and junior counsel and solicitors were not properly retained to act for the Owners Corporation in connection with the Original Proceedings. Further, the Owners Corporation does not contend that senior counsel did not have authority to consent to the Impugned Orders. Rather, the Owners Corporation contends that the executive committee did not have authority to make the agreement with Mr & Mrs Yau pursuant to which the Impugned Orders were made by consent. The Owners Corporation relies upon the inherent jurisdiction of the Court to set aside final orders made by it pursuant to a contract between the parties that is void or voidable.

[7] Gamser v Nominal Defendant (1977) 136 CLR 145; [1977] HCA 7 at 147 and 154.

221 Mr & Mrs Yau rely on the ostensible authority conferred on senior counsel for the Owners Corporation by his being retained to appear for the Owners Corporation in the Original Proceedings. The question is whether it is in the interests of justice for a compromise agreement to which effect has been given by the entry of formal orders to be set aside, with the consequence that the orders made in pursuance of the compromise agreement should also be set aside.

222 One difficulty in the present circumstances is identifying any agreement that the Owners Corporation contends should be set aside as having been made without its authority. The relief sought by the Owners Corporation in its amended statement of claim is simply the setting aside of the Impugned Orders and the restitution of the money paid pursuant to the Impugned Orders. The amended statement of claim makes allegations that may be relevantly restated as follows:

- On 9 August 2013 Mr & Mrs Yau offered to settle the Original Proceedings on terms set out in an email sent that day by their solicitor to the solicitor for the Owners Corporation (**the offer**).
- Seven members of the executive committee of the Owners Corporation met on 13 August 2013 (**the 13 August meeting**).
- At the 13 August meeting, the members of the executive committee purported to resolve to settle the Original Proceedings on or substantially to the effect of the terms set out in the offer.
- On the morning of 14 August 2013 the members of the executive committee purported to settle the Original Proceedings on terms substantially to the effect of the terms set out in the offer (**the agreement**).
- On 14 August 2013 the Chief Judge made the Impugned Orders.
- The 13 August meeting was not a valid meeting of the executive committee of the Owners Corporation.
- The executive committee members had no authority to settle the Original Proceedings in the manner in which they purported to do.
- The Owners Corporation is not bound by the agreement.
- The Impugned Orders were made without consent and are null and void.

223 It is by no means clear from those allegations as to whether it is asserted that there was an agreement between the Owners Corporation and Mr & Mrs Yau. The allegation of an “agreement” is simply that the members of the executive

committee purported to settle the Original Proceedings and that that constituted an agreement. It is not stated whether the "agreement" was express or implied or who made the agreement on behalf of the parties. If the Owners Corporation is entitled to have the Impugned Orders set aside, it must establish that the Impugned Orders were made pursuant to a purported agreement between the Owners Corporation and Mr & Mrs Yau that was void because it was made without the authority of the Owners Corporation.

Disposition of the Appeal

224 The allegations made by the Owners Corporation raise further questions according to the way in which their claims are determined. Thus, if the claims are successful, there would be a prospect of a claim by Mr & Mrs Yau against counsel for the Owners Corporation in the original proceedings on the basis of a breach of the implied warranty that an agent gives as to his authority.[8] If, on the other hand, the claims are unsuccessful, there is the spectre of a claim by the Owners Corporation against counsel for entering into a binding contract on behalf of the Owners Corporation that they were not authorised to make.

225 There may also be questions as to the terms upon which solicitors and counsel were retained by and on behalf of the Owners Corporation to conduct the original proceedings. That raises questions as to the implied express authority, or at least ostensible authority, of counsel properly retained in proceedings to enter into a compromise agreement binding on the client. There does not appear to be any suggestion that the Owners Corporation did not have the power to enter into an agreement to compromise the original proceedings on the basis of the Impugned Orders. That, in itself, may raise questions as to the powers of owners corporations under the Management Act.

226 I have had the advantage of reading in draft form the proposed reasons of Beazley P and Leeming JA. I agree, for the reasons proposed by Beazley P, that the appeal should be dismissed with costs. With Leeming JA, I also prefer not to express a view on the question of ratification.

****

[8] See Collen v Wright (1857)8 El & Bl 647 and Black v Smallwood (1966) 117 CLR 52.