Supreme Court

New South Wales

Case Name:	Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111
Medium Neutral Citation:	[2020] NSWSC 1505
Hearing Date(s):	3-6; 11-12 August 2020
Date of Orders:	28 October 2020
Decision Date:	28 October 2020
Jurisdiction:	Equity
Before:	Darke J
Decision:	Declarations and orders to be made as summarised at [277] – [280].
Catchwords:	LAND LAW – strata title – building manager – duration of caretaker agreement – agreement made in 2001 provides for 10 year term with options for three additional 5 year terms – legislation introduced in 2003 regulates appointments of caretakers and duration of caretaker agreements – effect of legislation including transitional provisions upon variations to caretaker agreement made in 2010 and 2015 – variations provided for additional options for further terms – held that agreement as varied not an agreement the duration of which is protected by transitional provisions – held that agreement as varied has maximum duration of 10 years from date when agreement as varied authorised caretaker to act under it – Strata Schemes Management Act 1996, s 40B and Sch 4 Part 4, cl 12 – effect of transitional provisions of Strata Schemes Management Act 2015, ss 66-70 and Sch 3 cll 3, 15 LAND LAW – strata title – owners corporation – meetings of owners corporation – voting by proxy –

voting by a proxy who is a caretaker – where vote would confer or assist in conferring a material benefit on the proxy – where proxies held by persons said to be acting on behalf of caretaker as its agent – the provision that invalidates certain votes by a proxy who is a caretaker held to apply only to votes by the caretaker itself as proxy – Strata Schemes Management Act 1996, Sch 2 Part 2 cl 11

LAND LAW – strata title – building manager – cl 9.3 of caretaker agreement gives owners corporation the right to terminate the agreement if caretaker guilty of gross misconduct or gross negligence in performing its responsibilities – numerous allegations of misconduct or negligence including overcharging, standing for election to executive committee, improper use of electricity and failures in respect of fire safety – held that caretaker was guilty of gross misconduct in taking supply of electricity paid for by owners corporation over 18 year period – held that caretaker was guilty of gross misconduct or gross negligence in failing to promptly report to executive committee about unresolved faults in fire alarm system – owners corporation entitled to terminate caretaker agreement under cl 9.3 – right to terminate exercised by executive committee of owners corporation – right to terminate validly exercised despite no advance approval of general meeting of owners corporation – action of executive committee later ratified by resolution passed at general meeting – caretaker had not in the meantime terminated the agreement for repudiation by owners corporation – upon termination under cl 9.3 parties bound to follow regime laid down by cl 10 of agreement – owners corporation in breach of cl 10 by taking possession of caretaker lot, but conduct held not to be repudiatory – caretaker entitled to damages and compensation pursuant to usual undertaking as to damages for deprivation of possession of caretaker lot – Strata Schemes Management Act 2015, s 68(3)

Legislation Cited: Strata Schemes Management Act 1996 (NSW), s 40B; Sch 2 Part 2, cl 11; Sch 4 Part 4, cl 12
Strata Schemes Management Act 2015 (NSW), ss 66-

	70, Sch 3, cll 3, 15
Cases Cited:	2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409 Berry v CCL Secure Pty Ltd (2020) 94 ALJR 715; [2020] HCA 27 Commissioner of Taxation v Sara Lee Household and Body Care (Australia) Pty Ltd (2000) 201 CLR 520; [2000] HCA 35 DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] NSWCA 117 Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7 European Bank Limited v Evans (2010) 240 CLR 432; [2010] HCA 6 Hughes v NM Superannuation Pty Ltd (1993) 29 NSWLR 653 Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61 Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37 Scott v Ennis-Oakes [2020] NSWCA 239 The Owners Strata Plan No 57164 v Yau (2016) 18 BPR 36,095; [2016] NSWSC 1056 The Owners Strata Plan No 57164 v Yau (2017) 96 NSWLR 587; [2017] NSWCA 341 Waldorf Apartment Hotel The Entrance Pty Ltd v Owners Corporation SP 71623 [2010] NSWCA 226 Wigan v Edwards (1973) 1 ALR 497
Category:	Principal judgment
Parties:	Australia City Properties Management Pty Limited (First Plaintiff/Cross-Defendant) Bo Yun Wang (Second Plaintiff) The Owners - Strata Plan No. 65111 (Defendant/Cross-Claimant)
Representation:	Counsel: Mr N J Kidd SC with Mr S R Meehan (Plaintiffs/Cross Defendant) Mr S Free with Mr O Jones (Defendant/Cross-Claimant) Solicitors:

	Harris Freidman Lawyers (Plaintiffs/Cross-Defendant) Barry Nilsson Lawyers (Defendant/Cross-Claimant)
File Number(s):	2019/257962
Publication Restriction:	None

JUDGMENT

Introduction

1 These proceedings concern a Caretaker Agreement entered into on 30 March 2001 in respect of a strata scheme located in George Street, Sydney and known as The Summit.

2 The Caretaker Agreement was made between the first plaintiff, Australia City Properties Management Pty Ltd, as Caretaker, and the defendant, the Owners Corporation of Strata Plan 65111. The first plaintiff will henceforth be referred to as the Caretaker, and the defendant will henceforth be referred to as the Owners Corporation. A director of the Caretaker, Mr Bo (Robin) Wang, is the second plaintiff.

3 The Strata Plan was registered on 20 March 2001. The building consists of 34 levels from the ground floor up, and 3 levels for parking below. The building predominantly contains residential apartments and associated facilities, and there are also a number of commercial and retail lots.

4 The dispute between the parties arises from the termination of the Caretaker Agreement ("the Agreement") in August 2019. On 17 August 2019 members of the strata committee of the Owners Corporation served a letter of termination of the Agreement upon the Caretaker. The letter stated that the Agreement was terminated with immediate effect pursuant to cl 9.3(iv), which concerns termination if the Caretaker "is guilty of gross misconduct or gross negligence in performing its responsibilities".

5 The Caretaker contends that the Owners Corporation was not entitled to terminate the Agreement. It contends that the conduct of the Owners Corporation in purporting to terminate, and its associated conduct thereafter, amounted to a repudiation of the Agreement, which the Caretaker accepted on 26 August 2019.

6 The Caretaker pursues a claim for loss of bargain damages of about $2 million on the basis that were it not for the repudiation of the agreement by the Owners Corporation, the Agreement would have continued until March 2041. The Caretaker also seeks relief in respect of Lot 179 in the strata scheme. The Caretaker is the registered proprietor of that lot which is located on the ground floor of the building. It was designated as a Caretaker's Lot under the Agreement. It is contended that in circumstances where the Agreement was not validly terminated by the Owners Corporation under cl 9.3, the Owners Corporation is not entitled to invoke the provisions of cl 10 to require the Caretaker to sell the lot to a nominee of the Owners Corporation. Mr Wang makes a similar claim in respect of his Lot 162 in the strata scheme, which is a one bedroom apartment located on level 29. The Caretaker further contends that even if the Agreement was validly terminated under cl 9.3, the Owners Corporation was not entitled to take immediate possession of Lot 179.

7 The Owners Corporation resists these claims on various grounds and, by its Cross-Claim, it seeks damages for numerous alleged breaches of the Agreement including breaches in the nature of charging additional amounts for services the Caretaker was already obliged to provide under the Agreement. The Owners Corporation also claims restitutionary relief in respect of amounts said to have been paid by it to the Caretaker in the mistaken belief that the amounts were due and payable when in fact they were not. The Owners Corporation further claims relief pursuant to the Australian Consumer Law in respect of these amounts, on the basis that the Caretaker's conduct in issuing invoices for payment was relevantly misleading or deceptive or likely to mislead or deceive. There is also a claim against the Caretaker for improper use of electricity supplied to Lot 179 which was paid for by the Owners Corporation.

8 As will be seen, an important aspect of the respective cases concerns the validity of certain agreements between the parties including:

(a) Deeds of Variation entered into in March 2010 and April 2015 which purported to amend the Agreement, including in relation to its term and, in one case, in relation to the remuneration payable thereunder;

(b) the purported appointment in August 2010 of an Assistant Building Manager; and

(c) a Deed entered into on 2 April 2013 for the provision of additional security services.

9 These issues, in turn, raise various questions as to the interpretation and operation of the applicable legislation, notably the *Strata Schemes Management Act 1996* (NSW) ("the 1996 Act"), and pertinent amendments to the 1996 Act that were effected by the *Strata Schemes Management Amendment Act 2002* (NSW) and the *Strata Schemes Management Legislation Amendment Act 2008* (NSW).

10 It is convenient to first refer to some of the salient provisions of the Agreement.

The Caretaker Agreement made on 30 March 2001

11 Clause 1 provides:

> 1. The Owners Corporation engages the Caretaker to perform the duties set out in Schedule 2 in a conscientious, expeditious and workmanlike manner so as to maintain the building and to permit it to be enjoyed to a standard appropriate to a residential development and the Caretaker accepts the engagement upon the terms and conditions of this Agreement.

12 By cl 2 and Item 2 of Schedule 1, the Owners Corporation agreed to pay the Caretaker, in consideration of its performance of the duties specified in Schedule 2, annual remuneration of $360,000 (excluding GST) in equal monthly instalments in arrears. By cl 3, the remuneration was to be varied annually in accordance with movements in the Consumer Price Index. Clause 3.2 provided that at the commencement of the sixth year of the term, and at the expiration of each 5 year period thereafter, the remuneration was to be an amount mutually agreed upon between the Owners Corporation and the Caretaker. Failing agreement, the remuneration was to be determined by an expert (see cl 3.3). It was acknowledged that the remuneration was not to include payment for the provision of leasing, managing and selling agency services conducted by the Caretaker pursuant to cl 4.

13 Clause 4, in effect, gave the Caretaker the right to conduct such services at its own expense, including from the Caretaker's Lots specified in Item 3 of Schedule 1 (see also cl 5). Lot 179 was so specified. (The Caretaker became the registered proprietor of Lot 179 on about 26 July 2001.)

14 Clause 8.1 provided that the Agreement shall be for an initial term of 10 years with an option to renew (vested in the Caretaker by cl 8.2) for three additional

terms of 5 years each as specified in cl 8.4. Thus, the initial term extended to 30 March 2011, and if the three options were exercised, the Agreement would extend to 30 March 2026. It was common ground that the Caretaker exercised the options up to 30 March 2021. The option for the period ending on 30 March 2021 was exercised on about 30 June 2015. By cl 8.3, the next option would not have been open for exercise until 30 June 2025.

15 Clauses 9 and 10 are of some significance. They provide:

> 9.1 This Agreement shall continue in force until it is terminated in accordance with and subject to clauses 9 and 10.
>
> …
>
> 9.2 (i) The Agreement may be terminated by the Caretaker at any time by giving to the Owners Corporation not less than three (3) months' notice in writing;
>
> (ii) The Agreement may be terminated by the Caretaker at any time by notice in writing to the Owners Corporation, should the by-law referred to in Clause 5 be varied or repealed without the consent of the Caretaker.
>
> …
>
> 9.3 The Owners Corporation may terminate the Agreement at any time by notice in writing to the Caretaker if any of the following occur:-
>
> (i) A breach of the Agreement or of a condition of the by-law referred to in Clause 5 is not remedied by the Caretaker within thirty days after written notice (a "Default Notice") has been given to the Caretaker by the Owners Corporation specifying the breach provided that if there is any dispute as to whether a breach has occurred, the matter shall at first instance be referred to mediation under clause 24;
>
> (ii) A breach of the Agreement or of a condition of the said by-law is repeated by the Caretaker within three months of a similar breach of which a Default Notice was given to the Caretaker;
>
> (iii) An order is made for the Caretaker to be wound up, or the Caretaker enters into a Deed of Arrangement, or a receiver or receiver/manager is appointed to it;
>
> (iv) The Caretaker is guilty of gross misconduct or gross negligence in performing its responsibilities;
>
> (v) At the request of the Developer if the Caretaker is in default of any of its obligations to the Developer pursuant to the Deed of Sale of Caretaker Management Rights or any security arrangements with the Caretaker's Financier and the Developer has made or makes arrangements for the Caretaker's obligations pursuant to this Agreement to be met;
>
> (vi) The proprietor or one of the proprietors of the Caretaker's Lots, recorded on the folio of the Register comprising that lot, is not the Caretaker or any shareholder or director of any Caretaker company (at any time after sixty days from the date of this Agreement), or is not an assignee under this Agreement (at any time after sixty (60) days from the assignment to it);

(vii) The Caretaker does not hold any licence (including, if necessary, a restricted real estate agent's licence issued under the Property, Stock & Business Agents Act 1941) or other qualification required for the lawful performance of its responsibilities or exercise of its rights under this Agreement.

9.4 This Agreement may be terminated by the expiration of time.

10. In the event of termination of this Agreement under Clause 9.3:-

1. The Caretaker and/or Guihua Lu must sell or cause the owner(s) of the Caretaker's Lots to sell, together with the Caretaker's interest in this Agreement ('the Caretaker-Management Rights') the Caretaker's Lots to a person nominated by the Owners Corporation;

2. The Owners Corporation may nominate in writing on or before the date being ninety (90) days after the termination of the Agreement, ("the Nomination Period") any person or persons, corporation or corporations ("the Nominee") who shall be deemed to have the right of the first refusal to purchase ("the Right of Pre-emption") from the owners of the Caretaker's Lots in the building together with the Caretaker-Management Rights at such price and upon such terms as are agreed upon between the Caretaker and the Nominee or, failing such agreement, at such price as is fixed as being the fair market value of the Caretaker's Lots and the Caretaker Management Rights by a valuer appointed for the purpose by the Law Society President and on such terms and conditions as are fixed as being the usual ones applicable in such a transaction by a Solicitor appointed for the purpose by the Law Society President. The exercise of the Right of Pre-emption shall be made in writing and served upon the Caretaker within fourteen (14) days after the date of nomination by the Owners Corporation of the Nominee. If no nomination is made by the Owners Corporation within the Nomination Period or if the Right of Pre-emption so created is not exercised then the Caretaker shall be at liberty to affirm this Agreement and to retain the Caretaker's Lots and the Caretaker-Management Rights or to sell the Caretaker's Lots and to assign the Caretaker-Management Rights in accordance with Clause 21.

3. The parties must continue to perform and fulfil all their obligations pursuant to this Agreement during the Nomination Period.

4. The Caretaker must admit the Owners Corporation by its agents, servants and contractors to the Caretakers Lots for the purpose of restoring the lots and its fittings and fixtures to a state of good, serviceable and clean repair.

5. The Caretaker irrevocably appoints the Owners Corporation its attorney for the purpose of doing any act or executing any document necessary for or conducive to the discharge of the Caretaker's responsibilities under this Clause 10.

6. The Caretaker irrevocably consents to the Owners Corporation lodging a caveat over the Caretaker Lots to protect the Owners Corporations interests pursuant to this Clause 10.

16 Expenses were dealt with in cll 11 and 12 which provide:

11. Unless otherwise provided for in this Agreement, and with the exception of fittings and fixtures and personal property of the Owners Corporation and any items or materials necessary for the repair of [sic] replacement of the common property, the Caretaker at its own expense must provide all products,

materials and equipment required for the performance of its letting and caretaking responsibilities.

12. Subject always to any directions the Caretaker may receive from the Owners Corporation, the Caretaker in performing its responsibilities under this Agreement is authorised to engage contractors, if necessary, on behalf of the Owners Corporation to a limit of $1500.00 per month.

17 Clause 18 provides:

18.1 The Caretaker must not seek or accept instructions from the Owners Corporation about the performance of its responsibilities except from the Owners Corporation's strata managing agent or from a person who has been appointed by the Executive Committee for this purpose.

18.2 The Caretaker, or where the Caretaker is a corporation, any shareholder or director of the Caretaker, shall not offer himself for election as an office bearer of the Executive Committee of the Owners Corporation.

18 Clause 20 provides:

20. Nothing contained in this Agreement or inferred from it, of itself or with other circumstances, shall constitute a relationship of partnership or employer and employee between the parties. It is the express intention of the parties that any such relationship is denied.

19 Clause 21 provides:

21.1 The Caretaker may not assign this Agreement without the consent under seal of the Owners Corporation which consent will not be unreasonably withheld. The Owners Corporation will grant its consent to the assignment of the Agreement to a natural person who is, or to a company whose directors are to the reasonable satisfaction of the Owners Corporation:

i) Respectable and of appropriate personal qualities;

ii) Solvent;

iii) Licenced or capable of becoming licenced and possess qualifications, as required for the lawful performance of the Caretaker's responsibilities under this Agreement;

21.2 A change in the shareholding of the Caretaker which alters the effective control of the Caretaker shall constitute an assignment of this Agreement.

21.3 Upon assignment, the Caretaker must be released and discharged from any further liability under this Agreement but without prejudice to the rights and remedies of either party arising in respect of any matter or thing occurring prior to the date of assignment.

20 The duties of the Caretaker are set out in detail in Schedule 2. Schedule 2 is divided into sections headed "1. General Duties", "2. Cleaning Duties", "3. Security Duties" and "4. Leasing Duties".

21 I do not propose to set out any of the details of Schedule 2 at this point. It will be necessary to refer to some of them when considering the questions of

breach of contract and whether the Owners Corporation was entitled to terminate the Agreement pursuant to cl 9.3(iv) for gross misconduct or gross negligence. It is sufficient to note here that at the end of the Schedule the following statement appeared in bold:

> All of the foregoing activities shall be undertaken and carried out by the Caretaker at the reasonable direction of the Owners Corporation and shall not be a delegation of any duty or obligation of the Owners Corporation.

22 I note in passing that Guihua Lu was also a party to the Agreement. Robin Wang gave evidence that she was his grandmother. The references in cll 5 and 10 indicate that Guihua Lu would or might have an interest in the Caretaker's Lots. Mr Michael Wang (Robin Wang's father), and manager of the Caretaker's business (between 2001 and about 2005) used a power of attorney given to him by Guihua Lu to sign the Agreement.

The March 2010 Deeds of Variation

23 Deeds of Variation were executed by the Owners Corporation, the Caretaker and Guihua Lu (again, by Michael Wang under power of attorney) on about 23 March 2010 following the Annual General Meeting of the Owners Corporation held on that day.

24 The first Deed of Variation is of lesser significance to the present dispute. By its terms:

(a) all references in the Agreement to Guihua Lu were deleted;

(b) clause 8.4 was deleted and replaced with a new cl 8.4 which did not alter the existing regime of 3 options for further terms of 5 years;

(c) amendments were made to the details in Schedule 1, including the addition of Lot 162 alongside Lot 179 as a Caretaker Lot; and

(d) it was confirmed that the current remuneration for the year ending 30 March 2010 was $609,250 plus GST.

25 The second Deed of Variation purported to make changes to the provisions concerning the duration of the Agreement. Clause 2.1 provided:

> 2.1 Variation to Caretaking Agreement
>
> The Owners Corporation and the Caretaker agree to vary the Caretaking Agreement as follows:

(a) Vary clause 8.1 by deleting the reference to three (3) additional terms and replacing it with a reference to five (5) additional terms so the clause reads as follows:

'8.1 This Agreement shall be for an initial term of ten (10) years with further options to renew this Agreement for five (5) additional terms each of five (5) years duration.'

(b) Delete clause 8.4 and replacing it with a new clause 8.4 to read as follows:

'8.4 Upon the exercise of each [sic] the options by the Caretaker in accordance with clause 8.3, the Owners Corporation shall grant to the Caretaker the following additional option terms:

(i) The first option of five (5) years commencing on the 31 March 2011 and ending on the 30 March 2016;

(ii) The second option of five (5) years commencing on the 31 March 2016 and ending on the 30 March 2021;

(iii) The third option of five (5) years commencing on the 31 March 2021 and ending on the 30 March 2026;

(iv) The fourth option of five (5) years commencing on 31 March 2026 and ending on the 30 March 2031; and

(v) The fifth term option of five (5) years commencing on the 31 March 2031 and ending on the 30 March 2036

subject to the same terms, covenants and conditions as are contained in the Caretaking Agreement.'

(c) Add the following words to the end of clause 3.3:

'Provided however that the remuneration shall not be less than that received by the Caretaker in the preceding year'.

26 Accordingly, two more options for further terms of 5 years would be added, and cl 3.3 would become subject to a proviso so that on an expert determination of the remuneration, the remuneration could not fall. As was the case with the first Deed of Variation, the second Deed of Variation contained in cl 3 a covenant between the Owners Corporation and the Caretaker as follows:

The Owners Corporation and the Caretaker:

(a) Ratify and confirm all of the terms and conditions of the Agreement as varied by this Deed; and

(b) Agree to be bound by the terms and conditions of the Agreement as varied; and

(c) Acknowledge that it is not the intention of the Owners Corporation to appoint the Caretaker as a Strata Managing Agent under section 27 of the *Strata Schemes Management Act 1996*, nor to delegate to the Caretaker all or any of its functions and that the Caretaking Agreement does not delegate any of its functions to the Caretaker;

(d) Confirm and agree that the current remuneration for the year ending 31 March 2010 is $609,250.00 per annum plus GST.

(e) Confirm and agree that the Agreement was executed by the Owners Corporation on 30 March 2001 with the seal affixed in the presence of Trevor Bright of Bright & Duggan, the duly appointed Strata Managing Agent at that time.

27 It is clear that the terms of this Deed of Variation would operate to confer significant benefits upon the Caretaker.

28 Entry into the Deeds of Variation was the subject of a resolution put to the Annual General Meeting. The Minutes of the Annual General Meeting, apparently prepared by the then strata managing agents (Strata Title Management), record at Item 10:

> 10 Variations / Caretakers agreement
>
> The Owners Corporation RESOLVED to vary the (undated) Caretaker Agreement entered into on the 30th March 2001 as set out in the Deeds of Variation tabled at the meeting.
>
> *Note – Employees of Australian City Properties Management abstained from voting on this matter*

29 Item 7 of the Minutes suggests that the reference in the note to employees of the Caretaker may have been intended to encompass Mr Wang, Mr Di Bitetto and Ms Liu. Item 7 was in the following terms:

> 7 Executive Committee
>
> *At this time Mr Wang, Mr Di Bitetto and Ms Liu made a disclosure of interest in regards to their positions with Australian City Properties Management pursuant to Clause 3A(2), Schedule 3 of the Strata Schemes Management Act 1996.*
>
> It was RESOLVED that the size of the Executive Committee be five (5).
>
> It was RESOLVED that the following be declared elected:
>
> Mr R Wang, Ms [sic] C Di Bitetto, Ms O Liu, Mr O Kavanagh and Mr T Lee

30 However, Mr Wang gave evidence (in his affidavit of 29 May 2020) that not only did the three named persons abstain from voting on the resolution concerning the Agreement, so too did any others with a relationship with the Caretaker including Ms Hu (his mother), Mr Chan and Mr Myers (the Caretaker's then solicitor and "company nominee" in respect of Lot 179). That evidence of Mr Wang's was not challenged, and it is accepted.

The validity of the March 2010 Deeds of Variation

31 The Owners Corporation contends that the Deeds of Variation are void because the purported authority to enter into them was granted by a resolution passed at a general meeting of the Owners Corporation in the absence of the required quorum. In this regard, reliance is placed upon cl 11(7A) of Schedule 2 Part 2 of the 1996 Act which at the relevant time provided:

> 11(7A) A vote by a proxy who is a caretaker, an on-site residential property manager or a strata managing agent is invalid if it would obtain or assist in obtaining a pecuniary interest for, or confer or assist in conferring any other material benefit on, the proxy.

Clause 11(7B) provided:

> 11(7B) For the purposes of subclause (7A), ***material benefits*** include, but are not limited to, the following:
>
> (a) an extension of the term or an additional term of appointment of the proxy as caretaker, on-site residential property manager or strata managing agent,
>
> (b) an increase in the remuneration of the proxy,
>
> (c) a decision of the owners corporation not to proceed with, to withdraw, to delay, to compromise or to settle litigation or other legal proceedings relating to the proxy,
>
> (d) any other decision of the owners corporation that affects litigation or other legal proceedings relating to the proxy.

32 Again, it is clear that the terms of the second Deed of Variation, in particular those concerning the additional options to renew, would confer material benefits upon the Caretaker within the meaning of cl 11(7A). The matter in dispute is whether cl 11(7A) operated in such a way that there was no quorum for the relevant resolution in accordance with the requirements of cl 12(2) of Schedule 2 Part 2. Clause 12(2) provides:

> 12(2) There is a quorum for considering and voting on such a motion or at such an election only if:
>
> (a) at least one-quarter of the number of persons entitled to vote on the motion or at the election is present, either personally or by duly appointed proxy, or
>
> (b) at least one-quarter of the aggregate unit entitlement of the strata scheme is represented by the persons who are present and entitled to vote on the motion or at the election, either personally or by duly appointed proxy.

33 In short, the Owners Corporation submitted that cl 12(2) was not satisfied because all of the proxies recorded in the Minutes were invalid under cl 11(7A) because they were held by persons acting on behalf of the Caretaker as its

agent. It was submitted that there was no quorum where only 15 persons entitled to vote on the motion were personally present, and all of the proxy holders in respect of the 99 persons who were present by a proxy could not cast a valid vote on the motion.

34 The Minutes of the 23 March 2010 Annual General Meeting do record that the owners of 15 lots were present in person, and that the owners of another 99 lots were present by a proxy. Of that 99, Ms Hu held proxies in respect of 84 lots, Ms Liu held proxies in respect of 3 lots, Mr Di Bitetto held proxies in respect of 9 lots, Mr Chan held proxies in respect of 2 lots, and Mr Myers held a proxy in respect of 1 lot (the Caretaker's Lot 179). Each of those proxy holders was an employee of the Caretaker at the time, except for Mr Myers who was retained by the Caretaker as a solicitor and was the "company nominee" to vote in respect of Lot 179 (see cl 10(3)(b) of Schedule 2 Part 2).

35 The Owners Corporation submitted that if cl 11(7A) is to have any practical effect where a caretaker is a corporation, it must be construed in such a way that it applies to any person who is acting on behalf of the corporate caretaker as its agent. It was submitted that otherwise a corporate caretaker could circumvent cl 11(7A) by simply procuring that proxies are held by its agents or others acting at its direction, rather than by itself directly.

36 The Caretaker submitted that cl 11(7A) is only engaged in respect of a vote by a "proxy who is a caretaker"; that is, a vote by the same person who would obtain the pecuniary interest or material benefit. It was submitted that as none of the proxies was a caretaker cl 11(7A) did not apply to them.

37 The submissions of the Caretaker should be accepted. The language of cl 11(7A) is concerned with a proxy who is itself a caretaker, on-site residential property manager or a strata managing agent. The provision renders votes by such proxies invalid in circumstances where the vote would assist in obtaining or conferring certain benefits upon the proxy. The legislature must be taken to have contemplated that caretakers, on-site residential property managers or strata managing agents might be corporations, but has not employed language that would be apt to include proxies who have an employment or agency relationship with the corporation.

38 It should not be overlooked that a proxy is appointed as such by the person entitled to vote. The proxy is to that extent the agent of the appointor and, as the prescribed form shows (see *Strata Schemes Management Regulation 2005* (NSW), Schedule 7), is subject to the direction of the appointor. Accordingly, where an employee or other agent of a caretaker is appointed by someone else as a proxy, the employee or agent, in voting as a proxy, is exercising an authority conferred by the appointor rather than acting in the course of its employment or other agency.

39 There was no evidence of the terms of the appointment of the proxies in respect of the 23 March 2010 Annual General Meeting, or the circumstances in which the appointments were made. It may be assumed, however, that the Chair of the meeting (Mr Andrew Terrell of Strata Title Management) was satisfied that the 99 proxies were given to the named individuals (and not to the Caretaker). In my opinion, had those individuals as proxies voted on the motion concerning the Agreement, their votes would not have been rendered invalid by cl 11(7A).

40 The fundamental basis of the contention that there was no quorum in respect of the motion has not been made out. The attack upon the validity of the March 2010 Deeds fails. It is unnecessary to consider various other arguments advanced by the Caretaker on this issue. I will state, however, that even if a quorum had been lacking when the motion was considered and voted on, I do not think that the resolution would thereby be invalid and of no effect. Whilst the question that arose in *The Owners Strata Plan No 57164 v Yau* (2016) 18 BPR 36,095; [2016] NSWSC 1056 at [87]-[96] (and on appeal in *The Owners Strata Plan No 57164 v Yau* (2017) 96 NSWLR 587; [2017] NSWCA 341 at [103]-[111]) concerned different provisions, namely, the requirement in cl 6 of Schedule 3 to give notice of an executive committee meeting, similar reasoning can be applied in respect of the requirement in cl 12(1) that a motion at a general meeting must not be considered unless there is a quorum present, and s 153 of the 1996 Act indicates that non-compliance would not itself result in the invalidity of the relevant resolution (see also s 185(2)).

The effect of the second Deed of Variation

41 The next issue to consider is the effect the second Deed of Variation had upon the Agreement in respect of its duration. The Owners Corporation contended that the provisions of Part 4A of Chapter 2 of the 1996 Act operated so that the duration was not extended, and was indeed truncated. Those provisions were introduced on 10 February 2003 by the *Strata Schemes Management Amendment Act 2002* (which also introduced cll 11(7A) and 11(7B) into Schedule 2 Part 2). Prior to the commencement of this amending statute, caretakers had not been specifically mentioned in the 1996 Act.

42 The key provisions of the new Part 4A are ss 40A and 40B which provide:

> 40A (1) A caretaker is a person who is entitled to exclusive possession (whether or not jointly with another person or other persons) of a lot or common property and assists in exercising any one or more of the following functions of the owners corporation for the strata scheme concerned:
>
> (a) managing common property,
>
> (b) controlling the use of common property by persons other than the owners and occupiers of lots,
>
> (c) maintaining and repairing common property.
>
> (2) However, a person is not a caretaker if the person exercises those functions only on a voluntary or casual basis or as a member of the executive committee.
>
> (3) A person may be both a caretaker and an on-site residential property manager.
>
> 40B (1) A caretaker is required to be appointed by an instrument in writing (a ***caretaker agreement***) executed before or after the strata scheme commenced by the caretaker and:
>
> (a) by the original owner, if executed before the strata scheme commenced, or
>
> (b) under the authority of a resolution passed at a general meeting of the owners corporation of the strata scheme concerned, if executed after the strata scheme commenced.
>
> (2) Unless it expires or otherwise ceases to have effect earlier, a caretaker agreement (including any additional term under any option to renew it) expires:
>
> (a) at the conclusion of the first annual general meeting of the owners corporation, if the agreement was executed by the original owner, or
>
> (b) when 10 years have expired after it commenced to authorise the caretaker to act under it, in any other case.
>
> (3) The functions of a caretaker under a caretaker agreement may be transferred to another person only with the approval of the owners corporation.

A person to whom those functions are transferred is taken to be appointed as a caretaker by the caretaker agreement.

(4) An owners corporation may terminate a caretaker agreement in accordance with its terms, and may approve a transfer of the functions of a caretaker, if authorised by a resolution at a general meeting of the owners corporation.

43 Mention should also be made of the introduction of s 183A in the following terms:

183A (1) The Tribunal may make an order with respect to a caretaker agreement:

(a) terminating the agreement, or

(b) requiring the payment of compensation by a party to the agreement, or

(c) varying the term or varying or declaring void any of the conditions of the agreement, or

(d) confirming the term or any of the conditions of the agreement, or

(e) dismissing the application.

(2) An order under this section may be made only on an application made by the owners corporation of the strata scheme concerned on one or more of the following grounds:

(a) that the caretaker has refused or failed to perform the agreement or has performed it unsatisfactorily,

(b) that charges payable by the owners corporation under the agreement for the services of the caretaker are unfair,

(c) that the agreement is, in the circumstances of the case, otherwise harsh, oppressive, unconscionable or unreasonable.

(3) Any amount ordered to be paid under this section may be recovered as a debt.

44 Further, a new Part 4 was inserted into Schedule 4, including cl 12 in the following terms:

12 (1) Any agreement that was in force immediately before the commencement of Part 4A of Chapter 2 that, if entered into after that commencement, would be a caretaker agreement is taken to be a caretaker agreement appointing a caretaker.

(2) However:

(a) the caretaker is not required to be or have been entitled to exclusive possession of a lot or common property either while the agreement is in force or as a precondition to entering into the agreement, and

(b) section 40B(2) does not apply to such an agreement, and

(c) an application for an order under section 183A may not be made with respect to such an agreement on the ground that the period for which the agreement is in force is harsh, oppressive, unconscionable or unreasonable.

45 It was not disputed that the Agreement, in the form it was in on 9 February 2003, fell within the terms of cl 12. It follows that the Agreement was taken to be "a caretaker agreement appointing a caretaker". However, s 40B(2) did not apply to the Agreement, and an application under s 183A could not be made with respect to the Agreement on the ground that the period for which the agreement is in force is harsh, oppressive, unconscionable or unreasonable. The Owners Corporation submitted, including by reference to the Second Reading Speech, that the intention was to apply the new provisions to pre-existing caretaker agreements, whilst at the same time allowing those agreements to "run their course".

46 The Owners Corporation submitted that the second Deed of Variation, if valid, was a further appointment of the Caretaker as caretaker, to which the provisions of s 40B applied. Hence, so it was said, it expired 10 years after it commenced to authorise the Caretaker to act under it (see s 40B(2)). The Owners Corporation pointed to cll 3(a) and 3(b) of the Deed whereby the parties ratified, confirmed and agreed to be bound by the terms and conditions of the Agreement as varied. It was thus submitted that the 10 year period set by s 40B(2)(b) would commence on 23 March 2010 and expire on 23 March 2020.

47 The Caretaker submitted that the transitional provisions of cl 12, in particular cl 12(2), continued to apply to the Agreement for so long as the Agreement remained in force. It was submitted that the intention of the parties to the Deed of Variation was not that the existing agreement should be wholly rescinded and replaced by a new agreement (see *Commissioner of Taxation v Sara Lee Household and Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; [2000] HCA 35 at [22]-[25]). It was put that the effect of the submission of the Owners Corporation would be to read cl 12(2)(b) as if it was subject to the proviso "unless such an agreement is materially amended". The Caretaker submitted that in circumstances where long-term agreements are commonly the subject of amendments, the provision should not be read in that way. Rather, for so long as "such an agreement" remains in force, cl 12(2)(b) continues to operate upon it.

48 I agree that the parties did not intend that the existing Agreement be wholly rescinded and replaced by a new agreement. The evident intention was that the parties would henceforth be bound by the Agreement as varied in particular respects. However, it seems to me that the relevant question is whether that agreement as varied is "such an agreement" within the meaning of cl 12(2)(b).

49 An agreement that falls within cl 12(1) is "such an agreement" for the purposes of cl 12(2). It must be an agreement that was in force immediately before the commencement of the new Part 4A of Chapter 2. It might be said that an agreement as varied was in force at that time where, as here, the unamended agreement was then in force. However, that conclusion may depend upon the nature and extent of the variations. Also, it is relevant to consider the subject matter of the statutory provisions involved.

50 The subject matter of s 40B(2), and hence the subject matter of cl 12(2)(b), is the duration of the caretaker agreement. That is also the subject matter of cl 12(2)(c). The legislature clearly intended that a defined class of agreements would be protected from the strictures that would otherwise be imposed by s 40B(2) upon the permissible duration of caretaker agreements, and protected from applications under s 183A based upon their duration. Agreements within that class of agreement would, as the Owners Corporation put it, be allowed to run their course. However, when one reads the statutory provisions as a whole, it is difficult to discern a legislative intention that where such an agreement is later varied so as to increase its duration (even substantially so) the agreement so varied should nonetheless continue to be protected from the strictures of s 40B(2), and exposure to challenge under s 183A on the basis of its duration. Indeed, that seems to me to be contrary to the evident aim of the amendments.

51 Ultimately, I have come to the conclusion that the nature and extent of the amendments effected by the second Deed of Variation in respect of the duration of the Agreement is such that the Agreement as varied cannot be regarded as "such an agreement" within cl 12(2). On that basis, s 40B(2) applies to it, and an application can be made with respect to it under s 183A on the ground that the period for which it is in force is harsh, oppressive, unconscionable or unreasonable.

52 The second Deed of Variation is an instrument in writing, executed under the authority of a resolution passed at a general meeting of the strata scheme, pursuant to which the Caretaker is appointed for a different duration. Instead of a term expiring on 30 March 2011 with options to renew extending to 30 March 2026, there would henceforth be a term expiring on 30 March 2011 with options to renew extending to 30 March 2036. The Caretaker submitted that it would be an absurd result if in these circumstances the legislative provisions operated so that the agreement could not go beyond 23 March 2020. I do not agree. I think it would be an absurd result if the legislative provisions operated so that parties to "such an agreement" within cl 12(2) could vary the agreement by adding decades to its term, and yet retain the benefit of cll 12(2)(b) and 12(2)(c). If that were so, not only would the extended term be valid and protected from challenge under s 183A, it would remain open to the parties to agree to further extensions. I cannot accept that parliament had that intention when Part 4A was introduced into the 1996 Act.

53 In my opinion, the Owners Corporation was correct to submit that the second Deed of Variation was a caretaker agreement to which s 40B(2) applied. Accordingly, the agreement (including any additional term under an option to renew) would expire by statutory force no later than 10 years after it commenced to authorise the Caretaker to act under it. That is, no later than 23 March 2020. It follows that the Agreement (as varied by the second Deed of Variation) would expire no later than that date.

54 It remained the position that the initial term would expire on 30 March 2011, and the Caretaker had the option to extend the term for a further five years to 30 March 2016. That option was exercised on 8 July 2010. A Deed of Extension was entered into by the Owners Corporation and the Caretaker on 12 August 2010 to give effect to the extension.

The April 2015 Deed of Variation

55 On 29 April 2015 (in the course of that extended term) the Owners Corporation and the Caretaker entered into another Deed of Variation. Entry into the deed was authorised by a resolution passed at the Annual General Meeting held on that day. Clause 2 of the deed provided for the Agreement to be varied by

inserting yet another option to renew, for a five year period commencing on 31 March 2036 and ending on 30 March 2041. Clause 4 of the deed contained a covenant to the same effect as the covenant contained in cl 3 of the March 2010 deeds, namely, that the parties agreed to be bound by the terms and conditions of the Agreement as varied.

56 The Caretaker submitted that if the second Deed of Variation of March 2010 was regarded as an appointment of the Caretaker for a new term then it would follow that the April 2015 Deed of Variation should also be so regarded, in which case the statutory expiry date would become 29 April 2025. The Owners Corporation submitted that this did not follow as the April 2015 deed was not an instrument that appointed the Caretaker for any period of time but rather purported to give the Caretaker a new right being an option to be the caretaker between 2036 and 2041 if it so chose.

57 The April 2015 Deed of Variation is more limited in scope than the second Deed of Variation of March 2010. It says nothing about remuneration, for example. Nonetheless, I think it is an instrument (executed under the authority of a resolution passed at a general meeting) pursuant to which the Caretaker is appointed for a different duration. Instead of a term expiring on 30 March 2016 with options to renew extending to 30 March 2036, there would henceforth be a term expiring on 30 March 2016 with options to renew extending to 30 March 2041. It therefore seems to me that the April 2015 Deed of Variation should also be regarded as a caretaker agreement to which s 40B(2) applied, such that the Agreement as varied by it would expire no later than 29 April 2025. On 30 June 2015, the Caretaker exercised the option to renew for the term ending on 30 March 2021.

58 As I see it, both the second Deed of Variation of March 2010 and the April 2015 Deed of Variation operated in accordance with their terms, but subject to the operation of s 40B(2). That provision would only operate to cause the Agreement to expire if the Agreement had not expired or otherwise ceased to have effect when 10 years have elapsed after the relevant instrument commenced to authorise the Caretaker to act under it. Of course, s 40B(2) was repealed as part of the general repeal of the 1996 Act on 30 November 2016,

before that point was reached. It is thus necessary to consider the savings and transitional provisions of the replacement legislation, the *Strata Schemes Management Act 2015* (NSW) ("the 2015 Act").

59 Before turning to those provisions, it should be noted that the Owners Corporation challenged the validity of the April 2015 Deed of Variation on the basis that there was a lack of a quorum at the Annual General Meeting. The challenge was advanced on two grounds. First, that it was evident from the Minutes that the requirements of cl 12(2) of Schedule 2 were not met; and secondly, because a number of proxies were acting on behalf of the Caretaker as its agent. For the reasons given earlier, I reject that second ground. I would add that the factual basis for that ground was not made out in any event. As for the first ground, whilst the information contained in the Minutes leaves open the possibility that the requirements of cl 12(2) were not met, I would not draw that conclusion in the absence of further information about the persons shown on the strata roll at the time (see cl 10(1)) and the payment of contributions (see cl 10(8)). Moreover, as I have already said, I do not think that a lack of a quorum would result in the invalidity of the resolution that authorised entry into the April 2015 Deed of Variation.

The savings and transitional provisions of the 2015 Act

60 Broadly, the 2015 Act dealt with the same subject matter as the 1996 Act, and in more or less equivalent terms. As far as caretakers are concerned, the 2015 Act employed the term "building manager". Building managers were the subject of Part 4 Division 4 (ss 66 to 70).

61 Building manager is defined in s 66(1) as follows:

> A ***building manager*** is a person who assists in exercising any one or more of the following functions of the owners corporation:
>
> (a) managing common property;
>
> (b) controlling the use of common property by persons other than the owners and occupiers of lots,
>
> (c) maintaining and repairing common property.

62 Unlike the position under s 40A of the 1996 Act, it was no longer a requirement that the person be entitled to exclusive possession of a lot or common property (see s 66(4)).

63 Section 67 provides:

> 67(1) A building manager may be appointed for a strata scheme.
>
> (2) The appointment is to be made by instrument in writing (a ***building manager agreement***) executed before or after the strata scheme commenced by the building manager and:
>
> (a) by the original owner, if executed before the strata scheme commenced, or
>
> (b) under the authority of a resolution passed at a general meeting of the owners corporation of the strata scheme, if executed after the strata scheme commenced.

Section 67(2) can be seen as the equivalent of s 40B(1) of the 1996 Act.

64 The term of appointment of building managers is dealt with in s 68 which provides:

> 68(1) A building manager agreement (including any additional term under any option to renew it) expires (if the term of the appointment does not end earlier or is not ended earlier for any other reason):
>
> (a) at the conclusion of the first annual general meeting of the owners corporation, if the agreement was executed before the meeting, or
>
> (b) when 10 years have expired after it commenced to authorise the building manager to act under it, in any other case.
>
> (2) A person may be reappointed as building manager for a strata scheme at the end of the person's building manager agreement.
>
> (3) The appointment of a building manager may be terminated in accordance with the building manager agreement, if authorised by a resolution at a general meeting of the owners corporation.

Section 68(1) can be seen as the equivalent of s 40B(2) of the 1996 Act.

65 Savings and transitional provisions are contained in Schedule 3 to the 2015 Act. Clause 3 provides:

> 3(1) Any act, matter or thing done or omitted to be done under a provision of the former Act and having any force or effect immediately before the commencement of a provision of this Act that replaces that provision is, on that commencement, taken to have been done or omitted to be done under the provision of this Act.
>
> (2) This clause does not apply:
>
> (a) to the extent that its application is inconsistent with any other provision of this Schedule or a provision of a regulation made under this Schedule, or
>
> (b) to the extent that its application would be inappropriate in a particular case.

Clause 15 provides:

> 15(1) An agreement in force immediately before the commencement of this clause is taken to be a building manager agreement for the purposes of this Act, despite any of the provisions of the agreement, if:
>
> (a) the agreement provides for the appointment of a person to carry out any of the functions specified in section 66(1) in relation to the owners corporation for a strata scheme, and
>
> (b) the primary purpose of the agreement is to provide for that appointment and related matters, and
>
> (c) the person is not entitled to exclusive possession of a lot or common property in the strata scheme.
>
> (2) Any such building manager agreement expires 10 years after the commencement of this clause unless the terms of the agreement provide that it expires on an earlier day or the agreement is terminated on an earlier day.
>
> (3) A reference in any instrument to a caretaker in relation to a strata scheme is taken to be a reference to a building manager in relation to that scheme.

66 The Caretaker submitted that as it was entitled to exclusive possession of a lot in the strata scheme, cl 15(1) was not satisfied in respect of the Agreement, and the Agreement was thus not a building management agreement for the purposes of the 2015 Act. The Owners Corporation submitted that the Agreement, in the form it existed upon the commencement of the 2015 Act, fell within the general savings provision of cl 3(1). It was submitted that if the second Deed of Variation of March 2010 was valid, it took effect as an instrument of appointment under s 40B(1) of the 1996 Act. I think that is correct (and in my view the same can be said about the April 2015 Deed of Variation). It was submitted, on that basis, that the appointment was something done under a provision of the 1996 Act that had force or effect immediately before the commencement of a provision of the 2015 Act that replaced that provision (that is, s 67(2)). It followed that on the commencement of the 2015 Act, the appointment was taken to have been done under s 67(2) of the 2015 Act. The Agreement was thus a building manager agreement for the purposes of the 2015 Act.

67 I accept these submissions of the Owners Corporation. I also accept its further submissions in support to the effect that cl 15 of Schedule 3, which applies to only a limited class of agreement, was not intended to exhaustively define the pre-existing caretaker agreements that would be taken to be building manager agreements under the new Act.

68 Accordingly, when the 2015 Act came into force, the Agreement, as a building manager agreement under the Act, became subject to s 68(1), the equivalent of the former s 40B(2). It therefore seems to me that the Agreement (as varied by the deeds in 2010 and 2015) would by virtue of s 68(1) expire no later than 29 April 2025. As noted earlier, on 30 June 2015 the Caretaker exercised the option to renew for the term ending on 30 March 2021.

Was the Owners Corporation entitled to terminate the Agreement on 17 August 2019?

69 The Owners Corporation raises numerous matters in support of its contention that it validly terminated the Agreement. There is some overlap here with the Cross-Claim brought by the Owners Corporation, particularly insofar as it is alleged that the Caretaker overcharged for services that it was required to provide under the Agreement. It is convenient to deal first with these allegations of overcharging.

Overcharging

70 The Owners Corporation alleges that in addition to the remuneration to which it was entitled under the Agreement, the Caretaker charged amounts for services that were not "additional services" but were in fact services required to be provided by it under the Agreement. In summary, these amounts were:

(a) about $593,000 for an Assistant Building Manager, purportedly appointed in August 2010;

(b) about $1.9 million for additional security services, pursuant to a Deed entered into on 2 April 2013 and various other arrangements for such services; and

(c) about $210,000 for additional cleaning services, pursuant to various arrangements for such services.

71 Mr Wang gave evidence about the circumstances in which the Assistant Building Manager ("ABM") was appointed. He deposed that since 2008 the Owners Corporation had been involved in litigation with Meriton in relation to certain building rectification works, and the Caretaker (through himself and Mr Di Bitetto) carried out a number of tasks connected with the litigation. Mr Wang was of the view that these tasks were outside the scope of the Agreement. He says that he raised the issue at one or more meetings of the Executive Committee in late-2009 and early 2010, and suggested that an additional

person be put on to cover these tasks. It seems that this suggestion, or at least the suggestion that the additional person be paid by the Owners Corporation, was initially met with resistance from some members of the Executive Committee.

72 In May and June 2010, Mr Wang raised the matter with Mr Terrell and later Mr Johnson of the Strata Manager, and he asked Mr Hsueh, then a casual employee of the Caretaker, whether he would be interested in taking on the role of ABM. Mr Hsueh was keen. Mr Wang again raised the issue at a meeting of the Executive Committee on 21 June 2010. It appears that on that occasion, the Executive Committee resolved that the Caretaker would present a proposal at the next meeting on 2 August 2010.

73 The minutes of that meeting record that it was resolved that "the proposal from Mr Hsueh be accepted for the position of assistant building manager", with the Executive Committee approving a maximum wage of $55,000 plus superannuation. I note in passing that of the five committee members present, three were associated with the Caretaker, namely, Mr Wang, Mr Di Bitetto, and Ms Liu.

74 Mr Hsueh accepted in cross-examination that when he became the ABM he was given a copy of the schedules to the Agreement and told that they set out the responsibilities of the building manager with which he was to assist. Mr Hsueh understood that his role was to assist Mr Di Bitetto, the Building Manager at the time, because he needed assistance in carrying out those duties. Mr Hsueh deposed that he was given training by Mr Di Bitetto between about August 2010 and early-2011 about various tasks required to properly manage the building. These tasks, as described by Mr Hsueh, seem to fall within the ambit of the Agreement. However, Mr Hsueh deposed that at least some of the tasks he undertook were related to the litigation involving Meriton, such as arranging for access to be given to experts and lawyers. In March 2012 Mr Johnson of the Strata Manager wrote a letter seeking to have Mr Hsueh excused from jury duty on grounds that included Mr Hsueh's involvement in the "defect rectification proceedings against Meriton". Mr Hsueh remained in the position of ABM until about January 2017, when he became

the Building Manager. He was replaced as ABM by Mr Buchan. A series of others served in the position thereafter.

75 The Owners Corporation contends that the decision of the Executive Committee approving the appointment of the ABM is void or not binding upon it because the approval of the Owners Corporation in general meeting was required in accordance with s 40B of the 1996 Act. It is contended that the approval of the general meeting was required because the agreement to appoint the ABM was either an appointment of a caretaker within the meaning of s 40A, or an amendment to a caretaker agreement within the meaning of s 40B.

76 I do not accept those submissions. The ABM does not fall within the definition of a caretaker, found in s 40A, because the ABM (Mr Hsueh) was not a person entitled to exclusive possession of a lot or common property in the strata scheme. Neither do I accept that the decision amounts to an amendment of the Agreement. It is a separate agreement intended to operate in conjunction with the Agreement, the terms of which remain unaltered. In any event, I do not think that s 40B requires that any amendment to a caretaker agreement be made under the authority of a resolution passed at a general meeting. The provision operates only in respect of an appointment of a caretaker or a transfer of the functions of a caretaker to another person. The resolution of the Executive Committee on 2 August 2010 was not of that character.

77 The main argument advanced by the Owners Corporation is that the decision of the Executive Committee approving the appointment of the ABM is void for want of consideration due to the Caretaker's pre-existing obligations under the Agreement. It was submitted that the functions Mr Hsueh was told he would carry out, and the functions he in fact carried out, including the work done in relation to the litigation with Meriton, were all functions that the Caretaker was already obliged to carry out. It was submitted, for example, that liaising with tradespeople who need access to the building fell within the Agreement whether that was sought for the purposes of assessing defects the subject of the litigation, or otherwise. It was further submitted that there was no "carve out" from the Agreement for work of that kind.

78 The Caretaker submitted that the agreement to approve the appointment of the ABM was not an agreement to perform an existing duty and nothing more. It was submitted that the promised services of the ABM went beyond the duties of the Caretaker under the Agreement, particularly in relation to the assistance that was being given to the Owners Corporation in relation to the legal proceedings. The Caretaker did not suggest that the ABM did not perform any services of the type that are required under the Agreement, but submitted that the need for the ABM came about because of the great deal of work associated with the Meriton litigation. It was thus submitted that there was consideration because what was promised to be done was not indistinguishable from the existing promises. Reference was made to the judgment of Mason J (as his Honour then was) in *Wigan v Edwards* (1973) 1 ALR 497 at 512, where his Honour said:

> The first question which arises is whether there was valuable consideration for the appellant's promise of 22 April 1969. The general rule is that a promise to perform an existing duty is no consideration, at least when the promise is made by a party to a pre-existing contract, when it is made to the promisee under that contract, and it is to do no more than the promisor is bound to do under that contract. The rule expresses the concept that the new promise, indistinguishable from the old, is an illusory consideration. And it gives no comfort to a party who by merely threatening a breach of contract seeks to secure an additional contractual benefit from the other party on the footing that the first party's new promise of performance will provide sufficient consideration for that benefit.
>
> An important qualification to the general principle is that a promise to do precisely what the promisor is already bound to do is a sufficient consideration, when it is given by way of a bona fide compromise of a disputed claim, the promisor having asserted that he is not bound to perform the obligation under the pre-existing contract or that he has a cause of action under the contract…

79 It may be debateable whether activities such as arranging access to the building for experts and lawyers falls within the ambit of the Agreement. Importantly, however, Mr Wang was asserting in late-2009 and early-2010 that the Caretaker was doing a lot of extra work of that nature and that this was outside the scope of the Agreement. He suggested that an additional person be engaged to cover that work. Mr Wang gave evidence, which I accept, that at the Executive Committee meeting on 21 June 2010 he said words to the following effect:

> Obviously we are under resourced and understaffed as we are dealing with significant overcrowding issues and a large defects case. The Assistant

> Building Manger will assist Colin [Di Bitetto] in performing duties outside of the caretaker agreement and will assist in performing duties within the agreement where needed. We propose that the Assistant Building Manager be paid a total salary package of about $50,000 including super.

80 I further accept that at the Executive Committee meeting on 2 August 2010 Mr Wang said:

> The Assistant Building Manager is needed to carry out the vast duties involved with the defect works and the case against Meriton. As I said at the last meeting, the Owners Corporation will be responsible for the payment of his salary, which has been budgeted for.
>
> …
>
> We recommend that Mr Hsueh take on the role. We think he is perfect for the job. It makes sense for ACPM to employ Mr Hsueh directly as Colin [Di Bitetto] and I will manage and oversee his employment.

81 It was envisaged that the ABM (Mr Hsueh) would be employed by the Caretaker, but the Owners Corporation would bear the cost of his salary. That is the way it turned out.

82 The context in which approval was given to the ABM involved an assertion on the part of the Caretaker that it was undertaking tasks in relation to the Meriton litigation that it had no obligation to perform under the Agreement, and that this was causing difficulty for the Caretaker. A suggestion was made that an ABM be retained as a solution to the problem. It was explained that the appointment of an ABM, at the cost of the Owners Corporation, would assist by performing duties both outside the scope of the Agreement and within the scope of the Agreement. I accept that Mr Wang, in making the statements about the ABM, was advancing views genuinely held by him. There was, at least initially, some resistance to what Mr Wang was proposing.

83 Under the proposal for the engagement of an ABM, the Caretaker was promising that it would, with the assistance of the ABM, undertake tasks including some which it hitherto claimed it was not bound to undertake. The agreement reached when the proposal was later accepted is in the nature of a genuine compromise or settlement of the issue raised by the Caretaker. It falls within the important qualification to the general principle as identified by Mason J in *Wigan v Edwards* (supra) at 512. I accept the submissions made by the Caretaker to this effect. It follows that I do not accept that the agreement approving the appointment of the ABM is void for want of consideration.

84 In any event, I do not think that work in connection with the Meriton litigation, including arranging access for experts and lawyers, was already covered by the Agreement. In my view, such tasks are not within the ambit of the Agreement. Unless the subject of a further agreement as envisaged by cl 1(ah) of Schedule 2, tasks of that character do not seem to fall within Schedule 2 to the Agreement.

85 The Owners Corporation has failed to establish that the Caretaker, by charging the Owners Corporation in respect of the ABM, engaged in any overcharging. Further, it has not been shown that the Caretaker, by invoicing the Owners Corporation in respect of the ABM, engaged in any conduct that was misleading or deceptive, or likely to mislead or deceive. Neither is there any basis for the Owners Corporation to recover payments made in respect of the ABM on any restitutionary grounds.

86 The next category of alleged overcharging concerns payments made for additional security services. That is to say, security services in addition to the services provided by the security guard that had been engaged by the Caretaker in about 2002 and paid for by the Caretaker. Mr Wang deposed that this security guard was engaged to assist the Caretaker's staff in providing the required security services under the Agreement. Clause 1(ai) of Schedule 2 to the Agreement provides that the Caretaker is required to be available at the reception areas of the building between certain hours of each day, and is required to use its best endeavours to ensure that the reception areas are attended for 24 hours per day "by either the Caretaker or a security guard". In this regard, Mr Wang gave evidence that from 2002 until the termination of the Agreement the Caretaker engaged a security guard to provide 99 hours of security shifts per week (said to be approximately 6:30pm to 7:00am each day – although that suggests only 87.5 hours per week).

87 Since about 2002 other security services have been provided by the Caretaker and charged for in addition to the remuneration payable under the Agreement. Mr Wang gave extensive evidence about these arrangements in his affidavit of 29 May 2020. In brief summary, Mr Wang gave evidence about:

(a) arrangements made for additional security principally on Friday, Saturday and Sunday nights; and

(b) arrangements for additional security to assist in dealing with the problems associated with overcrowding of units in the building, including use of Security Access Keys.

88 As to (a), there is evidence of a request made by the Executive Committee on 29 October 2001 for an additional security guard overnight from 6:00pm to 6:00am each day, initially on a three month trial basis. On 28 October 2002, the Executive Committee decided, as a cost saving measure, to reduce the additional security to Friday, Saturday and Sunday evenings, again on a trial basis. On 7 February 2003, the Executive Committee decided that the current security arrangements would remain, with reviews to be held quarterly or whenever deemed necessary.

89 Evidence in the form of invoices issued by the Caretaker show that the amount of additional security varied from time to time. It appears, for example, that in about mid-2006 the additional security was reduced to only Friday and Saturday nights. The invoices also show additional security provided on an ad hoc basis for particular occasions (New Year's Eve is one example). On 4 May 2009, the Executive Committee resolved that an extra security guard be engaged on Sunday nights for a trial period of 6 months.

90 As to (b), there is evidence that problems associated with overcrowding in the building were persistent. These problems were raised, for example, at Executive Committee meetings in June, August and October 2008. The minutes of the Executive Committee meeting held on 2 November 2009 record that the Caretaker and the Strata Manager were to "work on a plan" in relation to overcrowding. At the Executive Committee meeting held on 14 December 2009 it was resolved to engage a solicitor to provide advice in relation to overcrowding in the scheme.

91 Mr Wang gave evidence that some of the ad hoc increases in security were aimed at assisting in managing the overcrowding problem. The issue was discussed at the Executive Committee meeting on 1 March 2010. By that time, the solicitor had provided advice and it seems suggested that some by-laws be made. It was resolved "to adopt by-laws in relation to overcrowding for the

AGM". A special resolution was passed at the Annual General Meeting on 23 March 2010 for the making of additional by-laws directed to the issue.

92 The overcrowding issue continued to be the subject of discussion at Executive Committee meetings in 2010. It seems that some improvements were observed (see, for example, the minutes of the 2 August 2010 meeting) but, as shown by the regular reports of the Caretaker to the Executive Committee, the problems persisted into late-2012 and early-2013.

93 At the Annual General Meeting held on 28 March 2013, a resolution was passed (said to be in accordance with s 40C of the 1996 Act) to amend the Agreement "to reflect the additional security services provided by Australia City Property Management Pty Ltd in response [to] the additional measures required for controlling overcrowding".

94 On 2 April 2013, the Caretaker and the Owners Corporation entered into a Deed whereby the Agreement was varied by the insertion of new cll 29 and 30 as follows:

> 29. In addition to the duties set out in Schedule 2 of the Caretaking Agreement, the Owners Corporation engages the Caretaker to provide the Additional Security Services during the Security Term at the Premises during the Additional Security Hours. For the avoidance of doubt, the Caretaker may engage a contractor or agent to provide the Additional Security Services.
>
> 30. Despite clause 12, the Owners Corporation agrees to pay the Additional Fee for the Additional Security Services to the Caretaker.

The Additional Security Services and the Additional Security Hours were defined in Parts 1 and 2 respectively of the Schedule to the Deed. The services, as defined, are clearly directed towards the overcrowding issue, in particular the use of Security Access Keys, and inspections of units suspected of overcrowding.

95 By cl 3.1 of the Deed, the parties ratified, confirmed and agreed to be bound by the terms of the Agreement as varied.

96 The Owners Corporation contends that the Caretaker was not entitled to the payments that were made on top of the remuneration under the Agreement for the various additional security services as described above. These payments

were made by the Owners Corporation in relation to invoices issued by the Caretaker from time to time.

97 The Owners Corporation submitted that any purported authorisation by the Executive Committee for further payments for security personnel is void or not binding upon it because approval was required in accordance with s 40B of the 1996 Act. Again, it was contended that the approval of the general meeting was required because the agreements to engage further security personnel were either appointments of a caretaker within the meaning of s 40A, or amendments to a caretaker agreement within the meaning of s 40B.

98 For substantially the same reasons as given earlier in relation to the ABM, I do not accept those submissions. No appointment of a caretaker within the meaning of s 40A was involved and, apart from the amendments effected by the Deed of 2 April 2013 (which were the product of a resolution passed at a general meeting), no amendment of the Agreement was made. The various agreements in respect of additional security for Friday, Saturday and Sunday nights and other occasions on an ad hoc basis, and the agreements made before 2 April 2013 in respect of additional security to assist with problems associated with overcrowding, were separate agreements intended to operate in conjunction with the Agreement (the terms of which were to remain unaltered). This is reflected in the forms of the invoices issued by the Caretaker, which show the amount for additional security as an item separate from the remuneration under the Agreement. In any event, I do not think that s 40B requires that any amendment to a caretaker agreement be made under the authority of a resolution passed at a general meeting. Section 40B only operates in respect of an appointment of a caretaker or a transfer of the functions of the caretaker to another person. Neither of those is involved here. I should add that at least some of the agreements for additional security were made prior to the coming into force of the new Part 4A of the 1996 Act (which includes ss 40A and 40B).

99 The Owners Corporation further submitted that any agreements beyond the Agreement itself and the Deed of 2 April 2013 (if valid) for additional security personnel are void for want of consideration due to the Caretaker's pre-existing

obligations under the Agreement (and/or the Deed of 2 April 2013 if valid). The Owners Corporation referred to cl 3(a) of Schedule 2 to the Agreement which requires the Caretaker to ensure that the reception areas are attended 24 hours a day 7 days a week, and cl 1(ai) of Schedule 2, referred to earlier, which requires the Caretaker to be available at the reception areas between certain hours and to use its best endeavours to ensure that the reception areas are attended for 24 hours per day by either the Caretaker or a security guard. The Owners Corporation then referred to Mr Wang's evidence about the security guard engaged by the Caretaker to provide 99 hours of service each week. By reference to the hours specified in cl 1(ai), it was submitted that this revealed a "deficit" of at least 13 hours (and perhaps as much as 24.5 hours) as the Caretaker was obliged to have a security guard, in addition to the Building Manager, working 112 hours per week. Thus it was put that the Caretaker was not entitled to say that 99 hours of security services represented the complete fulfilment of its contractual obligations in that regard. It was suggested that the "overnight security guard" was simply filling in a gap left by the Caretaker's failure to perform its obligations under the Agreement.

100 I do not think that this accurately reflects the contractual position. Whilst the Agreement provides that the Caretaker has "Security Duties" (specified in cl 3 of Schedule 2), and contemplates that the Caretaker might engage a security guard to attend the reception areas (see cl 1(ai)), the Caretaker is not bound to have a security guard carry out any of those duties, much less employ a security guard for 112 hours per week. As explained by Mr Wang in his affidavit, the security guard engaged to provide 99 hours of service was to assist the staff of the Caretaker in providing the required security services under the Agreement. In cross-examination, Mr Wang gave evidence to the effect that the 112 hours (derived from cl 1(ai) of Schedule 2) was covered through the employees of the Caretaker. I take it from Mr Wang's evidence that the required hours are filled by a combination of the security guard and employees of the Caretaker. That mode of performance is clearly envisaged by cl 1(ai) of Schedule 2.

101 I do not agree that the security services provided pursuant to the various agreements to engage further security personnel were services the Caretaker

was already obliged to provide under the Agreement. Again, it may be debateable whether some of these services would fall within the Agreement but the services appear to have been regarded by the Executive Committee as involving something additional, such that it was not unreasonable for the Owners Corporation to bear the cost. Accordingly, it cannot be said that any of those agreements are void for want of consideration. It follows that I do not accept that the further security personnel merely supplied a deficiency in the Caretaker's performance of its obligations under the Agreement.

102 The Owners Corporation separately attacked the validity of the Deed of 2 April 2013 on the basis that at the Annual General Meeting on 28 March 2013 there was no quorum for the relevant resolution because almost all of the proxies present were held by Ms Hu or Mr Di Bitetto on behalf of or as agent for the Caretaker. The argument is to the same effect as those made in relation to the March 2010 Deeds of Variation and the April 2015 Deed of Variation, and may be rejected on the same grounds.

103 The Owners Corporation has failed to establish that the Caretaker has engaged in any overcharging in respect of additional security services, and it has not been shown that by invoicing the Owners Corporation for those services the Caretaker has engaged in conduct that is misleading or deceptive or likely to mislead or deceive. Again, no basis has been shown for the Owners Corporation to recover payments made in respect of those services on any restitutionary grounds.

104 The final category of alleged overcharging concerns payments made for additional cleaning services. These payments fall into two categories, namely, payments for cleaning of the Summit Arcade, and payments for "bi-annual cleaning". In each case, the Owners Corporation says that it had no obligation to make the payments as no valid agreement was made in relation to those particular services, and the Caretaker was in any event obliged to provide the services under the Agreement.

105 Mr Wang gave evidence that by 2008 increasing wear and tear in the common areas meant that additional maintenance services were required, including in relation to the hard floor surfaces in the Arcade, which needed professional

stripping and sealing with specialised equipment. The minutes of an Executive Committee meeting held on 8 December 2008 record that it was resolved that the Caretaker accept a quotation for the cleaning and sealing of tiles in the Arcade Area, Lobby Area, Pool Area, Office Area and Lift Area Floors.

106 On 7 August 2009 Mr Wang sent an email to Mr Terrell of the Strata Manager in the following terms:

> I have just received a complaint from cleaners that there's a lot of work required in the arcade areas especially the flooring of the arcade need to be constantly stripped and cleaned on a fortnightly basis in order to keep the arcade looking up to scratch. I believe according to the Caretaker's Agreement, the strip clean of the floor area in the arcade is not covered within the agreement.
>
> The cleaners are proposing a cost of $75 +GST per week for cleaning of the arcade flooring and other works involved i.e. dumping of the garbage and cleaning of the commercial garbage etc. Could you put this forward to the Committee as this is additional works for the cleaners and advise me accordingly.

107 At the Executive Committee meeting held on 24 August 2009, it was resolved that a fee of $75 per week (excluding GST) be paid to the cleaners of the Summit "for the additional works involved in the strip cleaning of the Summit arcade". The resolution stated that this was to be for a six month trial period, after which the matter would be reviewed. At the Executive Committee meeting on 1 March 2010 a resolution was passed in the following terms:

> 5.2 Cleaning – extra duties
>
> It was **RESOLVED** to commence extra cleaning duties on the following schedule;
>
> Arcade area stripping and sealing – every 4 months
>
> Main lobby area stripping and sealing – every 3 months
>
> Carpet claiming all floors – every 6 months or sooner if deemed necessary

108 The evidence is sparse as to the detail, but it appears that the extra cleaning duties, including in relation to the Arcade, were continued thereafter. It further appears that "half-yearly general cleaning" was added at some point no later than October 2014. This does not seem to have been the subject of a formal resolution of the Executive Committee, but it is referred to in Caretaker's Reports to the Executive Committee and was the subject of invoices sent to the Owners Corporation by the cleaning contractor that carried out this work. In cross-examination, Mr Wang said that it was something requested and wanted

by the Executive Committee "to make the place look better". He did not agree that without the bi-annual clean the property was not being adequately cleaned.

109 Mr Wang explained that the bi-annual cleaning was a "twice yearly program of intensive cleaning" that generally involved six additional cleaning staff over a period of about two weeks, during which time the regular cleaners continued to carry out their duties.

110 I am unable to accept that no valid agreement was made in respect of the cleaning of the Summit Arcade. The Executive Committee resolved on 24 August 2009 to pay the fees for those works which were described as additional works, and invoices later submitted in respect of such works were paid by the Owners Corporation. Moreover, the agreement was not of a type that required the approval of a general meeting pursuant to s 40B of the 1996 Act. It was not an agreement that involved the appointment of a Caretaker within the meaning of the 1996 Act as contended by the Owners Corporation.

111 I am also not satisfied that the Caretaker was obliged to provide these services under the Agreement. The evidence of Mr Wang suggests that these services were not ordinary or routine cleaning services which would fall within the general cleaning duties of the Caretaker (including under the "overriding principle" referred to in cl 1(l) of Schedule 2), and they do not seem to me to fall within any of the paragraphs in cl 2 of Schedule 2 which identify a number of specific cleaning duties (such as paragraphs (b) and (d)).

112 Based on Mr Wang's evidence, I have reached the same conclusion in relation to the bi-annual cleaning. I do not think that this cleaning was required in order for the Caretaker to discharge its cleaning duties under the Agreement. It is in the nature of an additional service.

113 I also do not accept that no valid agreement was made in respect of the bi-annual cleaning services. Despite the lack of a formal resolution, I am satisfied on the evidence of Mr Wang that the services were likely the subject of an informal request from members of the Executive Committee. In addition, it is clear that the Executive Committee was aware of the services, and the invoices submitted in relation to the services were paid by the Owners Corporation. The

Owners Corporation should accordingly be treated as having accepted the services.

114 The Owners Corporation has failed to establish that the Caretaker has engaged in any overcharging in respect of additional cleaning services. The claims based on misleading or deceptive conduct and the restitutionary claims in this regard have not been made out.

115 Before leaving the topic of overcharging, it should be recorded that the Owners Corporation also claimed that the Caretaker had overcharged for its remuneration in circumstances where the second Deed of Variation of March 2010 was invalid. By cl 3(d) of that Deed (and also cl 3(d) of the first Deed of Variation) it was confirmed and agreed that the current remuneration of the Caretaker was $609,250 per annum plus GST. The overcharging is alleged to have stemmed from invoices issued on that basis. However, this allegation and the associated misleading or deceptive conduct and restitutionary claims fall away as I have rejected the Owners Corporation's attack on the validity of the March 2010 Deeds (see [40] above).

Breaches of cl 18.2 of the Agreement

116 Clause 18 of the Agreement provides:

> 18.1 The Caretaker must not seek or accept instructions from the Owners Corporation about the performance of its responsibilities except from the Owners Corporation's strata managing agent or from a person who has been appointed by the Executive Committee for this purpose.
>
> 18.2 The Caretaker, or where the Caretaker is a corporation, any shareholder or director of the Caretaker, shall not offer himself for election as an office bearer of the Executive Committee of the Owners Corporation.

117 The Owners Corporation alleges that the Caretaker acted in flagrant disregard of cl 18.2 over a lengthy period of time, from August 2004 (when Mr Wang was elected as a member of the Executive Committee) until June 2019 (when Mr Wang ceased to be a member of the Executive Committee). Complaint is also made about other persons associated with the Caretaker who served on the Executive Committee during that period.

118 There is no doubt that the Caretaker has breached cl 18.2. The Caretaker admits that some breaches have occurred, when Mr Wang (who has been a director of the Caretaker since 18 February 2005) served as the treasurer of

the Executive Committee for one year from June 2018, and Mr Tsiprin-Reznik (a director of the Caretaker since 23 January 2017) served as the secretary of the Executive Committee for one year from June 2018.

119 The differences between the parties as to the extent of the breaches derives from differing views as to the proper construction of cl 18.2. First, the Owners Corporation submits that the expression "office bearer of the Executive Committee" refers to persons who offer themselves for election as members of the Executive Committee, whereas the Caretaker submits that the expression refers only to persons who offer themselves for election as chairperson, treasurer or secretary of the Executive Committee. Secondly, the Owners Corporation submits that cl 18.2 should be read as extending to persons acting at the direction of or on behalf of the Caretaker (such as Mr Di Bitetto), whereas the Caretaker submits that there is no warrant to go beyond any shareholder or director of the Caretaker.

120 The task of construction is of course to be approached in accordance with the well-established principles for the construction of written commercial agreements, as laid down in cases such as *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35] and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [46]-[52]).

121 As to the first matter, the Owners Corporation submitted that the ordinary meaning of "office bearer of the Executive Committee" is someone who holds office as a member of the Executive Committee. Reference was made to the statutory context, including s 18(1) of the 1996 Act (and also cll 2, 4 and 17 of Schedule 3 to the 1996 Act). Section 18(1) refers to members of an executive committee assuming office as members, and then appointing a chairperson, secretary and treasurer of the executive committee. In cl 2 of Schedule 3, reference is made, in relation to elections of members of the executive committee, to nominations for office. In cl 4 of Schedule 3, reference is made to a member of an executive committee vacating office as a member. Clause 17 of Schedule 3 refers to a vacancy in the office of a member of the executive committee. The Owners Corporation submitted that the suggested ordinary

meaning was reinforced by the language of those provisions, and further submitted that there was no commercial justification to limit the prohibition to chairpersons, treasurers of secretaries as these positions were essentially administrative in nature.

122 The Caretaker submitted that such a limitation accorded with the natural meaning of the words "office bearer". It was submitted that if cl 18.2 was not so limited it would amount to an unlawful contracting out of the provisions of the 1996 Act relating to the entitlement of lot owners to nominate for membership of the Executive Committee (see s 245 of the 1996 Act, and cl 2(6) of Schedule 3 to the 1996 Act), noting that the Agreement contemplated that the Caretaker would own a lot in the scheme.

123 In response to the unlawful contracting out argument, the Owners Corporation submitted that s 245 preserved the operation of the Act despite any contractual stipulation to the contrary, but did not go so far as to make any contract illegal or unenforceable. It was submitted that cl 18.2 does not stop the Act from operating in accordance with its terms; so, if a director of the Caretaker is elected as a member of the Executive Committee, that is valid, but the director offering himself or herself for election would amount to a breach by the Caretaker of cl 18.2.

124 I think that submission is correct. Section 245 operates so that the provisions of the Act have effect, and operate, regardless of any contractual provision. That is to say, no contractual provision can in any way affect the operation of the statute. The section does not in my view go further to preclude the making or enforcement of a contractual promise not to exercise a right that exists by virtue of the statute.

125 Turning then to the expression "office bearer of the Executive Committee", it seems to me that viewed in its contractual and statutory context, reasonable businesspersons in the position of the parties would understand the words to mean a member of the Executive Committee rather than only a chairperson, treasurer or secretary of the Executive Committee. Whilst it is natural to think of such persons as office holders or office bearers, and cl 5 of Schedule 3 to the 1996 Act refers to them as holding office as such, they are not in fact elected to

those positions. They are appointed by the Executive Committee. The process of appointment does not necessarily involve any election. The prohibition in cl 18.2 is against offering oneself for election. In addition, and as shown by the statutory provisions referred to by the Owners Corporation, it is also natural to think of persons who become members of an executive committee as office holders or office bearers. These persons are elected to the position. Finally, when regard is had to cl 1(al) of Schedule 2 to the Agreement which requires the Caretaker to be available to attend at and report to Executive Committee meetings, the role of the Executive Committee in monitoring the work of the Caretaker, and the evident purpose of cl 18.2 to restrict the involvement of the Caretaker on the Executive Committee, it would make little sense to read cl 18.2 so as to enable directors and shareholders of the Caretaker to participate as members of the Executive Committee provided only that they do not become a chairperson, treasurer or secretary.

126 However, I agree with the submission of the Caretaker that cl 18.2 should not be read as extending beyond any shareholder or director of a corporate Caretaker. A broader reach might be thought to better secure a purpose of maintaining a separation between the Executive Committee and the Caretaker, but the chosen language has a particular focus. It would have been a simple matter to include references to employees or agents but this was not done. I think that reasonable businesspersons in the position of the parties would understand cl 18.2 to preclude only shareholders or directors of a corporate Caretaker from offering themselves for election to the Executive Committee.

127 In these circumstances, the conduct of Mr Wang in offering himself for election every year from 2005 to 2018, and the conduct of Mr Tsiprin-Reznik in offering himself for election in 2017 and 2018, amounted to breaches by the Caretaker of cl 18.2 of the Agreement. I note that even on the Caretaker's preferred construction, cl 18.2 was breached in 2018 when Mr Wang became the treasurer of the Executive Committee and Mr Tsiprin-Reznik became the secretary.

128 Whilst these breaches should be regarded as amounting to misconduct on the part of the Caretaker, I would not conclude that they amount to gross

misconduct such as would entitle the Owners Corporation on 17 August 2019 to terminate the Agreement pursuant to cl 9.3(iv). The expression "gross misconduct" within cl 9.3(iv) should be construed in accordance with the ordinary meanings of the words used. A breach or breaches of the Agreement can be readily regarded as improper or wrongful conduct; if sufficiently serious and flagrant, the conduct may also be described as gross. However, the overall circumstances must be considered at the time the right to terminate is sought to be exercised. Here, the Owners Corporation must be taken to know of the conduct of Mr Wang and Mr Tsiprin-Reznik in offering themselves for election to the Executive Committee. The Owners Corporation was at the very least aware from March 2010, when the Deeds of Variation were executed, that Mr Wang was a director of the Caretaker. The Owners Corporation does not appear to have taken any action in response to Mr Wang's continued involvement as a member of the Executive Committee. It can be said that the Owners Corporation tolerated the situation over many years. In these circumstances, the seriousness and scale of the breaches, viewed as at 17 August 2019, does not in my view rise to the level of "gross misconduct" within the meaning of cl 9.3(iv) of the Agreement.

129 Finally, on this topic, the Cross-Claim contained numerous allegations to the effect that breaches of cl 18.2 caused certain agreements to be entered into by the Owners Corporation whereby loss was suffered. These agreements include the second Deed of Variation of March 2010, the April 2013 Deed of Variation, the April 2015 Deed of Variation, and the agreement to engage the ABM. It is true that resolutions of the Executive Committee, passed at a time when Mr Wang was on the committee, played a role in the making of the various agreements as alleged. There are difficulties with proof of causation here, but with one possible exception, it is not necessary to consider such questions as the breaches of cl 18.2 relied upon by the Owners Corporation occurred more than six years before the filing of the Cross-Claim. The possible exception concerns the April 2015 Deed of Variation. The Owners Corporation submitted that the April 2015 Deed of Variation only arose because of a breach of cl 18.2 in circumstances where the proposal was brought forward by the Executive Committee. The precise role played by the Executive Committee in this respect

does not emerge clearly on the evidence, save that it is clear that on 14 April 2015 the Executive Committee noted that the Caretaker would be submitting a variation to the Agreement at the Annual General Meeting to be held on 29 April 2015. A resolution was passed at that Annual General Meeting to enter into the April 2015 Deed of Variation. In these circumstances, I could not be satisfied that entry into the deed was relevantly caused by any breach of cl 18.2 of the Agreement.

Failures to disclose in relation to Executive Committee elections

130 Related to the preceding topic, the Owners Corporation complains that on numerous occasions persons connected with the Caretaker breached the applicable strata titles legislation by failing to disclose the connection, as required by the legislation, prior to seeking election to the Executive Committee. The Owners Corporation contends that these failures amounted to breaches of an implied term of the Agreement to the effect that the Caretaker would in performing its duties under the Agreement comply with the statutory requirements applicable to the management of strata title schemes.

131 In relation to the 1996 Act, the relevant provision was cl 3A(1) of Schedule 3. This provision commenced operation on 1 August 2008. It provides:

> 3A(1) A person who is connected with the original owner or caretaker of a strata scheme is not eligible to be elected as a member of an executive committee for the strata scheme unless:
>
> (a) the person discloses the connection that the person has with the original owner or caretaker, and
>
> (b) the disclosure is made at the meeting of the owners corporation at which the executive committee is to be elected and before the election is conducted.

Under the relevant definition found in cl 7 of Part 2 of the Dictionary to the 1996 Act, a person is connected with another person (referred to as the principal person) if the person is employed by the principal person, or the person is a director of or holder of an executive position within the principal person (being a corporation).

132 Following the repeal of the 1996 Act and the commencement of the 2015 Act on 30 November 2016, the relevant provision became s 32(1) of the 2015 Act. It relevantly provides:

> 32(1) The following persons are not eligible for appointment or election to a strata committee or to act as members of a strata committee unless they are also the owners of lots in the strata scheme:
>
> …
>
> (c) a person who is connected with the original owner of the strata scheme or the building manager for the scheme, unless the person discloses that connection at the meeting at which the election is held and before the election is held or before the person is appointed to act as a member…

Under the relevant definition found in s 7 of the 2015 Act, a person is connected with another person (referred to as the principal person) if the person is employed by the principal person or if the person holds an executive position (which includes a director) within the principal person (being a corporation).

133 The Owners Corporation submitted that in the period from 1 August 2008 to 30 November 2016, there were many occasions when persons connected with the Caretaker were elected as members of the Executive Committee without making the requisite disclosures. It was submitted that disclosures were only made on a few occasions, being on 30 March 2009 and 23 March 2010 in respect of Mr Wang, Mr Di Bitetto and Ms Liu. In respect of the period after 30 November 2016, the Owners Corporation submitted that Mr Tsiprin-Reznik, who did not own a lot in the scheme, failed to make the requisite disclosure prior to his elections to the Executive Committee on 22 May 2017 and 18 June 2018. The Caretaker seems to accept that the asserted failures to disclose may have taken place, although reference was made to some evidence which suggested that there were occasions when Mr Di Bitetto and Ms Liu were "presented to" the Annual General Meeting as representatives of the Caretaker. The Caretaker submitted that, in any event, any failures on the part of persons connected with the Caretaker to disclose the connection prior to their election to the Executive Committee was the conduct of the individuals, not of the Caretaker.

134 I agree that any relevant failure to disclose the existence of a connection with the Caretaker is conduct of the person seeking election to the Executive Committee. The disclosure required by the legislation is disclosure by that person. No failure on the part of the Caretaker is involved. It is thus difficult to see how any failure to disclose could amount to a breach of an implied term

requiring the Caretaker to comply with applicable statutory requirements. Accordingly, I am not satisfied that any breaches of such a term have been established. It is not necessary to consider whether, in any event, a term should be implied to the effect of that contended for (although not pleaded by) the Owners Corporation.

Misuse of proxies

135 The Owners Corporation alleges that at numerous Annual General Meetings in the period from 3 May 2005 to 18 June 2018, the Caretaker misused proxies held by it, or by persons acting at its direction or on its behalf, in order to secure benefits for itself. Leaving aside the Annual General Meeting of 3 May 2005, the relevant proxies were held, not by the Caretaker itself, but by persons associated with it.

136 The Owners Corporation contends that this conduct breached implied terms of the Agreement not to use its position as Caretaker to benefit itself, and to comply with applicable statutory requirements in performing its duties under the Agreement.

137 In relation to the latter alleged term, the Owners Corporation claims that the votes of the various proxies were invalid pursuant to cl 11(7A) of Schedule 2 Part 2 of the 1996 Act. Presumably, it is further said that, for that reason, the votes ought not have been cast. I have already held that cl 11(7A) only applies in respect of votes by a proxy who is a caretaker. As noted above, the only relevant votes by the Caretaker as a proxy were the votes cast at the Annual General Meeting held on 3 May 2005, when Mr Wang was elected to the Executive Committee.

138 This is significant in relation to the first of the alleged implied terms. In order to establish a breach of the term it must be shown that the Caretaker has used its position in a particular way so as to obtain a benefit. That has not been done in relation to the votes of the various individuals as proxies. As noted earlier in these reasons, where an employee or agent of the Caretaker is appointed by someone else as a proxy, the employee or agent, in voting as a proxy, is exercising an authority conferred by the appointor rather than acting in the course of its employment or other agency. The mere existence of an

employment, agency or other representative relationship with the Caretaker does not establish that votes by those persons as proxies are the result of some use by the Caretaker of its position. The Owners Corporation did not refer to any particular evidence beyond that which showed the relationship between the Caretaker and the individuals who held the proxies. No reference was made to the particular circumstances in which the individuals were appointed as proxies. I am prepared to assume that the Agreement contains a term to the effect of the first alleged implied term (cf *Waldorf Apartment Hotel The Entrance Pty Ltd v Owners Corporation SP 71623* [2010] NSWCA 226 at [53]), but I am not satisfied that the Caretaker has breached the term.

139 Returning to the second of the alleged implied terms, I do not think that the mere casting of a vote that is rendered invalid under the legislation amounts to a failure to comply with the legislation. An implied term of the type postulated would not in my view extend beyond a promise not to do anything that would itself amount to a breach or contravention of the legislation. In addition, the casting of the votes at the 2005 Annual General Meeting as the holder of proxies does not seem to me to fall within the performance of duties under the Agreement.

140 For the above reasons, the Owners Corporation has not established that any "misuse of proxies" constitutes a breach of the Agreement.

Breaches of cl 21.1 of the Agreement

141 The Owners Corporation alleges that the Caretaker breached the Agreement by not disclosing to the Owners Corporation various changes in its shareholding which occurred in about November 2001, February 2011, January 2015 and February 2018. The Owners Corporation contends that this conduct constituted breaches of cl 21 of the Agreement. Clause 21 provides:

> 21.1 The Caretaker may not assign this Agreement without the consent under seal of the Owners Corporation which consent will not be unreasonably withheld. The Owners Corporation will grant its consent to the assignment of the Agreement to a natural person who is, or to a company whose directors are to the reasonable satisfaction of the Owners Corporation:
>
> i) Respectable and of appropriate personal qualities;
>
> ii) Solvent;

iii) Licenced or capable of becoming licenced and possess qualifications, as required for the lawful performance of the Caretaker's responsibilities under this Agreement;

21.2 A change in the shareholding of the Caretaker which alters the effective control of the Caretaker shall constitute an assignment of this Agreement.

21.3 Upon assignment, the Caretaker must be released and discharged from any further liability under this Agreement but without prejudice to the rights and remedies of either party arising in respect of any matter or thing occurring prior to the date of assignment.

142 The Owners Corporation submitted that the changes in shareholding of the Caretaker altered the effective control of the Caretaker within the meaning of cl 21.2, such as to constitute an assignment of the Agreement. It was then said that cl 21.3 operated so as to release and discharge the Caretaker from any further liability under the Agreement, and that the Agreement terminated accordingly.

143 There is evidence, in the form of Annual Returns and Change to Company Details forms, which show that there have been changes in shareholdings in the Caretaker substantially as alleged. I say substantially as alleged because some of the Change to Company Details forms (in particular, the numbers given for "Shares Increased by") are difficult to reconcile and may be inaccurate, or otherwise indicate that the evidence is incomplete. Nevertheless, even if the shareholdings at various times are as alleged by the Owners Corporation, I do not think that it has been shown that any change in shareholding has altered the effective control of the Caretaker within the meaning of cl 21.2.

144 In summary, the shareholding position appears to have changed as follows:

(a) initially the 100 ordinary shares were held by Mr Michael Wang (50) and Peng Wong (50);

(b) by 23 November 2001 the 100 ordinary shares were held by Mr Michael Wang (75), Gui Liang (10), Fan He (9) and Yi Shen (6);

(c) by 14 February 2011 the number of ordinary shares had increased to 200. It seems that of that 200, Mr Michael Wang now held 76 and Mr Robin Wang (the second plaintiff) held 95. The position in relation to the remaining 29 shares is not clear;

(d) by 16 January 2015 Mr Robin Wang had transferred 90 of his 95 shares to the Caretaker itself; and

(e) by 5 February 2018 the Caretaker, said to have held 109 shares, transferred those to WFT Co Pty Ltd. There is evidence that WFT Co Pty Ltd has acted as the trustee of the Wang Family Trust.

145 The Owners Corporation submitted, based upon the recorded shareholdings, that in November 2001 Mr Michael Wang had effective control of the Caretaker. It was submitted that by 14 February 2011 Mr Robin Wang had effective control of the Caretaker. It was then submitted that by 16 January 2015 the Caretaker "appears to have had effective control of itself". Finally, it was submitted that by 5 February 2018 WFT Co Pty Ltd had effective control of the Caretaker.

146 The Caretaker submitted that at all times control of the Caretaker has resided with Mr Michael Wang and/or Mr Robin Wang through shareholdings in the Caretaker held by them either directly or through WFT Co Pty Ltd. There is evidence that Mr Robin Wang is the sole director and shareholder of that company. These submissions, which appear to me to be somewhat vague and imprecise, may reflect the paucity of the evidence going to the question of effective control. I note, for example, that the constitutional documents of the Caretaker are not in evidence, and neither is any trust deed for the Wang Family Trust. Mr Wang did not himself go into any detail in his affidavits about this matter. Of course, as it is the Owners Corporation which alleges a breach of the Agreement, it bears the legal onus of establishing any breach.

147 I do not think that any breach has been established. The notion of "effective control" within the meaning of cl 21.2 is of course a matter of construction of the Agreement. In my view, the concept of "effective control" under cl 21.2 calls for an enquiry as to who, in practical terms, is in a position to exercise control over the decision making of the Caretaker (compare the notion of control contained in s 50AA of the *Corporations Act 2001* (Cth)).

148 If one starts with the assumption that Mr Michael Wang had effective control as at November 2001, it does not necessarily follow that the subsequent allocation of shares to Mr Robin Wang had the result that he took effective control, or that there was a change of effective control because there was some sharing of control. A similar point can be made about the subsequent allocations of

shares to the Caretaker itself and to WFT Co Pty Ltd. The Court is simply not in a position, on the evidence before it, to reach a firm conclusion about what, if any, changes in effective control occurred as a result of any of these changes in shareholdings.

149 I should add that even if it had been shown that there had been a change in effective control of the Caretaker I do not think it would have the result that the Agreement would come to an end. It is true that cl 21.2 treats an alteration in the effective control of the Caretaker as an assignment of the Agreement, and it is true that cl 21.3 describes certain consequences of an assignment. However, I would construe cl 21.2 as a deeming provision which operates only for the purposes of cl 21.1. That is to say, where a change in the shareholding of the Caretaker alters the effective control of the Caretaker it is regarded as an assignment which requires the consent of the Owners Corporation (albeit that such consent may not be unreasonably withheld). In other words, altering the effective control of the Caretaker in that way may constitute a breach of cl 21.1. It seems to me that cl 21.3 is only concerned with an actual assignment, not a deemed assignment pursuant to cl 21.2. Clause 21.3 operates in that circumstance to make it clear that the Caretaker is discharged from further performance, presumably on the basis that performance would henceforth be required from the assignee.

Improper use of electricity

150 It is clear that the Caretaker has never paid for any of the electricity that has been supplied to Lot 179, one of the Caretaker's Lots under the Agreement. The electricity has always been paid for by the Owners Corporation. It seems that there has never been a separate meter measuring the electricity supplied to Lot 179. I think that it is open to infer that such electricity likely forms part of an amount of electricity that is supplied to the Owners Corporation in respect of the common property and billed to the Owners Corporation accordingly. Lot 179 is located on the ground floor of the building which is otherwise largely comprised of common property.

151 Mr Wang gave evidence that until August 2019 the Caretaker occupied Lot 179 and used it in connection with the provision of services under the Agreement

and the operation of its real estate agent's business. It is not clear how much electricity was supplied to Lot 179 (and its monetary value) over the more than 18 year period since the making of the Agreement, but it may be presumed to be substantial having regard to the fulltime nature of the obligations under the Agreement and the evidence of the electrical appliances used in Lot 179 which included computer equipment and an air-conditioning unit.

152 The Owners Corporation submitted that the consumption of this electricity without the agreement or authorisation of the Owners Corporation breached implied terms of the Agreement and is conduct that justifies termination of the Agreement by the Owners Corporation, either because it is gross misconduct within the meaning of cl 9.3(iv) or otherwise repudiatory.

153 Mr Wang deposed, in his affidavit of 5 December 2019 (which deals with the expenses of the businesses of the Caretaker) that the electricity expense "has always been met" by the Owners Corporation. In his affidavit of 29 May 2020, Mr Wang deposed:

> Since about 2001, Lot 179 has been supplied with electricity from The Summit's electricity mains. Within Lot 179 is a large air conditioning compressor unit that is approximately 3 cubic metres in size and provides air conditioning to the entire ground floor of The Summit, including the lobby and mail room.
>
> To the best of my knowledge, it has never been alleged that ACPM [the Caretaker] was required to pay for electricity supplied to Lot 179 and I understood this was not required due to the presence of the air conditioning unit within Lot 179 and due to ACPM providing caretaking services from Lot 179.

154 In cross-examination, Mr Wang accepted that he knew from 2005 that the Caretaker was not paying for the electricity it was using in Lot 179. He was not prepared to concede that he knew the Owners Corporation was paying for the electricity but said:

> I made that assumption, you can say that.

155 Mr Wang went on to say that the matter was "just never discussed". Mr Wang later appeared to agree that he had no understanding that the Caretaker was not required to pay because he had just not thought about it.

156 Mr Wang agreed that whilst he had a conversation with a member of the Executive Committee (Mr Davison) in 2009 about the Caretaker not needing to

pay for the electricity for a digital signboard, Mr Davison said nothing about any other electricity. Mr Wang said that in 2009 he did not know whether the Owners Corporation was paying for the electricity for Lot 179, but knowing there was no separate meter he assumed the Owners Corporation was paying for it. At one point Mr Wang appeared to accept that he knew at the time that the Owners Corporation was paying for the electricity.

157 Mr Wang was then challenged about an email he sent on 3 November 2016 to Ms Amy Wang (not related to Mr Wang) who was then a member of the Executive Committee. It appears that at that time email communications were occurring amongst members of the Executive Committee and representatives of the Caretaker and of the Strata Manager concerning the payment of a higher hourly rate for some of the additional security services. In supporting a higher rate, Mr Wang referred in an email sent on 2 November 2016 to higher utility costs borne by the Caretaker. The email was in the following terms:

> I also forgot to mention in my last email that the Security Royal Corp also uses our offie [sic] facilities during the hours of their work.
>
> This includes uses of water, printing costs; electricity and gas since they're in the reception during the hours of their work.
>
> The prices of utility has also gone up in the past few years. All these costs which we're currently paying for and have not been factored in the second security and overcrowding security rate.

158 Ms Wang responded by email on 3 November 2016 in the following terms:

> Just a dumb question who owns the space in the reception area (i assume it's common property) and how and who are we recovering the occupancy costs from currently?

159 Shortly thereafter, Mr Wang sent an email in response in the following terms:

> My Amy [sic] owns the reception space which is lot 179 and is currently paying strata levees [sic] and all associated utility costs on it.

"My Amy" seems to be an error generated by a spellcheck function. Mr Wang confirmed that he intended the email to commence with "My company".

160 Mr Wang conceded that it was wrong to say that the company was currently paying strata levies and all associated utility costs for Lot 179. His cross-examination continued:

> Q. Why did you tell Ms Wang that ACPM was paying all associated utility costs for lot 179 if it was in fact not paying the electricity costs?

> A. Well, I didn't know at the time, to be completely frank, and, and I mean by occupancy costs I was, I was thinking strata levies, council rates, water rates, but I didn't know about the electricity.
>
> Q. Where you say all associated utility costs, you weren't intending to include electricity?
>
> A. I made an assumption there on electricity.
>
> Q. You made an assumption that you were paying for electricity?
>
> A. Yes, correct.

161 When it was put to Mr Wang that when he sent the email to Ms Wang he knew that it was wrong to say that the Caretaker was paying for all the utilities on Lot 179, he said:

> No, I didn't. I assumed. I made an assumption that the occupancy costs, you know, there's, there's quite a few items in there.

162 The evidence given by Mr Wang on this topic was unimpressive. He deposed that he had an understanding that the Caretaker was not required to pay for electricity for Lot 179 "due to the presence of the air-conditioning unit within Lot 179 and due to ACPM providing caretaking services from Lot 179". However, there is no apparent basis for such an understanding, and in the witness box he did not seek to uphold it. I do not accept that Mr Wang ever had an understanding that for any particular reason (including the terms of the Agreement), the Caretaker was not required to pay for the electricity supplied to Lot 179. Neither do I accept that he ever assumed that the Caretaker was paying for the electricity. I consider that not only did Mr Wang assume that the Owners Corporation was paying for the electricity, he must have thought that it was almost certain that was in fact the case. I think that in these circumstances Mr Wang was content to stay silent and continue to accept the benefit of the free electricity, even though he did not understand that the Caretaker had an entitlement to the benefit. It no doubt suited Mr Wang that no one from the Owners Corporation ever raised the issue. Moreover, when eventually faced with Ms Wang's query in November 2016, Mr Wang did not respond in a truthful manner but instead stated, falsely, that the Caretaker was paying "all associated utility costs" on Lot 179. The earlier email sent by Mr Wang makes it clear that the utilities under discussion included electricity. That email itself suggests that the Caretaker was paying for electricity supplied to the office (i.e. Lot 179).

163 I think that when Mr Wang sent his email on 3 November 2016 in response to Ms Wang he must have known that he was hiding the true position in relation to electricity. I note in addition that the email was sent in support of the Caretaker's case for an increase in the hourly rates paid by the Owners Corporation for certain additional security services.

164 The Agreement itself does not in my opinion entitle the Caretaker to a free supply of electricity to Lot 179. Clause 4, which concerns the provision of leasing, managing and selling agency services, indicates that the Caretaker is to bear all the expenses incurred in providing those services, which were plainly contemplated to be provided from the Caretaker's Lots (including Lot 179).

165 Clause 11 of the Agreement relevantly provides that, unless otherwise provided for in the Agreement, the Caretaker must at its own expense provide all "products, materials and equipment required for the performance of its letting and caretaking responsibilities". Read in the context of the clause as a whole, "products" seems to me to be wide enough to cover required inputs such as utility services. At the very least, cl 11 does not confer any entitlement upon the Caretaker to a free supply of electricity.

166 The Caretaker submitted that such an entitlement might be found in cl 1(h) of Schedule 2 to the Agreement, or cl 2(i) of Schedule 2. Clause 1(h), which forms part of the Caretaker's General Duties, refers to making contracts at the expense of the Owners Corporation for water, electricity, gas, fuel, telephone and other necessary services. The content of this duty is the making of such contracts for the benefit of the Owners Corporation. I do not think it follows that the Owners Corporation is obliged to pay for electricity supplied to Lot 179. Clause 2(i), which forms part of the Caretaker's Cleaning Duties, refers to all "consumables" including pool chemicals, toilet paper, hand towels, light globes and cleaning chemicals, and provides that these are to be purchased by the Caretaker with the invoices sent to the Strata Manager for payment by the Owners Corporation. Whilst electricity can be regarded as something which is "consumed" by those who make use of the appliances powered by the electricity, I do not think that it falls within the notion of a consumable within cl

2(i). The clause is directed to products that are consumed in the course of the carrying out of the Caretaker's cleaning duties. I cannot accept that the electricity supplied to Lot 179 falls within that concept. I therefore reject the submission of the Caretaker that on a proper interpretation of the Agreement, the cost of electricity supplied to Lot 179 was to be a cost of the Owners Corporation.

167 Both sides referred to *Waldorf Apartment Hotel The Entrance Pty Ltd v Owners Corporation SP 71623* (supra), especially at [51]-[54], where a similar issue arose. There are a number of differences between the two cases, including that the electricity supplied to Lot 179 was provided in connection with the provision of services to the Owners Corporation under the Agreement, and in part for appliances operated for the benefit of the Owners Corporation (e.g, air-conditioning). Also, there was no complaint made in this case about the use of the electricity. Nevertheless, the cases are similar in that, over a lengthy period of time (although a much longer period in the present case), the Caretaker was knowingly using electricity which was being paid for by the Owners Corporation, and the amount of electricity must have been substantial. I do not accept the submission of the Caretaker that there is no foundation in the evidence for concluding that the costs of the electricity were substantial. As I have said, having regard to the fulltime nature of the obligations under the Agreement and the evidence of the electrical appliances used in Lot 179, it is open to infer that the amount and monetary value of the electricity over the more than 18 year period is substantial.

168 In *Waldorf Apartment Hotel The Entrance Pty Ltd v Owners Corporation SP 71623* (supra) it was held by Hodgson JA (with whom Beazley P and Macfarlan JA agreed on this issue) that there was no obligation on the Owners Corporation to provide the relevant lot with an electricity supply (see at [52]). Hodgson JA continued at [53]:

> In my opinion, there was a clear obligation on WAHTE, implied under its contract to manage the common property for the Owners Corporation, not to benefit itself by incurring substantial debts payable by the Owners Corporation through the use of electricity provided to the common property, at least without disclosing this and obtaining consent and/or taking reasonable steps to indemnify the Owners Corporation…

169 I think that an obligation to similar effect is implied in the Agreement here. The Caretaker was in breach of that obligation over many years by accepting the benefit of the electricity and remaining silent about the matter. It is no answer that the Owners Corporation did not itself raise the matter, at least prior to November 2016. The breach was compounded in November 2016 by the false statement made in Mr Wang's email to Ms Wang which hid the true position. I was not referred to any evidence that showed that any relevant persons associated with the Owners Corporation were aware of what was going on.

170 It is my opinion that in this respect the Caretaker has been guilty of gross misconduct in performing its responsibilities within the meaning of cl 9.3(iv) of the Agreement. The notion of "responsibilities" here encompasses the performance of all of the Caretaker's responsibilities pursuant to the Agreement including the performance of the leasing and sales agency services contemplated by cl 4 (compare cl 11 which refers to "the performance of its letting and caretaking responsibilities"). As envisaged by the terms of the Agreement, the Caretaker has made use of Lot 179 as a Caretaker Lot in the carrying out of those responsibilities, and necessarily made use of the electricity supplied to Lot 179 for those purposes. I think it is plain that the Caretaker's conduct in relation to the use of that electricity amounts to misconduct, and the seriousness and scale of the misconduct, extending over many years and at one point involving deliberate deception, renders it apt to describe the conduct as falling within the ordinary meaning of gross misconduct. The Caretaker submitted that in order for any misconduct to be regarded as gross, it had to be serious and flagrant. In my opinion the conduct of the Caretaker in this regard may be so described.

171 It follows from the above that the conduct of the Caretaker in relation to the use of the electricity supplied to Lot 179 over the years, which was paid for by the Owners Corporation, gave rise to a right in the Owners Corporation to terminate the Agreement pursuant to cl 9.3. That right existed as at 17 August 2019. I reach that conclusion even though it is not possible on the evidence to make any reliable assessment of the actual monetary value of the electricity supplied to Lot 179. The lack of evidence in that respect does mean, however,

that the various monetary claims made by the Owners Corporation for the cost of the electricity cannot be made out.

172 It is not necessary to determine whether the conduct of the Caretaker would also amount to a repudiation of the Agreement, as was found in *Waldorf Apartment Hotel The Entrance Pty Ltd v Owners Corporation SP 71623* (supra) at [54].

173 The Owners Corporation makes similar complaints about the Caretaker's use of electricity, paid for by the Owners Corporation, in respect of some digital signboards. The first of these was installed by the Caretaker near the entrance door to the building in 2009. Approval for this was given at the Annual General Meeting held on 30 March 2009, and a new by-law was made granting the Caretaker exclusive use rights to part of the common property for that purpose. The terms of the by-law do not expressly deal with who would bear the associated electricity costs. The location of the signboard suggests that it was likely to take electricity from the supply to the common property. Mr Wang gave evidence that there was a power point there, and he understood that the signboard would be obtaining electricity from a source different from the source of the Lot 179 electricity.

174 As previously noted Mr Wang deposed that in early-2009 he had a conversation with Mr Davison in which Mr Davison told him that Mr Wang did not need to worry about paying for the power in relation to the digital signboard. I am prepared to accept that such a conversation occurred, although I note that Mr Wang agreed in cross-examination that he knew that no individual member of the Executive Committee had authority to speak on its behalf. Nonetheless, in light of that conversation and the apparent absence of any request for the Caretaker to pay for the extra electricity involved, I am not persuaded that the conduct of the Caretaker here amounted to any breach of the Agreement. I would in any case not regard the conduct as amounting to gross misconduct within the meaning of cl 9.3(iv).

175 I reach the same conclusions in relation to the two further signboards placed in the lobby area in about December 2018. I am prepared to accept Mr Wang's evidence, which in this respect was not challenged, that he assumed that the

arrangements for these signboards would be the same as those for the signboard installed in 2009.

Failures in respect of fire safety

176 The Owners Corporation make two complaints about the conduct of the Caretaker in relation to fire safety. The first is the failure to implement an evacuation plan for the building. The second is the failure to take timely action in the face of evidence of faults in the fire alarm system (referred to as the Emergency Warning and Intercommunication System, or "EWIS").

177 It is clear that no evacuation plan had been prepared by August 2019. The Owners Corporation submitted that since 2013 the Caretaker was aware of the need for such a plan. In this regard, reference was made to a Fire Order issued by the City of Sydney Council on 18 November 2013. The Fire Order required various works to be undertaken, including making provision "for safe and effective emergency egress in the event of fire". In relation to emergency egress, the stated reasons for the order were:

> **Means of egress**
>
> 2. Lack of fire separation between car park and lift lobbies on levels 2-6, which serve as means of egress for occupants of residential apartments, could cause fire spread to these areas and subsequently endanger life safety of evacuating occupants, in the event of a fire in the car park;
>
> 3. Signs to warn persons against interference with fire doors leading to fire isolated stairs and smoke doors are not installed on all of these doors;
>
> 4. Direction or exit signs are not installed on smoke doors from both sides to guide evacuating occupants to emergency exits;
>
> 5. Fire isolated exits are not provided with re-entry facilities to ensure occupants are not trapped and have the ability to re-enter the building, in case of an emergency

178 The receipt of the Fire Order was noted in the minutes of an Executive Committee meeting held on 21 November 2013 as follows:

> It was noted that a Fire Safety Order had been received on the day of the meeting from City of Sydney Council. Bannermans Lawyers are required to liaise with council due to the fire defects being part of the claim against Meriton. There are significant additional legal and expert costs involved with addressing the Order as a side issue to the proceedings…

179 The Executive Committee resolved that the strata manager request that Bannermans Lawyers request as long as possible extension to comply with the

order whilst legal proceedings were on foot. It can be inferred that at least some of the works required by the Fire Order related to the allegedly defective works the subject of the litigation against Meriton.

180 It appears that Bannermans Lawyers made contact with the Council about the matter, but a letter from the Council to the Owners Corporation dated 27 February 2014 indicates that the Council was maintaining that the Fire Order be complied with. The matter does not appear to have been on the agenda for, or in fact raised at the Annual General Meeting of the Owners Corporation held on 13 March 2014.

181 By the end of May 2014, the Caretaker was making arrangements to facilitate the undertaking in June 2014 of the annual fire safety inspections as required by Council regulations. These inspections were to be carried out by the fire consultant engaged by the Owners Corporation, Integrated Fire Solutions ("IFS").

182 The Fire Order was further discussed at the Executive Committee meeting held on 23 July 2014. It seems that no further correspondence had been received from the Council, and that Council "had attended site this week to inspect the building with the caretaker". It appears from the minutes of the Executive Committee meeting held on 17 September 2014 that no further correspondence had been received from Council on the matter "and therefore no action is necessary". The basis for that view is not clear on the evidence. I note that the minutes of the Executive Committee meeting held on 5 November 2014 suggest that there may have been some discussions with the Council about the issuing of another Fire Order.

183 On 17 April 2015 the Council revoked the Fire Order issued on 18 November 2013. The letter from the Council to the Owners Corporation dated 17 April 2015 included the following:

> Reference is made to the Fire Safety Order served on "The Owners – Strata Plan Number 651111 on 18 November 2013.
>
> Please be advised that in light of our recent discussions with Accredited Certifier Mr Michael Wynn-Jones and additional information provided by him, we consider that adequate fire safety is provided within the subject premises. Moreover we have formed our position based on Mr Wynn-Jones's advice, the additional information submitted, Tripartite Settlement Deed (exchanged by the

> owners corporation, Meriton, Vero Insurance Limited and the City of Sydney Council in September 2002) (the Deed) and other relevant documents.
>
> Accordingly we wish to formally advise that pursuant to the provisions of S. 121ZG of the Environmental Planning and Assessment Act, 1979 (as amended), Council revokes the aforementioned fire safety order.
>
> Notwithstanding the above determination it is apparent that the essential fire safety measure "re-entry facilities" within the building's fire exit stairways is not being maintained in accordance with Clause 182(1) of the Environmental Planning and Assessment Regulation 2000 (the Regulation). Furthermore we draw your attention to the fact that re-entry facilities are considered to be an essential fire safety measure for the building, as re-entry facilities is mentioned in the "Brief to address Fire and Life Safety" dated 25/09/2002 prepared by Michael Wynn-Jones – attached to the Deed.
>
> …
>
> As the owner of the subject premises you are instructed to attend to the following works;
>
> Ensure that all doors providing access to all fire isolated exits comply with the re-entry requirements as stated in Part D2.22 of the BCA;
>
> The abovementioned work is required to be completed within thirty days (by 17/05/15) from the date of this letter.
>
> …

184 It is not clear on the evidence whether those works were done as required, but I infer from the lack of any evidence of follow-up action by the Council on that particular matter, that it is likely that the works were done.

185 Despite the revocation of the Fire Order, consideration seems to have been given to having an Emergency Management Manual and Evacuation Diagrams prepared. Mr Alldritt, the Building Manager employed by the Caretaker, received a fee proposal for such on 29 March 2016 from a business known as "First5minutes". On 13 October 2016 Mr Alldritt received a fee proposal from SPS Fire and Safety for preparation of evacuation diagrams. Later on 13 October 2016 Mr Alldritt sent an email to Mr Papadimitriou of IFS enquiring whether an evacuation diagram was required in the entrance foyer or lift foyer of the building. The matter does not seem to have been taken any further at that stage. The reasons for this are unclear. I note that at about the same time, Mr Alldritt was in contact with members of the Executive Committee about works to be done to rectify certain fire dampers in the building. BCA Logic was retained by the Owners Corporation to prepare a specification for those works.

The works (including inspections of units and other areas) appear to have been carried out in stages, and were continuing in 2019.

186 The Owners Corporation referred to an insurance risk report, prepared by Chubb Insurance (Australia) Pty Ltd on 21 December 2018 which, amongst other things, recommended (as a medium priority) that emergency evacuation diagrams be developed and displayed in common area lobbies.

187 Mr Hsueh replaced Mr Alldritt as the Building Manager in about January 2017. In cross-examination, Mr Hsueh said that he was aware that Mr Alldritt had been working on a proposal to develop an evacuation plan. Mr Hsueh said that it was not put across to him that getting an evacuation plan for the building was an important piece of work that needed to be done. Mr Hsueh agreed that he had read the risk report prepared by Chubb, but said that he did not read the part concerning emergency evacuation diagrams. However, in February 2019, Mr Hsueh requested IFS to prepare an emergency evacuation plan. He could not suggest a reason why that was not done earlier.

188 The Owners Corporation referred to various provisions of the Agreement including cl 1(f) of Schedule 2 which requires the Caretaker to:

> Report promptly on all things requiring repair and on all matters creating a hazard or danger of which the Caretaker has notice and take remedial action where practicable.

Reference was also made to cl 1(l) of Schedule 2 which provides:

> Bearing in mind the overriding principle that the Caretaker is responsible to the Owners Corporation for the overall presentation, upkeep and appearance of the Complex, to perform such other acts and things as are reasonable, responsible, necessary and proper in the discharge of its duties under this Agreement.

189 It was put by the Owners Corporation that the absence of an evacuation plan for a 34 storey building containing about 400 residential units clearly constitutes a hazard or danger for the occupants. It was submitted that the Caretaker had known since 2013 that no such plan was in place, yet the matter was not reported to the Executive Committee and steps were not promptly taken to have an evacuation plan prepared.

190 The Caretaker submitted that there was no legal requirement for such a plan, and Annual Fire Safety Statements were signed off each year by the fire

consultant, IFS. It was submitted that there was no obligation under the Agreement for the Caretaker to ensure that an evacuation plan was in place, and it was put that in any event by February 2019 the Caretaker had requested IFS to prepare an evacuation plan.

191 I agree that there was no obligation on the Caretaker to ensure that an evacuation plan was in place (or, as pleaded, to implement an evacuation plan). The relevant obligation in this respect seems to me to be the reporting obligation under cl 1(f) of Schedule 2 which calls for prompt reporting on all matters creating a hazard or danger of which the Caretaker has notice.

192 The Fire Order issued in November 2013 would indicate to a reasonable reader that there was a lack of signage to guide persons seeking to exit the building in an emergency. However, the Fire Order came to the attention of the Executive Committee, and instructions were apparently given to solicitors to liaise with the Council about it. The Fire Order was later revoked in circumstances where the Council expressed the view that, subject to dealing with re-entry requirements for fire exits, "adequate fire safety is provided within the subject premises". As I have said, I infer that those requirements were later attended to so as to satisfy the Council.

193 It appears that Mr Alldritt nonetheless came to the view by late-2016 that an evacuation plan should be put in place, or at least be considered. I was not referred to any evidence to suggest that this was prompted by any new facts coming to the attention of the Caretaker, not already known to the Owners Corporation, to indicate the existence of a hazardous or dangerous situation.

194 The progress towards the development of an evacuation plan was undoubtedly slow. The matter does not appear to have been given much priority at the time of the handover from Mr Alldritt to Mr Hsueh, or indeed thereafter until early-2019. I note that the Chubb risk report of December 2018 ascribes only a medium priority to the display of evacuation diagrams. That level of priority is described as "review within 6 months", which is something less than "urgent attention required".

195 In these circumstances, I do not think that the Owners Corporation has established that the conduct of the Caretaker in relation to the preparation of

an evacuation plan amounted to any breach of the Agreement or gross misconduct or gross negligence within the meaning of cl 9.3(iv) of the Agreement.

196 I turn now to consider the conduct of the Caretaker in relation to the Emergency Warning and Intercommunication System ("EWIS").

197 The essence of the complaint is that despite becoming aware in the course of the annual fire safety inspections in May 2017 and July 2018 of faults in the EWIS, the Caretaker failed to take any action or inform the Owners Corporation of the existence of the problems.

198 On about 29 May 2017, Mr Hsueh was accompanying personnel of IFS whilst they carried out the annual testing of the system. Mr Hsueh witnessed instances of malfunction. He was told by one of the personnel that the system was "not responding as it is supposed to do" and by another (Mr Papadimitriou) that "the alarm isn't going off and the PA isn't working". Mr Hsueh deposed that after some further testing, Mr Papadimitriou said to him:

> It seems it is doing what it is supposed to do. Let's get the test done and we will need to look into maintenance of the EWIS system.

199 In cross-examination, Mr Hsueh agreed that after witnessing the faults in May 2017 he had concerns that the EWIS was not operating reliably. He further agreed that it was an important matter to look into. Mr Hsueh suggested that he spoke to the strata committee about the faults, and sent emails which referred to the faults. However, I was not referred in the evidence to any emails which make specific reference to these faults.

200 Mr Tsiprin-Reznik was also present for some of the testing in 2017. He recalls, on the first day of the inspection, one of the IFS personnel saying that the EWIS system was "not responding". Mr Tsiprin-Reznik agreed in cross-examination that he did not do anything about this. He explained that this was because IFS "cleared the fault".

201 On 23 June 2017 Mr Hsueh sent an email to various persons including members of the Executive Committee relating to the fire safety inspection. Reference was made to "a lot of repairs and rectifications required on fire safety equipment" but no mention was made about any faults with the EWIS. It

is not disputed that faults with the EWIS were not referred to in any of the later Caretaker's reports that were regularly provided to the Executive Committee.

202 Mr Hsueh deposed that between May 2017 and November 2018 he had several conversations with Mr Papadimitriou to the following effect:

> Mr Hsueh: Please arrange for the EWIS to be checked and any faults rectified.
>
> Mr Papadimitriou: We weren't able to find a fault. It doesn't seem like it is playing up regularly. We need to continue to monitor it to determine the cause of the fault.

203 Following the annual fire safety inspection for 2017, IFS signed a Fire Safety Statement as required by the Council. The EWIS was one of the items certified as having been assessed and found to be capable of performing to a standard no less than that specified in the schedule to the statement.

204 Problems were also experienced during the annual testing carried out by IFS in July 2018. Mr Hsueh recalled one occasion where one of the IFS personnel said that the EWIS panel was "acting funny again" and that he was constantly "having trouble de-activating the faults on the EWIS panel".

205 In cross-examination, Mr Hsueh agreed that he was also aware of an incident when the alarm did not go off when activated. This was an incident witnessed by Mr Tsiprin-Reznik. Mr Hsueh further agreed that this was a fundamental failure that could be absolutely catastrophic in a real fire. He explained that he did not have enough knowledge about what had happened, so he was relying on the direction of IFS.

206 Mr Hsueh agreed that what Mr Papadimitriou said about continuing to monitor the system to determine the cause of the fault was not satisfactory and did not provide him with any reassurance that the system was working. Mr Hsueh accepted that the issue needed to be brought to the attention of the strata committee. He said that he did report the matter to the committee, but not in writing. Mr Hsueh accepted that he should have included something in the Caretaker's reports about the malfunctioning EWIS. Ultimately, Mr Hsueh maintained that he was acting on the directions of IFS who did not say that the matter was urgent. He nonetheless agreed that by November 2018 it was something that had to be dealt with as soon as possible, or urgently. He

agreed, by reference to the provision to the Executive Committee in April 2019 of quotes for replacing the EWIS, that the process could have been more efficient, but said he was guided by the words of IFS who never told him he needed to worry. In re-examination, Mr Hsueh also said that he was guided by IFS signing the annual Fire Safety Statements which refer to the EWIS. As was the case in 2017, the Fire Safety Statement signed by IFS in respect of the 2018 inspection certified that the EWIS had been assessed and found to be capable of performing to a standard no less than that specified in the schedule to the statement.

207 Mr Tsiprin-Reznik was again involved in the fire safety inspection carried out in July 2018. He recalls an occasion when the evacuation signal could not be heard even though it had been activated. He recalls that further tests were done, and the evacuation signal worked for some of the tests but not for others.

208 In cross-examination, Mr Tsiprin-Reznik said that he concluded that the system was not reliable, and that there was a significant risk that in a real emergency the EWIS would not function properly. Mr Tsiprin-Reznik also agreed that the lack of an evacuation signal was deeply concerning, but he said that IFS "actually cleared the fault once again" and assured him that it was OK. However, Mr Tsiprin-Reznik said that he verbally informed the Executive Committee that the system "had started to play up", and on 8 November 2018 he sent an email, including to members of the Executive Committee, which referred to unexpected expenses which arise, for example the fire control panel which two contractors have said will need to be replaced (for a cost of approximately $40,000 - $80,000). Mr Tsiprin-Reznik said that Mr Hsueh was in the process of obtaining quotes.

209 The complaints made by the Owners Corporation need to be considered in the light of the regulatory environment, which includes the annual fire safety inspections and certification by a qualified person. Reference also needs to be made to cl 1(f) of Schedule 2 to the Agreement (referred to above at [188]), and also to cl 1(n) of Schedule 2 to the Agreement which obliges the Caretaker to:

> (n) Undertake and complete all relevant fire safety and operational training courses, regularly inspect the fire fighting equipment installed within the

> Complex, arrange for the inspection of such equipment by the Chief Fire Officer at least once in every period of twelve (12) months and arrange for any maintenance or other works with a view to keeping such equipment in efficient working condition in accordance with the Fire Safety Act 1984 provided however that the charges relative to such inspection and the out-of-pocked expenses required to keep the said equipment in order shall be borne by the Owners Corporation.

(The reference to "Chief Fire Officer" is not defined in the Agreement.)

210 The Owners Corporation submitted that both Mr Hsueh and Mr Tsiprin-Reznik had witnessed the EWIS failing tests and admitted that they were deeply concerned about the reliability of the system. It was submitted that the signing of the Fire Safety Statements by IFS was no reason to take no action to bring the matter to the attention of the Executive Committee. Indeed, it was suggested that the signing of the reports by IFS in the circumstances would if anything increase the level of concern. It was submitted that the failure to properly bring the matter to the attention of the Executive Committee allowed an obvious risk to the building and its occupants to subsist, which was not only a breach of the Agreement but also gross misconduct.

211 The Caretaker pointed to the evidence given by Mr Hsueh and Mr Tsiprin-Reznik to the effect that they informed the Executive Committee verbally about the faults seen during the testing, or at least of the fact that the EWIS was starting to play up. It was submitted that there was no need to do more in circumstances where the qualified expert had on each occasion signed the Fire Safety Statement, and not said that there was any cause for concern. The Caretaker submitted that in any event the conduct complained of does not amount to gross misconduct.

212 I accept, based on the evidence of Mr Hsueh (who I regard as an honest and impressive witness, who was plainly doing his best to accurately answer the questions put to him), that he spoke at an Executive Committee meeting about the unresolved issue concerning the cause of the faults in the EWIS that had been observed during the annual testing. Mr Hsueh could not recall when this verbal reporting took place. I think it is likely that it did not occur until after the July 2018 testing. I think it is likely that Mr Hsueh would have been content up to that time to see whether anything came from the monitoring Mr Papadimitriou said would be carried out. I am further prepared to accept that

on the occasion the matter was raised with the Executive Committee, Mr Tsiprin-Reznik said something to the effect that the EWIS had started to play up. It seems that shortly thereafter steps were taken to obtain quotes for replacement of the fire control panel.

213 However, having regard to the potentially serious consequences of a faulty EWIS, the matter should have been brought to the attention of the Executive Committee promptly after the May 2017 testing, and in writing as part of a formal report. In my view, this was required in circumstances where, despite the signing of the Fire Safety Statement, it was clear from what Mr Papadimitriou said about further monitoring the system to try to find the cause of any fault, that there was an unexplained problem with a system the reliability of which was likely to be critical in any fire emergency. The failure of the Caretaker to so act was in breach of its reporting obligations pursuant to cl 1(f) of Schedule 2 to the Agreement, and may be regarded as misconduct in performing its responsibilities within the meaning of cl 9.3(iv) of the Agreement.

214 The next question is whether this breach amounts to gross misconduct or gross negligence within the meaning of cl 9.3(iv) of the Agreement. I think this question is finely balanced. Ultimately, I have come to the conclusion that the breach of the Agreement is sufficiently serious to amount to gross misconduct or gross negligence.

215 It is true that in a broad sense the relevant employees of the Caretaker are able to place reliance upon what they are told by IFS as a professionally qualified expert in fire safety. However, the evidence of Mr Hsueh is clear that he regarded as unsatisfactory what Mr Papadimitriou told him, repeatedly, about continued monitoring in order to determine the cause of the fault. Whilst IFS did not say that the matter needed to be treated as urgent, Mr Hsueh accepted that he should have identified the matter as a serious issue that needed to be brought to the attention of the strata committee.

216 The obligation under cl 1(f) of Schedule 2 is to report promptly on all matters creating a hazard or danger of which the Caretaker has notice. Given the potentially grave consequences that might flow from a faulty EWIS in the event of a fire, the matter was one that was obviously required to be reported

promptly. It is the very sort of thing that responsible members of a strata committee would want to know about as soon as possible so as to consider the taking of appropriate action. It would be difficult for an Owners Corporation to have any confidence in a Caretaker that failed to report matters of this kind.

217 It would have been a simple matter for the Caretaker to provide a brief written report on what had occurred in the May 2017 testing, and on what IFS was proposing to do. There is really no excuse for the failure to promptly provide a written report to the Executive Committee on those matters. Instead, it appears that the issue was not raised at all over a period of more than 12 months, and then in a less than formal manner. In my view, the seriousness and scale of this misconduct or negligence, which continued over a considerable period of time, warrants the conclusion that it is gross misconduct or gross negligence, within the meaning of cl 9.3(iv) of the Agreement. In my opinion, the Owners Corporation had the right on 17 August 2019 to terminate the Agreement pursuant to cl 9.3 on this ground as well. It is not necessary to determine whether the conduct also amounted to a repudiation of the Agreement.

Provision of unsafe working conditions for cleaners

218 The Owners Corporation alleges that the Caretaker breached cl 17 of the Agreement and also cll 1(f) and 1(l) of Schedule 2 to the Agreement, and was guilty of gross misconduct and/or gross negligence in allowing contracted cleaners to make use of a garbage room on Level 5 to fraternise and store goods.

219 Garbage is deposited into the room on Level 5 from garbage chutes from higher levels. There was evidence to suggest that on occasions some of the cleaners may have retrieved items from the garbage and retained them for their own use, although this was not witnessed directly by Mr Hsueh. Mr Hsueh agreed that no action was taken to prevent the cleaners from following this unhealthy practice. He further agreed that the matter was not reported to the Executive Committee.

220 Mr Hsueh provided an account in his affidavit of the manner in which cleaning services were provided (see paragraphs 38-63). It emerges from this account, which was essentially unchallenged, that the cleaners (who were acting under

the direction and control of the director of the cleaning company) had access to clean areas of the building to take breaks (including the Level 1 Recreation Room) and they had access to bathrooms. Mr Hsueh explained that due to a lack of allocated storage space in the building, the cleaners made use of the Level 5 garbage room to store cleaning equipment and consumables, and used it as their "operating base". Mr Hsueh said that this room, which requires a key for access, is not used by lot owners or occupiers. Mr Hsueh observed that the cleaners sometimes put items that had been disposed of by lot owners and occupiers in this room before taking them away. He said that very occasionally directions were given by the Caretaker to move such items out and tidy up the room.

221 I am not satisfied that any breach of the Agreement has been established as alleged. I agree with the submission of the Caretaker that cl 17 does not require the Caretaker to ensure adequate supervision of the cleaners who were contractors, not employees or agents of the Caretaker. As for cl 1(f), I do not think that any identified hazard or danger has been identified that would be required to be reported promptly. As for cl 1(l), I do not think it has been shown that the Caretaker failed to take any steps that are reasonable or necessary in the interest of maintaining the overall presentation, upkeep and appearance of the Complex. Even if any breach of these provisions was established, the breaches would not in my view be of sufficient seriousness to amount to gross misconduct or gross negligence.

Storage of inappropriate and hazardous materials in plant rooms

222 There is evidence that some combustible materials were allowed to be stored in plant rooms. This was seen as a problem by the new caretaker appointed in August 2019. It appears that the new Building Manager (Mr Smaimi) initially took steps to remove offending materials, but as a result of complaints (presumably from residents responsible for some of the storing) he has allowed the situation to continue as it was "until a solution is found". Mr Smaimi agreed that after a year he has still not found an acceptable solution. He said that the matter is a priority but at this point he has a lot of issues to deal with. It seems likely that the lack of allocated storage space, referred to in evidence by Mr Hsueh, may be causing or contributing to the problem.

223 The Owners Corporation did not identify which provision or provisions of the Agreement were alleged to be breached by the Caretaker. It was not suggested that the Caretaker failed to comply with any direction given to it about storage in plant rooms (see cl 1(i) of Schedule 2). It may be that the Caretaker should have reported the situation to the Executive Committee as a hazardous or dangerous situation (see cl 1(f) of Schedule 2). It may be that if the Caretaker was itself storing combustible items in plant rooms, it would be contrary to its general duties to maintain and care for the strata scheme and be responsible for the overall presentation of the Complex (see cll 1(a) and 1(l) of Schedule 2). However, having regard to the evidence of Mr Hsueh concerning the limited extent to which access or use of the rooms was impeded, and Mr Smaimi's evidence about allowing the situation to continue, even if there was a breach or breaches of the Agreement I could not be satisfied that the conduct of the Caretaker amounted to gross misconduct or gross negligence.

Other matters

224 The Owners Corporation raised numerous other matters of alleged mismanagement which were said not to amount to gross misconduct, gross negligence or repudiatory conduct, but were nonetheless said to be relevant to be taken into account in the overall assessment of the Caretaker's conduct. Many of these matters were ultimately not pressed, or were not the subject of any submissions. The remaining matters (with the possible exception of the padlock on a fire door on Level P1) seem to be of only minor significance.

225 The Owners Corporation again did not identify which provisions of the Agreement were alleged to be breached. As for the padlock on the fire door, there was a paucity of evidence as to how and when it came to be there, or as to any danger it posed. Mr Hsueh suggested that it might have been put on by "the fire guys", and deposed that IFS had not said that it should be removed. I cannot be satisfied that there was any breach by the Caretaker of the Agreement in this respect.

226 These other matters do not seem to me to take the matter any further in circumstances where I have found that the Owners Corporation otherwise had

the right to terminate the Agreement on 17 August 2019 pursuant to cl 9.3 (see [171] and [217] above).

Validity of termination of Agreement by the Owners Corporation

227 The next issue to consider is whether the Owners Corporation validly exercised the right to terminate the Agreement on 17 August 2019.

228 The purported termination was communicated to the Caretaker by letter dated 17 August 2019 that was served upon the Caretaker at Lot 179. The letter, which was signed by the treasurer of the Strata Committee, Mr Lowe, included the following:

> I have been instructed by the strata committee of SP65111 to serve this letter to your company.
>
> …
>
> Given the 18 years your company has been managing the Building, its current state of disrepair, the current health, safety and fire issues and the complete lack of proper management, the strata committee has formed the opinion the Caretaker has been guilty of gross misconduct and/or gross negligence in performing its responsibilities.
>
> …
>
> The strata committee on behalf of the Owners Corporation has resolved that the caretaker agreement is terminated pursuant to Clause 9.3(iv), effective immediately.
>
> As per the terms of the caretaker's agreement 10.5 the owners corporation is IRREVOKABLY appointed attorney for the caretaker's lots, being lot 179 of SP65111 which consists of the reception and office room behind. Accordingly, entry upon lot 179 will be a trespass.
>
> Your company, its employees, contractors and agents are no longer permitted to enter Lot 179 and any plant room. Entry upon lot 179 or any restricted plant room area will be a trespass.
>
> Should you have any query relating to this matter, please contact our treasurer.

229 Service of the letter occurred the day after the Strata Committee met and resolved to terminate the Agreement forthwith. However, as I have held, the Agreement was a building manager agreement for the purposes of the 2015 Act (see at [66] above). Accordingly, the Agreement became subject to s 68(3) of the 2015 Act which provides:

> The appointment of a building manager may be terminated in accordance with the building manager agreement, if authorised by a resolution at a general meeting of the owners corporation.

230 It follows that the Agreement could only be terminated in accordance with its terms if authorised by a resolution of a general meeting of the Owners Corporation. No such authority was given in advance of the service of the letter of termination. A resolution authorising the termination was not passed at a general meeting of the Owners Corporation until 31 January 2020. On that occasion, a resolution was passed in the following terms:

> **2. CARETAKER TERMINATION**
>
> Resolved that the Owners Corporation resolve that, to the extent necessary, the termination of the Caretaker Agreement entered into on 30 March 2001 and/or 31 March 2011 and/or 31 March 2016 be authorised and/or ratified.

231 The Owners Corporation submitted, by reference to *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [58]-[59] per Barrett JA, that it was open to the Owners Corporation to ratify the termination in the manner it did and thereby satisfy the requirements of s 68(3) of the 2015 Act. The Caretaker did not seem to take issue with the notion that there could be ratification of a termination effected without the authorisation of the general meeting. However, the point was taken that prior to the purported ratification, the Caretaker had itself terminated the Agreement (on the ground that it had been repudiated by the Owners Corporation) and had thus acquired a vested right to loss of bargain damages. It was submitted that in these circumstances the purported ratification was too late to have any legal effect as there could be no retrospective divestiture of the Caretaker's accrued rights (see *Hughes v NM Superannuation Pty Ltd* (1993) 29 NSWLR 653 at 664-5).

232 The Caretaker's argument depends upon establishing that it had a vested right to loss of bargain damages. In order to have that right, the Caretaker would need to have validly terminated the Agreement as the innocent party for breach or repudiation by the Owners Corporation (see *Scott v Ennis-Oakes* [2020] NSWCA 239 at [38]-[41]). In my opinion, that did not occur. In conformity with the conclusions I have reached, the Owners Corporation had the right to terminate the Agreement on 17 August 2019 pursuant to cl 9.3, and it purported to exercise that right. The conduct of the Owners Corporation in that regard, albeit occurring at a time when the authorisation required by s 68(3) was lacking, was not repudiatory. The conduct did not evince an intention not

to be bound by the contract; it was a purported exercise of a contractual right that in fact existed. Neither should the associated conduct of the Owners Corporation be regarded as repudiatory.

233 This conduct includes:

(a) the demanding and taking of possession of Lot 179 on 17 August 2019;

(b) re-taking possession of Lot 179 on 22 August 2019 pursuant to an order made by the Court on the previous day (which followed a short period when the Caretaker resumed possession of Lot 179 in accordance with an ex parte order made by the Court on 19 August 2019);

(c) nominating itself on 22 August 2019 as the purchaser of the Caretaker's Lots (Lots 179 and 162) pursuant to cl 10.2 of the Agreement; and

(d) stating on 22 August 2019 that Jones Lang La Salle had been appointed as interim caretaker.

234 This conduct must be considered in the light of cl 10 of the Agreement. Clause 10 is expressed to operate in the event of termination of the Agreement under cl 9.3. It presupposes that such a termination has occurred, yet it provides in cl 10.3 that during the 90 day period after the termination (referred to as the "Nomination Period"), the parties must continue to perform all their obligations pursuant to the Agreement. Plainly, the notion of termination as used here (i.e. termination of the Agreement under cl 9.3) does not bear its commonly understood meaning that the parties are discharged from all future performance under the contract. Clause 10, which operates upon such termination, contemplates a process under which the Owners Corporation has rights to require the Caretaker's Lots to be sold to a nominated purchaser and, if that does not occur, the Caretaker has rights to "affirm" the Agreement and retain the Caretaker's Lots or sell or assign them. By cl 10.4, the Caretaker is obliged to give the Owners Corporation access the Caretaker's Lots for the purpose of undertaking restoration works.

235 Clause 10 may be seen, broadly, as providing for an orderly cessation (or in one situation the re-establishment) of the relationship between the parties that had been established by the Agreement. The cl 10 regime can be seen to serve a function that is subsidiary to the Agreement as a whole.

236 The Caretaker contends that the conduct of the Owners Corporation described above, in particular the re-taking of possession of Lot 179, amounted to a repudiation of the Agreement. I do not think that is correct. The conduct was purportedly taken in furtherance of the exercise of the right of termination under cl 9.3. It occurred after that termination at a time when only the cl 10 regime remained to be performed. I agree with the submission of the Caretaker that cl 10 did not give the Owners Corporation a right to take possession of Lot 179. Accordingly, the conduct of the Owners Corporation in this regard was a breach of cl 10. However, I do not think that this breach should be regarded as repudiatory. Viewed in its context, it was not conduct that would convey to reasonable persons in the position of the Caretaker that the Owners Corporation was renouncing either the Agreement as a whole or a fundamental obligation under it (see *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115; [2007] HCA 61 at [44]). Repudiation, of course, is not something to be lightly found (see *DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd* [2016] NSWCA 117 at [39]).

237 That principle should be heeded in the present circumstances where termination of the cl 10 regime would leave both parties in a difficult and uncertain position in relation to the fate of the Caretaker's Lots. Moreover, even if it is accepted that possession of Lot 179 is necessary to enable the Caretaker to carry out at least some of its obligations under the Agreement, the cl 10 regime only requires the obligations to continue for a 90 day period. Being excluded from possession of the lot whilst the process envisaged by cl 10 was completed would thus be unlikely to cause the Caretaker to suffer large losses, particularly when further regard is had to the rights of access held by the Owners Corporation pursuant to cl 10.4.

238 It is clear that nominating itself as the purchaser pursuant to cl 10.2 of the Agreement could not conceivably amount to repudiatory conduct. Finally, having regard to the subsidiary nature of the cl 10 regime, stating that Jones Lang La Salle had been appointed as an interim caretaker is not in my view repudiatory conduct. The acts of the Owners Corporation, whether viewed individually or together, do not in my view amount to a repudiation of the

Agreement which had already been terminated, in the particular sense I have sought to describe, under cl 9.3.

239 It is thus my view that the Caretaker did not validly terminate the Agreement on 26 August 2019 when it purported to accept a repudiation by the Owners Corporation. The Caretaker acquired no right to loss of bargain damages. In these circumstances, there seems to be no reason not to apply the general rule that the later ratification by the general meeting of the Owners Corporation relates back to 17 August 2019 when the Strata Committee of the Owners Corporation gave notice of termination of the Agreement (see *Commissioner of Taxation v Sara Lee Household and Body Care (Australia) Pty Ltd* (supra) at [20]).

240 It follows that the termination of the Agreement by the Owners Corporation on 17 August 2019 was valid. As the termination occurred under cl 9.3 of the Agreement, the provisions of cl 10 came into operation. Declarations to that effect should be made.

The operation of cl 10 of the Agreement

241 Under cl 10.1 the Caretaker is obliged to sell the Caretaker's Lots, or cause the owners of the Caretaker's Lots to sell the lots, to a person nominated by the Owners Corporation. On 22 August 2019 the Owners Corporation nominated itself pursuant to cl 10.2 as the person to purchase the Caretaker's Lots, and thus is deemed to have rights of first refusal to purchase the Caretaker's Lots.

242 It is envisaged by cl 10.2 that the parties will then seek to agree upon a price and other terms, failing which the price is to be fixed by a valuer appointed pursuant to the clause. The envisaged process appears not to have progressed beyond the nomination stage. The Caretaker has at all times denied that cl 10 had been engaged. I have concluded that this is not correct. It seems to me that the parties are bound to follow the process laid down by cl 10.

243 There are some outstanding issues concerning the Caretaker's Lots. The Caretaker contends, correctly in my view, that even if the Agreement was validly terminated pursuant to cl 9.3, it remains entitled to possession of Lot 179 until completion of the cl 10 process. Clause 10 does not in terms confer

any right of possession upon the Owners Corporation (or a person nominated as a purchaser), and cl 10.4 rather suggests that the Caretaker is to remain in possession, albeit that the Owners Corporation is entitled to access for certain purposes. The cl 10 process does not inevitably conclude with the Owners Corporation having ownership of the Caretaker's Lots. In my opinion, the Owners Corporation does not acquire any rights of possession in respect of the Caretaker's Lots otherwise than pursuant to a purchase in accordance with the process.

244 Since 19 August 2019 the possession of Lot 179 has been regulated by interlocutory orders made by the Court. Leaving aside the brief period between 17 August 2019 and 19 August 2019, the Owners Corporation has been in possession of Lot 179 since 22 August 2019 pursuant to an order made by the Court on 21 August 2019. The Owners Corporation gave the usual undertaking as to damages in respect of that order.

245 I think that declarations and orders should be made, to recognise that the Caretaker remained entitled to possession of Lot 179 notwithstanding the valid termination of the Agreement on 17 August 2019, and to compensate the Caretaker for loss sustained as a result of the Owners Corporation taking possession. The question of compensation will be returned to in the next section of these reasons.

246 An issue also arises in relation to Lot 162. It may be recalled that Lot 162 is owned by Mr Wang. It was added as a Caretaker Lot pursuant to the first Deed of Variation made in March 2010. Mr Wang (the second plaintiff) contends that as he is not a party to the Agreement (or any of the Deeds of Variation) the Agreement does not confer upon the Owners Corporation any rights in respect of Lot 162. A declaration to that effect is sought.

247 I agree that the Agreement does not confer any rights upon the Owners Corporation that are enforceable against Mr Wang personally. Nevertheless, the Caretaker has agreed to the addition of Lot 162 as a Caretaker Lot, and the Owners Corporation has contractual rights against the Caretaker in that regard. Clause 10.1 of the Agreement obliges the Caretaker to cause the owner of Lot 162 to sell the lot to a person nominated by the Owners Corporation. The

provision clearly envisages that a Caretaker Lot might not be in the ownership of the Caretaker itself, as does cl 9.3(vi) which confers a right of termination upon the Owners Corporation if within a certain period the Caretaker's Lots are not owned by the Caretaker or a shareholder or director of the Caretaker. It is open to the Owners Corporation to call upon the Caretaker to cause Mr Wang to sell Lot 162 to a person nominated by the Owners Corporation. The contractual promise is enforceable against the Caretaker. So too is cl 10.4. The declaration sought by Mr Wang seems to be expressed too broadly, but a declaration to the effect that the Agreement does not confer any rights upon the Owners Corporation that are enforceable against Mr Wang personally would be appropriate.

Compensation for deprivation of possession of Lot 179

248 The Caretaker relied upon the valuation evidence of Mr David Bird who assessed Lot 179 as having a gross rental value of $28,500 p.a. The Owners Corporation relied upon the valuation evidence of Mr Peter McSwiggan who assessed Lot 179 as having a gross rental value of $18,700 p.a.

249 Mr Bird's report included the following:

> The subject comprises the area of Lot 179 in SP65111 contained on the ground floor, being some 30 square metres. It would appear at the current date to consist of an area of space off the main foyer entry to the apartments, as this foyer leads through to the inner lift foyer area.
>
> From the limited inspection available, and reference to the strata plan, it includes within its [sic] an area the reception counter desk and open sitting area behind, and the room to its rear occupied as a back office for building management/reception staff. The Fire Control Room noted as common property of the strata plan bounds the lot to its rear, with doorway access through from this space.
>
> …
>
> My rental valuation assessment as per my specific instructions in this matter, is based upon an analysis of comparable rentals, the most relevant set out in the table following at *4.0 Market Evidence & Analysis*;
>
> The rental assessment is considered on the basis of the space having a continued usage as is current, and on the presumption this is permissible under the consideration of the Owner's Corporation & by all relevant By-Laws;
>
> Given the nature of the subject lot, I have no evidence of directly comparable leasing or asking rental of similar use space, and thus I have had to widen my search parameters;

> I have firstly sought evidence of ground floor small scale lots, in arcade or lobby situations, or at the upper end footpath take-away of café rentals. It is acknowledged that these should generally provide a higher range on a rate per square metre, given their retail or café potential and superior exposure to pedestrian traffic;
>
> …
>
> As a second point of reference, I have considered B grade or similar office space and suites on upper floors of commercial buildings within the broader precinct, of which there is an abundance of evidence;
>
> …
>
> The subject provides some 30 square metres of space, with an open reception desk and behind it a single office room, with basic sink/cupboard unit;
>
> Whilst not able to be considered as retail or café space, it provides an essential ground floor lobby area for building and apartment management and reception;
>
> Its smaller scale nature demands a rental premium, and combined with its ground floor reception lobby position, should see it considered at a rate above that of typical office space, whilst below that of reduced scale arcade retail or café space;
>
> Having considered a broad range of evidence, I would assess a current rental rate at say $950/sq m gross.

250 Mr McSwiggan's report included the following:

> I have considered comparable rental evidence for small area office tenancies below. I note the subject office space is located on the ground floor. I have generally excluded ground floor commercial area rentals as these are typically retail tenancies and command significantly higher rental rates and are therefore not comparable with the subject properties approved usage as office space.
>
> …
>
> Having regard to current market conditions relative to the subject locality at the southern end of the Sydney Central Business District, the ground floor location, the existing constraints of the office design and the proportion of open reception and storage located within the subject office and reception area of the lot. I am of the opinion that an appropriate rate per square metre for the enclosed office area is $850 per square metre per annum net and a rate of approximately $425 per square metre net per annum or 50% of the enclosed office space rate for the open reception area on the basis this area (as per the registered Strata Plan and my physical inspection) is enclosed and not lockable.
>
> …
>
> I have therefore adopted $18,700 Gross per annum ex GST as my estimate of Market Rental subject to the critical assumptions outlined above.

The $18,700 is divided into $15,300 for the enclosed office area (18m2 at $850 per m2), and $3,400 for the unenclosed reception area (8m2 at $425 per m2).

No amount was attributed to the plant room component (4m2) which contains air-conditioning equipment.

251 Both valuers were cross-examined in relation to the opinions they expressed in their reports.

252 Mr Bird was asked about the 4m2 area that contains air-conditioning equipment. He agreed that if that area was not useful space for Lot 179 then the lettable area should be considered to be reduced. Mr Bird did not agree that the reception desk area should be regarded as less useful space than the remaining parts of Lot 179. In re-examination he said that on the assumption that the air-conditioning equipment could be removed by a tenant if it wished, then he would consider the 4m2 area to be a useable lettable area.

253 Mr Bird essentially maintained that, despite a significant lack of exactly comparable or directly comparable space, his assessment was based on a consideration of a range or a matrix of rentals (including for space used as café or retail) within which he placed the subject lot.

254 Mr McSwiggan maintained that his assessment of the enclosed office area was properly based on a comparison with office rentals, as building and management office space is a subset of office space. He agreed that his 50% reduction in rate for the unenclosed reception area was not justified by reference to any comparable rental information. Mr McSwiggan said that it was a professional opinion based on experience with office areas that are compromised in some fashion. Mr McSwiggan was prepared to accept that a small adjustment or increase may be justified to allow for the opportunity for some commercial use. Mr McSwiggan agreed that the 4m2 area would be lettable space if a tenant was able to remove the plant from that area.

255 There was little difference between the valuers on the rate to be adopted at least insofar as the enclosed office space is concerned. Both explained their approaches clearly and reasonably, having regard to the obvious fact that Lot 179 is an unusual space to let. I would adopt the mid-point between the two, namely $900 per m2 for that 18m2 area (i.e. $16,200).

256 As for the unenclosed reception area, Mr Bird was firm that the area was very useful space, and that the same rate should be applied to it. Mr McSwiggan explained his rationale for a reduction, but it seemed to me that the reasons given were not compelling. That area might be less useful for more traditional office uses, but it does lend itself to other uses that would not be possible with ordinary office space. I think that the same rate of $900 per m2 should be applied to this 8m2 area (i.e. $7,200).

257 Only a small value should be ascribed to the 4m2 where the air-conditioning equipment is located. The air-conditioner evidently services the foyer area as a whole. That area includes Lot 179 as well as common property areas. Its presence in Lot 179 is likely due to the lot being earmarked as a space for a caretaker rather than a space for exclusively private use by its occupier. Given that the air-conditioner is of benefit to users of Lot 179, it seems unlikely that its owner would remove the equipment in order to create more lettable area, or allow a tenant to do so.

258 Based on the above, including a small allowance in respect of the 4m2 area, I consider that Lot 179 should be assessed as having a gross rental value of about $24,000 p.a.

259 On that basis, had the Caretaker not been kept out of possession since 22 August 2019 in accordance with the order made by the Court on 21 August 2019, the Caretaker may have been able to let Lot 179 on a short-term basis pending the determination of these proceedings. If an allowance is made for say two months to put the space on the market and achieve a letting, the loss suffered by the Caretaker can be assessed to be approximately $24,000.

260 The order made on 21 August 2019 should be discharged, and an order should be made requiring the Owners Corporation to vacate Lot 179 and give possession to the Caretaker. The process envisaged by cl 10 of the Agreement may then be undertaken, as is required following a termination of the Agreement pursuant to cl 9.3. In accordance with the principles applicable to compensation pursuant to the usual undertaking as to damages (see *European Bank Limited v Evans* (2010) 240 CLR 432; [2010] HCA 6 at [18]) it would be just and equitable to order the Owners Corporation to pay compensation to the

Caretaker of $24,000 (plus interest of $600, calculated at half of a reasonable rate of 5% per annum over one year).

261 The Caretaker also claimed to be entitled to compensation because it was deprived of the right to earn profits under the Agreement, at least until the cl 10 process had completed. However, by 26 August 2019 the Caretaker was asserting, incorrectly, that the Agreement had terminated upon the acceptance of the repudiation by the Owners Corporation. In these circumstances, I do not see how the Caretaker can claim that it suffered a loss of profits for any period from 26 August 2019. In respect of the period from 17 August 2019 to 25 August 2019 (nine days), and based on the loss of profit calculations of Mr Paul Russell, which were essentially unchallenged, lost profits in that period would be approximately $7,840. The Owners Corporation should be ordered to pay that sum (plus interest) to the Caretaker as damages, in addition to the $24,600 to be paid as compensation pursuant to the usual undertaking as to damages.

Other matters

262 The conclusions I have reached concerning the termination of the Agreement mean that the Caretaker's claim for loss of bargain damages must fail. However, in case my conclusions are wrong, and for completeness, I will briefly state how I would have assessed those damages if the Owners Corporation had wrongfully terminated the Agreement.

263 The Caretaker claimed damages for loss of profits that would have been earned under the Agreement. The damages were claimed in respect of a period ending on 30 March 2041. The amount claimed was about $1.96 million, based on the calculations made by Mr Russell, which were themselves essentially based on unchallenged evidence given by Mr Wang. There is no reason not to accept Mr Russell's calculations as accurate.

264 I accept, based on Mr Wang's evidence, that the Caretaker would have exercised the options to renew the Agreement as they arose. However, I have held that the Agreement, as varied by the deeds in 2010 and 2015, would by virtue of s 68(1) of the 2015 Act expire no later than 29 April 2025 (see [68]

above). Mr Russell calculated the lost profits to 30 April 2025 as $1,216,881. Adjusting for one day would reduce the figure to $1,216,518.

265 The Owners Corporation submitted that any assessment of loss of profits had to take into account the prospect that the Agreement would be terminated as a result of an application made under s 72 of the 2015 Act. I agree that such a prospect is a matter that must be taken into account (see *Berry v CCL Secure Pty Ltd* (2020) 94 ALJR 715; [2020] HCA 27 at [37]).

266 Under s 72(1) of the 2015 Act the Civil and Administrative Tribunal ("the Tribunal") may, on the application of an owners corporation for a strata scheme, make an order terminating a building manager agreement. The grounds for such an order are specified in s 72(3). They include that the building manager has performed the agreement unsatisfactorily, and that the agreement is in the circumstances "otherwise harsh, oppressive, unconscionable or unreasonable".

267 It should be assumed for the purposes of this exercise that any breaches of the Agreement by the Caretaker or other conduct of the Caretaker, falls short of gross misconduct or gross negligence, or repudiatory conduct. That is to say, whatever the defaults or deficiencies of the Caretaker they do not justify termination by the Owners Corporation either under cl 9.3(iv) or at common law. The defaults or deficiencies might, however, constitute unsatisfactory performance for the purposes of s 72(3). It would also be open to the Owners Corporation to assert (as it does) that aspects of the Agreement, for example the level of remuneration, operated harshly or oppressively for the purposes of s 72(3).

268 I would accept, based on the breakdown of the relationship between the Owners Corporation and the Caretaker, and evidence given by members of the strata committee, that had the Agreement not been terminated in August 2019, the Owners Corporation is likely to have brought an application under s 72. It could be expected that such an application would be firmly resisted by the Caretaker.

269 The Caretaker submitted that there was no proper basis for the Court to conclude that a contested application would have resulted in an order

terminating the Agreement. It was put that the Court would really be engaging in speculation. There is some force in these submissions, but I think that the Court would have to do its best to assess the possibility.

270 In my view, even assuming that the relevant conduct falls short of gross misconduct or gross negligence, or repudiatory conduct, the conduct of the Caretaker in breaching cl 18.2 over a number of years, improperly using electricity supplied to Lot 179 over a number of years, and failing to report the existence of faults in the EWIS, is likely to be regarded by the Tribunal as unsatisfactory performance. However, having regard to my findings concerning the allegations of overcharging, I do not think that the Tribunal would find that the Agreement is harsh or oppressive on that suggested ground.

271 It is relevant to note that the Tribunal has powers under s 72(1) to make orders that a party to the agreement pay compensation or take any action under the agreement. There is thus some scope to make orders to redress the effects of unsatisfactory performance and prevent the continuation of unsatisfactory performance.

272 Viewing the circumstances overall, including that under the legislation the Agreement would expire no later than 29 April 2025, I consider that the prospect of the Tribunal making an order terminating the Agreement is one that exists and is not fanciful, but should be regarded as small. I would not discount the damages calculation by any more than about 20%, to a rounded figure of $975,000, on account of this matter.

273 The Owners Corporation also submitted that the Caretaker failed to mitigate its loss because it could have but did not deploy its employees or other resources towards other profitable activity. The Owners Corporation bears the onus of establishing a failure to mitigate, which in essence is a failure to take reasonable steps so as to avoid suffering the loss, or part of the loss, claimed.

274 Mr Wang agreed in cross-examination that since the termination of the Agreement the Caretaker had not sought to secure a caretaking agreement in any other building. However, it was not put to Mr Wang that any particular opportunities of that kind were available, or that it was unreasonable of the

Caretaker not to pursue any such opportunity. It was also not shown that any such opportunity was likely to yield profits of any magnitude.

275 The Owners Corporation submitted that the existence of such opportunities should be inferred. An inference can perhaps be drawn at a general level that caretaker positions for large strata schemes arise from time to time in Sydney; but that, without more, does not show that the Caretaker has acted unreasonably in not seeking such positions. In my opinion, the Owners Corporation has not established that the Caretaker has acted unreasonably and thereby failed to avoid incurring some part of the losses it claims.

276 For the above reasons, had it been necessary to assess the Caretaker's damages for loss of bargain, I would have assessed them to be $975,000.

Conclusion

277 A declaration will be made to the effect that on 17 August 2019 the Owners Corporation validly terminated the Agreement pursuant to 9.3 thereof. A declaration will also be made to the effect that upon such termination, the provisions of cl 10 of the Agreement operated and bound the parties accordingly. A further declaration will be made to the effect that in the events that happened, the Caretaker remained entitled to possession of Lot 179. The order of the Court made on 21 August 2019 that allowed the Owners Corporation to re-take possession of Lot 179 will be discharged.

278 An order will be made requiring the Owners Corporation to permit the Caretaker to resume possession of Lot 179 within 7 days. In addition, orders will be made for the Owners Corporation to pay damages of $7,840 (plus interest) to the Caretaker, and $24,600 in compensation pursuant to the usual undertaking as to damages. A judgment will be entered accordingly. The Further Amended Statement of Claim will otherwise be dismissed. The Cross-Claim will also be dismissed.

279 As the Court has concluded that the parties are bound by cl 10 of the Agreement, there will be a grant of liberty to apply in respect of any issues that may arise in the course of the completion of the process laid down by cl 10.

280 As for costs, it is apparent that each party has enjoyed at least some success, and has otherwise failed. The Court will direct the parties to confer and seek to reach an agreement upon the appropriate orders as to costs. If agreement is not forthcoming, the Court will give directions for the making of submissions on costs.

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