Supreme Court

New South Wales

Case Name:	Bondi Beach Astra Retirement Village Pty Ltd v Assem
Medium Neutral Citation:	[2020] NSWSC 1814
Hearing Date(s):	26-29 May 2020
Decision Date:	16 December 2020
Jurisdiction:	Equity
Before:	Meagher JA
Decision:	See [213]
Catchwords:	RETIREMENT VILLAGES – Retirement Villages Act 1999 (NSW), s 5 – meaning of “retirement village” – “village contracts” – whether contracts giving rise to “residence right” – whether contracts “under which” services provided – whether complex “predominantly or exclusively” occupied or intended to be occupied by residents having village contracts with operator RETIREMENT VILLAGES – Retirement Villages Act 1999 (NSW) – meaning of “operator” of retirement village – whether plaintiff manages or controls village – whether sufficient that plaintiff owns land in the village or is within Retirement Villages Regulation 2017 (NSW), reg 6 – meaning of “land” RETIREMENT VILLAGES – Retirement Villages Act 1999 (NSW), s 171 – where prospective seller not a resident – whether “vendor” must be a “resident" of village – whether s 171 applies to operator not involved in management or control of village CONTRACTS – uncertainty – where clause requires that any contract for sale of property be subject to purchaser’s agreement with third party – whether

clause void for uncertainty as agreement to agree – whether purchaser under contract for sale would have discretion not to perform

CONTRACTS – restraints on alienation – where clause requires that any contract for sale of property be subject to purchaser's agreement with third party – whether clause void as impermissible restraint on alienation of land – whether restraint has valid collateral purpose

Legislation Cited:

Conveyancing Act 1919 (NSW), s 88E
Interpretation Act 1987 (NSW), s 21(1)
Real Property Act 1900 (NSW), ss 3(1), 74H(5)(a), 93(1)
Retirement Villages Act 1989 (NSW), s 3(1)
Retirement Villages Act 1999 (NSW), ss 4, 5, 24, 24A, 40, 41, 43, 72, 112, 166, 171, Part 10 Div 5
Retirement Villages Regulation 2009 (NSW), reg 15A
Retirement Villages Regulation 2017 (NSW), regs 6, 17, 26(i), Schedule 2
Strata Schemes Development Act 2015 (NSW), s 9
Strata Schemes Management Act 1996 (NSW), ss 9(2), 12(1), 42(2), 43(4), 117
Strata Schemes Management Act 2015 (NSW), ss 136(2), 144
Strata Titles Act 1973 (NSW), s 58(2), (7)

Cases Cited:

Adventure World Travel Pty Ltd v Newsom (2014) 86 NSWLR 515; [2014] NSWCA 174
Aged Care Services Pty Ltd v Kanning Services Pty Ltd (2013) 86 NSWLR 174; [2013] NSWCA 393
Attorney-General (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1; [2013] HCA 3
Australian Education Union v Dept of Education and Children's Services (2012) 248 CLR 1; [2012] HCA 3
Bird v Perpetual Executors and Trustees Association of Australia Ltd (1946) 73 CLR 140; [1946] HCA 52
Bondi Beach Astra Retirement Village Pty Ltd v Gora [2010] NSWSC 81
Bondi Beach Astra Retirement Village Pty Ltd v Gora (2011) 82 NSWLR 665; [2011] NSWCA 396
Brown v Heffer (1967) 116 CLR 344; [1967] HCA 40
Brown v West (1990) 169 CLR 195; [1990] HCA 7
Bursill Enterprises Pty Ltd v Berger Bros Trading Co

Pty Ltd (1970) 124 CLR 73; [1971] HCA 9
Caboche v Ramsay [1993] FCA 611; (1993) 119 ALR 215
Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd (1988) 1 NSWLR 439
Eastman v DPP (ACT) (2003) 214 CLR 318; [2003] HCA 28
Farkas v R [2014] NSWCCA 141
Hall v Busst (1960) 104 CLR 206; [1960] HCA 84
Inghams Enterprises Pty Ltd v Hannigan [2020] NSWCA 82
John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc (2004) 88 SASR 334; [2004] SASC 128
Johns v Australian Securities Commission (1993) 178 CLR 408; [1993] HCA 56
Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52
Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd [2008] NSWCA 327; (2008) 14 BPR 26,339
Nairn v Metro-Central Joint Development Assessment Panel (2018) 53 WAR 20; [2018] WASCA 18
Noon v Bondi Beach Astra Retirement Village Pty Ltd [2010] NSWCA 202
Noon v The Owners – Strata Plan No. 22422 [2014] NSWSC 1260
Onus v Alcoa of Australia Ltd (1981) 149 CLR 27; [1981] HCA 50
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537; [1982] HCA 29
Re Lehrer and the Real Property Act 1900-1956 (1960) 61 SR (NSW) 365
Reuthlinger v MacDonald [1976] 1 NSWLR 88
Reuthlinger v MacDonald (NSWCA, Street CJ, Glass and Samuels JJA, 20 October 1976, unreported)
Sovar v Henry Lane Pty Ltd (1967) 116 CLR 397; [1967] HCA 31
Ta Lee Investment Pty Ltd v Antonios [2019] NSWCA 24
The Salvation Army (New South Wales) Property Trust v Chief Commissioner of State Revenue (2018) 96 NSWLR 119; [2018] NSWSC 128
Thorby v Goldberg (1964) 112 CLR 597; [1964] HCA 1

Texts Cited:	P Butt, Land Law (Lawbook Co, 2006, 5th ed) J D Heydon, Heydon on Contract (2019, Lawbook Co) C Sweet, 'Restraints on Alienation I' (1917) 33 LQR 236
Category:	Principal judgment
Parties:	Bondi Beach Astra Retirement Village Pty Ltd (Plaintiff) Yasser Assem (First Defendant) Mohammed Assem (Second Defendant) The Owners – Strata Plan 22422 (Third Defendant)
Representation:	Counsel: S Balafoutis SC and E Doyle-Markwick (Plaintiff) P W Gray SC and D M Flaherty (First and Second Defendants) Solicitors: Thomson Geer (Plaintiff) GP Legal (First and Second Defendants)
File Number(s):	2019/137526
Publication Restriction:	Nil

FJUDGMENT

Introduction

1 **MEAGHER JA**: These proceedings concern the Bondi Beach Astra (**the Astra**), a strata title property overlooking Bondi Beach. All of its occupants are elderly. Most are retired. The first and second defendants, Yasser and Mohammed Assem, are the executors of the estate of their father, Isamil Assem, a former owner and occupant of unit 61 of the Astra (lot 61 in strata plan 22422). In their capacity as executors they are the registered proprietors of lot 61, which they now seek to sell. The third defendant (The Owners – Strata Plan 22422) has filed a submitting appearance and taken no part in the proceedings. For ease of reference, the first and second defendants are hereafter referred to as the defendants.

2 The plaintiff, Bondi Beach Astra Retirement Village Pty Ltd (**BBARV**), contends that the Astra, including lot 61, is a "retirement village" under the *Retirement Villages Act 1999* (NSW) (**RVA**), and that BBARV is its "operator". Accordingly, the plaintiff contends, a sale by the defendants will be subject to s 171 of the RVA, subs (2) of which makes any contract for sale of residential premises in a retirement village "conditional" on the purchaser entering into a "service contract" with the plaintiff. The defendants dispute all of these propositions. The question whether the purchaser's performance of that 'imposed' condition of the contract for sale is precedent to the vendor's entitlement to performance of the contract, and can be waived, does not arise.

3 The plaintiff also relies on cl 13 of an agreement with the defendants' parents (**the Agreement**), dated 16 February 2005 and described as a "Post-2000 Occupancy Agreement", which it submits requires that the defendants include in any agreement for the transfer or sale of lot 61 a condition similar to that imposed by s 171(2). The defendants claim that cl 13 is void for uncertainty or, in the alternative, is an impermissible restraint on the free alienation of land.

4 Both the plaintiff and, by their amended cross-claim, the defendants, seek declarations consistent with their positions. The plaintiff also seeks orders that

the defendants: (a) give it notice of any proposed sale, as required by s 171(1); (b) include the condition said to be required by cl 13 in any contract for sale; (c) be restrained from completing any sale of lot 61 until the purchaser has entered into a service contract with BBARV; and (d) notify the plaintiff as soon as practicable after any contract for sale is entered into.

5 A "retirement village" is a "complex" made up of residential premises "predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex" (RVA, s 5(1)). An "operator" is "the person who manages or controls the retirement village", and includes a person "who owns land in the village" or who is within the class of persons prescribed by the regulations for the purposes of the definition (RVA, s 4(1)). That is, the questions whether the Astra is a retirement village and whether BBARV is an operator of the village are technically interdependent. However, it remains possible to address the issues raised by the two definitions separately.

6 These reasons proceed as follows. First, they address whether the Astra's residential lots are or are intended to be predominantly or exclusively occupied by retired persons who have entered into "village contracts" with BBARV. Over the years the plaintiff has entered into a number of different classes of contracts with occupants of the Astra which it contends answer the definition of village contract. A number of classes remain disputed.

7 The second issue is whether BBARV is an operator. The plaintiff submits that as a factual matter it "manages or controls" the retirement village, and also that it is a person within the class of persons prescribed by the regulations. It is strictly not necessary to address either of these questions, because it is sufficient, for BBARV to satisfy that description, that it owns land in the retirement village. However, because the plaintiff's primary case is that it manages or controls a retirement village, and as that being the position has been fully contested, each of these questions is addressed below.

8 The final issues under the RVA relate to s 171. They are whether it applies to a prospective sale by the defendants and, if it does, whether the plaintiff has

standing to enforce it. The case in contract, which is logically separate, is dealt with last.

9 Before considering the first of these questions, I propose to make findings, in relatively general terms, as to the history of the Astra as a purported retirement village and BBARV's control and management of that village, including by the entry into contracts for the provision of services to residents, from an office forming part of the strata scheme's common property.

Origins of the Astra and BBARV's occupation and operation of its business using part of the common property

10 Originally, the Astra was a licensed hotel. In 1985, it was subdivided by a strata plan (SP 22422) into 61 residential and 3 commercial lots. In August 1987, 10 of those residential lots were consolidated into 5 lots (SP 32039). The conditions of Waverley Municipal Council's approval of the alterations to convert the existing building to "residential accommodation for the housing of aged persons" included that the applicant, C G Maloney Pty Ltd (**C G Maloney**), agree to a restriction as to user providing that "no unit be used other than as a residence for persons aged 55 years or over or for people who are disabled persons". That condition was satisfied by the creation of a restriction as to user pursuant to s 88E of the *Conveyancing Act 1919* (NSW). That restriction was expressed to be for the benefit of the local council.

11 As a consequence of the consolidation effected by SP 32039, there are 56 residential lots and 3 commercial lots. The numbers of the residential lots correspond with their "unit" numbers except in respect of lots 65, 66, 67, 68 and 69 which are, respectively, the consolidation of earlier lots 1 and 2, 11 and 12, 21 and 22, 31 and 32, and 41 and 42, and retained the unit numbers 2, 12, 22, 32 and 42 respectively. The commercial lots are lots 62, 63 and 64.

12 At the first annual general meeting (AGM) of the proprietors of SP 22422 on 12 December 1986, a series of by-laws, including by-law 32, were passed by unanimous resolution. By-law 32 provided:

> Exclusive use of those parts of the Common Property comprising the swimming pool area, passageways and corridors on all floors, the courtyard areas, and the residents' facilities and lounges on the ground floor will be granted to the Service Company [BBARV] subject to the Service Company properly maintaining and keeping in good repair those areas and that in

> accordance with the Occupancy Agreement the Service Company will sub-licence all proprietors and occupiers of the residential lots to permit them to use such areas.

13 By-law 30, also passed at that AGM, provided that the proprietor for the time being of lot 52 should have the exclusive use and enjoyment of 21 car spaces in the basement of the Astra.

14 Thereafter C G Maloney, as owner and developer of the proposed retirement village, went about selling the lots in SP 22422. At the same time BBARV, and not C G Maloney, agreed to give licences of car spaces to some of the registered proprietors of lots purchased from C G Maloney: see *Bondi Beach Astra Retirement Village Pty Ltd v Gora* [2010] NSWSC 81 (***Gora* (SC)**) at [6]. It is not clear from the evidence whether thereafter C G Maloney granted licenses to those purchasers. BBARV was not a party to the contracts for sale, which also required that the purchasers enter into two deeds with BBARV on completion of the purchase. The first was an Occupancy Deed describing BBARV as the Service Company and reciting that "as far as legally possible" it had been granted "exclusive use and possession of the Communal Areas". By cl 1(a) of that Deed, BBARV agreed to employ a manager and staff:

> ... to manage and administer the Communal Areas and common property of the Astra to attend to the comfort and all reasonable and proper requests and demands of the occupants thereof and to ensure that the occupants enjoy such reasonable privacy and quiet possession and enjoyment of their unit and the Communal Areas as is consistent with the physical characteristics of a retirement village designed for the residence of persons of 55 years of age and over.

15 The second was a Buy-back Deed which, in the event the lot was to be sold, transferred or otherwise disposed of, conferred on BBARV a right to purchase it at the price for which it had been purchased. The Occupancy Deed also granted BBARV a call option to purchase the relevant lot at its price when purchased.

16 From 30 October 1989, the conduct of a "retirement village" in NSW became subject to the provisions of the *Retirement Villages Act 1989* (NSW). It does not appear to have been controversial that the Astra was a "retirement village" within the meaning of that Act, the residential complex being predominantly or exclusively occupied by persons over the age of 55 years by reason of their ownership of "residential premises subject to a right or option of repurchase or

conditions restricting the subsequent disposal of the premises" (s 3(1)). Over the following years the efficacy and enforceability of some of the contracts between C G Maloney or BBARV and residents of the Astra has been challenged or questioned. See *Gora* (SC) (enforceability of put and call options granted in an occupancy agreement); *Noon v Bondi Beach Astra Retirement Village Pty Ltd* [2010] NSWCA 202 (***Noon v BBARV***) (although it was common ground that the village was a "retirement village" under the 1989 Act, there were issues as to whether the initial contract for sale from C G Maloney was a "resident contract" under the 1989 Act and whether the call option granted to BBARV in that contract was enforceable); and *Noon v The Owners – Strata Plan No. 22422* [2014] NSWSC 1260 (***Noon v The Owners***) (the issue being whether by-law 32 was valid).

17 The defendants' parents, Isamil and Madiha Assem, purchased lot 61 in 1997 under an Agreement for Sale of Land which conferred a buy back entitlement on BBARV "for the price at which the [lot owners] bought the unit". In 2005, Mr and Mrs Assem, for consideration of $220,000, secured BBARV's release from all obligations under the 1997 agreement. Those parties also executed a separate deed, which was to govern "all future relations and their relationship". That is the Post-2000 Occupancy Agreement dated 16 February 2005.

18 The evidence establishes that by 2001 BBARV was providing "concierge" services to residents of the Astra, monitoring the common areas, liaising with tradesmen in relation to work to be done in the common areas and assisting in organising the Astra's social activities and functions. That evidence was given by a resident whose lot was purchased in 2001. Another resident gave evidence of the services being provided by BBARV in 2010. They included staffing the front office, managing the electronic security key system, assisting with community activities within the Astra, maintaining the gym equipment, organising handyman and maintenance services for residents, arranging for the ordering and collection of takeaway meals from a nearby restaurant, and installing, maintaining and monitoring a medical alert system for each residence. The same resident also remarked that the "number, quality and variety of services" provided by BBARV to residents had "increased markedly since early 2017" when there was a change in its ownership.

19 It is not controversial in this proceeding that from at least 2014, BBARV has occupied and used part of the common property, namely the front office area on the ground floor, to operate its business of managing a retirement village and providing services to its residents. Indeed, the inference to be drawn from the limited evidence of the early history of the Astra, including the passage of by-law 32, is that BBARV has occupied and used part of the common property as the office from which it has provided services (if perhaps of variable and limited extent) to the residents of the Astra from 1987. In 2014, the services provided were described in Annexure B to a Retirement Village Contract entered into at that time as including managing and administering the use of common areas with a view to ensuring quiet possession and enjoyment of residents consistent with the characteristics of village as residence of persons over 55 years of age; inspecting fire fighting equipment; supervising and controlling employees or contractors of residents; taking precautions to safeguard common areas against unlawful entry or accident or damage; maintaining and managing the village emergency call system; and organising and providing a secure retirement village. At the same time the various village contracts it was entering into confer contractual rights on BBARV with respect to the provision of services and the payment of charges, access to the regulated premises, subletting, the behaviour of residents, including on common property, and the sale of the premises.

20 At the 2012 AGM of the Owners Corporation held on 20 November 2012, it was resolved that for the 2012-2013 financial year $24,000 (including GST) be paid to BBARV by monthly instalments for concierge services, “unless and until a mutually negotiated agreement” was in place for the “management and supervision of the building”. A resolution in substantially the same terms was passed on 19 November 2013 at the 2013 AGM.

21 Since 2013, draft agreements answering that description and proposed by BBARV to the Owners Corporation have failed to achieve the special majority required for their execution (75% of the value of votes cast). At the 2014 AGM on 9 December 2014, having rejected a resolution to enter into a form of written agreement with BBARV, the Owners Corporation resolved:

> ... to grant in principal approval to [BBARV] to operate its business from the office and to use common property (excluding the upstairs old kitchen and games area) to provide services to residents as a part of the retirement village for a period of six months, as an interim measure to allow owners further time to consider the proposal by BBARV submitted in motion 5 [and rejected] ...
>
> ...
>
> [It was also noted that] nothing in this motion shall be taken as owners corporations consent to BBARV remaining in occupation of Common property ... unless and until the detailed Licence Agreement contemplated by Part 1 is entered into by the Owners Corporation and BBARV.

22 Thereafter provision was made for concierge or management fees to be paid to BBARV in each of the Owners Corporation's subsequent annual budgets, including for the year ending 30 September 2020. In its financial records that fee is part of an amount allocated for "building management", with BBARV described as a "contract Building Manager".

23 At the 2016 AGM held on 29 November 2016, the Owners Corporation resolved by special resolution to enter into an agreement with BBARV that was explained to the meeting by the solicitor for the Owners Corporation as being for a period of 5 years commencing on 1 January 2017 and requiring that the Owners Corporation pay a concierge fee in an initial amount of $24,000 including GST. That description of the agreement included:

> ... [it] would allow the BBARV to operate the retirement village from the communal areas in the building and would grant BBARV a licence for that purpose. Mr Mueller [the solicitor] also explained that the deed would require the BBARV to provide a variety of services to the owners corporation and residents. Mr Mueller indicated that those services would include a requirement for the BBARV to keep the office open during certain times, provide concierge services and assist the owners corporation with various functions including cleaning, gardening, swimming pool maintenance, security and by-law monitoring.

24 No such agreement was executed. A further draft agreement was proposed for approval at the 2017 AGM held on 19 December 2017. That agreement was rejected, as was the further draft proposed for approval at an extraordinary general meeting (EGM) of the Owners Corporation held on 12 September 2018.

25 At the Owners Corporation's 2019 AGM on 19 November 2019, its audited accounts for the financial year ended 30 September 2019 and its budget for the year ending 30 September 2020 were ratified or adopted. In each, provision

was made for continuing annual payments (in the former of $24,000 and the latter of $25,000) to BBARV, described in each case as the "Onsite Management Company".

26 It is convenient now to turn to the question whether the Astra complex is a "retirement village".

Whether the Astra is predominantly or exclusively occupied by retired persons who have entered into village contracts with BBARV

27 A "retirement village" is defined by s 5 as follows:

> **5 Meaning of "retirement village"**
>
> (1) For the purposes of this Act, a ***retirement village*** is a complex containing residential premises that are—
>
> > (a) predominantly or exclusively occupied, or intended to be predominantly or exclusively occupied, by retired persons who have entered into village contracts with an operator of the complex, or
> >
> > (b) prescribed by the regulations for the purposes of this definition.
>
> (2) It does not matter that some residential premises in the complex may be occupied by employees of the operator or under residential tenancy agreements containing a term to the effect that this Act does not apply to the premises the subject of the agreement (instead of being occupied under residence contracts), or that those premises do not form part of the retirement village.
>
> (3) However, a retirement village does not include any of the following—
>
> > ...
> >
> > (g) any accommodation provided in a complex for employees of the complex who are not residents of the retirement village,
> >
> > (h) any residential premises the subject of a residential tenancy agreement in the form prescribed under the Residential Tenancies Act 2010 to which the operator of a retirement village is a party and that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement,
> >
> > (i) any other place or part of a place excluded from this definition by the regulations.

28 The other definitions of relevance are set out in s 4:

> **4 Definitions**
>
> (1) In this Act—
>
> > ...
> >
> > ***resident*** of a retirement village means a retired person who has a residence right in respect of residential premises in the village and

includes the following persons (each of whom is taken also to have a residence right in respect of the residential premises concerned)—

(a) the spouse of the retired person, if the spouse occupies the residential premises with the retired person,

(b) if the retired person is in a de facto relationship—the other party to that relationship, if the other party occupies the residential premises with the retired person,

(c) any person or class of persons prescribed by the regulations for the purpose of this definition,

(d) in Parts 6, 7 and 8 and Division 5 of Part 10—a former occupant of the retirement village.

...

retired person means a person who has reached the age of 55 years or has retired from full-time employment.

...

village contract means—

(a) a residence contract, or

(b) a service contract, or

(c) a contract under which a resident of a retirement village obtains the right to use a garage or parking space, or a storage room, in the village, or

(d) any other contract of a kind prescribed by the regulations for the purpose of this definition.

Note—

A residence contract, a service contract and any other village contract may be contained in a single document.

The plaintiff's case as to the number of residential premises occupied by residents who are parties to village contracts

29 Although there are 56 residential lots in the Astra, it is accepted that one lot, belonging to a Mr Noon, does not form part of any retirement village and is to be disregarded. What follows records the position as disclosed in the evidence, which addresses the position as at late May 2020. Of the remaining 55 residential lots, 16 are owned by the plaintiff. Of those 16 lots, 11 are occupied and 5 remain vacant. The Astra residential complex has 51 occupants, of which 47 are said to be "residents". Of those residents, 44, occupying 41 lots, are said to be parties to "village contracts" with the plaintiff. All of those occupants are aged over 55 and most have also retired from full-time employment.

30 The defendants do not contest the number of "residents" or the number or form of the contracts those residents have entered into with the plaintiff. Those matters are either the subject of uncontested evidence or were admitted in response to notices to admit facts served by the plaintiff. Further, over the course of the hearing, the defendants conceded that a number of classes of contracts were either residence or service contracts. Only a small number of classes of contracts remain disputed. It is necessary next to deal with whether contracts in those classes are "village contracts".

Residence contracts

31 The plaintiff contends that it has "residence contracts" with 23 residents, occupying 20 lots. It is accepted that the contracts described as "Agreements for Sale of Land (1988 edition)", "Agreement for Sale of Land (1996 edition)", "Pre-2017 Registered Lease" (first and second forms) and "Post-2017 Registered Lease" are residence contracts. In relation to the agreements for sale of land, that concession reflects an acceptance that the reasoning in *Noon v BBARV* at [66] (Giles JA, Macfarlan JA agreeing) as to the meaning of "residence contract" under the 1989 Act is not applicable to the RVA, which makes express reference to contracts for sale: see *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665 at 746; [2011] NSWCA 396 (***Gora***) at [361]-[363] (Campbell JA).

32 The remaining issue between the parties is whether the "Post-2000 Occupancy Agreement" is a residence contract. The 16 February 2005 agreement between the plaintiff and Mr and Mrs Assem is representative of this class of contracts, though it is not itself relied upon. Nine residents occupying seven lots have materially identical agreements with the plaintiff. As I will explain, these agreements are *not* residence contracts.

33 A "residence contract" is a contract that gives rise to a "residence right", which is in turn defined to mean:

> ***residence right*** of a person means the person's right to occupy residential premises in a retirement village, being a right arising from a contract—
>
> (a) under which the person purchased the residential premises, or
>
> (b) under which the person purchased shares entitling the person to occupy the residential premises, or

(c) in the form of a lease, licence, arrangement or agreement of any kind, other than a residential tenancy agreement in the form prescribed under the Residential Tenancies Act 2010—

(i) that is entered into under Division 5 of Part 10, or

(ii) that contains a term to the effect that this Act does not apply to the residential premises the subject of the agreement, or

(d) in the form of any other contract of a kind prescribed by the regulations,

or any other right of a kind prescribed by the regulations.

34 The plaintiff contends that the Post-2000 Occupancy Agreements are within para (c) as conferring a right to occupy the relevant lots, being a right arising from "a contract... in the form of [an] agreement of any kind other than a residential tenancy agreement". It is not suggested that the *Retirement Villages Regulation 2017* (NSW) (**RV Reg**) otherwise addresses this definition. The "right to occupy the Unit and to use the communal areas and or the common property" is said to be conferred by cl 8 of the agreements.

35 The relevant provisions of these occupancy agreements are as follows:

WHEREAS

...

B. The Proprietor is registered or entitled to be registered as the Proprietor of the unit.

C. The Service Company has been granted exclusive use and possession of the Communal Areas pursuant to by-law 32.

D. The parties hereto desire to enter into an Agreement for the welfare, regulation and conduct of all unit owners at the Astra and the Occupant and the Proprietor have requested that the Owners' Corporation manage and administer the Astra, the Communal Areas and the common property to ensure that the Residents of the Village enjoy such a reasonable privacy and quiet possession and enjoyment as is consistent with the physical characteristics of a Retirement Village designed for the residence of persons fifty-five (55) years of age and over.

…

Commencement Date

2. Provisions of the Deed will take effect upon the earlier date on which: -

(a) The Occupant becomes entitled to become the Registered Proprietor as at the owner of the Unit; or

(b) A Qualified Occupant commences to occupy the Unit.

…

Covenants and restrictions

...

7. (a) In consideration of the covenants and agreements on the part of the Occupant and the Proprietor herein contained and in particular, the covenants and conditions set out in clauses 6, 13 and 14 hereof, the Service Company hereby grants to the Occupant during the currency of this Agreement the right to the use and enjoyment in common with all other Occupants at the Bondi beach Astra Retirement Village and any other persons authorised by the Service Company, the Communal Areas of the Bondi Beach Astra Retirement Village subject only to the performance and observance by the Occupant of the terms and conditions herein contained.

...

(c) The right of use hereby granted may not be assigned and does not confer upon the Occupant any estate or interest in the Communal Areas or any part thereof.

Occupation

8. That notwithstanding any other clause in this Agreement, the right to occupy the Unit and to use the communal areas and, or the common property or any part thereof shall commence on the later of fourteen (14) days after the date in which the Occupant was provided with a copy of this Agreement or the date the Agreement. was [sic] duly executed by the Occupant and Proprietor and returned to the Service Company.

36 As recital B records, the occupancy agreements are agreements between the plaintiff and persons who were already the registered proprietors of the lots to which the agreements relate. (At the time they entered their occupancy agreement, the defendants' parents had owned and occupied their unit for some 8 years.) The plaintiff had no rights to the occupation of those lots, proprietary or contractual, which it could confer by cl 8. It follows that the rights of persons who have entered into occupancy agreements to occupy their lots cannot, and do not, arise from those agreements.

37 The plaintiff makes two arguments against that conclusion. Each depends on the claim that the proprietors' rights of occupation were in some way "conditional" until confirmed by cl 8, and that once made "unconditional" by cl 8 the proprietors' rights of occupation arose in part from the occupancy agreements. The first is that by cl 8 the proprietors conditioned or restricted their rights of occupation, which were then restored to them – also by the operation of cl 8 – after the expiry of the relevant 14 day period. The second is that RVA, s 24 rendered the proprietors' rights to occupy their lots conditional on entry into a contract with the plaintiff. (This second argument would have

the consequence that every service contract made in compliance with s 24 is also a residence contract.)

38 Each of these arguments should be rejected. As to the first, nowhere in the text of cl 8 is there any suggestion that the proprietors' pre-existing rights of occupancy are conditioned or withdrawn. It is not seriously contended that the proprietors could have been required by the plaintiff to cease to occupy their units until their rights were returned or rendered unconditional. In what other sense their rights were "conditional" during that period was never explained. As to the second, s 24 requires an operator to enter into either a residence contract or a service contract with a "prospective resident" before that prospective resident occupies residential premises, and imposes a penalty on the *operator* for failure to comply. It does not make a resident's right of occupation conditional on entry into a residence contract with the operator.

39 The plaintiff also seeks to draw support from the express reference in the definition of residence right to a contract of sale, which, it is said, shows that the RVA contemplates a distinction between proprietorship and a right of occupancy. What the reference shows is that the words "arising from" are to be read broadly, so that while a proprietor's right to occupy premises is held by reason of their proprietorship, that right is understood as arising (albeit indirectly) from the contract by which he or she became proprietor. It does not show that a right of occupation can somehow arise from a contract entered into after that right was obtained.

Service contracts

40 Five classes of contract are said to answer this description. Three, which in any event are accepted to be residence contracts, are also conceded to be service contracts: the first and second forms of the "Pre-2017 Registered Lease" and the "Post-2017 Registered Lease". The two classes of contract that remain in dispute are the "Deed for Provision of Services" and the "Retirement Village Contract". Sixteen residents of fifteen lots are party to Deeds for Provision of Services, and five residents of four lots are party to Retirement Village Contracts. The Retirement Village Contracts are not all in precisely the same

terms, but, as will be seen, the differences do not justify different conclusions as to whether they are "village contracts".

41 A service contract is a contract "under which" a resident "is provided with general services or optional services". Those latter expressions are defined:

> ***general services*** means services provided, or made available, by or on behalf of the operator, to all residents of a retirement village, and includes such services as may be prescribed by the regulations for the purposes of this definition.
>
> **Note**—
>
> Examples of general services are management and administration services and gardening and general maintenance.
>
> ...
>
> ***optional services*** means optional services made available, by or on behalf of the operator, to individual residents of a retirement village, and includes such services as may be prescribed by the regulations for the purposes of this definition.
>
> **Note**—
>
> Examples of optional services are the provision of meals, laundry services and the cleaning of the residents' residential premises.

42 RV Reg, r 7 prescribes "optional services" as follows:

> **7 Definition of "optional services"**
>
> For the purposes of the definition of ***optional services*** in section 4 (1) of the Act, the following services are prescribed—
>
> (a) the provision of meals,
>
> (b) laundry services,
>
> (c) home cleaning,
>
> (d) domestic services (for example, hairdressing, shopping assistance or pharmaceutical services).

43 The explanatory notes below the definitions of general and optional services, to which regard may be had in construing them (*Farkas v R* [2014] NSWCCA 141 at [30] (Basten JA)), show that "services" takes its natural and ordinary meaning.

44 Although the defendants did lead evidence that, "at least until relatively recently", the services provided by the plaintiff have been minimal, it is not contested that the plaintiff has continued to provide some services to the residents of the Astra. What is disputed is whether any services, "whatever

their extent or longevity", are provided "under" any agreements between residents and the plaintiff.

45 At this point it is convenient to record, again in relatively general terms, my findings as to the services which BBARV currently provides to the residents of the Astra. The evidence describing those services was given by Mr Aaron Ross, who has been village manager at the Astra since about May 2017. Those services include: controlling access to the areas of common property and residential lots during business hours; managing the furniture and equipment on the common property; organising social activities for the residents; communicating notices to residents from the Owners Corporation, the residents committee, individual residents and BBARV; coordinating improvements to the common areas and to individual units, including the installation of an emergency call system; managing and monitoring the operation of that call system; coordinating maintenance services for both the common areas and individual units; conducting fire drills and safety inspections; managing the library and gym; supervising the use and condition of the car park; maintaining the garden in the common property area; managing the council clean-up; providing a meal service to the residents; and collecting mail and signing for parcels received by residents.

46 *As to the Deed for Provision of Services:* the 21 March 2012 Deed between BBARV and Mr and Mrs Assem is representative of this class of contract. It recites that the plaintiff is the person who "manages and controls the *Bondi Beach Astra Retirement Village*" and that Mr and Mrs Assem have requested BBARV "to provide, and the operator has agreed to provide, the Services in accordance with this Deed".

47 Two definitions are relevant. They are:

> **Communal Areas** means that party of the Common Property the exclusive use of which is granted to the Operator pursuant to the By-Laws of the Strata Plan, including but not limited to the swimming pool areas, passageways and corridors on all floors, the courtyard areas, the area containing residents facilities on the ground floor, the old kitchen and old games room on the first floor.
>
> ...
>
> **Recurrent charges** has the same meaning specified in the [Retirement Villages] Act.

48 Two matters should be mentioned at this point. First, in *Noon v The Owners*, Darke J declared that by-law 32 (see [12] above) was invalid and ineffective in so far as it purported to confer exclusive use rights upon BBARV in relation to part of the common property. The defendants submit that a consequence of that invalidity is that it is no longer possible to identify by reference to the definition of Communal Areas what part or parts of the common property answer that description in this Deed. Secondly, a "recurrent charge" is defined in the RVA to mean "any amount (including rent) payable under a village contract, on a recurrent basis, by a resident of a retirement village". That definition is accompanied by an explanatory note that "Levies payable under a community land scheme or strata scheme are not ***recurrent charges*** (because they are not payable under a village contract)".

49 In this context reference should also be made to the provisions of the RVA and the RV Reg dealing with annual budgets of the operator of a retirement village. RVA, s 112(1) requires the operator to supply each resident of the village with a proposed annual budget itemising the way in which it is proposed to expend money received by way of recurrent charges from the residents. The regulations may make provision for matters that must not be financed by way of recurrent charges (s 112(3)). Regulation 26(i)(i) provides that in a retirement village subject to a strata scheme, works or maintenance required to be carried out by the owners corporation must not be financed by way of recurrent charges "unless the operator is engaged by the owners corporation to carry out the work".

50 Returning to the Deed for Provision of Services, the immediately relevant clauses are 7.1 and 8.1, which in turn refer to Schedules 1 and 2:

> 7.1 The Proprietor must pay to the Operator the recurrent charges set out in **Item 9 of Schedule 1**.
>
> ...
>
> 8.1 The Operator will at the Proprietors expense provide to the Proprietor the services described in **Schedule 2**.

51 Item 9 of Schedule 1 is:

Item	Description	Matter

9.	The amount of current recurrent charges payable by the resident as at the date of this Deed.	The Operator's Charges for the provision of all optional and general services including but not limited to the services specified in Schedule 2 which charges are currently collected on the Operator's behalf by the Owners Corporation.

52 Schedule 2 contains a description of the services to be provided by BBARV as operator. 21 services are described. A number of them refer to the subject matter of the service as the Communal Areas. Examples are paras 1, 5 and 11:

> 1 Manage and administer the Communal Areas and attend to reasonable and proper requests and demands of the Occupants with a view to ensuring that Occupants enjoy quiet possession and enjoyment of their Unit and the Communal Areas as is consistent with the physical characteristics of a Retirement Village designed for the residence of persons of fifty-five (55) years of age or over.
>
> ...
>
> 5 Regularly inspect the Communal Areas [including equipment, plant and machinery forming part of the Communal Areas (if any)] and report to the Resident's Committee in respect of the condition of the Communal Areas.
>
> ...
>
> 11 Arrange for the supply and erection of such signs and notices on Communal Areas as may be necessary for the proper and efficient control, management, use and enjoyment of Communal Areas.

53 Examples of other services that do not use this description are provided in paras 18, 19 and 20:

> 18 Provide an On-Site manager.
>
> 19 Maintain and manage a Village Emergency Call System.
>
> 20 Organise and provide a secure retirement village in accordance with the obligations placed upon the Operator by Section 58 of the Act.

54 The defendants contend that to the extent the plaintiff provides services to residents of the Astra who are parties to a deed in these terms, the services are not provided "under" that deed. It is not controversial that the description of services as provided "under" an agreement directs attention to the source of the obligation to provide those services and whether the relevant agreement governs or controls the existence of that obligation: see the discussion in

Inghams Enterprises Pty Ltd v Hannigan [2020] NSWCA 82 at [137]-[140] (Meagher JA, Gleeson JA agreeing). In support of the defendants' contention it is first said, as has already been noted, that many of the "services" which are the subject of the promise in cl 8.1 cannot be ascertained because of uncertainty as to the content of the references to Communal Areas. Secondly, it is said that there are no "charges" currently collected within the Schedule 1 description for item 9, and alternatively, that no recurrent charges of the kind referred to could have been collected in the face of the prohibition in reg 26(i)(i). It follows that BBARV has no obligation to provide the services described in Schedule 2.

55 Neither of these contentions should be accepted. The definition of Communal Areas describes the areas to which the various services relate by reference to those which were, lawfully or otherwise, the subject of by-law 32. Relevantly, those areas comprise "the swimming pool area, passageways and corridors on all floors, the courtyard areas, and the residents' facilities and lounges on the ground floor". Where the defined term appears, it is used only to describe the physical area in relation to which a relevant activity is to be conducted, arranged or undertaken. None of those descriptions depends for its efficacy on the validity of by-law 32 or BBARV in fact having "exclusive use" of the relevant area.

56 The undertaking in cl 7.1, as the defendants' argument accepts, is to pay the charges described in item 9. At the date of the deed, those "recurrent charges" were nil if understood as describing amounts paid or to be paid directly by the residents to BBARV. What BBARV was receiving, as may be taken to have been known to both parties, was an annual amount paid in monthly instalments by the Owners Corporation sourced from its administrative fund, which in turn was funded by levies received from the lot owners. Whilst the description under the heading "Matter" of an annual amount "currently collected on the Operator's behalf by the Owners Corporation" might very generally and loosely be understood as referring to or including moneys paid by the Owners Corporation to BBARV for management services, item 9 refers to an amount "payable" by the resident, and that description makes plain that no amount of "recurrent charges" was currently being paid by the residents.

57 Construing these various provisions together and having regard to Schedules 1 and 2, cl 7.1 records that at the time of the Deed no amount of recurrent charges was payable and cl 8.1 records a promise by BBARV to provide the 21 services in Schedule 2, Communal Areas referring to the areas of the common property which were the subject of by-law 32. The expression "at the Proprietor's expense" in cl 8.1 refers to the amount, if any, payable under cl 7.1. None of that is prohibited by reg 26.

58 Accordingly, as between BBARV and lot owners who are parties to a Deed for Provision of Services, the performance of the services described in Schedule 2 is in satisfaction of BBARV's obligation under cl 8.1. The Deeds are contracts "under which" those services are provided to those lots owners.

59 *As to the Retirement Village Contract:* the Retirement Village Contract with the owner and resident of lot 18 was identified as representative of this class of contract. There are three other lots whose resident or residents are party to a Retirement Village Contract. The contract for lot 55 is in substantially the same terms as that for lot 18. The contracts for lots 37 and 20 are slightly different, and the differences are dealt with below.

60 The contract for lot 18 is dated 16 May 2014 and is in the form of the standard form village contract then prescribed pursuant to RVA, s 43(1) by *Retirement Villages Regulation 2009* (NSW), reg 15A(1) and set out in Schedule 2 of those regulations. Its table of contents has three headings: Key Terms, Financial Terms, and General Terms. The Key Terms identify the resident as the owner of a lot in a strata scheme. The "entry" payment is the amount of the purchase price paid to the vendor of the lot. In item D of the Financial Terms, the current frequency of payment of "recurrent charges" is marked "Other", and followed by the words "Current rate of recurrent charges for your premises: $.included in Strata levies". That statement is to be understood as indicating that there were no recurrent charges payable because the "Current rate" was included within the strata levies paid to the Owners Corporation. Accordingly, no recurrent charges are to be paid. It is also made clear that that being the position does not apply to "optional services".

61 Clause 5.1 says that BBARV "must provide you with a particular service or facility which we are required to provide to the residents for the life of the village in accordance with the terms of our development consent". There are no services answering that description, having the consequence that this provision has no content. Clause 21.6 provides that "the operator will at the resident's expense provide to the resident the services described in Annexure B". That annexure contains the same list of services and facilities as is set out in Schedule 2 of the Deed for Provision of Services considered above, the only difference being that the numbering sequence in Schedule 2 is not the same, because it does not use the number 9.

62 The defendants make two submissions. First, it is said that the undertaking by cl 21.6 to provide the services described in Annexure B suffers from the same uncertainty because of the continued use of the defined expression Communal Areas to describe those services. That argument is rejected for the same reasons as are given above. Secondly, it is said that the effect of item D of the Financial Terms (Recurrent Charges) is to require the payment of "Strata levies" and accordingly either what is said to be an expense of BBARV which may not be claimed by reason of reg 26(i)(ii) or expenses related to works or maintenance required to be carried out by the Owners Corporation (reg 26(i)(i)). This argument in both of its aspects misdescribes the effect of item D, which records that the current rate of recurrent charges for the lot owner's premises is included in their strata levies. That provision does not seek either to recover that current rate under this Contract or to make any additional charge on the lot owner. Instead, it recognises that the annual amount paid to BBARV by the Owners Corporation for management services is paid by it out of revenue generated by strata levies, and that no separate amount is payable by way of recurrent charges. Finally, there is sufficient consideration passing between the parties to the Retirement Village Contract to support the promise in cl 21.6 by reason of other promises made by each to the other in that agreement.

63 For these reasons, the obligation of BBARV to provide general services to the residents of lots 18 and 55 arises under cl 21.6 of their respective Retirement Village Contracts.

64 It remains to consider the position in relation to lots 37 and 20. The relevant Retirement Village Contracts are in the standard form now prescribed by RV Reg, reg 17(1), set out in RV Reg, Schedule 2. The contract for lot 37 is dated 28 March 2017. Financial Terms, item D is in the same terms. Clause 21.3 is the relevant provision in relation to the services described in Annexure B, which in turn is a list of 20 services and facilities that, in different language, describes the same or similar services to those described in Annexure B to the May 2014 contract. None of those descriptions uses the term Communal Areas. Clause 21.3 provides:

> Subject to and conditional upon any agreement between ourselves and the owners corporation, we shall provide to you the services described in Annexure B which shall be at your cost unless otherwise stated.

65 The Disclosure Statement attached to this version of the Retirement Village Contract includes the following explanation in relation to "current charges":

> The operator's charges for the provision of all optional and general services are currently collected on the operator's behalf by the Owners Corporation and form part of the quarterly strata levies...

66 Returning to cl 21.3, in the light of that explanation in the Disclosure Statement and the description of the recurrent charges in Financial Terms, item D, the promise by cl 21.3 is enforceable, and to be understood as being at the cost of the resident in the sense explained: namely, that BBARV receives a payment from the Owners Corporation which is accepted in satisfaction of BBARV's costs of providing the services. None of this requires a different conclusion in relation to the Retirement Village Contract for lot 37.

67 The position is the same in relation to the contract for lot 20, which is dated 15 April 2019. Unlike any of the other Retirement Village Contracts, this contract as I read it provides for payment by the lot owner of a quarterly recurrent charge of $471.91, which is separate from the quarterly strata levy payable to the Owners Corporation. By cl 26.4, BBARV agrees to make available to the resident the "general services" in return for the payment of "recurrent charges calculated in accordance with cl 26.5". The 19 services answering that description are described in Schedule 3. Again, they do not substantially differ from earlier formulations of those services. Clause 26.5(b) states that the Recurrent Charges payable are set out in item D of the Financial Terms. Item

D states that the current rate of recurrent charges is $2,258.86 per quarter. Almost immediately below is a statement that "the amount of the levies for your premises as at the date of this contract is included in your recurrent charges". Although that might otherwise be slightly misleading, the Disclosure Statement in Schedule 2 makes clear that the quarterly recurrent charge is $471.91 and that the quarterly strata levy is $1786.95. The requirement that the lot owner pay that recurrent charge does not involve the making of any charge prohibited by reg 26(i)(i) or (ii), the relevant services not including the carrying out of any works or maintenance required to be carried out by the Owners Corporation or levies under the strata scheme payable by BBARV.

68 The outcome is that notwithstanding the differences in their language, each of the Retirement Village Contracts is a contract "under which" the resident is provided with general services.

Car parking contracts

69 Ten residents of seven lots are parties to contracts described as "Car Parking Licences", under which the plaintiff purports to grant them the right to use a parking space in the Astra car park. The defendants submit that those contracts are ineffective to grant rights to any residents because the by-law granting the plaintiff the exclusive right to use the relevant parking spaces (purportedly granted in turn to those residents) is invalid.

70 The relevant by-law, by-law 30, provides as follows:

> That the Proprietor for the time being of lot 52 in the Strata Plan shall have exclusive use and enjoyment of the car spaces marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 23, 24, 25, 26, 27 and 28 inclusive in the basement of the building known as "the Bondi Astra". The grant of exclusive use of such car spaces herein contained is subject to that residential Section of the Strata Scheme to use such car spaces upon the terms and conditions set out in the Agreement between the Body Corporate and that proprietor in force from time to time.

71 BBARV became the proprietor of lot 52 on 25 May 2009, before the relevant agreements were made. (The plaintiff ultimately disclaimed reliance on other car parking contracts, made before it became proprietor of lot 52, to which it was a party but under which the licensor was a different entity.) If by-law 30 is valid, the car parking contracts are contracts under which residents obtain a

"right to use" a parking space, and accordingly village contracts. For the reasons which follow, it is, and they are.

72 The defendants rely on *Noon v The Owners*, in which Darke J held invalid by-laws 32 (set out in [12] above) and 34. His Honour held that by-law 32 was not authorised by s 58(2) of the *Strata Titles Act 1973* (NSW) (**the 1973 Act**), under which the by-law was purportedly made, because s 58(2) did not confer power to grant exclusive use and enjoyment of any part of the common property to a person who was not a lot owner in the strata scheme. Further, by-law 32 could not have been supported by s 58(7), which expressly permitted the conferral of exclusive use of all or part of the common property on the registered proprietor of a lot, because "the Service Company" was not such a person at the time the by-law was made: *Noon v The Owners* at [40].

73 The defendants suggest that Darke J held that s 58(7) was also unavailable for the further reason that the by-law was expressed to be made pursuant to s 58(2), emphasising [55] of his Honour's reasons:

> By-law 32, in its terms, confers exclusive use of part of the common property upon the Service Company (assumed to be Astra), albeit subject to conditions, one of which envisages the Service Company granting sub-licenses to the owners of the residential lots. *The by-law was not made pursuant to s 58(7),* and was not authorised by s 58(2). Accordingly, by-law 32 was not validly made. (emphasis added)

74 If by the italicised statement Darke J meant more than that s 58(7) could not have supported by-law 32, which is doubtful, his Honour was, with respect, wrong. It has been repeatedly held that express reliance on an unavailable source of power does not invalidate an administrative act where another power is available to support it. Brennan J explained in *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426; [1993] HCA 56 that "a mistake in the source of the power works no invalidity. Validity depends simply on whether a relevant power existed." See also *Australian Education Union v Dept of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3 at [34] (French CJ, Hayne, Kiefel and Bell JJ); *Eastman v DPP (ACT)* (2003) 214 CLR 318; [2003] HCA 28 at [124] (Heydon J); *Brown v West* (1990) 169 CLR 195 at 203 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); [1990] HCA 7.

75 The principle is not applied narrowly. As Crennan and Kiefel JJ explained in *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1; [2013] HCA 3 at [175], it extends to the exercise of delegated legislative power:

> The issue of the effect, if any, of stated reliance upon a wrong source of power arises most frequently in the area of administrative decision making. There is no reason why the principle relevant to the determination of that issue cannot be applied to the exercise of delegated legislative powers, subject to the terms of the authorising legislation. It is a settled principle that an act purporting to be done under one statutory power may be supported under another statutory power. A mistake as to the source of power does not render an act or decision invalid.

76 A mistake as to the source of a power will ordinarily be relevant to the validity of an exercise of power only if it leads to the disregard of requirements which condition the power, such as the formation of a particular opinion or state of satisfaction. In this case, the question is simply whether by-law 30 was supported by s 58(7).

77 By-law 30 was expressed to have been made "in accordance with the provisions of Section 58(2) of the Strata Titles Act, 1973". It may be accepted that the express reliance on s 58(2) was misplaced. However, the Owners Corporation's mistake as to the empowering provision is not invalidating. By-law 30 was made "pursuant to a unanimous resolution", as s 58(7) required. It conferred exclusive use rights on "the proprietor of a lot", namely lot 52. And s 58(7) empowered the Owners Corporation to grant those rights "upon such terms and conditions... as may be specified in the by-law". It follows that by-law 30 was validly made.

78 The defendants also rely on the other grounds of invalidity upheld in *Noon v The Owners*:

(1) That the effect of the by-law was to deprive the owners of the lots of their rights to use and enjoy their common property, and that the by-law was therefore invalid as being repugnant to the Act under which it was purportedly made. As Darke J observed at [60], "the repugnancy argument does not in truth give rise to a ground of invalidity that is separate from the lack of statutory power ground."

(2) That s 43(4) of the *Strata Schemes Management Act 1996* (**SSMA 1996**) – now see *Strata Schemes Management Act 2015* (**SSMA 2015**), s 136(2) – rendered the by-law of "no force or effect" because it was inconsistent with lot owners' rights to use and enjoy common property. In *Noon v The Owners*, the inconsistency arose because of the

> "conferral of exclusive use rights upon a person who is not a lot owner" (at [63]).

79 There can be no question of repugnancy to the enabling legislation if s 58(7) supports the by-law, as it does. Even if it were possible to read down s 58(7) to exclude truly oppressive conferrals of exclusive rights to the use or enjoyment of common property, this is not such a case. And there is no necessary inconsistency with the rights of lot owners in conferring a right to the exclusive use of part of the common property upon a particular lot owner, which remains permissible under present strata legislation: see SSMA 2015, Part 7 Div 3.

80 The only conceivable inconsistency with present legislation is that by-law 30 makes no provision for who is to be responsible for the proper maintenance and upkeep of the common property to which it applies (cf SSMA 2015, s 144). However, sch 4 cl 4(2) of the SSMA 2015 provides:

> Despite any other provision of this Act, a by-law continued in force by this Act is taken to be a valid by-law if it was a valid by-law immediately before the commencement of this clause.

81 SSMA 1996, s 42(2) similarly continued by-laws made in accordance with Part IV Div 1 of the 1973 Act (which included s 58). It follows that there is no inconsistency with the rights of lot owners to the use and enjoyment of common property, which is conferred by, and subject to, the relevant legislation. Logically, the owners corporation remains responsible for the maintenance of common property that is the subject of a by-law validly made under previous strata title legislation.

82 For completeness, two minor issues relating to the effect of by-law 30 should be briefly explained and resolved. One arises from the second clause of the by-law. The grant to the proprietor of lot 52 is subject to the right of owners of residential lots – the "residential Section of the Strata Scheme", as opposed to the commercial Section, whose car park entitlements are provided for in by-law 31 – to use the car spaces on such terms and conditions as are agreed between the owners corporation and the proprietor of lot 52 from time to time. It appears that no such agreement has ever been made. However, the absence of any such agreement does not render by-law 30 uncertain. It simply has the result that the "residential Section" has no right to use the car spaces granted to the proprietor of lot 52.

83 Another arises from an inconsistency with the current form of by-law 31. By-law 31 was first enacted at the same time as by-law 30, and provided:

> That the Proprietors for the time being of lots 62, 63 and 64 in the Strata Plan shall have exclusive use and enjoyment of the car spaces marked 13, 14, 15, 16 and 17 inclusive in the basement of the building known as "the Bondi Astra". The grant of exclusive use of such car spaces herein contained is subject to that Proprietor maintaining and keeping in good repair such car spaces and obeying the reasonable directions of the Body Corporate as at all times.

84 By-law 31 was amended – precisely when is not apparent from the evidence – to distinguish between the car spaces to which the owners of lots 62, 63 and 64 were respectively entitled. In making that amendment, the car space marked 18 was included in by-law 31 without being removed from by-law 30:

> The owner for the time being of lot 62 in the Strata Plan shall have exclusive use and enjoyment of the car spaces marked 14 and 15 in the basement of the building known as the "Bondi Astra". The owner for the time being of lot 63 in the Strata Plan shall have exclusive use and enjoyment of the car spaces marked 13 and 18 in the basement of the building known as the "Bondi Astra". The owner for the time being of lot 64 in the Strata Plan shall have exclusive use and enjoyment of the car spaces marked 16 and 17 in the basement of the building known as the "Bondi Astra". The grant of exclusive use of such car spaces herein contained is subject to the owner maintaining and keeping in good repair such car spaces and obeying the reasonable direction of the Owners Corporation.

85 Presuming that the amendment of by-law 31 was valid according to the strata title legislation then applicable, there may have been an implied amendment of by-law 30 to remove the right of the proprietor of lot 52 to the exclusive use of the car space marked 18. The overlap is, however, not significant to these proceedings. None of the car parking contracts on which the plaintiff relies relates to the car space marked 18.

Predominantly or exclusively occupied (or intended to be so occupied)

86 The definition of "retirement village" is set out in [27] above. The term "residential premises" is defined as:

> ***residential premises*** means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a place of residence.

87 A retirement village is a "complex containing residential premises". The term "complex" is not defined, but s 5(2) makes clear that the "complex" is not limited to the particular residential premises occupied, or intended to be

occupied, by retired persons who have entered into village contracts with an operator. It follows that, provided the *complex* satisfies s 5(1), the residential premises within it are part of that retirement village unless excluded by s 5(3).

88 Section 5(1) is less straightforward than it seems. The use of "are", rather than "is", shows that it is the premises contained in the complex, and not the complex itself, that must satisfy subs (1)(a). That paragraph is directed to the actual or intended occupation of the set of residential premises making up the complex at the time the "retirement village" question is being determined. At that time, depending on the extent to which those premises are actually occupied, it may be possible by reference to the identity or identities of the occupants to be satisfied that, considered as a whole, the premises are "predominantly or exclusively" occupied by the relevant class of residents. In the case of "predominantly" occupied, that conclusion depends on a comparison of the number of residences occupied by that class of persons with the total number of residences and an evaluation that the former is the most dominant or prevailing class or group of occupants. As to the meaning of "predominant" in this context see *The Salvation Army (New South Wales) Property Trust v Chief Commissioner of State Revenue* (2018) 96 NSWLR 119; [2018] NSWSC 128 at [89], [148] (Ward CJ in Eq); and *Nairn v Metro-Central Joint Development Assessment Panel* (2018) 53 WAR 20; [2018] WASCA 18 at [90] (Buss P, Murphy and Beech JJA).

89 Where the number of residences occupied by the relevant class of persons is not sufficient to justify a conclusion that, looked at as a whole at the relevant time, the residences are "predominantly" occupied by such persons, the set of premises may nevertheless satisfy the alternative test, namely that they are "intended to be predominantly or exclusively occupied" by such persons. That description may be satisfied notwithstanding that some of the premises are occupied. The actual occupation of those premises will, at least ordinarily, reflect their intended use. In other words, the alternative means of satisfying the definition of "retirement village" is available not only where none of the relevant premises are occupied but also where the progress to full occupation has commenced but not concluded. On this alternative test, the relevant intention is that which, viewed objectively, is likely to prevail by reason of

ownership or other means of affecting the use to which the relevant premises may be put. Those means include the operation or application of statutory and contractual provisions. It follows that that intention may not coincide with the subjective intentions of persons who own the premises, if those persons are not in a position to control their use.

90 On this basis, many of the submissions made by the plaintiff in support of its contention that the Astra is intended to be predominantly or exclusively occupied by older or retired persons who have entered into village contracts are misconceived. In support of that contention, the plaintiff relies on: the development approval permitting the conversion of the building from a hotel, which approved the complex for use as "residential accommodation for the housing of aged persons"; the restrictive covenant placed on the title of the Astra pursuant to *Conveyancing Act 1919* (NSW), s 88E, which provides that persons not over 55 years of age shall not occupy lots; the notation on the register maintained under the *Real Property Act 1900* (NSW) that the complex is used as a retirement village, made pursuant to RVA, s 24A; the fact that the Astra is occupied exclusively by persons over 55 years, most of whom are retired; and the fact that the plaintiff has repeatedly represented itself as the operator of the Astra retirement village, to the public and, in contractual agreements, to the residents.

91 None of these matters is sufficient to establish an intention with respect to the use and occupation of the residential premises which, without more, is likely to prevail. However, that is not fatal to the plaintiff's primary case, which is that the 55 residential lots are "predominantly" occupied by retired persons who have entered into village contracts with the plaintiff.

Residential premises in Astra predominantly occupied by relevant class of persons

92 To summarise the position with respect to the disputed classes of contract: the Post-2000 Occupancy Agreements are *not* residence contracts, the Deeds for Provision of Services and the Retirement Village Contracts *are* service contracts, and the Car Parking Licences come within para (c) of the definition of village contract. The plaintiff has largely, but not entirely, succeeded in its contentions on this question.

93 As some residents are party to contracts in more than one class, the fact that the Post-2000 Occupancy Agreements are not residence contracts does not mean that all of the residents who have entered into such agreements are not parties to village contracts. Taking account of any overlap, the overall position as at late May 2020 is as follows. Of the 51 occupants of the Astra, 36 are residents who have entered into village contracts with BBARV. Those 36 residents occupy 33 of the 44 occupied residential lots (11 lots are vacant).

94 The 11 remaining occupied lots are made up of: 6 lots occupied by residents who have entered into Post-2000 Occupancy Agreements; 2 lots occupied by the sibling or partner of a deceased resident; 2 lots leased or sub-leased under a residential tenancy agreement that is not with an operator (cf s 5(3)); and 1 lot occupied by a resident who has an agreement with the plaintiff which is not relied on as a village contract. Of the 11 vacant lots, 5 are owned and offered for lease by the plaintiff.

95 This analysis shows that 33 of the 55 residential lots (representing 60% of the residential premises) are occupied by the relevant class of persons. That fact is sufficient to justify a conclusion that the premises are "predominantly" occupied by such persons. Furthermore, when regard is also had to the 5 vacant lots offered for lease by the plaintiff, and attention directed to the current "intended" position, it may readily be concluded that looked at overall the premises are intended to be "predominantly" occupied by such persons.

BBARV is an operator

96 In s 4(1), "operator" is defined as follows:

> ***operator*** of a retirement village means the person who manages or controls the retirement village, and includes—
>
> (a) a person (other than a resident or other person referred to in subsection (2)) who owns land in the village, and
>
> (b) any other person or class of persons prescribed by the regulations for the purposes of this definition,
>
> but does not include—
>
> (c) the relevant association of a community land scheme or the owners corporation of a strata scheme, or
>
> (d) the managing agent of such a scheme, or

(e) any person or class of persons excluded from this definition by the regulations.

97 RV Reg, r 6 provides that:

> **6 Definition of "operator"**
>
> For the purposes of paragraph (b) of the definition of operator in section 4 (1) of the Act, a person who is engaged under an agreement with—
>
> (a) the relevant community association, neighbourhood association or precinct association of a retirement village that is subject to a community land scheme, or
>
> (b) the owners corporation of a retirement village that is subject to a strata scheme, or
>
> (c) the company that is the owner of a retirement village that is subject to a company title scheme,
>
> and who enters into individual village contracts with the residents of the village (or arranges for another person to enter into those contracts) is prescribed.

98 There is a factual dispute as to whether the plaintiff "manages or controls" the retirement village. In relation to para (b) of the definition, there is also a dispute as to whether the plaintiff is "engaged under an agreement" with the owners corporation. What is not in dispute is that the plaintiff owns 16 strata title lots in the Astra, which, for the reasons that follow, is sufficient to make the plaintiff an "operator".

Not necessary for an operator to manage or control the retirement village

99 The plaintiff submits that definitions of the form "means X, and includes Y and Z" are typically to be construed as deeming provisions, so that Y and Z will come within the definition whether or not they are X. Whether that is correct as a general proposition can be put to one side. In the present case, the result would be that a person may be an operator merely because they own land in a retirement village and are not a resident or a person referred to in s 4(2), whether or not they manage or control the village. A similar result would follow for para (b), although the description of an operator as managing or controlling might inform the scope of the regulation-making power.

100 The definition of operator uses the definite article, as do the vast majority of the provisions in the RVA which refer to an operator, but the RVA expressly contemplates that there may be more than one operator: s 4(5). That is consistent with, but provides little independent support for, the view that a

person who falls within para (a) or (b) need not manage or control the retirement village to be an operator. There are, however, several provisions of the RVA which put the matter beyond argument.

101 First, s 40(1) enables village contracts with former operators to be enforced against *any* person presently an operator. Section 40(2) provides:

> (2) However, proceedings do not lie against the owner of land in a retirement village (not being a person involved in the management or control of the village) for the enforcement of rights under subsection (1) unless—
>
> (a) the owner is a party to the contract, or
>
> (b) the owner is a close associate of an operator involved in the management or control of the village, and
>
> an operator other than the owner has failed to satisfy a judgment given for the enforcement of those rights.

102 That is, a person who owns land in a retirement village, but is not involved in the management or control of the village, may be an "operator for the time being of the village" within s 40(1). As the explanatory note to the *Retirement Villages Bill 1999* explains:

> **Clause 40** provides that a contract between the operator of a retirement village and a resident of the village is enforceable against any operator for the time being of the village, except an operator who is merely a landowner in the village.

103 Secondly, by s 41 a person who proposes to become an operator must make a report at a meeting of residents and former occupants of the village at least 28 days before they become an operator. The provision does not apply to a person who proposes to become an operator but does not propose to manage or control the village:

> (1) A person who proposes to become an operator of an existing retirement village (and who proposes to manage or control the village) must, at least 28 days before the person becomes the operator, report on—
>
> (a) his or her financial ability to operate the village, and
>
> (b) his or her plans for the future management and operation of the village (including any changes that he or she proposes to make),
>
> at a meeting of the residents and former occupants of the village convened for that purpose in accordance with this section.
>
> Maximum penalty—50 penalty units.

104 Finally, s 72(1) requires an operator to meet with the Residents Committee on the committee's reasonable request, but by s 72(2) the provision "does not

apply to an operator who owns land in the village unless the operator is also involved in the management and control of the village."

105 It is not surprising that a non-resident landowner in a retirement village would be deemed to be an operator (possibly in addition to another operator who manages and controls the village). Indeed, it is obviously consistent with the policy of the RVA for such a landowner, who may be entering into residence contracts as a lessee, to be subject to the obligations created by the RVA for the protection of retired persons. Section 4(5), which provides that "it is sufficient compliance" if "any of the operators exercises the functions of an operator under this Act", mitigates the stringency of those obligations for operators who have not contracted with a predominant number of the occupants of the village or are otherwise not in a position to manage or control the village as a whole.

106 The question then is whether the plaintiff comes within para (a) or (b) of the definition of operator.

Whether BBARV is an operator because it is a person owning "land"

107 Para (a) raises the question whether BBARV owns "land in the village" because it is the registered proprietor of strata title lots that are "residential premises" making up the village. That question arises because the definition of "residential premises" appears to draw a distinction between land and "premises", which may be on or include land. Further, ss 6 and 7 refer to the "registered proprietor of land" and "the owner of a lot in a strata scheme", as possibly distinct. Despite those considerations, however, the better view is that a strata title lot comprising residential premises is "land" under the RVA.

108 First, although the RVA distinguishes between "residential premises" and "land", it does not make the latter exclusive of the former. The exclusion of "a resident" in para (a) of the definition of "operator" acknowledges that a resident may be a person who "owns land in the village". Further, a resident landowner will only hold a "residence right" if land can be described as "residential premises". The distinction drawn between land and residential premises simply acknowledges that, depending on how the property holdings of a retirement village are structured, there may not be a precise correspondence between

individual residential premises and particular plots of land. That will be so where, for instance, residents acquire only a licence to occupy part of the village. See RVA, s 4, definition of "residence right"; P Butt, *Land Law* (Lawbook Co, 2006, 5th ed) 854.

109 Secondly, it is consistent with the broader statutory context, and with s 21(1) of the *Interpretation Act 1987* (NSW), for a strata title lot to be treated as "land". The provisions of the RVA do not disclose any narrower intention.

110 At common law it has been possible since at least the time of Coke to subdivide land horizontally, so that (for instance) the upper storey of a building can be conveyed separately from the rest of the building and the soil on which it stands: *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1970) 124 CLR 73 at 91 (Windeyer J, Barwick CJ agreeing); [1971] HCA 9. Whether an interest above the surface of the earth, separate from the soil, answers the description of "land" depends on the context in which that word is used: see *Re Lehrer and the Real Property Act 1900-1956* (1960) 61 SR (NSW) 365 at 369-371 (Jacobs J).

111 Section 9 of the *Strata Schemes Development Act 2015* (NSW) (**SSDA 2015**) now enables "land" coming within s 9(1)(a) or (b) to be subdivided, horizontally and/or vertically, into strata title lots and common property by the registration of a strata plan. In that section "land" means land under the *Real Property Act 1900* (NSW) that is held in fee simple (subject to a presently irrelevant qualification). The definition of "land" adopted by *Real Property Act*, s 3(1) is in very broad terms:

> ***Land***—Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted.

112 The extended definition of land in the *Real Property Act* is in very similar terms to the extended definition of "land" which applies to all NSW Acts, subject to evidence of a contrary intention, by reason of *Interpretation Act*, s 21(1). That definition "is wide enough to include the air space above the soil and the upper chamber of a building": *Lehrer* at 371. See also *Bursill* at 91. It would include

an estate in fee simple in a strata title lot: SSDA 2015, s 8 provides that the *Real Property Act* "applies to lots and common property in the same way as it applies to *other* land" (emphasis added).

113 Against that background the RVA plainly intends that strata title lots be treated in the same way as other land. RVA, s 24A provides for the recording on the "Register" by the Registrar-General of the fact that "land" comprises or is part of a retirement village. In s 4, "Register" is defined to mean:

> "**Register**" means—
>
> (a) in relation to land under the *Real Property Act 1900*–the Register kept under that Act, and
>
> (b) in relation to any other land—the General Register of Deeds kept under the *Conveyancing Act 1919*.

114 If "land" does not include a strata title lot comprising residential premises, s 24A can have no application to a strata title retirement village complex. There is no reason to think such a result was intended. The same observation may be made with regard to a number of other provisions of the RVA, including s 130, read with s 122, and Part 10A. For those provisions to have a sensible operation "land" must include a strata title lot comprising residential premises.

115 BBARV owns 16 lots within the Bondi Astra, is not a resident or a person described in s 4(2), and accordingly is an "operator".

Whether BBARV manages or controls the retirement village, or is a person within para (b) of the definition of operator

116 *Management or control of the retirement village:* it is convenient to deal first with the question whether BBARV manages or controls the "retirement village" known as the Bondi Beach Astra Retirement Village. As the plaintiff points out, the RVA does not in terms define what it is to "manage or control" a retirement village. However, there are in that Act provisions which indicate what is involved in the management or control of such a complex of residential premises.

117 It is also correct, as the defendants observe, that with respect to a retirement village which is the subject of a strata scheme the subject matter of an operator's management or control must take account of the functions and obligations of the Owners Corporation under SSMA 2015. Under that Act, the

Owners Corporation has the “principal” responsibility for the management of the strata scheme and, “for the benefit of the owners of lots” in that scheme, the “management and control of the use of the common property” as well as the responsibility for “maintaining and repairing” that common property (s 9). The Owners Corporation also has the duty to maintain and repair common property and personal property vested in it (s 106(1)).

118 The RVA anticipates that the functions of an Owners Corporation, presumably with respect to the use of common property in a strata scheme retirement village, may overlap with the activities of the operator of that village: the definition of “operator” is expressed not to include the Owners Corporation of a strata scheme or the managing agent of such a scheme.

119 It should first be observed, as has already been noted, that the RVA contemplates there may be more than one operator and that one or more of them may exercise the functions of an operator under the Act (s 4(5)). What follows concerns the functions that an operator may exercise under the RVA or RV Reg.

120 The nature and scope of some of those functions, and their subject matter, is indicated by the objects of the RVA, which include facilitating the disclosure of information to prospective village residents, requiring contracts between residents and operators to contain full details of the rights and obligations of the parties, and facilitating resident input, where desired, into the management of retirement villages (s 3).

121 Parts 3, 4 and 5 of the RVA deal respectively with the provision of information about retirement villages, entry into retirement villages, and village contracts. The functions of an operator in relation to those matters include: (1) providing information to prospective residents in the form of disclosure statements (s 18); (2) making certain documents available to prospective residents and residents, including examples of proposed village contracts, which have to be in a prescribed form (ss 20, 43); and (3) entering into a residence or service contract with a prospective resident before they go into occupation (s 24).

122 Part 6 is concerned with the “general management” of retirement villages and imposes obligations on operators directed to ensuring that the residential

complex is a suitable place for the elderly and retirees. The functions of an operator provided for in that part include: (1) ensuring the safety and security of the "building complex" containing the residential premises (s 58); (2) ensuring that the "village generally" – which necessarily includes the common areas in a strata scheme – is reasonably safe, by the preparation and maintenance of an emergency plan with which residents and staff are familiar, and by undertaking safety inspections (s 58A); (3) ensuring that annual emergency evacuation exercises take place (s 58B); (4) providing a system that enables residents, whether in residential premises or common areas, to summon assistance in an emergency (s 59); and (5) ensuring emergency and home care service personnel have unimpeded vehicular access to the premises by day and night (s 59A).

123 Although the operator of a retirement village has limited access to the residential premises, it must also take all reasonable steps to ensure that residents meet their obligations under their village contracts "so that a resident does not unreasonably interfere with the peace, comfort and quiet enjoyment of his or her fellow residents" (ss 66, 67). The RVA also makes provision for the formation of a Residents' Committee and for meetings between that committee and the operator (ss 70, 72), who is, additionally, required to hold an "annual management meeting".

124 Part 7 addresses the financial management of retirement villages. The operator is responsible for capital items other than those owned by a resident or which are common property under a strata scheme. The operator is responsible for the maintenance of such items, as well as their being insured (ss 92, 93, 100). Finally, the operator is required to prepare an annual budget in respect of "money to be received by way of recurrent charges from the residents". The residents may consent to not being supplied with such a budget where the annual recurrent charges do not exceed $50,000 or such other amount as may be prescribed (s 112). The consent of the residents must then be sought to the expenditure itemised in the proposed budget (s 114).

125 It is not controversial that from 1987, and following the commencement of *Retirement Villages Act 1989*, BBARV held itself out and acted as the manager

or administrator of a “retirement village” designed for the residence of persons 55 years of age and over. Exercising that function it has occupied and used part of the common property as the place from which it undertakes that activity and provides services to residents. That state of affairs is acknowledged and assumed by various resolutions of the Owners Corporation, including at its 2014 and 2016 AGMs (see above at [21], [23]). Furthermore, by-law 43, which was passed at the 2012 AGM and empowers the Owners Corporation by special resolution to provide that “commercial or business activities may be conducted on a lot or common property only during certain times”, expressly excludes “usage of the common property by BBARV in its capacity as Village Operator (as defined in the Retirement Villages Act 1999)”. Underlying that legal characterisation is a recognition that BBARV was engaging in activities capable of answering that description.

126 The evidence as to the “village contracts” establishes that BBARV has entered into contracts – almost all of which are village contracts – with the owners or residents of almost every residential lot in the Astra, and provides services under service contracts to the residents of a majority of those lots. The evidence indicates that since the introduction of standard form contracts in the *Retirement Village Regulation*, the plaintiff has contracted with all incoming residents, other than those leasing their premises from the plaintiff under a residence contract, in that standard form.

127 Specifically, reg 15A was inserted into the *Retirement Villages Regulation 2009*, with effect from 1 October 2013, to prescribe as the standard form of village contract the standard form set out in Schedule 2. Reg 15A was replaced in the 2017 regulations by reg 17, which is, save as to the capitalisation of “Form”, identical to its predecessor. There were no changes to the standard form which are material in the present context. By reg 15A(2), now reg 17(2), no standard form is prescribed for car parking contracts or for residence contracts relating to premises subject to a strata scheme. Before reg 15A came into effect, the regulations had not prescribed any standard form, prescribing only (by reg 15, pursuant to RVA, s 42) certain matters required to be included or excluded in certain village contracts.

128 The various Deeds for Provision of Services were admitted to be in the same terms as the Deed entered into by Mr and Mrs Assem on 21 March 2012, and the dates of the other Deeds are not in evidence. However, the defendants do not contend that any of those Deeds are void as not in the standard form of village contract prescribed at the time of their execution (or as not compliant with the former reg 15). It would seem, having regard to the date of the earliest Retirement Village Contract in evidence (16 May 2014), that all of the village contracts answering that description were made prior to the insertion of reg 15A and its prescription of a standard form of village contract.

129 As is referred to in [19] above, those village contracts impose obligations on BBARV and the residents with respect to the use and occupation of residential premises, the use of common property, the residents' behaviour in the village and in respect of other residents, the provision of services and facilities in the village by BBARV, and the residents' obligations on the termination of the resident's "residence right", which may involve in this case the sale of the lot or termination of any relevant lease or licence of premises. By the enforcement where necessary of those contractual arrangements, BBARV is able to exercise control with respect to a broad range of matters concerning the retirement village, including ensuring that future occupants do not go into possession without having entered into a residence contract or service contract.

130 In addition to entering into and enforcing village contracts, the plaintiff has engaged in activities which the RVA recognises as constituting general management of a retirement village. Those activities, principally established by the evidence of Mr Ross, include taking steps to ensure that the village is reasonably secure by providing a full time manager and front office staff during business hours, and regulating access to the village; overseeing the installation of an emergency call system; preparing an emergency plan and conducting safety inspections and evacuation drills of the village; making recommendations to the Owners Corporation as to how safety in the village could be improved; providing services to village residents, in most cases under their service contracts, and organising regular social events for them; providing

annual budgets to the residents; and holding, although only in the last two years, annual management meetings.

131 In engaging in all of these activities, the plaintiff is a person who "manages or controls" the retirement village; and the functions it performs answer each of those descriptions.

132 *Operator within para (b):* it remains to consider whether the plaintiff is an operator within para (b) of the definition (see [97] above) because it is engaged under an agreement with the Owners Corporation and has entered into individual village contracts with "the residents" of the village.

133 The plaintiff satisfies the second part of that definition. I do not accept the defendants' submission that reg 6 is to be read as requiring a person to have contracted with *all* the residents of the village. On that construction, a person might fail to satisfy the extended definition because of a trivial oversight, or a failure to contract with (for instance) a spouse or de facto partner (see s 4(1), definition of "resident"). That is not likely to have been intended.

134 In my view it also satisfies the first. Under SSMA 2015, s 12(1), an owners corporation for a strata scheme may "employ such persons as it thinks fit to assist it in the exercise of any of its functions". In the context of the SSMA, there is every reason to think that most of the persons likely to be engaged to assist an owners corporation in the exercise of its functions will be contractors rather than employees in a strict sense, and that "employ" was used in a broader, but still entirely ordinary, sense. Accordingly, a contract for services with a corporation is within the subject matter of the power. The relevant functions of the Owners Corporation include managing or controlling the use or enjoyment of the lots and common property (s 9(2)).

135 The defendants submit further that by-law 38 had the effect of impliedly limiting the power of the Owners Corporation to enter into an agreement for the provision of "Concierge and resident support services" other than by special resolution. By-law 38 relevantly provides that:

> a. The Owners Corporation may, by special resolution, determine to enter into arrangements for the provision of the following *amenities or services* to one or more of the lots, or to the *owners or occupiers* of one or more of the lots:

...

- Concierge and resident support services

Services to be provided by the Village Operator [BBARV] 5 hours daily (9.30-3.30) six days per week for amount of $24,000 inclusive of GST or as agreed from time to time.

b. If the Owners Corporation makes a resolution referred to in subclause (1) [to be read as a reference to subclause a] to provide an amenity or service to a lot, it must indicate in the resolution the amount for which, or the conditions on which, it will provide the amenity or service.

(emphasis added)

136 The by-law adopts the language of, and is to be read by reference to, SSMA 2015, s 117, which provides that an "owners corporation may enter into an agreement *with an owner or occupier* of a lot to provide *amenities or services* to the lot or to the owner or occupier of the lot" (emphasis added). As para b makes clear, by-law 38 is concerned with "arrangements" between the Owners Corporation and lot owners, not arrangements between the Owners Corporation and service-providers.

137 By its conduct since 2012 in permitting BBARV to occupy the office and part of the common property to provide concierge and other services to residents, as well as some services to it with respect to its management and maintenance of common property, in return for an annual amount paid by monthly instalments, the Owners Corporation agreed with the plaintiff for its provision of such services for reward. In the absence of agreement as to the duration of that arrangement, it is terminable on reasonable notice, the period of notice depending on circumstances at the time of termination: *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 1 NSWLR 439 at 443-444 (McHugh JA). There is no suggestion, either by the defendants or in the language of reg 6, that "engaged" excludes agreements terminable on reasonable notice. RV Reg, reg 6 does not require that the "agreement" be in writing. Nor does SSMA 2015, the engagement not being or involving the appointment of the plaintiff as a "building manager" for the strata scheme: cf ss 11(c), 66 and 67.

Conclusion as to operator

138 BBARV is an operator of a retirement village within s 4(1) as the person who manages or controls the retirement village, and because it separately satisfies paras (a) and (b) of that definition.

The application of s 171 to a prospective sale by the Assems

139 In full, s 171 provides:

> **171 Purchaser and operator to enter contract**
>
> (1) If a vendor for the sale of residential premises in a retirement village is not the operator of the village, the vendor must give the operator of the village sufficient notice of the proposed sale to enable the operator to provide the purchaser with a disclosure statement (and the information required under section 19) at least 14 days before the contract is entered into.
>
> (2) Such a contract is taken to include a provision to the effect that the contract is conditional on the purchaser's entering into a service contract with the operator of the village on or before completion of the purchase.
>
> (3) As soon as practicable after the contract for the sale of the premises is entered into, the vendor must notify the operator in writing of that fact.
>
> (4) If the operator decides not to enter into a service contract with the purchaser, the operator must, not later than 14 days after being notified under subsection (3)—
>
> (a) advise the vendor of that decision and of the reasons for it, and
>
> (b) apply to the Tribunal for an order declaring that the operator is not obliged to enter into the service contract.

140 The provision forms part of Part 10, Div 5 of the RVA. That division is concerned with "Sale or letting of premises by certain residents" and, by s 166, "applies only to a resident of a retirement village who is a registered interest holder in respect of his or her residential premises". When the issue was raised during closing submissions, senior counsel for the plaintiff accepted that s 171 would only apply to a sale by the defendants if they were "residents" of the retirement village (there being no doubt that they were registered interest holders within s 7). Subsequently, the plaintiff requested leave to file a note contending that s 171 applied whether or not the defendants were residents. That leave was granted. It is necessary to deal with that issue first.

A "vendor" need not be a "resident"

141 There is a conflict between the apparently clear words of s 166 and those of s 171, which in terms applies to "a vendor for the sale of residential premises in a retirement village". The submission of the plaintiff is that s 166 does not limit the persons to whom the division applies but rather restricts the meaning of "resident" where it appears in that division. That may be one reason for the use of the indefinite article rather than the plural. Accordingly, when used in the division, "resident" does not refer to residents who are not registered interest

holders, because they only have a licence, reside with a spouse or partner who has a residence right, or are deemed by the operation of s 4(2) to have a residence right. In relation to such residents, the application of provisions such as 168(1) – which provides that a resident may set the sale price of his or her premises – would involve obvious difficulties.

142 Plainly, s 166 does not limit the application of Part 10, Div 5 to residents who are registered interest holders in the sense that its provisions have no force in respect of other persons. Those provisions also apply to operators, and to the tenants or subtenants of residents who enter into leases or subleases in accordance with the division (ss 176 and 178). Thus, the real question is whether, in light of s 166 and the other provisions of the division, "a vendor for the sale of residential premises" is to be understood as shorthand for "a resident proposing to sell his or her residential premises". On that view, s 166 identifies the persons whose selling or leasing is regulated by Part 10, Div 5.

143 It is helpful to begin by reviewing the other provisions in the division.

144 Section 167 sets a time limit for the exercise by an operator of any option to purchase premises which have been permanently vacated or, if never occupied, are to be sold by a resident. The remainder of the division deals, in a roughly parallel fashion, with the sale and lease of residential premises.

145 Section 168 permits a resident to appoint a selling agent, who need not be the operator, and sets out certain obligations of a selling agent who is or is chosen by the operator. If an operator is not appointed selling agent, s 169(1), which makes no reference to a sale by a resident but can only be understood by reference to s 168, prohibits them from interfering with the sale of the premises. Section 170 provides that a resident who sells his or her premises is to share the costs of sale with the operator in the same proportion as they are to share the capital gains on sale (s 170).

146 Sections 171(4) and 172(1) allow for applications to NCAT by the operator or the vendor, respectively, in circumstances where the operator declines to enter into a service contract with a purchaser; the vendor may also apply to NCAT where the terms of the contract offered to a purchaser are "substantially different" from the sample contracts made available under s 20 (s 172(2)).

Section 173 provides for the approach NCAT is to take to such applications and the orders it can make in resolving them.

147 Section 174 permits a "resident" to let (or, for long-term lessees, sublet) their premises under a residential tenancy agreement for a term (including any option) of less than 3 years, provided that the tenant or subtenant is a retired person and that the operator has, after receiving certain written particulars, consented in writing to the making of the agreement. Where an operator refuses consent, they must apply to NCAT for a determination in accordance with s 175 within 7 days of receiving the written particulars of the proposed tenancy. An operator is forbidden from interfering with "a resident's attempt to let residential premises" (s 177).

148 The operator is to provide services to a tenant or subtenant under the resident's service contract, if any, as if they were the resident (s 176), although such a tenant or subtenant is excluded from the statutory definition of resident (see s 4(1), definition of "residence right") and cannot themselves assign or sublet the premises the subject of their tenancy agreement (s 178).

149 Turning then to the question of construction, the plaintiff makes essentially two arguments. The first is that the choice of "vendor" rather than "resident" in ss 171-173 should not be assumed to be of no significance. The second is that construing "vendor" broadly is consistent with the objects of the RVA. In this regard particular reliance is placed on s 24, which relevantly provides:

> **24 Resident to enter village contract**
>
> (1) The operator of a retirement village must not permit a prospective resident of the village to occupy residential premises in the village before the prospective resident enters into at least one of the following contracts with the operator:
>
> (a) a residence contract,
>
> (b) a service contract.
>
> Maximum penalty: 50 penalty units.
>
> ...
>
> (3) If the operator contravenes subsection (1), then (despite the provisions of Part 10):
>
> (a) the former occupant (if any) of the residential premises concerned has no liability to pay any recurrent charges or departure fees relating

> to the premises in respect of any period after the date on which the prospective resident occupies the premises, and
>
> (b) the operator must, no later than one month after that date, make any refund of the former occupant's ingoing contribution, and make any other payment that is required, under a village contract, to be made to the former occupant.

150 Two points should be made about the operation of s 24. First, it relates only to prospective residents. It has no application to persons who will not be residents (for instance, because they are not a retired person). Secondly, when proper attention is paid to subs (3), it is apparent that the primary purpose of the provision is to protect former occupants of the premises proposed to be occupied from incurring recurrent charges which would, if s 24(1) were complied with, cease to be payable by reason of s 152(2)(a). It provides only limited support for the plaintiff's construction.

151 However, there are two further considerations which support the plaintiff's construction. The first is that the opening words of s 171(1) acknowledge that "the operator" may be "a vendor". It is hard to see how an operator could also be a resident. The second is that RVA, s 4(2) expressly contemplates there being residential premises which are *owned* by persons who are not residents, either because they are corporations or because they are not retired (or, perhaps, because the residence right is "taken" to be held by another), but which are *used* by persons who are:

> (2) For the purposes of the definition of residence right in subsection (1), it does not matter that the person who obtains the right:
>
> (a) is a corporation, if the premises concerned are intended for use as a residence by a natural person, or
>
> (b) obtains it for the purpose of allowing another person to live in the residential premises (instead of the person who obtained the right),
>
> and in those cases, a retired person who lives in the premises with the consent of the corporation or of the person (as the case may be) is taken to have the residence right.
>
> **Note**. Subsection (2) would apply in the case, for example, of a person who buys a strata-titled unit in a retirement village for the person's parent to live in.

152 For the owners of property used by retired persons as part of a retirement village (and purchased for that very reason) to be able to avoid the operation of s 171 would be an arbitrary and unlikely result. That is to say, the structure of the RVA provides an explanation for the deliberate use of "vendor" rather than

"resident". (A similar point might be made about executors or administrators of a resident proprietor whose estate does not continue to have rights or liabilities "under" a village contract, who will not answer the definition of "former occupant" and are not residents for the purposes of Part 10, Div 5.)

153 There are considerations which point against the conclusion that a vendor need not be a resident, the most substantial being that the provisions regulating leasing or subleasing apply only to "residents" (with the result that a non-resident owner could lease or licence their premises as they wished, without the consent of the operator, to non-retired persons, and for arbitrarily long periods of time). Neither result makes perfect sense of the legislation. However, as a matter of the statutory language, it is tolerably clear that a "vendor" is not necessarily a resident and that s 166 functions only to restrict the meaning of "resident" within Part 10, Div 5 to exclude those residents to whom its provisions could not sensibly apply.

Section 171 will apply to a sale by the defendants

154 The defendants are not, and are not contended to be, within the primary definition of resident. That is because even if they are retired persons for the purposes of the RVA, which they will be if they are over 55 years of age, they do not have a residence right. Although they have a right to occupy the premises by reason of their proprietorship, that right does not arise from the contract under which they purchased the premises: there is no such contract. Nor are the defendants within paras (a)-(c) of the definition. There is a question whether they come within para (d), an extension of the definition which applies only in respect of Parts 6, 7 and 8 and Div 5 of Part 10, as "former occupants" of the village.

155 The defendants are, however, persons who own land in the village. They are neither residents (subject to para (d) of the definition, considered below) nor persons referred to in s 4(2). It would seem to follow that they are operators. (The plaintiff contended, correctly, that it was sufficient that it owned land in the village. Why this was not also true of the defendants was not explained.)

156 Section 171 does not apply to "the operator" of the retirement village. Section 171(1) requires a vendor who is not the operator to give the operator notice of

the proposed sale, so that the operator can provide a disclosure statement at least 14 days before "the contract" is entered into. Section 171(2) is directed only to "such a contract", being a contract with a vendor who is not an operator. That position is confirmed by ss 172 and 173, which enable NCAT to order "the operator" to enter a service contract, satisfying the condition imposed by s 171(2).

157 The definition of "operator" admits of the possibility, as is the case here, that a person who does not exercise any of the functions of an operator, and accordingly does not in any respect manage or control the retirement village, may nevertheless be an operator. That possibility is also recognised by s 4(5). However, if the references to "the operator" in s 171 are construed as extending to a 'landowner only' operator, s 171(2) will not apply and performance of the contract will not be conditional on the purchaser entering into a service contract with the (or a) managing or controlling operator. On completion of such a contract the purchaser would acquire a "residence right" and, provided he or she was over 55 or retired, also be a "resident". On the landowner only operator ceasing to be an operator – which would occur on completion, if the premises the subject of the sale are the only land in the village that operator owns – that residence right would be enforceable against the managing or controlling operator or operators. Those operators could not rely on s 24(1) as prohibiting them from permitting the purchaser to occupy the residential premises, because the purchaser would have entered into a residence contract with someone who was an operator at that time.

158 Thus, if "the operator" in s 171 includes someone who is not exercising any of the functions of an operator, the purchaser would be entitled to occupy the residential premises and enjoy whatever benefits are available to occupiers of the retirement village without being subject to any corresponding obligations that would arise on the signing of a service contract, currently required to be in the form prescribed by RV Reg, reg 17.

159 Returning to the construction of s 171(1), the expression "the operator" appears three times. In the second and third uses it refers to an operator who is either receiving notice of the proposed sale or providing a disclosure

statement to the purchaser. In each case that operator is a person exercising functions of an operator under the Act. If the same expression when first used is understood in that sense, the difficulties described above do not arise, because the vendor would not cease to be an operator upon the completion of the contract for sale; and such an operator would remain subject to the obligations in ss 18, 19, 23 and 24. To avoid that unreasonable outcome, that construction should be adopted. It follows that s 171 continues to apply to the defendants.

160 That makes it unnecessary to consider whether the defendants, as owners of land in the village, are included as an operator by para (a) of the definition of that term, which does not apply to a landowner who is a "resident". As the definition of "resident" by para (d) includes, in Division 5 of Part 10, "a former occupant of the retirement village", it *may* have been necessary to consider that defined term, which provides:

> ***former occupant*** of a retirement village means a resident, or a former resident, of the village—
>
> (a) who has permanently vacated any residential premises in the village, and
>
> (b) whose residence contract has been terminated (unless the resident is a registered interest holder (other than a person referred to in section 7 (1) (c)) in respect of the residential premises concerned), and
>
> (c) who continues to have rights or liabilities under a village contract relating to the village,
>
> and includes the executor or administrator of the estate of such a person.

161 In my view, the reference in para (c) to a former resident "who continues to have rights or liabilities under a village contract" does not extend to the defendants as executors of the estate of their father, who therefore satisfy the definition of an operator. The relevant village contract was the "Agreement for the Sale of Land – 1988 Edition" under which the defendants' parents agreed, on 30 May 1997, to purchase the property. That agreement was a residence contract, because Mr and Mrs Assem's right to occupy the property was "a right arising from" that agreement.

162 The only right or liability under that agreement on which the plaintiff relies is the right to occupy the premises, held by reason of Mr Assem's proprietorship. However, para (c) of the definition refers to rights or liabilities which the former

resident “continues” to have “under” a village contract notwithstanding that they have permanently vacated (and, in most cases, had their residence contract terminated). The evident intention is to pick up only those village contracts under which there remain liabilities on the part of the resident or operator, a view supported by the nature of the express references to “former occupant” in the RVA (see eg ss 24(3), 44E, 151-161, and 180-181). The defendants’ parents’ rights to occupy lot 61 arose from the agreement for sale in the broad sense in which “arising from” is used in the definition of residence right. But they cannot be said to have continued to have rights or liabilities “under” that agreement which now vest in their estates: cf *Inghams Enterprises Pty Ltd v Hannigan* at [95] (Bell P), [137]-[140] (Meagher JA, Gleeson JA agreeing).

The plaintiff has standing to enforce s 171

163 The plaintiff, who seeks orders framed as mandatory injunctions requiring the defendants to comply with RVA, s 171, contends that it has standing to enforce the requirements of that provision against the defendants in respect of any prospective sale. It is said that the plaintiff either has, as a necessary implication from s 171 and the other relevant provisions of the RVA, a private right to enforce by injunction the requirements of the Act or, alternatively, a sufficient special interest in the enforcement of the obligation for “a court of equity [to] lend its aid to the enforcement of the statute”: *King v Goussetis* (1986) 5 NSWLR 89 at 93 (McHugh JA). These arguments do not appear to be contested by the defendants, who made no written or oral submission to the contrary.

164 The question whether a statute confers a private right to sue on a particular person or class of persons is not a straightforward one, depending as it does on “what inference really arises, on a balance of considerations, [including], generally, the whole range of circumstances relevant upon a question of statutory interpretation”: *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 (Kitto J); [1967] HCA 31; see also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 66-68 (Brennan J); [1981] HCA 50. Here it is not necessary to decide the point. The plaintiff seeks only declaratory and injunctive relief and, as will be seen, I do not propose to grant the latter at this stage. It suffices to observe that the plaintiff, as an operator of the retirement village, is subject to

various civil penalty provisions, compliance with which will only be realistically possible in the event that the defendants comply with the requirements of s 171 (see eg ss 19(2), 24(1), 27). It must follow that the plaintiff has a sufficient special interest for it to have standing to seek the relevant relief.

The contractual dispute

The construction of cl 13(d)

165 The parties to the Agreement are identified as "the Service Company", BBARV, and Mr and Mrs Assem, described as both "Occupant" and "Proprietor". Below those definitions it is noted that expressions are to have the meaning given in the schedule to the Agreement "unless the context otherwise requires". The schedule relevantly provides:

> "The Occupant" – means and includes Isamil Asem and Madiha both of 61/34 Campbell Parade jointly and severally and his/her or their executors, administrators and successors in title and permitted assigns
>
> "The Proprietor" – means and includes 61/34 Campbell Parade jointly and severally and his/her or their executors, administrators and successors in title being the registered Proprietor who is registered or entitled to be registered as the Proprietor of the Unit or any Mortgagee who has granted a Mortgage to the Proprietor.

166 Clause 13 of the Agreement, entitled "Transfer or Succession in Title", provides:

> 13. The Occupant and the Proprietor covenant and agree that:-
>
> (a) To ensure that the Service Company has sufficient control over the Occupants and the Proprietors and the village, that the Service Company may place a caveat on the title to the unit,
>
> (b) the Occupant and Proprietor Shall not require nor demand the Service Company to provide a withdrawal of that caveat unless the Occupant and the Proprietor have given not less than twenty-one (21) days' notice to the Service Company of their intention to sell, lease or dispose of the Unit and at least fourteen (14) days prior to the completion of any sale or transfer of title or commencement of any lease or licence or as the case shall be, the purchaser or successor in title or lessee or licensee has entered into an Agreement in the form required by the Service Company; and
>
> (c) The Occupant and the Proprietor further covenant and agree that the Service Company may rely on this clause in applying to the Supreme Court of NSW for an Order continuing the operation of any caveat placed upon the title unless the provisions of this clause have been complied with;
>
> (d) the Occupant and the Proprietor hereby covenant and agree that in respect of any sale of the unit or transfer of title that all Agreements for sale or transfer either written or oral shall require a clause to be included that the sale or transfer is conditional upon the purchaser or transferee or successor in title

> entering into an Agreement with the Service Company in the form required by the Service Company.

167 It is *possible* that paras (a)-(c), properly construed, do not actually grant BBARV an interest in the property so as to entitle it to lodge a caveat: see *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174; [2013] NSWCA 393 at [82]-[83] (Gleeson JA, Meagher and Leeming JJA agreeing); *Ta Lee Investment Pty Ltd v Antonios* [2019] NSWCA 24 at [95]-[98] (Bathurst CJ, Beazley P and Macfarlan JA). Whether that is so is not a live issue in these proceedings, because the caveat on the title of lot 61 has lapsed. However, those paras remain relevant to understanding the effect of cl 13 as a whole, and cl 13(d) in particular. It is evident that the purpose of cll 13(a)-(c) is to enable the lodging of a caveat to protect BBARV's 'rights' under cl 13(d) in respect of a proposed sale or transfer.

168 It is appropriate to begin by observing that an executor, in his or her capacity as such, is bound by the contracts of the deceased, which, subject to provision to the contrary, continue against the estate. Indeed, it is possible for a person expressly to contract during their lifetime that their executors will do a certain act: *Bird v Perpetual Executors and Trustees Association of Australia Ltd* (1946) 73 CLR 140 at 146 (Dixon J); [1946] HCA 52. And an injunction may issue against an executor to protect rights held under a contract with the deceased: *Brown v Heffer* (1967) 116 CLR 344 at 351 (Windeyer J); [1967] HCA 40.

169 Prima facie, cl 13(d) is enforceable against the defendants in their capacity as Isamil Assem's executors. The argument against that conclusion proceeds as follows. (1) The "sale" or "transfer" referred to in cl 13(d) must be understood to mean the *first* sale or transfer by or from the defendants' parents. If it were otherwise, cl 13(d) would be legally ineffective to bind the relevant persons, and/or would make the defendants' parents liable for the actions of persons over whom they had no control. (2) Context therefore requires that "Occupant" and "Proprietor" in cl 13(d) be understood as not taking their extended definitions, which include "successors in title". (3) A transfer from the defendants' parents has already occurred, in that the defendants have been registered as the proprietors of the property in their capacity as executors. (4)

Accordingly, any sale or transfer by the defendants would not be caught by cl 13(d), either because it would not be the first sale or transfer or because they are not the "Occupant" or "Proprietor".

170 This argument should not be accepted. Although cl 13(d) cannot sensibly apply to any transfer from persons who took directly or indirectly from the defendants' parents or their executors, at least without an assignment of the agreement, it is not necessary that "Occupant" and "Proprietor" take their extended definitions for cl 13(d) to be enforceable against the defendants as executors. It is sufficient that there is no reason to think the clause was intended not to continue to have effect against the estates of Mr and Mrs Assem after their deaths.

171 The clause should not be construed so that the registration of executors as proprietors is a "transfer". First, there was no reason for BBARV to require that Mr and Mrs Assem's executors enter into a separate agreement, as cl 13(d) would otherwise require. The Agreement would be enforceable against the executors in their capacity as such. Secondly, the possibility of Mr and Mrs Assem passing away, and the lot passing to their executors, must have been in the contemplation of the parties when the Agreement (which purported to be subject to the RVA) was made. In that context there is every reason to think the parties would have wished to bring transfers or sales *by* executors or administrators within cl 13(d).

172 Thirdly, the mechanism by which the defendants became registered proprietors is not readily described as a "transfer". On the death of their father, the defendants, as his executors, automatically became entitled to make a "transmission application" to the Registrar-General to become registered proprietors of the unit (*Real Property Act*, s 93(1)). That is what they did, and although that process resulted in a new registered proprietor it was not dealt with by the *Real Property Act* as an ordinary transfer or dealing. Rather, it was merely a means of giving effect to the automatic vesting of the property of the deceased in his executors in relation to land held under that Act. This view is confirmed by cll 13(a)-(c), because any transmission application would not be

barred by a caveat lodged pursuant to those clauses (see *Real Property Act*, s 74H(5)(a)).

173 There is a residual difficulty in relation to executors who are entitled as residuary beneficiaries, who would not need to make a further transfer to themselves in the latter capacity, and certainly would not need to enter an agreement to transfer the property (as cl 13(d) contemplates). The likely answer is that the executors simply would or could not cease to be bound by cl 13(d). It is enough that the difficulty is surmountable.

174 Accordingly, unless cl 13(d) is void for uncertainty or as an impermissible restraint on the free alienation of land, it is enforceable against the defendants in respect of a transfer or sale from or by them.

Clause 13(d) is not void for uncertainty

175 The plaintiff submits that there is nothing uncertain about how the defendants are to comply with cl 13(d): they will insert, into any contract for sale or transfer, a provision to the effect that "this contract is conditional upon the purchaser entering into an agreement with BBARV in whatever form BBARV requires." Would inserting such a condition into a future contract for sale make that contract uncertain? The plaintiff's position is that the question is irrelevant to whether cl 13(d) is void for uncertainty.

176 That is correct, so far as it goes, but it remains necessary to consider the question. If the insertion of the condition that cl 13(d) apparently requires would render uncertain or void the contract for sale, the potential validity of which cl 13(d) presumes, the requirement for the inclusion of such a provision would make no sense. It would at least arguably be inappropriate to declare that the defendants are required to insert that condition into any future contract for sale, much less order that they do so, if doing so would make that contract void.

177 Clause 13(d) is to be understood by reference to the RVA, to which the Agreement expressed itself to be subject (cl 1):

> The sale of the Unit and this Agreement are subject to the Retirement Villages Act 1999 and the Retirement Villages Regulation 2000, which impose obligations upon the Occupant and the Proprietor and the Service Company.

178 RVA, s 171(2) provides (and provided when the Agreement was executed) that a contract for sale is deemed to contain a term making "the contract" conditional on entry by the purchaser into a "service contract" on or before completion of the sale. It is immediately apparent that cl 13(d) differs from s 171(2) at least in not requiring that the contract to be entered into be a service contract under the RVA.

179 Clause 13(b) suggests that cl 13(d) should, like s 171(2), be understood as requiring that any contract for sale be made conditional on entry by the purchaser into a contract with BBARV before *completion* of the sale. Accordingly, cl 13(d) is better understood as requiring the insertion of a condition precedent to performance rather than to contract. Notwithstanding that senior counsel for the plaintiff opted for the latter when the question was raised in argument, this view is consistent with both the language of cl 13 and the proposition that conditions are typically to be understood as subsequent rather than precedent to contract. The distinction, typically somewhat academic, may be relevant to this case for two reasons. First, a condition precedent to contract cannot be waived, because there *is* no contract until it is satisfied, whereas a condition precedent to performance may in some cases be waived by the party for whose benefit it was inserted: see J D Heydon, *Heydon on Contract* (2019, Lawbook Co) at [3.510]ff. Secondly, where a condition is a condition precedent to the formation of the contract, there can be no obligation on either of the parties, sourced in the contract, to bring about its satisfaction: see *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 541-542 (Mason J); [1982] HCA 29.

180 BBARV will not, and certainly need not, be a party to any contract for sale. It will not be under any restriction sourced in that contract as to the nature of the agreement it may require the purchaser to enter. It *could* be argued that BBARV is under an implied obligation as a matter of the Agreement not to require a purchaser to enter an agreement for a purpose unrelated to that for which cl 13(d) was conferred, namely, to further the operation of the Bondi Beach Astra as a retirement village, or that is wholly unreasonable having regard to that purpose. No such implication is urged by the defendants, presumably because they wish instead to invalidate the clause in its entirety.

181 Unlike s 171(2), cl 13(d) does not provide any mechanism for arriving at a particular form of agreement. The RVA confers jurisdiction on NCAT to make various orders in the case that an operator and a purchaser fail to reach agreement: an operator may apply for a declaration it is not obliged to enter a service contract with a purchaser (s 171(4)); and a vendor may apply for an order directing an operator to enter a service contract (s 172(1)) or, where a contract is offered that is "substantially different, to the detriment of the purchaser," from the sample contracts available for inspection by prospective residents under s 20, to enter into a contract in the same terms as the sample contract (s 172(2)). The form of such contracts remains, subject to the RVA's other provisions, within the discretion of the operator(s) of a village.

182 It is not clear that similar machinery is necessary for a condition inserted in compliance with cl 13(d) to be sufficiently certain. Such a condition contemplates that (1) the plaintiff will require the purchaser to enter an agreement in a form within its discretion; and (2) that the purchaser will accept or decline to enter to enter the agreement. If the purchaser declines, the condition will be unsatisfied and the contract will fail. The contract for sale is not therefore an agreement to agree. It is an agreement, otherwise complete, which is not to be performed if one party does not first enter an agreement offered to it by a third party. The separate agreement between BBARV and the purchaser is not to be incorporated into the contract for sale. The existence of that agreement is merely a fact on which the operation of the contract of sale depends, no different than if the contract were made conditional on BBARV's approval.

183 The real question is whether the condition would effectively reserve to the purchaser a discretion whether or not to enter into the form of contract required by BBARV, and therefore whether or not to carry out their obligations under the contract for sale: cf *Thorby v Goldberg* (1964) 112 CLR 597 at 605; [1964] HCA 1. However, the restraints on a party's discretion in relation to the satisfaction of a condition precedent need not be significant for a contract to be certain. In the case of a contract for sale made subject to a purchaser obtaining satisfactory finance, it is sufficient that the purchaser be required to act honestly (or honestly and reasonably) in deciding whether available finance is

satisfactory: *Meehan v Jones* (1982) 149 CLR 571 at 589-591 (Mason J); [1982] HCA 52.

184 A term requiring the purchaser not unreasonably to decline to enter into an agreement of the form required by BBARV could perhaps be implied: see *Heydon on Contract* at [3.550]; *Meehan* at 591 (Mason J), and the cases there cited. Alternatively, it would always be open to the defendants to insert into any contract for sale an express term governing the obligations of the purchaser in deciding whether to enter an agreement in the form required by BBARV. The defendants are not in the impossible position of only being able to enter an uncertain contract for sale.

185 There remains a question whether as between themselves and the purchaser the defendants could waive compliance with the condition included in the contract for sale. What is clear is that even if they could, it is implicit in the Agreement that they have promised not do so, just as it is implicit that the defendants not proceed to completion in disregard of such a condition.

Clause 13(d) is not void as an impermissible restraint on the alienation of land

186 The common law's antipathy to restraints on the alienation of property has a long pedigree. In relation to conditional grants, the initial justification for the doctrine was repugnance to the grant, "a principle of the early law that feoffors could not create interests in property unknown to the law and could not, therefore, remove from an interest known to the law one of its 'essential' attributes": *Reuthlinger v MacDonald* [1976] 1 NSWLR 88 at 96 (Needham J). The doctrine has also been "attributed to an indirect effect of *Quia Emptores*" or to "public policy", the explanation generally preferred by modern authorities: *Hall v Busst* (1960) 104 CLR 206 at 217 (Dixon CJ); [1960] HCA 84. It is now said to apply "to all species of property", not merely interests in fee simple: *Caboche v Ramsay* [1993] FCA 611; (1993) 119 ALR 215 at 226 (Gummow J, Ryan J agreeing).

187 Only in 1960 was it decided that the prohibition also applies to restraints based in contract, and separate from the transfer of the property restrained: *Hall v Busst* at 218 (Dixon CJ) and 235-236 (Menzies J). That conclusion, although technically the dicta of a minority of the High Court, is now well established:

Reuthlinger at 100; *Gora* at 713-714; [217], [218] (Campbell JA, Giles and Whealy JJA agreeing). In its application to contractual restraints, the justification for the doctrine can only be the desirability, as a matter of public policy, of the free alienability of land (or other property): see *Gora* at 669 [3] (Giles JA).

188 There is disagreement about the degree of contractual restraint necessary for invalidity. In *Reuthlinger*, Needham J declined to invalidate a restraint that was "limited to the joint lives of the parties", observing (at 101):

> It seems to me that the question which Dixon C.J. answered in the affirmative was: "whether a bond or covenant or contract purporting to impose a total contractual restraint upon alienation is void." Fullagar J. and Menzies J. each specifically agreed with his conclusion and his reasons. It is that principle which, in my view, should be applied to the present case. Each of the majority construed the agreement as imposing a restriction on alienation for ever without the consent of the other party. I do not think *Hall v. Busst* can be used to invalidate any less contractual restriction.

His Honour's conclusion was approved on appeal in *Reuthlinger v MacDonald* (NSWCA, Street CJ, Glass and Samuels JJA, 20 October 1976, unreported).

189 It may, however, be too strict. In *Moraitis Fresh Packaging (NSW) Pty Ltd v Fresh Express (Australia) Pty Ltd* [2008] NSWCA 327; (2008) 14 BPR 26,339, Hodgson JA stated that a restraint must be "of sufficient degree and duration" (at [144]). Giles JA, who would have declined leave to raise the issue for the first time on appeal, referred with approval to the observation of Gummow J that, in the case of contractual restraints, "the question is one of degree": *Moraitis* at [77]-[81], citing *Caboche* at 232. See also *Noon v BBARV* at [114] (Giles JA, Macfarlan JA agreeing) and [222] (Young JA). A similar view appears to have been taken in *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* (2004) 88 SASR 334; [2004] SASC 128 at [121]-[122], [129] (Besanko J, Mullighan and Gray JJ agreeing). Finally, in *Gora*, Campbell JA doubted whether Dixon CJ or Needham J would have upheld a restraint which, although not "literally absolute", was "in substance total", though his Honour ultimately did not decide the point.

190 In this case, the relevant restraint applies to any sale or transfer *of title* (cf *Hall v Busst* at 214), but not to a mere lease or licence (cf cl 13(b)). Any lease or sub-lease would, however, need to comply with cl 14, which provides that the

"Occupant and the Proprietor" will not "lease, licence or in any other manner part with the possession of the residence" without the written consent of BBARV but that such consent will not be unreasonably withheld if certain conditions are met, including that the term of the lease or licence does not exceed 3 years. Clause 6(c) is less detailed but ultimately to similar effect, although it applies only to leases or sub-leases, requires approval of lessees or sub-lessees by the "Manager", and does not expressly require that approval not be unreasonably withheld (but given cl 14, that condition would be readily implied). The defendants do not seek to invalidate cll 6(c) and 14, but they are plainly relevant when considering the restraining effect of cl 13(d).

191 Clause 13(d) applies indefinitely in relation to the persons into whose hands title to the property could pass conformably with the restraint. Although framed as a requirement for entry by the prospective purchaser into an agreement, it in effect confers on BBARV a power of veto over any sale or transfer, because the form of the agreement "required" is largely or entirely within its discretion. Whilst the exercise of its contractual power may be constrained, the position remains that considered as a whole, the restraint on alienation imposed by the Agreement, principally by cl 13(d), is very close to total.

192 If it were necessary to decide, the better view is that although cl 13(d) is a contractual restraint that is not absolute, it could be held invalid as an impermissible restraint on the free alienation of land. The desirability of the free alienability of land is equally relevant to a condition in a transfer or grant as to a separate covenant. The doctrine is founded on public policy considerations, and is able to be countermanded by countervailing public policy considerations: questions of degree are necessarily raised. There appears no obvious reason why the doctrine could not, in an appropriate case, operate to invalidate a restraint as restrictive as cl 13(d). It is not, however, necessary to decide the question.

Valid collateral purpose

193 As Besanko J observed in *Nitschke*, "there are many restrictions on the full alienability of private property which are upheld by the courts", and "there is an important countervailing public policy consideration... that parties who freely

negotiate an agreement should be bound by the terms of the agreement" (at [121]). The common law doctrine is kept within appropriate bounds by the "valid collateral purpose" exception, which derives from C Sweet, 'Restraints on Alienation I' (1917) 33 LQR 236 and was accepted by the Court of Appeal in *Reuthlinger* and in *Gora*.

194 The explanations of the nature of the exception given by Campbell JA (Whealy JA agreeing) and Giles JA in *Gora* differ slightly in some respects. Campbell JA expressed the view that a restraint imposed for a valid collateral purpose is permissible simpliciter, whereas Giles JA suggested at [4] that a court should assess whether the "public interest is better served by permitting the restraint" having regard not only to the position between the parties but also to "the social utility of permitting restraints of that nature". The difference is not ultimately material because, in Campbell JA's view, where a restraint serves both legitimate and illegitimate purposes, and the part which serves the latter cannot be severed, the court is to make an assessment of whether the restraint is on balance contrary to public policy (at [328]).

195 The Agreement states (see cl 1 at [177] above) that the property is part of a retirement village subject to the RVA. There is no question that there is a legitimate public interest in ensuring the provision of housing for the aged through the operation of a retirement village: see *Gora*. Nor, more specifically, can it be doubted whether that purpose is furthered by restrictions on the persons able to purchase or lease residential property in a retirement village. The ability of an operator to manage and control a retirement village, and to maintain its character for the benefit of residents, may depend on its control over the persons who come to own property or reside in the village, and on the obligations those persons assume, for the benefit of the operator and other residents, when they do so. RVA, Part 10, Div 5 exists for that reason.

196 It is convenient to begin by comparing cl 13(d) to the restraints in issue in *Gora*, which were also "not absolutely total, but very close to total":

> **[321]** ... The occupancy agreement bound not only Mr and Mrs Evans, but also their successors in title. *Clause 2(g) of the occupancy agreement contains a prohibition on disposing of any estate or interest whatever in the unit without the consent of BBA. As a matter of construction, BBA can withhold its consent,*

even unreasonably, except in relation to a proposed mortgage on terms that protect all its rights under the occupancy agreement.

[322] The practical effect of obtaining a mortgage on those terms would be that the amount that could be raised on mortgage would be, at best, a percentage of the price that would be receivable by the mortgagee on exercise of the option. There is a further exception, permitting leasing, sub-leasing or parting with or sharing possession of the unit within the very narrow limits established by the proviso to cl 2(f). *The prohibition on disposing of any estate or interest without consent is not absolutely total, but very close to total*.

[323] The circumstances in which the option is exercisable, set out in cl 7 of the occupancy agreement, effectively prevent disposal of any interest in the unit without the option becoming exercisable. Furthermore, even if (as has happened) the option was not effectively exercised on the death of Mr Evans, the restraints still bind his executors and other successors in title. ... The price at which the option is exercisable (broadly, $107,000, minus BBA's legal fees, and the cost of refurbishment of the unit) was always bound to be less than the market value of the unrestrained fee simple, particularly when Mr and Mrs Evans purchased for less than the value of the unrestrained fee simple. The expert evidence concerning value of the unit in 2008 bears that out.

[324] While the buyback deed does not include an express clause prohibiting transfer, there would be an implied term that no transfer would occur that would have the effect of frustrating the option granted in the buyback deed. The relevant provisions of the option in the buyback deed are the same as those of the occupancy agreement. The buyback deed has a provision not contained in the occupancy agreement, permitting the proprietor to dispose of the unit to a qualified occupant who is prepared to undertake the same restrictions on transfer as applied to Mr and Mrs Evans. *Permitting a transfer to occur on terms that no sensible purchaser would agree to, or would agree to only at a severely discounted price, is in substance the same as prohibiting transfer*. (emphasis added)

197 It will be observed that the restraints imposed by the Assem Agreement appear, on first inspection, to be no more restrictive than the restraints upheld in *Gora*. The defendants seek to distinguish *Gora* in two respects. First, they emphasise that those restraints were connected to an option of BBARV to repurchase the property at below market value, and that Giles JA (at [5]) and Campbell JA (at [336]) both identified particular benefits which might arise from the permissibility of such agreements, principally that they enabled the provision of housing to retired persons at a significant discount to the market value of the property in the absence of any option. (Options are peculiar restraints, in that entering an option is itself an exercise of the property owner's power of alienation: at [340].) Secondly, they submit that the agreements considered in *Gora* involved the provision of important services by BBARV (see at [110]ff, [336]), whereas the Agreement merely states, as a matter of fact, that services would be provided by the Owners Corporation (cl 3). It is said that

the purpose of cl 13(d) can only be the impermissible purpose of extending the plaintiff's "control" over the Astra.

198 As to the first argument, it is true that the restraints described in *Gora* at [321]-[322] were incidental to options to repurchase, and that the public policy considerations relevant to those restraints may differ to some degree from those raised by cl 13(d). Nevertheless, *Gora* demonstrates that very substantial restraints may be justified by the public interest in providing appropriate housing for the elderly. In practical terms the restraints considered in *Gora* were at least as restrictive of the alienation of property as cl 13(d). Under them, it would have been possible for BBARV to make its consent to a transfer or alienation conditional on entry by the purchaser or transferee into an agreement (in any form) with BBARV. It was open to BBARV to refuse its consent to the alienation of *any* estate or interest, whereas under the Agreement consent to a lease or licence may not be unreasonably withheld provided that certain conditions are met.

199 Turning then to the second argument, Recital D to the Agreement is in the same terms as a recital to the agreement considered in *Gora* (at [22]). It provides:

> The parties hereto desire to enter into an Agreement for the welfare, regulation and conduct of all unit owners at the Astra and the Occupant and the Proprietor have requested that the Owners' Corporation manage and administer the Astra, the Communal Areas and the common property to ensure that the Residents of the Village enjoy such reasonable privacy and quiet possession and enjoyment as is consistent with the physical characteristics of a Retirement Village designed for the residence of persons fifty-five (55) years of age and over.

200 Clause 3(a) states that BBARV "may require that the Owners' Corporation employs a Manager... to attend to the comfort and all reasonable and proper requests and demands of the Occupants" and "to ensure that the Occupants enjoy such reasonable privacy and quiet possession and enjoyment... as is consistent with the physical characteristics of a Retirement Village". That clause is merely a statement of fact. (Under one of the agreements considered in *Gora*, on the other hand, BBARV itself promised to employ a "Manager": see at [110].) By cl 3(b), BBARV promises to "ensure that the Communal Areas and all common property are maintained and kept in good repair and condition",

and to employ "such staff or contractors as may be necessary to effect such purpose at the expense of the Owners' Corporation".

201 The defendants' submission that cl 13(d) must fail because the plaintiff did not promise to provide services under the Agreement neglects cl 3(b), which relates to "all common property" (regardless of whether the Owners Corporation also has that obligation under strata scheme legislation). More significantly, it ignores the possibility of a general benefit to the effective operation of the retirement village (see [195] above), which does not depend on the particular benefits provided to the Assems' parents by BBARV under the Agreement. The defendants' submission, which restricts its focus to cl 13(d) in particular, does not show due regard for "the social utility of permitting restraints *of that nature*" (*Gora* at [4]).

202 Nor do I accept that the purpose for which cl 13(d) was conferred is relevantly different from the purpose held to be legitimate in *Gora*, of ensuring the appropriate provision of housing for the aged. Contrary to the submission of the defendants, "control" by an operator of a retirement village is not necessarily an invalid purpose. The function of an operator is to manage and control, and the RVA gives operators many powers for that purpose. Such "control" may work to an operator's advantage, but that does not of itself make the purpose of cl 13(d) invalid (cf *Gora* at [336]).

203 As has already been observed, cl 13(d) is in similar terms to RVA, s 171(2), which reflects – rather than is contrary to – public policy. To this the defendants say, first, that s 171(2) requires a *service* contract, whereas the agreement required by BBARV pursuant to cl 13(d) may have nothing to do with furthering the purposes of the retirement village; and, secondly, that s 171(2) is less restrictive of alienation than cl 13(d), being limited to service contracts and subject to the power of the Tribunal to compel an operator to enter into a service contract with a purchaser.

204 In terms, cl 13(d) is broader than it needs to be to protect the legitimate purposes for which it was conferred. In the absence of some restraint on the form of agreement the plaintiff may require, cl 13(d) does not merely facilitate its control of the village as an operator. It gives the plaintiff total control over the

sale or transfer of lot 61. BBARV could, for example, extract a significant portion of the capital value of the property from any purchaser, or require an agreement on terms so unattractive that the defendants are forced to sell the unit, at a significant undervalue, back to the plaintiff. If cl 13(d) is read literally, there is much to be said for the view that it cannot be justified as serving a valid collateral purpose.

205 However, "where a contractual power is given to one party for a purpose but in terms wider than necessary for the protection of its legitimate interests, the exercise of the power may be constrained by implied obligations of reasonableness and good faith": see *Adventure World Travel Pty Ltd v Newsom* (2014) 86 NSWLR 515; [2014] NSWCA 174 at [26] (Meagher JA, McColl and Leeming JJA agreeing). It follows from the application of that principle to cl 13(d) that the plaintiff is under an implied obligation not to require a purchaser to enter an agreement for a purpose unrelated to that for which the clause was conferred, namely, to further the operation of the Astra as a retirement village, or that could not possibly be regarded as reasonable having regard to that purpose. If it does, the plaintiff cannot complain of the defendants completing a sale of lot 61 notwithstanding the nonfulfillment or non-insertion of any condition required by cl 13(d).

206 So construed, cl 13(d) is not substantially different from, and serves a similar purpose to, restrictions on alienation imposed by the RVA itself. The clause is within the "valid collateral purpose" exception, and should be upheld.

Conclusion and orders

207 By way of summary, all but one of the classes of contract which the plaintiff contended were village contracts come within one or more of paras (a) to (c) of the definition of village contract. It follows that the residential premises making up the Astra are predominantly occupied, or intended to be occupied, by retired persons who have entered into village contracts with BBARV.

208 The Astra is a retirement village and the plaintiff is an operator of that village as a person who owns land within the retirement village and is neither a resident nor a person described in s 4(2). Further, the plaintiff satisfies the primary definition of operator as a person who "manages or controls" the retirement

village, and comes within para (b) of the definition by reason of its engagement by the Owners Corporation to provide concierge services to residents of the Astra, as is reflected in the continuing annual payment of a "concierge fee".

209 RVA, s 171 applies to the sale of residential premises by any "vendor" (who need not be a "resident") who is not an operator involved in the management or control of the village. Accordingly, it will apply to a sale by the defendants. The plaintiff is entitled to enforce the requirements of s 171 in respect of a prospective sale.

210 Finally, cl 13(d) of the Agreement between the plaintiff and the defendants' parents will also apply to such a sale. The clause is not void for uncertainty and, even if it would otherwise be void as an impermissible restraint on the free alienation of land, is not void on that basis because the clause serves a valid collateral purpose.

211 The plaintiff is entitled to declarations consistent with those conclusions. The plaintiff does not expressly seek a declaration that it is an operator of the Astra, but, as has been explained, the plaintiff being an operator is a necessary step in reasoning to the conclusion that the Astra is a retirement village. It is appropriate to make a declaration to that effect so as to resolve conclusively any controversy about the operation of the Astra. Those declarations should be made as at the date of this judgment. Notwithstanding that the evidence before the Court spoke as to the position at the end of May 2020, my conclusions do not turn on circumstances or facts which could have changed materially between then and now.

212 In its amended statement of claim, the plaintiff also seeks orders, framed as mandatory injunctions, requiring that the defendants give notice of a proposed sale as required by s 171(2), insert the condition required by cl 13(d) into a contract for sale, and be restrained from completing any sale until the purchaser has contracted with BBARV. The plaintiff has not, however, given any reason or made any submission as to why the defendants should not be expected to comply with their existing obligations, statutory and contractual, as declared by this Court.

213 The following orders should be made:

(1) Declare that the strata title property at 34 Campbell Parade, Bondi Beach, including lot 61 of SP 22422 as "residential premises", is a "retirement village" under the *Retirement Villages Act 1999* (NSW), and that the plaintiff is an "operator" of that village.

(2) Declare that *Retirement Villages Act 1999* (NSW), s 171 applies to any sale of lot 61 of SP 22422 by the first and second defendants, as "vendors".

(3) Declare that cl 13(d) of the Deed of Agreement between the plaintiff and Isamil and Madiha Assem dated 16 February 2005 is not void for uncertainty or as an impermissible restraint on the free alienation of land, and that a sale or transfer of lot 61 by the first and second defendants will be a "sale of the unit or transfer of title" within the meaning of that clause.

(4) Direct that if the plaintiff seeks other orders by way of final relief, the plaintiff provide the form of orders sought and written submissions in support of those orders (not exceeding 5 pages) to the first and second defendants and Meagher JA's associate within 21 days. The first and second defendants are to serve and lodge with the Court any submissions in response (not exceeding 5 pages) within a further 14 days. The matters remaining in issue will then be dealt with on the papers unless either of the parties seeks to be heard orally, in which case written notice to that effect should be given to Meagher JA's associate within 7 days of the service of the defendants' submissions in response.

(5) First and second defendants pay the plaintiff's costs of the proceedings.

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Amendments

16 December 2020 - [130] - Removed superfluous "or engaging"

16 December 2020 - [130] - Inserted "and" in the place of a comma in the second sentence